

STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 5-2001:

AFSCME MONTANA COUNCIL)	Case No. 1624-2001
No. 9, AFL-CIO,)	
Petitioner,)	
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
)	AND RECOMMENDED ORDER
CITY OF LIBBY,)	
Respondent.)	

I. INTRODUCTION

On October 17, 2000, AFSCME Montana Council No. 9, AFL-CIO filed a petition with the Board seeking a new unit determination and election for employees of the City. The petition proposed a bargaining unit representing all employees of the City including city police, excluding all supervisors, confidential employees, Chief of Police, and other bargaining units. On October 25, 2000, the Board notified the City of the petition. The Board set an election, with the ballots to be counted on December 29, 2000.

On December 29, 2000, the City faxed to the Board a letter signed by Daniel E. Stephens contesting the inclusion of Mark O. McGill, Danny D. Burns, Scott C. Meyer, and John A. Knudson in the unit on the grounds that they were "foremen/supervisors."

On January 12, 2001, the Board certified that based on the election, Council No. 9 was the exclusive representative of the employees of the City. The certification noted that 4 of the ballots had been challenged. On January 29, 2001, Council No. 9 wrote a letter to the Board objecting to the Board's failure to take action to determine the status of the challenged ballots. On February 2, 2001, the City filed a response to the letter. On February 12, 2001, John Andrew on behalf of the Board issued a ruling, treating the letter of January 29, 2001 as a motion containing objections to the election under ARM 24.26.666. Andrew's ruling held that the objection was not timely filed, and denied the motion.

On March 5, 2001, Council No. 9 appealed the denial of the motion and requested a hearing. On March 8, 2001, the Board transferred this matter to the Department's Hearings Bureau for a hearing on the appeal.

In the prehearing conference, the parties acknowledged that they were not seeking a ruling on the challenged ballots. Because the City did not make its objection until the last day of the election, and the parties are not seeking to have the election results set aside, this proceeding is in essence a unit clarification proceeding to determine the appropriate composition of the unit.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on July 19, 2001 in Libby, Montana. Matthew B. Thiel represented AFSCME Montana Council No. 9, AFL-CIO. Daniel D. Johns represented the City of Libby. Anthony Berget, Dan Stephens, Mark McGill, Scott Meyer, Jeff Haugen, Dan Burns, Robert Lanham, and John Knudson testified as witnesses in the case. Exhibits A through TT were admitted into evidence by stipulation.

II. ISSUE

The issue in this case is whether a unit proposed for collective bargaining purposes is appropriate pursuant to § 39-31-202, MCA, because of the inclusion in that unit of a certain employees alleged to be supervisors, as provided in § 39-31-103(11), MCA. Specifically, are McGill, Burns, Meyer, and Knudson supervisory employees as that term is defined in § 39-31-103(11), MCA? In deciding that question, what effect does the stipulation signed by Mayor Berget waiving the right to hearing on questions of representation have, and what is the effect of Council No. 9 not signing the stipulation?

III. FINDINGS OF FACT

1. AFSCME Montana Council No. 9, AFL-CIO (Council No. 9) is a "labor organization" within the meaning of § 39-31-103(6), MCA.
2. The City of Libby is a "public employer" within the meaning of § 39-31-103(10), MCA.
3. On October 17, 2000, Council No. 9 filed a petition with the Board seeking a new unit determination and election for employees of the City. The petition proposed a bargaining unit representing all employees of the City including city police, excluding all supervisors, confidential employees, Chief of Police, and other bargaining units.
4. On October 25, 2000, the Board notified the City of the petition. In a cover letter accompanying the petition, the Board advised the City of its right to file a counter-petition, provided the City with notice of the unit determination proceedings to be posted in the workplace, and requested that the employer provide a list of the names and addresses of employees in the proposed unit.
5. On November 13, 2000, the City filed a certificate of posting of the notice of unit determination proceedings, attached to which was a list of employees. The list of employees included Mark O. McGill, Danny D. Burns, Scott C. Meyer, and John A. Knudson.
6. On December 5, 2000, the Board notified the City that the Board would conduct an election to determine the exclusive representative of its employees. The notice included a list of employees eligible to vote in the election, including McGill, Burns, Meyer and Knudson. The notice also

included a document entitled "Stipulation for Certification upon Consent Election." The notice provided that the Board would mail ballots to the eligible voters on December 15, 2000, and that ballots would be counted on December 29, 2000.

7. On December 11, 2000, Mayor Anthony Berget signed the stipulation for the City of Libby. The stipulation provided that the parties would waive a hearing on questions of representation and to the procedures for the election outlined in the notice. The Board's file contains no indication whether Council No. 9 signed the stipulation.

8. On December 29, 2000, the City faxed to the Board a letter signed by Daniel E. Stephens contesting the inclusion of McGill, Burns, Meyer, and Knudson in the unit on the grounds that they were "foremen/supervisors."

9. The City has an elected Mayor and City Council. It employs a Supervisor of City Services, Dan Thede. McGill, Burns, Meyer, and Knudson each report to Thede and to a city council member who is the committee chairperson for his area of responsibility.

10. The City Council has a Personnel Committee. The Personnel Committee is responsible for considering employee grievances, hiring city employees, firing employees, and any other personnel issues which may arise.

11. The City has a Personnel Policies and Procedures manual (Exhibit TT). The manual calls for the Supervisor of City Services to administer any or all selection procedures for hiring city employees, and to make recommendations to the Personnel Committee. It provides that the Personnel Committee is the actual hiring authority. (Exhibit TT, pages 29 - 30)

12. The manual provides that transfer of employees, other than by individual request, is at the discretion of the City of Libby. It does not specify who may transfer employees. (Exhibit TT, page 40)

13. The manual provides that the Supervisor of City Services may suspend employees. (Exhibit TT, page 43)

14. The manual provides that the Personnel Committee is the authority which determines when a reduction in force is required. (Exhibit TT, page 43). It further states that the determination of which personnel to retain in the event of a reduction in force will be made by the City Council, in coordination with the Supervisor of City Services. (Exhibit TT, page 44)

15. The manual provides for recall from lay-off, but does not state who has authority to recall. (Exhibit TT, page 45)

16. The manual provides for consideration to be given to internal candidates when vacancies arise. (Exhibit TT, page 28). In a section entitled "Promotion/Transfers," the manual provides for the Supervisor of City Services to receive and screen applications for vacancies from internal candidates. It also provides for the Supervisor of City Services to interview each qualified internal applicant, and for the Department Head to select the most qualified applicant for the

position and recommend the desired applicant to the Personnel Committee for promotion. (Exhibit TT, page 40)

17. The manual addresses discipline and discharge in two sections. The first, entitled "Discipline," provides for the "Supervisor or Supervisor of City Services" to notify the employee of any situation warranting disciplinary action, to conduct an investigative interview with the employee, and to give the employee a hearing. (Exhibit TT, page 7). The second section, entitled "Disciplinary Procedures," assigns responsibility for all disciplinary action, including oral reprimands, written reprimands, suspension, and discharge, to the Supervisor of City Services. (Exhibit TT, pages 42 - 43)

18. The manual provides for employees initially to attempt to resolve grievances informally with the immediate supervisor prior to involving the Supervisor of City Services. It then provides for grievances to the Supervisor of City Services, followed by appeals to the Mayor, Personnel Committee, and City Council. (Exhibit TT, pages 8 - 9)

19. The manual calls for employees to be assigned, directed and reviewed by supervisory personnel. It assigns supervisors the responsibility to ensure that the goals regarding work output established by the City are achieved. (Exhibit TT, page 37). It gives supervisors the authority to establish work schedules, schedule vacations, and authorize and assign overtime. (Exhibit TT, pages 12 and 32). The manual requires employees to report absence due to illness to their supervisor. It does not require approval of the leave, except that the Supervisor of City Services may require a doctor's statement from an employee who has used sick leave exceeding 5 consecutive work days. (Exhibit TT, page 14). The manual requires notification to the Supervisor of City Services for military leave and pregnancy leave. It appears to contemplate involvement of the Supervisor of City Services in Family and Medical Leave. (Exhibit TT, pages 15 - 16 and 18 - 19). Other leaves of absence require the approval of the City Council. (Exhibit TT, page 17)

20. The manual does not address rewards.

21. The manual calls for supervisors to complete performance appraisals of employees. (Exhibit TT, page 38 - 39)

22. Mark McGill's job title is City Foreman. He is responsible for streets, parks, and the cemetery. His position description identifies him as a "working foreman." He is the foreman of a crew consisting of three other permanent employees and two seasonal employees. He is paid on an hourly basis and receives overtime pay when he works more than 40 hours per week.

23. McGill receives work requests from City Hall and establishes priorities for those requests. He works with the crew to determine who will perform what work, using input from the other members of the crew. He helps the crew to perform the work as needed, and is also the shop mechanic. McGill completes performance appraisals of the members of his crew for purposes of the City's step and grade system of compensation. He completes the appraisals using a standard form developed by the City, and goes over each evaluation with the individual employee. He then turns in the appraisal to Thede.

24. McGill does not have authority to hire employees or effectively recommend their hire. When a vacancy occurs on his crew, the City posts the vacancy at the local Job Service office. McGill screens applications to determine which candidates are not minimally qualified, and assists the Personnel Committee in rating candidates by drafting guidelines to give points to candidates based on their ability to perform particular tasks as required in his department. He has participated with Thede and the Personnel Committee in interviewing candidates, with the selection being made by the consensus of all participants. With the approval of Thede, he recalled seasonal employees who had worked the previous year. When initially hired, the seasonal employees had been interviewed and selected by the Personnel Committee.

25. McGill does not have the authority to discipline or discharge employees. In one instance when he wanted to fire an employee, he took his concern to Thede, who relayed it to the Personnel Committee. The Personnel Committee took disciplinary action in the form of suspension.

26. McGill is able to authorize overtime, but does not believe he can require an employee to work overtime.

27. Employees in the Street Department request vacation by filling out a form and giving it to McGill. The City policy discourages having more than one employee in a department on vacation at the same time. McGill checks the calendar to see if any other employee has requested the time off, and authorizes the time if there are no conflicts. If there are conflicts, the employees work with each other to determine how to accommodate the requests. If a vacation request cannot be worked out, McGill can deny a request to take vacation.

28. Scott Meyer's job title is Water Plant Supervisor. His position description identifies him as a supervisor. He is paid on an hourly basis and receives overtime pay when he works more than 40 hours per week.

29. Meyer is in charge of overseeing the water treatment plant operations. The plant has three operators in addition to Meyer. He is a licensed operator and has much more experience than the other operators. Because the plant requires 24-hour per day monitoring and the City does not have sufficient funds to staff the plant 24 hours per day, he has developed a schedule pursuant to which each operator works 10 hours per day at the plant in for a 6 day period, and monitors the plant from home via computer during the balance of the 6 day period when not present at the plant. The operator then has 8 days off. That schedule has now become routine.

30. All of the plant operators are licensed and know what work they need to do in a shift. However, Meyer does have "quite a bit of discretion" to assign day to day tasks. The operators look to Meyer for direction when they do not know how to solve a problem. Sometimes Meyer tells them what to do by phone; other times, he goes to the plant and resolves the problem himself. In the latter cases, he trains the other operator in what he is doing so that the other operator will know what to do if the problem arises again. He also provides training for operators who have problems performing their duties. Meyer directs operators to review safety materials and to document that they have done so. Meyer completes performance appraisals on the operators at the water treatment plant. He completes the appraisals using a standard form

developed by the City, and goes over each evaluation with the individual employee. He then turns in the appraisal to Thede.

31. Meyer does not have the authority to hire employees or recommend their hire. In the time he has worked for the City, there have been three new hires for the water treatment plant. In the first case, he sat in on the interviews but did not review the applications. In the second case, city officials brought a new employee up to the plant and asked Meyer to give the employee a tour. In the third case, Meyer reviewed the applications and sat in on the interviews but was not allowed to vote. The Personnel Committee did ask his opinion of which candidate to hire in that case.

32. Meyer does not have the authority to discipline or discharge employees. When an employee is not performing his or her work properly, Meyer documents the problem in a corrective action memo, which he gives to the employee. He also sends a copy of the memo to Thede, and believes that if the problem were serious enough, Thede would initiate discipline. Meyer wrote a number of corrective action memos to an employee in 1998, after which the City discharged the employee. Meyer did not participate in the decision to discharge the employee and did not agree that discharge was warranted. Meyer also wrote corrective action memos to another employee in 2001. He decided to change the employee's schedule to day shift Monday through Friday because of her performance problems, but the City overrode his decision. The City gave the employee a written warning and placed her on 30 days probation.

33. Overtime in the water treatment plant is routine. If a problem arises at the plant, the operator on duty is called. If the operator cannot resolve the problem from the remote location, he or she must go to the plant. The employee does not need advance permission to work overtime. If there is a need for scheduled overtime, the employees together work out who will work. Meyer can call employees out to work overtime if needed.

34. When scheduling vacation, operators in the water treatment plant check the calendar to see if anyone else is scheduled to be on vacation for the days the operator wants off. If no one else is scheduled for vacation for the days requested, the operator seeks permission from Meyer. Meyer routinely grants such requests.

35. Dan Burns' job title is Wastewater Foreman/Assistant Superintendent of City Services. His primary duty is as foreman for the City's Sewer and Wastewater Plant. The wastewater plant has two operators in addition to Burns.

36. The employees in the wastewater plant work 8:00 a.m. to 4:30 p.m. daily. All three employees of the plant are licensed operators. They perform laboratory testing and maintain the plant equipment. They decide who will do what by dividing up the tasks among themselves each day. Burns completes performance appraisals for members of the crew for purposes of the City's step and grade system of compensation. He completes the appraisals using a standard form developed by the City, and goes over each evaluation with the individual employee. He then turns in the appraisal to Thede.

37. Burns does not have authority to hire employees or effectively recommend their hire. There has been one vacancy on his crew since he has been foreman. He assisted in the interview

process for that position by asking questions of the candidates at the interview conducted by the Personnel Committee. Thede, who had worked in the wastewater plant prior to becoming Supervisor of City Services, also participated in the interview process. Burns recommended the hiring of a candidate, and the Committee hired the person he recommended.

38. Burns does not have the authority to discipline or discharge employees. In 1996, at the direction of Thede, Burns wrote a memo documenting the failure of an employee to call in to report his absence. The memo was not a disciplinary action.

39. The wastewater plant runs 24 hours each day, and has an automated call out system to alert employees to go to the plant when there are problems outside of the normal work shift of 8:00 a.m. to 4:30 p.m. It calls Burns first, then the other plant operators in turn if Burns does not respond. Finally, it calls Thede if none of the operators respond. Overtime at the wastewater plant is normally assigned by the automated system. In an unusual situation, the first operator to respond may find he needs additional assistance, and in that circumstance would call one or both of the other operators.

40. Vacation in the wastewater plant is determined by the operators coordinating with each other. Employees also trade days off without obtaining approval from Burns.

41. John Knudson's job title is Water Department Foreman. In that capacity, he is responsible for the water distribution portion of the City's water system. There are three other employees in the department, two operators and a meter reader.

42. Knudson spends about 10% of his time working in his office in City Hall. During that time, he completes reports on tests of the system, maintains records, and handles complaints and questions from customers and contractors. During the rest of the time, he assists the operators on projects. He is responsible for making sure the work in his area gets done and works with the crew to "line out" the work to be completed. He lets the two operators work out who will perform what tasks in any project between themselves, based primarily on the preference of one employee who prefers to run the backhoe. In response to a customer complaint about low pressure or a meter not working properly, he would send an employee to check on the complaint. Knudson completes performance appraisals for the crew members. He completes the appraisals using a standard form developed by the City, then he and Thede meet with each employee to review the appraisal.

43. Knudson does not have authority to hire employees or effectively recommend their hire. There have been three vacancies on his crew since he has been foreman. He and Thede reviewed the applications and selected the candidates to be interviewed by the Personnel Committee. He assisted in the interview process by asking questions of the candidates at the interviews. He did not have a vote in the selection. The Committee did ask his opinion about who should be hired, and did hire the person he recommended.

44. Knudson does not have the authority to discipline or discharge employees. When there is a dispute regarding the work of an employee, he takes the issue to Thede. Knudson had a dispute

with one of the crew members about how he referred to the work of the crew member over the radio, and he and the employee met with Thede to resolve that dispute.

45. Water Department employees must occasionally respond to emergencies, such as water leaks. In those cases, the sheriff's department tries to reach Knudson or one of the employees. The employees do not need Knudson's permission to respond to a call out.

46. Water distribution employees work together to schedule vacation. In one case in which both water distribution operators wanted to take a month of vacation in the summer, Knudson determined he would not be able to complete all needed work if the requests were granted. He took the matter to Thede, who told him to tell the operators that they could not take a full month off in the summer.

47. McGill, Burns and Knudson are working foremen, not supervisors as that term is defined in § 39-31-103(11), MCA.

48. Meyer is a supervisor as that term is defined in § 39-31-103(11), MCA.

IV. DISCUSSION

The City seeks a determination that McGill, Meyer, Burns, and Knudson should be excluded from the City collective bargaining unit as supervisory employees.

Montana law gives public employees the right of self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. § 39-31-201, MCA. The law further authorizes the Board of Personnel Appeals to decide what units of public employees are appropriate for collective bargaining purposes. § 39-31-202, MCA. However, because the statute excludes "supervisory employee" from the definition of "public employee" (§ 39-31-103(9), MCA), a supervisory employee does not have the rights guaranteed by § 39-31-201, MCA, and is not appropriately included in a unit for collective bargaining purposes.

Section 39-31-103(11), MCA, defines supervisory employee as "any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, discharge, assign, reward, discipline other employees, having responsibility to direct them, to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment."

In analyzing this case, it is appropriate to consider cases decided under federal law. Section 9(b) of the National Labor Relations Act gives the National Labor Relations Board (NLRB) comparable authority to determine appropriate bargaining units. Thus, the Montana Supreme Court and the Board of Personnel Appeals follow federal court and NLRB precedent to interpret the Montana Act. State ex rel. Board of Personnel Appeals v. District Court, 183 Mont. 223, 598 P.2d 1117 (1979); Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals, 195 Mont. 272, 635 P.2d 1310 (1981); City of Great Falls v. Young (Young III), 211 Mont. 13,

686 P.2d 185 (1984). Further, supervisors are also excluded from bargaining units under federal law, and the definition of supervisor in the federal law is almost identical to the definition in the state law.

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). It is well settled that 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). However, possession of one of the enumerated powers confers supervisory status only when the employee performs one of the powers using independent judgment. NLRB v. S.R.D.C., Inc., 45 F.3d 328, 332 (9th Cir. 1995). The law distinguishes between true supervisory personnel vested with "genuine management prerogatives" and employees such as "straw bosses, lead men, and set up men" who enjoy the protection of the labor relations laws, even though they perform minor supervisory duties. NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-81 (1974).

The Board has outlined the following considerations in determining whether employees are supervisory under state law:

Whether the employee has independent authority to perform the functions enumerated in the Act.

Whether the exercise of authority in the area of assignment and direction is routine.

Whether the employee uses independent judgment in directing the activities of others.

Whether the recommendations made by the employee are subject to independent review or investigation.

Whether a substantial amount of the employee's time is spent doing work which is similar to the work of the subordinates.

Whether an unrealistic and excessively high ratio of supervisors to employees would be created.

UC No. 2-97, Yellowstone County v. Montana Public Employees Association (January 22, 1998).

The record contains conflicting evidence as to whether these employees possess the statutory powers indicating supervisory status. As to several points, City officials who testified asserted that the four employees did have some of the supervisory powers enumerated in the statute. However, their testimony was conclusory, and they conceded that the employees themselves would be in a better position to provide information about their actual duties and responsibilities. In addition, as to the factor of discipline, the City's testimony was contrary to the City Personnel Policies and Procedures Manual. Thus, the overall evidence presented at the hearing establishes that when the law is applied to the work of the employees in question, Scott Meyer meets the

tests for determining supervisory status, but the other employees do not. This conclusion is based on the following analysis of the statutory criteria:

Hiring authority

The evidence is clear that none of the four employees have hiring authority. The City's personnel manual vests responsibility for selection in the Personnel Committee and charges the Supervisor of City Services with administering selection procedures and making recommendations to the Personnel Committee. Each of the four employees testified that they did not have hiring authority.

The only evidence of one of the employees making an actual hiring decision was when Mark McGill hired seasonal workers. However, these were employees who had been hired through the normal City hiring process in previous years, and simply were allowed to be recalled without the normal hiring process. McGill had the approval of Thede to recall the employees; he did not do so on his own initiative.

The City maintained that the four employees have the authority effectively to recommend the hiring of employees, and the evidence includes several examples of the employees screening applications, being present for interviews and asking questions of candidates, and recommending the hire of particular candidates. An employee has the power effectively to recommend personnel action when the employee's recommendations are accepted without question. UDs No. 15-87 and 19-87, Board of Regents v. Montana Federation of Teachers (May 4, 1988), following City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307 (Iowa 1978). Although there were several instances when the Personnel Committee asked for recommendations, the evidence does not establish that the City relied on the recommendations to arrive at the hiring decisions.

Suspension, discharge, and discipline

None of the employees have the authority to suspend, discharge, or discipline, or the authority to effectively recommend such action. The City's personnel manual clearly assigns responsibility for disciplinary action to Thede. At best, under the policy, these employees have the authority to notify and interview an employee who warrants discipline, and give the employee a hearing. The responsibility for taking action is with the Supervisor of City Services. The evidence established a clear pattern of these employees bringing problems warranting disciplinary action to Thede and the Personnel Committee.

The evidence contains four examples of circumstances bearing on the authority of the four employees to discipline or effectively recommend discipline:

- . Mark McGill's recommended discharge of an employee on his crew. McGill thought took his concern to Thede. Thede met with the Personnel Committee, which suspended the employee.

- . The City maintained that Scott Meyer recommended discharge of an employee, and that the Personnel Committee followed his recommendation. Meyer, however, credibly testified that he

did not recommend the discharge of the employee in question, and that he did not believe discharge was warranted.

. Meyer's corrective action regarding a second employee. Meyer attempted to reassign an employee because of performance problems following a number of corrective action memos. However, the Personnel Committee overrode his action, and took other disciplinary action.

. Dan Burns' memo to an employee in 1996 documenting a "no-call, no-show." The memo is not framed as a warning or other disciplinary action, and Burns credibly testified that he wrote it at the direction of Thede.

These facts support a finding that the four employees do not have the authority to discharge, suspend, discipline or effectively recommend such action.

Adjustment of grievances

The Personnel Policies and Procedures Manual calls for employees to bring grievances to their immediate supervisor for informal resolution prior to a set of more formal procedures. In the only example in evidence of a situation in which an employee took a grievance to one of the four employees, the radio incident with a member of John Knudson's crew, Knudson and the employee took the matter to Thede for resolution. In view of the very limited authority of these four employees to take independent action in personnel matters generally, the evidence demonstrates that they do not have authority to use independent judgment to adjust grievances.

Assignment and direction

The strongest argument that can be made for supervisory status for the four employees is in the area of assignment and direction. The Personnel Policies and Procedures Manual calls for employees to be assigned, directed and reviewed by supervisory personnel. It assigns supervisors the responsibility to ensure that the goals regarding work output established by the City are achieved. It gives supervisors the authority to establish work schedules, schedule vacations, and authorize and assign overtime.

In the case of the Street Department, the Wastewater and Sewer Department, and the Water Department, the evidence as a whole shows that the foremen are in fact working foremen. They do not use independent judgment in assigning and directing employees. Rather, the employees work together as crew members, identifying priorities and deciding who will do which tasks. Shifts are standard, leaving little discretion to the foremen to modify them. Leaves of absence are routinely approved, as is overtime. Although the foremen can call other employees out if overtime is needed, the employees themselves can also call other employees out.

In the case of the Water Treatment Department, Scott Meyer's responsibility for assignment is much the same as that of the other three employees. However, the evidence does show that Scott Meyer uses independent judgment in directing employees. The corrective action memos directed to one of the operators are a clear example of the use of independent judgment in directing work. Meyer himself testified that he has "quite a bit" of discretion to assign day to day tasks. The

operators look to him for direction when they do not know how to solve a problem. He provides training for operators who have problems performing their duties, and directs operators to review safety materials and to document that they have done so. Meyer is not a working foreman, but a supervisor in the direction of employees.

Council No. 9 appears to maintain that Meyer's direction of employees is the exercise of independent judgment pursuant to his professional or technical training, rather than the exercise of managerial judgment in performing supervisory functions. The NLRB historically applied such a distinction in evaluating whether professional employees were supervisors. However, the U.S. Supreme Court rejected this distinction in NLRB v. Kentucky River Community Care, Inc., ___ U.S. ___, 121 S.Ct. 1861 (2001). Meyer exercises independent judgment in directing other employees in the technical operation of the water treatment plant, and this is sufficient to establish his supervisory status.

Transfer, layoff, recall, promotion, and reward

The City did not contend that the four employees had any of these responsibilities. From the Personnel Policies and Procedures Manual, it appears that responsibility for transfer, layoff, recall and promotion is with the Personnel Committee. The evidence did not address rewards, except that the Personnel Committee and Council have the authority to grant pay increases.

Other miscellaneous considerations

. Performance appraisals: Much evidence centered on the fact that these employees conducted performance appraisals for the members of their crews. Performance appraisal or evaluation is not one of the indicia contained in the statutory definition of supervisor. "The ability to evaluate employees. . ., without more, is insufficient to establish supervisory status." Harbor City Volunteer Ambulance Squad, Inc. and International Association of EMT's and Paramedics, 318 NLRB 764 (1995). Unless conducting performance appraisals demonstrates responsible direction or operates as a recommendation for reward or promotion, consideration of this factor has no bearing on whether the employees are supervisors. The appraisals do not appear to be used to provide direction. The evidence is inconclusive on what effect the performance appraisals had on employee pay. The testimony indicated that the appraisals were prepared for use by the Personnel Committee in administering the City's step and grade system, but also that pay increases in the step and grade system were routinely granted.

. Burns' responsibilities as Assistant Superintendent of City Services: The position description for Burns' position also identifies him as the Assistant Superintendent of City Services, and states that he assumes the responsibilities for the Superintendent of City Services in his absence. The evidence showed that in this capacity, Burns has been called upon to deal with one or two issues which arose when Theede was on vacation or otherwise absent. The primary situation involved a request from a state agency to resolve an environmental issue. He did not exercise any supervisory authority. He testified that when Theede was absent, he continued to work in the wastewater plant, only responding to problems directed to him by other City personnel. The evidence also showed that Burns completed performance appraisals for Mark McGill, but not that Burns supervised McGill.

. Ratio of supervisors to employees: If each of these employees is a supervisor, the ratio would be:

Street Department: 1:5 in the summer and 1:3 the balance of the year

Water Treatment Plant: 1:3

Wastewater Plant: 1:2

Water Distribution: 1:3

The Board's decisions give little guidance on what would be an excessively high ratio of supervisors to employees, but these ratios seem high.

. Effect of City's stipulation to waiver of right to hearing on questions of representation, and of Council No. 9's failure to sign the stipulation: When the petition for unit determination was filed, the Board requested that the City provide a list of all employees in the proposed bargaining unit which was described as, "all employees of the City including city police, excluding all supervisors, confidential employees, Chief of Police, and other bargaining units." The City responded by providing a list which included the four employees whose status is at issue. The Board then sought a stipulation for a consent election from the City and from Council No. 9. Included with the stipulation was a list of employees eligible to vote in the election, taken from the list provided by the City. The stipulation provided that the parties would waive a hearing on questions of representation, which would include whether these employees were properly included in the unit. The City signed the stipulation but Council No. 9 did not.

Although the City signed a waiver of its right to a hearing on questions of representation, the rules of the Board require a consent election **agreement** before the waiver is effective. ARM 24.26.620(1)(b)(iii) and (3). Because Council No. 9 did not sign the agreement, the waiver was not effective. Thus, the waiver did not preclude the City from contesting the inclusion of the four employees in the unit.

Nevertheless, the Board did request a list of all employees meeting the description contained in the petition for unit determination. The description in the petition specified the exclusion of supervisors. While not determinative, the City's inclusion of these employees on the Excelsior list does suggest that the City did not view them as supervisors when the petition for unit determination was filed, and only raised the issue after it appeared that the organizing campaign would succeed.

Summary

Because he provides direction to other employees using independent judgment, Scott C. Meyer is a supervisor for the City of Libby in the water treatment plant. The evidence as a whole establishes that Mark O. McGill, Danny D. Burns, and John A. Knudson do not meet the statutory criteria for establishing supervisory status.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this matter pursuant to § 39-31-207, MCA.
2. A unit composed of all employees of the City of Libby, including city police, excluding all supervisors, confidential employees, Chief of Police, and other bargaining units is an appropriate unit for collective bargaining purposes under § 39-31-202, MCA.
3. Mark O. McGill, City Foreman, Danny D. Burns, Wastewater Foreman/Assistant Superintendent of City Services, and John A. Knudson, Water Department Foreman, are not supervisors as that term is defined in § 39-31-103(11), MCA, and are therefore properly included in the unit.
4. Scott C. Meyer, Water Plant Supervisor, is a supervisor as that term is defined in § 39-31-103(11), MCA, and is therefore properly excluded from the unit.

VI. RECOMMENDED ORDER

The appropriate bargaining unit is defined as all employees of the City of Libby, including city police, excluding all supervisors, confidential employees, Chief of Police, and other bargaining units. The positions of City Foreman, Wastewater Foreman/Assistant Superintendent of City Services, and Water Department Foreman are properly included in the unit. The position of Water Plant Supervisor is properly excluded from the unit.

DATED this 29th day of August, 2001.

BOARD OF PERSONNEL APPEALS

By: /s/ ANNE L. MACINTYRE

ANNE L. MACINTYRE
Chief, Hearings Bureau
Department of Labor and Industry

Pursuant to ARM 24.26.215, this RECOMMENDED ORDER will become the Final Order of the Board unless written exceptions are postmarked no later than July 30, 2001. This time period includes the 20 days provided for in ARM 24.26.215, 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 6518
Helena, MT 59604