

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 3-2018:

MONTANA PUBLIC EMPLOYEES	)	Case No. 661-2018
ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	<b>FINDINGS OF FACT;</b>
	)	<b>CONCLUSIONS OF LAW;</b>
	)	<b>AND RECOMMENDED ORDER</b>
STATE OF MONTANA, OFFICE OF	)	
THE MONTANA STATE AUDITOR,	)	
	)	
Respondent.	)	

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**I. INTRODUCTION**

This matter involves the question of what constitutes an appropriate bargaining unit pursuant to Montana’s Public Employees Collective Bargaining Act.

Hearing Officer Caroline A. Holien convened a unit determination hearing in this matter in Helena, Montana. Morgan Smith, Organizing Director, appeared on behalf of Montana Public Employees Association (MPEA). Karl Englund, Attorney at Law, represented MPEA. Christian Mackay, Labor Relations Specialist, appeared on behalf of the Department of Administration (DOA). Derek Oestreicher, Special Assistant Attorney General, represented the Office of the Montana State Auditor.

The parties stipulated to the admission of MPEA’s Exhibits 1 through 32, as well as the State Auditor’s Exhibits A-1, A-7, A-9, A-10, A-14, A-15, A-17 through A-19, A-23, A-32, A-36, A-43 through A-45, B, and C.

Bob Biskupiak, Deputy Insurance Commissioner; Lynn Egan, Deputy Securities Commissioner; Richard Hersey, Compliance Services Bureau Chief; Jeannie Keller, Insurance Services Bureau Chief; Steve Matthews, Examinations Bureau Chief; and Leah Martin, Human Resource Specialist, all testified under oath.

The parties requested the opportunity to present post-hearing briefs, the last of which was timely filed on March 16, 2018. Neither party requested the opportunity to file response briefs. The matter was then deemed submitted for decision. Based on the evidence adduced at hearing as well as the arguments of the parties in their respective post-hearing briefs, the following findings of fact, conclusions of law, and recommended decision are made.

## II. ISSUE

Whether a unit proposed for collective bargaining purposes is appropriate pursuant to Mont. Code Ann. § 39-31-202. The parties do not contest the jurisdiction of the Board of Personnel Appeals (BOPA) over this matter.

## III. PROCEDURAL BACKGROUND

1. On October 24, 2017, MPEA filed a petition with BOPA for a new unit determination and election proposing a bargaining unit in the Auditor's office. The petition defined the bargaining unit as Compliance Specialists, License Examiner Specialists, License Permit Techs, Market Conduct Examiners, Financial Examiners, Investigators, Computer Systems Analysts, Information Systems Analysts/Help Desk, and Information Systems Administrators.

2. MPEA's petition sought to exclude Actuaries, Administrative Assistants, employees who worked less than full time, Attorneys, Legal Secretaries, Securities Examiners, Licensing Examiners, Assistant Financial Examiners, and Central Services employees, including human resources employees and Purchasing and Accounting Technicians from its proposed bargaining unit.

3. The employees in MPEA's proposed bargaining unit are "public employees" as that term is defined in Mont. Code Ann. § 39-31-103(9).

4. On November 8, 2017, the Auditor filed its counterpetition arguing that MPEA's proposed bargaining unit is inappropriate in that it excludes other employees who share a community of interest with those employees in the petitioned-for unit.

5. The Auditor's counterpetition advocates for the inclusion of the following positions:

- a. Compliance Specialist (00210, 00033)
- b. File Clerk (00316)

- c. Rates Bureau (00201, 00325, 00091, 00204)
- d. Lead Financial Examiner/Analyst and Financial Examiner/Analyst Level III (00202, 00203, 00317, 30005)
- e. Securities Bureau (00401, 00208, 00063, 00402, 00037)
- f. Centralized Services (00050, 00062, 00016, 00006)

#### IV. FINDINGS OF FACT

1. MPEA is a “labor organization” as that term is defined in Mont. Code Ann. § 39-31-103(6) in that it is an organization in which Montana public employees participate and which exists for the primary purpose of dealing with Montana public employers regarding grievances, labor disputes, wages, rates of pay, hours of employment, fringe benefits and other conditions of employment.

2. The State of Montana, Office of the Montana State Auditor (Auditor), is a public employer as defined in Mont. Code Ann. § 39-31-103(10).

3. The Auditor’s office is a state regulatory agency responsible for consumer protection, consumer advocacy, and regulation of the insurance and securities industries in the State of Montana.

4. The Auditor is responsible for enforcing Title 33 of the Montana Code, which governs insurance transactions by insurers and producers, as well as adjusters, consultants, administrators, risk retention groups, purchasing groups, and title companies. Insurance companies must have a certificate of authority from the Auditor to operate in Montana and producers and others must be licensed by the Auditor. All insurance contracts, forms, endorsements, and policies must be filed with and approved by the Auditor.

5. The Auditor’s office is organized into two divisions: the Insurance Division and the Securities Division.

6. The Insurance Division includes the Policyholder Services Bureau, the Forms Bureau, the Rates Bureau, the Licensing Bureau, the Market Conduct Bureau, and the Examinations Bureau. Ex. B.

7. The Securities Division includes only the Securities Bureau. Ex. B. The Securities Division is responsible for the administration and enforcement of the Securities Act of Montana (Sections 30-10-101 et. seq., Mont. Code Ann.) . . . The Department is responsible for the registration of securities issuers, salespeople,

investment advisors, broker-dealers, and investment advisor representatives. It also investigates instances of unregistered or fraudulent securities transactions and conducts fraud awareness events throughout the state. Ex. 20.

8. The Auditor's office is comprised of 71 non-appointed, classified job positions. Ex. B.

9. The Policyholder Services Bureau includes nine non-appointed, classified job positions. Ex. 32. The Compliance Bureau Chief supervises the Policyholder Services Bureau.

10. The Policyholder Services Bureau investigates consumer complaints about insurance and determines whether the insurer or license-holder is in compliance with state law and the terms of the contract for insurance. The Policyholder Services Bureau investigates and handles consumer complaints related to both insurance and securities products and works with "the entire agency" to address consumer complaints.

11. The only disputed positions within the Policyholder Services Bureau are the Compliance Specialist Lead positions (00210, 00033), which the Auditor seeks to include and MPEA seeks to exclude from the petitioned-for unit.

12. These Compliance Specialist Lead positions are responsible for distributing new consumer complaints to other Compliance Specialists or to themselves on a rotation basis. Neither Compliance Specialist Lead position has the authority on a regular, or recurring, basis to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to recommend the same.

13. The Compliance Specialist Lead positions are not supervisory positions.

14. The Forms Bureau includes six non-appointed, classified job positions. The Forms Bureau is responsible for ensuring every insurance form, endorsement and policy used in Montana is in compliance with state law. Forms Bureau employees review insurance contracts, forms, endorsements and policies to ensure compliance with state law. The Compliance Bureau Chief supervises the Forms Bureau.

15. The only disputed position is the File Clerk position (00316), which the Auditor seeks to include and MPEA seeks to exclude. The File Clerk position is .5FTE in the Forms Bureau and .5FTE in the Licensing Bureau.

16. The Licensing Bureau includes six non-appointed, classified job positions. The Licensing Bureau issues and renews insurance producer, consultant and adjuster licenses. The License Examiner positions within the Forms Bureau are pay band 5 while the File Clerk position is pay band 3. License Examiner positions require advance knowledge of the principles and practices of business administration and of the insurance industry. Ex. 4. The License Examiner position requires a Bachelor's degree and one year related experience. The File Clerk position requires only a high school education.

17. The File Clerk shares common supervision with the other positions within the Forms Bureau and the Policyholder Services Bureau and Rates Bureau. The File Clerk also shares common supervision with the Licensing Bureau and Market Conduct Bureau, both of which are supervised by the Insurance Services Bureau Chief. The work of the File Clerk overlaps with other agency positions and the positions are integrated with the work performed by the agency as a whole.

18. The File Clerk position performs the same functional duties as the License Permit Technicians within the Licensing Bureau. The File Clerk position is integrated with and integral to the work conducted in the Licensing Bureau.

19. The File Clerk position shares a community of interest with the other positions included in the petitioned-for unit.

20. The Rates Bureau includes four non-appointed, classified job positions. The Rates Bureau works with other insurance and securities bureaus to regulate both insurance and securities products. The Rates Bureau and the Forms Bureau share the same computer program to evaluate company form filings as well as company rate filings.

21. The Rates Bureau is under the dual supervision of the Compliance Bureau Chief and the Chief Actuary position.

22. The Auditor's office seeks to include the Actuary positions (00201, 00325); the Statistician position (00091); and Compliance Technician position (00204) in the petitioned-for unit.

23. The Actuary positions "conduct independent actuarial reviews of [insurance] rate filings to estimate financial outcomes of submitted rates." Ex. 7. Actuaries are required to have a college degree and be certified by the Society of Actuaries or the Casualty Actuarial Society. Exs. 7, 8, 9, A-32, and A-36. The

Actuary positions share a supervisor with the employees in the Forms Bureau. There is some integration of the work functions of the Actuary positions and the Compliance Specialist positions in that the Compliance Specialist who is investigating a complaint concerning an insurance rate may seek information about the insurers' approved rate from an Actuary.

24. The Actuary and Statistician positions do not perform work that is performed by any other bureau. These positions involve highly specialized work that is not performed by any other employee in the Auditor's office. There was no testimony that individuals in the Actuary positions desired to be included in the petitioned-for bargaining unit.

25. The Actuary and Statistician positions do not share a community of interest with the other positions included in the petitioned-for unit. Therefore, these positions are properly excluded from the petitioned-for unit.

26. The Compliance Technician position (00204) is a pay grade 4 administrative position that is .75FTE in the Rates Bureau and .25FTE in the Examinations Bureau. This is primarily a data entry position that requires an Associate's Degree and two years' work experience.

27. The Compliance Technician position shares common supervision with the other positions within the Rates Bureau and the Examinations Bureau.

28. The Compliance Technician position shares a community of interest with the other positions included in the petitioned-for unit.

29. The Market Conduct Bureau includes two non-appointed, classified job positions. The parties agree the two Market Conduct Examiner positions are properly included in the petitioned-for unit.

30. The Licensing Bureau and the Market Conduct Bureau are supervised by the Insurance Services Bureau Chief position. Ex. B.

31. The Financial Examinations Bureau includes 11 non-appointed, classified job positions. The only disputed positions are the Financial Examiner positions (00202, 00203, 00317, 30005) and the Compliance Technician position (00204). The Financial Examinations Bureau is supervised by the Examinations Bureau Chief position. The Auditor seeks to include and MPEA seeks to exclude the five positions in the petitioned-for unit.

32. The Financial Examinations Bureau is responsible for the financial oversight of insurers and makes solvency determinations primarily through financial analysis and financial examinations.

33. The two Lead Financial Examiner positions (00202, 00317) are responsible for assigning work within the bureau. Neither position has the authority on a regular or recurrent basis to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or to effectively recommend the same.

34. The Financial Examiner Advanced Level III serves as the examiner in charge of “multi-state examinations” and has the authority to assign work to other employees based upon an analysis of the employees’ strengths and expertise. Ex. 17.

35. The Lead Financial Examiner positions and the Financial Examiner Advanced Level III positions are supervisory positions.

36. The Investigations Bureau includes four non-appointed, classified job positions. The parties do not dispute the inclusion of the Investigators in the unit.<sup>1</sup>

37. The Securities Bureau includes five non-appointed, classified job positions, all of which the Auditor seeks to include and MPEA seeks to exclude from the petitioned-for unit. These positions include the Securities Examinations/Licensing position (00401, 00208); Licensing Examiner (00063); Administrative Assistant position (00402); and the Compliance Technician position (00057).

38. The Deputy Securities Commissioner supervises the Securities Bureau. The Securities Bureau regulates the securities industry. The Securities Bureau mirrors the regulatory structure of the Insurance Bureau.

39. The Securities Bureau regularly interacts with and works with other bureaus when the work involves “hybrid products,” such as variable annuities. Such hybrid insurance and securities products account for at least 25% of the Securities Bureau’s workload.

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<sup>1</sup>The Investigations Bureau is supervised by the Chief Legal Counsel position, which also supervises the agency’s attorneys. The inclusion of the agency’s attorneys is not at issue in this case.

40. There is no common supervision between the positions in the Securities Division and the positions in the petitioned-for unit.

41. The positions within the Securities Bureau do not share a community of interest with the other positions in the petitioned-for unit. Therefore, these positions are properly excluded from the petitioned-for unit.

42. The Information Technology (IT) Bureau includes three non-appointed, classified job positions. The parties do not dispute the inclusion of these positions in the petitioned-for unit.

43. The Centralized Services Bureau includes four non-appointed, classified job positions: Receptionist (00050, 00062); Purchasing (00016); and Accounting Technician (00006). The Auditor seeks to include all four positions in the petitioned-for unit.

44. The Centralized Services Bureau is supervised by the Administrator of Centralized Services.

45. The Centralized Services Bureau is responsible for processing and administering the various fees and fines levied by the Auditor's office. The Central Services Division is also responsible for building and vehicle maintenance, accounts payable and receivable, payroll and agency contracts.

46. The positions within the Centralized Services Bureau interact regularly with the majority of the agency and its work overlaps with other work performed within the agency.

47. The positions within the Centralized Services Bureau share a community of interest with other positions within the agency and are, therefore, properly included in the petitioned-for unit.

## V. DISCUSSION<sup>2</sup>

Montana law recognizes and protects public employees' right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. Mont. Code. Ann. § 39-3-201.

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<sup>2</sup>Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

The Board of Personnel Appeals (the Board) has the authority to “decide the unit appropriate for collective bargaining.” Mont. Code Ann. § 39-31-202(1).

In order to ensure employees the fullest freedom in exercising the rights guaranteed by this chapter, the board or an agent of the board shall decide the unit appropriate for the purpose of collective bargaining and shall consider such factors as community of interest, wages, hours, fringe benefits, and other working conditions of the employees involved, the history of collective bargaining, common supervision, common personnel policies, extent of integration of work functions and interchange among employees affected, and the desires of the employees.

*Id.*

The Board’s duty is not to determine the most appropriate unit, but merely an appropriate unit.

In determining an appropriate bargaining unit . . . the Board seeks to fulfil the objectives of ensuring employee self-determination, promoting freedom of choice in collective bargaining, and advancing industrial peace and stability. Under the Act, our task is to determine not the most appropriate or comprehensive unit, but simply an appropriate unit.

*Dezcon, Inc.*, 295 NLRB 109 (1989); *Bartlett Collins*, 334 NLRB 484 (2001) (the Board must certify any unit that is an appropriate unit, even if it is not the most appropriate unit); *Lundy Packing Co.*, 314 NLRB 1042, 1043 (1994) (the petitioned-for unit need only be an appropriate unit for purposes of collective bargaining, not the most appropriate unit); *Overnite Transportation Co.*, 322 NLRB 723 (1996) (a union is not required to request representation in the most comprehensive or largest unit of employees of an employer); *Montana Federation of Teachers v. Flathead Valley Community College*, UD 16-89 (Montana law does not require that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit, only that the unit be appropriate).

Accordingly, the Board’s rules provide, “A unit may consist of all of the employees of the employer or any department, division, bureau, section, or combination thereof if found to be appropriate by the board.” Admin. R. Mont. 24.26.610. In considering whether a bargaining unit is appropriate, the Board shall consider such factors as:

- (a) community of interest;
- (b) wages;
- (c) hours;
- (d) fringe benefits and other working conditions;
- (e) the history of collective bargaining;
- (f) common supervision;
- (g) common personnel policies;
- (h) extent of integration of work functions and interchange among employees affected; and,
- (i) desires of the employees.

Admin. R. Mont. 24.26.611.

Like federal law,<sup>3</sup> Montana law requires the Board to consider “community of interest” in determining an appropriate unit. Mont. Code Ann. § 39-31-202(1). However, “community of interest” is not defined under Montana statute or rule. The additional factors included in Mont. Code Ann. § 39-31-202(1) are not included in the federal statute but are made part of the definition of “community of interest” by federal case law. See, e.g. *Kalamazoo Paper Box Corp.*, supra; *MEA-MFT v. Dawson Comm’y College*, UD 9-2006. Since Montana law provides no other definition, “community of interest” has been determined to “encompass all of the statutory factors.” *Id.* All of the factors have to be weighed together and no one factor has controlling weight. *Montana Public Employees’ Association v. Cascade County* (2000), UC 1-2000.

The community of interest standard is applied to ensure that the terms and conditions of employment of the employees in the proposed bargaining unit are not “too varied for them to be grouped together in the same unit.” *Specialty Healthcare*, 357 NLRB 934, 937 (2011). The standard test is whether there exists “substantial mutual interests in wages, hours, and other working conditions of employment.” *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171-72 (1971). There are no per se rules to include or exclude any classification of employees in any unit. *Airco, Inc.*, 273 NLRB 348 (1984).

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<sup>3</sup>Section 9(b) of the National Labor Relations Act gives the National Labor Relations Board (NLRB) comparable authority to determine appropriate bargaining units. The Montana Supreme Court and the Board follow appropriate federal court and NLRB precedent to interpret the Montana Act. *State ex rel. BOPA v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *Teamsters Local No. 45 v. State ex rel. BOPA* (1981), 195 Mont. 272, 635 P.2d 1310; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

The NLRB most recently considered the situation where the employer seeks to add additional employees to a petitioned-for unit in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017). In that case, the NLRB announced that it is “returning to the traditional community-of-interest standard that the Board has applied throughout most of its history” when determining whether an appropriate unit must include positions advocated by the employer. *Id.*, at slip op. 7.

This “traditional” standard was explained by the D.C. Circuit Court in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (2008):

Decisions of the Board and of the courts in unit determination cases generally conform to a consistent analytic framework. If the employees in the proposed unit share a community of interest, then the unit is prima facie appropriate. In order to successfully challenge that unit, the employer must do more than show there is another appropriate unit because “more than one appropriate bargaining unit logically can be defined in any particular factual setting.” *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000). Rather, as the Board emphasizes, the employer’s burden is to show the prima facie appropriate unit is “truly inappropriate.” *Id.* at 1189; *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7<sup>th</sup> Cir. 1999) (“clearly inappropriate”); see also *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996) (the Board “need only select an appropriate unit, not the most appropriate unit”).

In *PCC Structurals, Inc.*, the NLRB reaffirmed the community-of-interest test requires the Board in each case to determine:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

*Id.*, at slip op. 11 (quoting *United Operations*, supra, 338 NLRB at 123).

The NLRB went on to note that the Board must also determine whether “excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.” *Id.* quoting *Constellation Brands*, supra at 794 (emphasis included in original). Ultimately, the question becomes whether the excluded employees are so similarly situated to the included employees that keeping them out of the unit would be “irrational.” *Rhino Northwest, LLC v. NLRB*, 867 F.3d 95, 100 (D.C. Cir. 2017).

For the sake of clarity, it is easier to note what factors listed in Admin. R. Mont. 24.26.611 are not in dispute in this case. As employees of the Auditor’s office, the positions in question are subject to common personnel policies, work hours, leave time, and fringe benefits. There is no history of collective bargaining within this state agency. Each position is located in the same building. Therefore, the issue becomes whether, upon consideration of the remaining factors, the positions included in the Auditor’s counterpetition are so similarly situated to the positions included in MPEA’s proposed unit that it would be irrational to exclude the positions from the bargaining unit.

- A. Compliance Specialist Lead positions; Lead Financial Examiner/Analyst; and Financial Examiner/Analyst Level III positions

MPEA contends the Compliance Specialist Lead positions; Lead Financial Examiner/Analyst; and Financial Examiner/Analyst Level III positions are supervisory positions that are properly excluded from the proposed bargaining unit. The Auditor counters those positions, while having the authority to delegate work assignments, are not “supervisory employee(s)” and are properly included in the proposed unit.

Supervisory employees are excluded from the definition of “public employee.” Therefore, a supervisory employee does not have the rights guaranteed by Montana Code Annotated § 39-31-201 and cannot be included in a unit for collective bargaining purposes. Mont. Code Ann. § 39-31-103(9)(iii). The party asserting that an employee should be excluded from a unit has the burden of proving supervisory status. *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427, 1445 (9th Cir. 1991).

Montana Code Annotated § 39-31-103(11)(a) defines a supervisory employee as “an individual having authority on a regular, recurring basis while acting in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or to effectively recommend the above actions if, in connection with the foregoing, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment.”

The term “authority” is defined as “the *power* to influence or command thought, opinion or behavior.” Webster’s Ninth New Collegiate Dictionary (1988) (emphasis added). In addition, Montana Code Annotated § 39-31-103(11)(b) provides that the authority articulated in subsection 11(a) “is the only criteria that may be used to determine if an employee is a supervisory employee.”

Looking to federal law, which is mirrored in Montana law, the general test to determine supervisory status is: 1) whether the employee actually possesses the authority to engage in any one of the criteria listed in the definition of a “supervisor;” 2) whether the employee exercises such authority that requires the use of independent judgment; and, 3) whether the employee holds the authority in the interest of the employer. *NLRB v. Health Care Retirement Corp.*, 511 U.S. 571, 574 (1994).

Not all, or even a large number, of the statutory indicia of supervisory status are necessary to establish that an employee is a supervisor. The statutory definition is in the disjunctive, and it is therefore sufficient for supervisory status to be established based on only one of the statutory criteria. *E and L Transport Co. v. NLRB*, 85 F.3d 1258, 1269 (7th Cir. 1996). The law distinguishes between true supervisory personnel vested with “genuine management prerogatives” from non-supervisory employees such as “straw bosses, lead men, and set up men” who enjoy the protection of the labor relations laws even though they perform some minor supervisory duties. *NLRB v. Bell Aerospace Co.* (1974), 416 U.S. 267, 280-81.

1. Compliance Specialist Lead (00210)

It is undisputed the Compliance Specialist Lead positions assign work to other workers within their bureau, as well as to themselves. Compliance Bureau Chief Hersey testified the positions are responsible for assigning consumer complaints for investigation on a rotational basis. Hersey conceded there were times when a Compliance Specialist Lead position would be required to consider an employee’s strengths or weaknesses when assigning a case for investigation.

The issue is whether the responsibility of assigning work to other workers qualifies these positions as supervisory positions as defined under Mont. Code Ann. § 39-31-103(11)(a). MPEA argues these positions have the authority to assign work to other employees that may take the employees days, weeks or months to complete. MPEA contends the decision to assign work requires the regular exercise of independent judgment performed in the interest of the employer.

The evidence shows these positions have no authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or to effectively recommend such actions. Neither individual who currently holds the Compliance Specialist Lead position testified at hearing. Hersey's testimony establishes that neither position satisfies the criteria set out in Mont. Code Ann. § 39-31-103(11)(a). While the position may occasionally require the worker to exercise independent judgment, which is presumably always exercised in the interest of the agency, the evidence shows the majority of cases are assigned on a rotational basis that does not require the Compliance Specialist Lead position to regularly exercise independent judgment when assigning work. Therefore, MPEA has failed to establish that neither of the Compliance Specialists (00210, 00033) are supervisory exempt under the Montana Public Employees Collective Bargaining Act and must be excluded from the bargaining unit.

The next issue is whether the remaining factors set forth in Mont. Code Ann. § 39-31-202(1) and Admin. R. Mont. 24.26.611 require the inclusion of the positions in the bargaining unit as advocated by the Auditor's office. The Compliance Specialist Lead positions are grouped in pay band 6. The rate of pay for these positions varies only slightly, from an hourly wage of \$25.96 to \$28.78, which falls into line with a majority of the positions in question. These positions all report to Hersey, who reports directly to Deputy Commissioner of Insurance Bob Biskupiak, who then reports to Deputy State Auditor Nancy Butler. The Compliance Specialist positions interact with the majority of divisions within the agency and the positions are more greatly integrated with the majority of the agency than other positions. Therefore, the Auditor's office has shown that it would be irrational to exclude the Compliance Specialist Lead positions (00210, 00033) from the proposed bargaining unit.

2. Lead Financial Examiner/Analyst and Financial Examiner/Analyst Level III positions (00202, 00203, 00317, 30005)

MPEA contends the Lead Financial Examiner/Analyst and Financial Examiner/Analyst Level III positions are all supervisory positions properly excluded from the proposed bargaining unit.

The job description for the Financial Examiner/Analyst (Level II and Advanced Level III-EIC) provides:

This position . . . is primarily responsible for conducting financial solvency analysis of insurance companies and performing risk-focused

examinations. This position reports to the Chief Examiner through the Lead Examiner, and does not supervise other agency personnel. However, the position will provide guidance and assistance to less experienced Financial Examiners positions, and the EIC (Level III) will supervise and assign analysis and examination work.

Ex. 17, p. 1.

The job description for the Lead Financial Examiner/Analyst position provides:

This position . . . is primarily responsible for directing and overseeing financial solvency analysis of insurance companies and directing risk-focused examinations. The position reports to the Bureau Chief, and provides lead worker supervision of Financial Examiner/Analyst positions and Administrative Financial Analyst positions.

Ex. 18, p. 1.

Again, the evidence shows these positions have no authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or to effectively recommend such actions. However, what distinguishes the Lead Financial Examiner/Analyst and Financial Examiner/Analyst Level III positions is the fact that the positions require the individual in the position to perform supervisory duties 30% to 60% of the time. The supervisory aspect of the job extends beyond assigning a case for investigation as in the case of the Compliance Specialist Lead position, it requires the individual in the position to provide guidance and assistance to less experienced employees. In the case of the Lead Financial Examiner/Analyst, the position is responsible for “directing and overseeing” the risk focused examinations and “provides lead worker supervision.” In terms of assigning financial analysis, the primary duties of the Lead Financial Examiner/Analyst position require the individual “to ensure that quality and depth of analysis was appropriate” and “[p]rovide lead worker supervision of Financial Examiner/Analysts and Administrative Financial Analysts.” Ex. 18, p. 2.

MPEA has met its burden of showing that the Lead Financial Examiner/Analyst and Financial Examiner/Analyst Level III positions are supervisory positions as defined under Mont. Code Ann. § 39-31-103(11)(b). Therefore, those positions are properly excluded from the proposed bargaining unit.

B. File Clerk (00316):

MPEA argues the File Clerk position is an administrative position in a unit dominated by professionals that does not share a community of interest with other employees in the unit that are primarily professional. See *MPEA v. City of Great Falls, UC 8-2005* (the Board generally holds that employees in clerical, technical and para-professional positions do not share a community of interest with professional employees).

The File Clerk position is employed by both the Forms Bureau and the Licensing Bureau. It is a pay band 3 position and receives a base salary of \$13.91 per hour. The File Clerk position reports to both the Compliance Bureau Chief and the Insurance Services Bureau Chief. According to the testimony of Insurance Services Bureau Chief Jeannie Keller, the File Clerk position performs much of the same work as the License Examiner and License Permit workers.

While the wages of the File Clerk position may be less than the wages received by the other positions in the various bureaus, the evidence shows there is significant interchange between the File Clerk and the other positions in the unit. The evidence further shows there is a common supervision of the File Clerk positions with other employees in the agency. Specifically, the File Clerk position performs work for both the Forms Bureau and the Licensing Bureau, each of which has its own Bureau Chief. However, those Bureau Chiefs both report directly to Biskupiak.

Unlike the position at issue in *City of Great Falls*, the File Clerk position is not part of units where the other positions “are involved in a higher level work of a professional character.” *Id.* at 10. The testimony establishes the other positions in the unit are engaged in work that have a significant overlap and integration with the rest of the agency. The File Clerk’s position, while a lower pay level and with more administrative or clerical duties, shares a sufficient community of interest with the other positions as to warrant its inclusion in the proposed unit. Therefore, the Auditor’s office has shown that it would be irrational to exclude the File Clerk positions from the proposed unit.

C. Compliance Technician (00204)

MPEA argues the Compliance Technician position (00204) is an administrative position that should be excluded from the proposed bargaining unit. The job description for the Compliance Technician position provides, “This position supports [the agency’s mission] by performing compliance and rate review functions

for the Insurance Division . . . including conducting rate reviews, reviewing benchmarks, processing payments, and tracking rate filings, certifications, quarterly tax submissions, and other processes to ensure compliance.” Ex. 10. The position requires an Associate’s degree in business administration, accounting, or a related field and two years of job-related work experience. *Id.*

The Compliance Technician position is employed by both the Rates Bureau and the Examinations Bureau and is a pay band 4 position. While the Rates Bureau and the Examinations Bureau have different bureau chiefs, both report directly to Biskupiak. Similar to the File Clerk position, the wages of the Compliance Technician may be less than the wages received by other positions within the agency, the evidence shows the position works with other parts of the agency and there is common supervision. There is a sufficient community of interest that it would be irrational to exclude the Compliance Technician position from the proposed unit.

#### D. Rates Bureau

MPEA argues that the Actuary/Statistician positions (00201, 00325, 00091) are properly excluded from the proposed unit as there is little integration of work functions between those positions and other employees in the agency. MPEA concedes there is common supervision but notes there is no interchange of employees due to the highly technical nature of the work performed by those positions.

The Auditor’s office counters that the positions in question are in pay bands 4, 5, 6, and 7, which are similar to wages earned by other positions within the agency, and there is common supervision in that all of the positions report to Hersey. The Auditor notes that the Rates and Forms Bureaus rely upon the expertise and work product of the other to effectively monitor the compliance of insurance companies operating within Montana. It also argues that the work is so integrated that the two bureaus share the same computer program.

Actuaries are highly trained and have specialized skills that are not easily duplicated by those not sharing the same training and experience. One could not expect a License Examiner to perform the work of an Actuary. The License Examiner would most likely not hold the necessary certification; nor would the License Examiner be reasonably expected to understand how to perform the work of an Actuary. In fact, no other employee within the agency would be qualified to perform the work of the Actuary. At hearing, it was fairly apparent that few people actually

understood the work of an Actuary, which tends to support the contention that their work does not integrate easily with other functions of the agency. For those reasons, it would be irrational to include the Actuary positions in the petitioned-for unit.

E. Securities Bureau

The Securities Bureau includes the following positions, all of which the Auditor contends should be included in the proposed bargaining unit:

Financial Examiner (00401, 00208)  
Administrative Assistants/Licensing Examiner (00063, 00402)  
Compliance Technician 4 (34100057)

The Auditor notes the Financial Examiner positions are pay band 7, which is similar to the rate of pay for the Investigator positions that have a base salary of \$34.50 per hour. The Administrative Assistant positions are pay band 4 and the Compliance Technician position is pay band 3. The Auditor argues there is common supervision because Deputy Securities Commission Lynn Egan, who supervises the unit, reports to Deputy State Auditor Nancy Butler. The Auditor goes on to argue that the Securities Bureau frequently interacts and collaborates with the Insurance Bureau to monitor hybrid insurance and securities products, like variable annuities. Deputy Securities Commissioner Egan testified that the Securities Bureau regularly interacts with Policyholder Services regarding a customer's compliant with the Licensing Division regarding licensure and the Forms Division to ensure the product is properly approved in Montana, which she described as being a large portion of the complaints received.

MPEA concedes that some integration exists between the work function of the Securities Bureau and the insurance side of the Auditor's operations. MPEA argues there is no common supervision, no interchange of employees between the Securities Bureau and other employees in the petitioned-for unit, and no indication the employees of the Securities Bureau desire to be part of the unit. MPEA goes on to argue the Compliance Technician is an administrative job in a unit dominated by professionals and is properly excluded from the proposed unit.

The job description for the Financial Examiner (34100401, 34100208) includes the following description of the purpose of the Securities Department:

The Securities Department is responsible for the administration and enforcement of the Securities Act of Montana to help protect Montana

investors. The Department is responsible for the registration of securities issuers, salespeople, investment advisors, broker-dealers, and investment advisor representatives. It also investigates instances of unregistered or fraudulent securities transactions and conducts fraud awareness events throughout the state.

Ex. 20.

The primary duties of the Financial Examiner include investigating allegations of securities fraud or violations, spearheading efforts to pilot new investigative approaches and to help establish regulatory and restitution parameters. The position's duties also include overseeing all aspects of financial regulatory examinations of Montana registered broker-dealer and investment adviser firms and to help establish a well-regulated securities industry. *Id.* The duties of the Financial Examiner are almost exclusively focused on the securities industry, as are the duties of the Administrative Assistant/Licensing Examiner (00063, 00402) and Compliance Technician. See Exs. 21, 22.

The evidence shows the positions in the Securities Bureau are in a separate and distinct department that is separately supervised. While there appears to be some functional integration when a hybrid product is involved, the evidence does not show it is so great as to render it irrational to exclude the Securities Bureau positions from the proposed unit. The positions have distinct job functions, distinct skills and training. Therefore, the Auditor has failed to show that it would be irrational to exclude the positions of the Securities Bureau from the proposed unit.

#### F. Centralized Services

The final positions at issue are the Receptionist (00050, 00062); Purchasing Technician (00016); and Accounting Technician (00016). The Auditor argues that these positions are relied upon by the entire agency and work with every bureau within the agency on a daily basis. The Auditor further argues that the work of these positions is not only integral to the agency in terms of budget, but works with various bureaus within the agency to assess fees, enforce fines and disseminate restitution awards.

MPEA counters that these positions have a lack of interchange and lack of common supervision, as well as a difference in pay substantial enough to warrant their exclusion from the petitioned-for unit. The Receptionist is a pay band 2 position. The Purchasing Technician and Accounting Technician are pay band 3.

While these positions are in a lower pay band, that alone is not sufficient to warrant their exclusion. When considering the community of interest standard, the evidence shows these positions are rationally included in the petitioned-for unit due to the regular interchange between the positions and the entirety of the agency. Therefore, the Auditor's office has shown it would be irrational to exclude the Centralized Services positions from the petitioned-for unit.

#### G. Manner of Election

The Board's rules require secret-ballot elections and permit either onsite or mail-ballot elections. Admin. R. Mont. 24.26.656. The Auditor's office advocates for an onsite election, at the Auditor's agency, with provisions made for absentee voting for the convenience of the employees. MPEA counters that the Board should consider the employees' preference, which in this case is a mail-ballot election.

"[U]nions must run elections that conform to the democratic principles embodied in the secret ballot mandate." *Brennan v. United Steelworkers of America*, 520 F.2d 516, 521 (7<sup>th</sup> Cir. 1975) (citations omitted). A mail-ballot election would afford the greatest number of employees the opportunity to cast their vote in a manner in which "the person expressing such choice cannot be identified with the choice expressed." *Id.* citing 29 USCS § 402(k). It is therefore determined that a mail-in ballot election would be the appropriate method of election in this case.

### VI. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over determining the appropriate bargaining unit for the Office of the Montana State Auditor's office in this matter. Mont. Code Ann. §§ 39-31-202 and 207.

2. The positions of Compliance Specialist Lead (00210, 0003); File Clerk (00316); Compliance Technician (00204); Receptionist (00050, 00062); Purchasing (00016); and Accounting Technician (00006) have a community of interest under Mont. Code Ann. § 39-31-202 that makes it appropriate to include them within the petitioned-for bargaining unit.

3. The Actuary and Statistician positions (00201, 00325, 00091, 00204); Lead Financial Examiner/Analyst and Financial Examiner/Analyst Level III positions (00202, 00203, 00317, 30005) do not have a community of interest under Mont. Code Ann. § 39-31-202, which makes it inappropriate to include them within the petitioned-for bargaining unit.

## VII. RECOMMENDED ORDER

An election by secret ballot shall be conducted as soon as possible, in accordance with the rules and regulations of the Board of Personnel Appeals. It is recommended the election be held by mail-in ballot to ensure the employees have the greatest opportunity to participate.

DATED this 23rd day of April, 2018.

BOARD OF PERSONNEL APPEALS

By: /s/ CAROLINE A. HOLIEN  
CAROLINE A. HOLIEN  
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.222, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than May 16, 2018. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.222, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals  
Department of Labor and Industry  
P.O. Box 201503  
Helena, MT 59620-1503