STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 7-2005:

MONTANA DEPARTMENT OF MILITARY AFFAIRS,	)	Case No. 809-2005
Petitioner,	)	
vs.	)	
GREAT FALLS AIRPORT FIREFIGHTERS ASSOCIATION IAFF LOCAL 3261,	)	
Respondent.	)	

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

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I. INTRODUCTION

On October 12, 2004, the Montana Department of Military Affairs filed a petition for unit clarification contending that the position of assistant chief should not be included in the Great Falls Airport Firefighters Association, IAFF Local 3261 (Local 3261) bargaining unit representing all shift employees of the Department of Military Affairs, Montana Air National Guard Fire Department, excluding the fire chief. The petition contended that the employees in question were supervisory employees.

On October 20, 2004, the Board served a copy of the petition on Local 3261. On November 9, 2004, Local 3261 filed a response to the petition in which it denied that the unit clarification petition should be granted and set forth certain affirmative defenses.

On December 30, 2004, Paul Melvin, Board agent, issued an order transferring the case to the Hearings Bureau for a hearing.

Hearing Officer Anne L. MacIntyre conducted the hearing on May 4, 2005. Kevin McRae represented the Montana Department of Military Affairs. Timothy J.

McKittrick represented Great Falls Airport Firefighters Association, IAFF Local 3261. Robert Rutherford and Rick Silva testified. Exhibits 14, A, B, C, F, G, H, I, J, K, L, M, N, O, P, Q, and R were admitted into evidence, pursuant to the stipulation of the parties. Exhibits 42 - 46, 47 - 49, 50, 51, 52, 54, 55 - 61, 63, 64, and S were admitted without objection. Exhibits 3, 4, 5 - 7, 8, 9, 10, 11, 15 - 22, 23, 24 - 39, 41, 53, and 62 were admitted over various objections by Local 3261. Exhibit D was excluded on relevance grounds and the fact that it represented inadmissible opinion evidence. Exhibit E was excluded on relevance grounds.

The parties filed post-hearing briefs on June 9, 2005. Local 3261 also filed a motion requesting that the hearing officer take administrative notice of the recommendation of the Base Realignment and Closure Commission to remove the F-16 fighter mission of the Montana Air National Guard. On June 15, 2005, the department filed a response to the motion. At that time, the case was deemed submitted for decision.

II. SEALED EVIDENCE

Exhibits M, S, 15 - 39, and 41 (disciplinary and performance documentation) were admitted as sealed documents to protect the privacy of the individual employees named in those documents. The department had redacted the individual names from a number of the documents, and the hearing officer admitted them conditionally, subject to the department filing unredacted copies which would then be sealed. Following the hearing, the department disclosed that it had redacted the names on many of the original documents, so no unredacted originals existed for those. The hearing officer allowed the admission of the originally proposed documents with the understanding that, even though they had been defaced, they were nevertheless the only original documents. However, most of the individual names on the documents were still legible through the redactions. For this reason, the hearing officer ordered that they remain sealed. Portions of the hearing record, consisting of tapes 3 and 4, in which the disciplinary and performance documentation was discussed, were also sealed. The recommended order in this case addresses the sealing of the documents.

III. RULINGS ON MOTIONS

A. Motion in Limine to Preclude Telephonic Testimony

Local 3261 filed a motion in limine to preclude the telephonic testimony of Doug Mahoney or any other witness. Mont. Code Ann. § 39-31-104, which governs Board hearings, expressly provides, "Hearings and appeals may be conducted by telephone or by videoconference, with the consent of the necessary parties." Since the union filed a motion in limine to preclude telephone testimony, the hearing officer concluded that it did not consent to a portion of the hearing being conducted by telephone. Therefore, the hearing officer granted the motion as to Mahoney. She reserved ruling on any other possible telephone testimony as premature since there had been no suggestion that any other witness might testify by telephone.

B. Request to Tour Facility

In the pre-hearing conference, the department requested that, as part of the hearing, the hearing officer tour the fire department facility. Local 3261 objected to a tour. The hearing officer denied the request to tour the facility because the physical layout of the facility was not relevant to the issue in the case and because of the difficulty in preserving any observations made for review on appeal.

C. Motion to Take Administrative Notice

Local 3261 requested that the hearing officer take administrative notice of the recommendation of the Base Realignment and Closure Commission (BRAC) to remove the F-16 fighter mission of the Montana Air National Guard, based on a newspaper article from the Great Falls Tribune dated May 18, 2005. The department objected to the request.

The request to take notice is denied. Mont. Code Ann. § 2-4-612(6) allows notice of judicially cognizable facts to be taken in contested case proceedings under the Montana Administrative Procedure Act. For a fact to be judicially cognizable, it must be a fact that is not subject to reasonable dispute in that it is either generally known within the territorial jurisdiction of the adjudicator, or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Rule 201(b), Mont. R. Evid. A newspaper report of the BRAC recommendation does not meet the standard for a fact to be judicially cognizable. *Frank v. Harding*, 1998 MT 215, ¶6, 290 Mont. 448, 965 P.2d 254.

Even if the fact of the proposed closure were judicially cognizable, the department correctly contends that it is speculative and irrelevant. The news accounts do not establish that the department will experience reductions in force,

only that this may occur in the future. Further, the fact that reductions in force may occur in the future is irrelevant to the question of whether the assistant fire chiefs are supervisors. Local 3261 apparently advances this evidence in support of its contention that removal of the assistant fire chiefs from the unit would unconstitutionally deprive them of previously accrued seniority rights. These constitutional claims are outside the jurisdiction of the Board and do not require a fact record to be developed before the Board. *Jarussi v. Board of Trustees* (1983), 204 Mont. 131, 135-36, 664 P.2d 316, 318; *Shoemaker v. Denke*, 2004 MT 11, 319 Mont. 238, 84 P.3d 4.

IV. ISSUE

The issue in this case is whether a unit established for collective bargaining purposes is appropriate pursuant to Mont. Code Ann. § 39-31-202. Specifically, the issue is whether the position of assistant fire chief is properly included in the unit for which the exclusive representative is the Great Falls Airport Firefighters Association, IAFF Local 3261.

V. FINDINGS OF FACT

1. The Great Falls Airport Firefighters Association, IAFF Local 3261, is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6), and is the certified exclusive bargaining representative for certain employees of the Department of Military Affairs, Montana Air National Guard Fire Department.

2. The Montana Department of Military Affairs, Montana Air National Guard Fire Department is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10).

3. The Montana Air National Guard Fire Department is headed by a fire chief who is employed by the National Guard Bureau of the U.S. Department of Defense. Robert Rutherford is the fire chief at present. All other fire department staff are employed by the Montana Department of Military Affairs. Thirteen members of the fire department, in addition to the fire chief, are members of the national guard. However, they work for the department in a civilian capacity.

4. The collective bargaining unit represented by Local 3261 was established in 1989 by a unit determination of the Board that established the unit to consist of:

> [A]ll shift employees including the positions of Firefighter, Crew Chief, Station Captain, and Assistant Chief, employed by the 120th Fighter Interceptor Group, International Airport, Great Falls, Montana,

excluding all managerial positions including Deputy Chief and Fire Chief.

5. The fire department no longer employs a deputy chief. In the time since the original unit determination was issued, the titles of several of the positions have changed. The position of "station captain" is now called "captain." The position of "crew chief" is now called "lieutenant." At least one additional position title exists, that of "engineer."

6. The fire department employs three assistant chiefs, one for fire training, one for fire operations, and one for fire prevention. At the time of hearing, the incumbents in these positions were Darnell Stucker, Doug Mahoney, and Jackie Willard, respectively.

7. The assistant chiefs serve on a selection panel with the fire chief to hire new firefighters. Their involvement consists of reviewing applications, deciding which applicants to bring in for testing, and evaluating and scoring applicants in oral interviews. The panel members then total their scores to determine the top applicant or applicants.

8. The assistant chiefs discipline firefighters by issuing warnings and corrective action to subordinate personnel.

9. The assistant chiefs plan, organize, schedule, manage, direct and supervise fire prevention activities. They plan and schedule facility and vehicle inspections, direct fire protection activities, order exercises to observe fire fighting operations and crew proficiency, direct exercises and training programs, and develop and establish tactical fire suppression and rescue plans. They assign firefighters to particular tasks and projects in connection with the activities they plan and manage. They assume command and control of fire incident scenes and direct fire fighting and rescue operations by directing placement and use of personnel, apparatus and equipment.

10. The assistant chiefs have authority to hire, discipline, and assign subordinate personnel on a regular, recurring basis.

11. The assistant chiefs exercise independent judgment in the performance of their responsibilities, including hiring, assignment, and discipline. Their assignments are self generating, and they are expected to take full responsibility for managing and operating the fire department on their assigned shifts.

VI. DISCUSSION[1]

The department seeks a determination that the three assistant fire chiefs should be excluded from the collective bargaining unit for Montana Air National Guard Fire Department workers on the grounds that they are 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. Mont. Code Ann. § 39-31-201. The law further authorizes the Board of Personnel Appeals to decide what units of public employees are appropriate for collective bargaining purposes. Mont. Code Ann. § 39-31-202. The statute excludes "supervisory employee" from the definition of "public employee." Mont. Code Ann. § 39-31-103(9). A supervisory employee does not have the rights guaranteed by Mont. Code Ann. § 39-31-201, and is not appropriately included in a unit for collective bargaining purposes.

Mont. Code Ann. § 39-31-103(11)(a), as amended by the 2005 legislature effective April 28, 2005, defines supervisory employee as "an individual having the 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 law in effect when the Board decides whether the employees are properly included in the unit established for collective bargaining purposes controls. *Wallace v. Mont. Dep't of Fish, Wildlife & Parks* (1995), 269 Mont. 364, 889 P.2d 817. Therefore, the amended definition of "supervisory employee" applies to this proceeding.

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. The Montana Supreme Court and the Board of Personnel Appeals apply federal court and NLRB precedent to interpret the Montana Act. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals* (1981), 195 Mont. 272, 635 P.2d 1310; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185. Supervisors are excluded from bargaining units under federal law. The definition of supervisor in the federal law is very similar to the definition in the

[1]Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

state law. However, House Bill 418 prohibits the Board from using "any secondary test developed or applied by the National Labor Relations Board" to determine whether an employee is a supervisor. Mont. Code Ann. § 39-31-103(11)(b). Therefore, to the extent that NLRB precedent relies on any "secondary test" or other test not consistent with Mont. Code Ann. § 39-31-103(11)(a), as amended by House Bill 418, reliance on such precedent is improper.

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.* (9th Cir. 1991), 929 F.2d 1427, 1445. 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 list of supervisory powers in 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* (7th Cir. 1996), 85 F.3d 1258, 1269. However, possession of one of the enumerated powers confers supervisory status only when the employee exercises the power using independent judgment. *NLRB v. S.R.D.C., Inc.* (9th Cir. 1995), 45 F.3d 328, 332. 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.* (1974), 416 U.S. 267, 280-81.

The department established, both through the testimony of Rutherford, the fire chief, and through the documentary evidence, that the assistant chiefs are supervisors. Although the employer's evidence was conclusory in nature, Local 3261 presented no evidence to rebut it. Neither party called the assistant chiefs, who might have been able to provide a more complete picture of their authority and responsibility. In this respect, Local 3261 contends, without citation to authority, that the department could not establish the assistant chiefs exercised independent judgment without their testimony. However, the testimony of Rutherford and the documentary evidence, particularly the position descriptions, are adequate to show independent judgment. Local 3261 had the burden of calling the assistant chiefs if their testimony would have contradicted that of the department.

Hiring

The testimony established that the assistant chiefs participate in selection panels to fill the positions they supervised and evaluated applicants through that process. This demonstrates, at a minimum, authority to effectively recommend hiring decisions using independent judgment.

Discipline

The evidence established that the assistant chiefs regularly discipline subordinate employees by issuing written warnings and corrective counseling. Local 3261 contends that because there is no evidence that the assistant chiefs imposed or effectively recommended more serious discipline, the department has not met its burden. However, both warnings and corrective counseling constitute discipline under the state's discipline handling policies. Admin. R. Mont. 2.21.6508 and 2.21.6509. The written warnings submitted as evidence by the department are supervisory responses to the performance deficiencies or misconduct of subordinates. They were prepared on the initiative of the assistant chief, and did not require investigation or action by higher level supervisors. The cases cited by Local 3261 holding such things as safety citations (*Brown & Root, Inc.* (1994), 314 NLRB 19) and reports of performance deficiencies (*Beverly Ent. d/b/a Northcrest Nursing Home* (1993), 313 NLRB 491[2]) to be inadequate to establish authority to effectively recommend discipline are inapposite to the warnings given in this case. The warnings given by the assistant chiefs in this case are indicia of supervisory authority.

Assignment

The evidence established that the assistant chiefs assigned subordinate employees as set out in paragraph 9 of the findings of fact. Local 3261 contends that the work performed by the assistant chiefs is not "assignment" as contemplated by the statute. Based on a strained grammatical construction of the statute, the union argues that the assignment referred to in the statute must be an assignment of non-transitory work status, rather than the assignment of work or tasks. There is no authority for this contention. Local 3261 also cites a number of federal cases for the proposition that the NLRB "has held in numerous contexts that merely assigning tasks to employees does not make an employee a supervisor." "Union's Post Hearing Brief," p. 18. However, the rationale for finding employees non-supervisory in the cited cases is not the fact that they assigned "tasks," but rather that their assignments did not involve the exercise of independent judgment.

Based on the evidence presented at hearing, the assistant chiefs plan and prioritize work and delegate it to other fire department personnel for completion. This demonstrates independent judgment in assignment on a regular and recurring basis, and proves that the assistant chiefs are statutory supervisors.

Other considerations

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[2]This case has been overruled on other grounds. *NLRB v. Health Care & Retirement Corp. of Am.* (1994), 511 U.S. 571.

The department did not attempt to prove that the assistant chiefs had any authority in the areas of transfer, suspension, lay off, recall, promotion, discharge, or reward. However, as noted ***supra***, the list of supervisory powers in the statute is in the disjunctive, and it is therefore sufficient for supervisory status to be established based on only one of the statutory criteria.

Much of the department's case at hearing focused on the responsibilities of the assistant chiefs for direction and performance management. These responsibilities implicate what would have been considered in previous Board orders as direction. Performance appraisals can be a means of directing the work of employees. However, the amendments to Mont. Code Ann. § 39-31-103(11) contained in House Bill 418 deleted the factor "having the responsibility to direct" other employees from the definition of supervisory employee. Therefore, directing work of other employees cannot form the basis for excluding the assistant chiefs from the bargaining unit.

Further, the fact that employees conduct performance appraisals is not, by itself, an indication of supervisory authority. 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* (1995), 318 NLRB 764. Unless performance appraisals operate as a recommendation for reward or promotion, or as a factor in disciplinary action, they have no bearing on whether the employees are supervisors. The department submitted no evidence that the performance appraisals were used to carry out any of the supervisory functions listed in the statute. Therefore, the hearing officer has accorded them no weight in the analysis of the case.

Additional contentions of Local 3261

The union contends that, because other employees, especially the captains, perform some of the same supervisory duties as the assistant chiefs, that these duties do not qualify the assistant chiefs as supervisors. The fact that some other employees also perform duties that can be characterized as supervisory is irrelevant to this case. The department may be able to establish that other employees besides the assistant chiefs are not properly included in the unit, but that issue is not before the Board at this time.

The union also contends that because of the paramilitary structure of the fire department, none of the actions of the assistant chiefs involve the use of independent judgment, but rather are routine. It cites the large volume of rules and regulations promulgated by the National Guard Bureau of the U.S. Department of Defense and the Air Force to govern the program for this assertion. The union cites no authority for the notion that working in a highly regulated environment renders the work of the

personnel to be routine, and the premise of the argument is debatable. Based on the evidence, it appears that working in this highly regulated environment enhances the need for supervisors who can assign and prioritize the work of the organization to conform to the rules and regulations.

The union also points to the testimony and position description of the fire chief for the proposition that the fire chief is in total, complete command and control of the fire station, thereby precluding the exercise of independent judgment by any other employee. There are several flaws in this argument. First, Rutherford did not testify unequivocally that he, and he alone, is the person in complete command and control of the fire station, as the union's brief contends. Second, the conclusion propounded by Local 3261 does not flow logically from the premise. The fact that Rutherford has authority does not preclude its delegation to others, and the evidence established that Rutherford did delegate authority to the assistant chiefs.

Local 3261 also contends that removal of the assistant chief positions from the collective bargaining unit is contrary to law, because it would deny the assistant chiefs their rights of self-organization provided for in Mont. Code Ann. § 39-31-201. However, if the assistant chiefs are in fact supervisors, they have no rights of self-organization under Mont. Code Ann. § 39-31-201. The statute affords rights of self-organization to "public employees." The term "public employee" is a defined term in Mont. Code Ann. § 39-31-103(9), which states:

> When used in this chapter, the following definitions apply:
> (9)(a) "Public employee" means:
> (i) except as provided in subsection (9)(b), a person employed by a public employer in any capacity; . . .
> (b) Public employee does not mean: . . .
> (iii) a supervisory employee, as defined in subsection (11). . . .

Therefore, supervisory employees are not public employees.

Mont. Code Ann. § 1-2-107 provides:

> Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.

The legislature, in using the phrase "this chapter" in Mont. Code Ann. § 39-31-103, clearly evinced an intent to have the phrase "public employee" have the same meaning throughout the Collective Bargaining for Public Employees Act, which

is chapter 31 of Title 39 of the Montana Code. Therefore, by using the term "public employees" in Mont. Code Ann. § 39-31-201, the legislature excluded supervisory employees from the class of employees who have rights of self-organization.

Local 3261 also cites cases from Washington, Illinois, and New Hampshire holding fire department positions comparable to the assistant chief positions were properly included in bargaining units in those states. *Local Union No. 469 v. City of Yakima* (1978), 91 Wash.2d 101, 587 P.2d 165, *City of Evanston v. State Labor Relations Board* (1992), 227 Ill. App.3d 955, 592 N.E.2d 415, and *Appeal of City of Concord* (1983), 123 N.H. 256, 459 A.2d 285. The state laws underlying these decisions are not analogous to Montana law.

The Washington and New Hampshire cases involved the application of state laws that allowed supervisors to be included in bargaining units. The New Hampshire law provided that although supervisors could be represented by unions, they could not belong to the same bargaining unit as their subordinates. The specific issue in the case was whether one of two groups of supervisors had supervisory authority over the other, thus precluding a single bargaining unit.

The Illinois case involved a state statute that protected historical bargaining units, following the amendment of the law to exclude supervisors. The court held that the work performed by certain assistant fire chief positions had been historically performed by bargaining unit members, thus precluding removal of the work from the bargaining unit, even if the assistant fire chiefs were supervisors. The court also held that the assistant fire chiefs were not excluded as managers or confidential employees. Montana law protects historical units that included supervisory employees in the same manner as the *City of Evanston* case when those units were established before 1973. *City of Billings v. Billings Firefighters* (1983), 200 Mont. 421, 651 P.2d 627, ***overruled on other grounds*** *State Compensation Mut. Ins. Fund v. Lee Rost Logging* (1992), 252 Mont. 97, 827 P.2d 85. This bargaining unit was established in 1989, and the case law allowing supervisors in existing units does not apply. Whether the assistant fire chiefs were managers or confidential employees is not an issue in this case.

Local 3261 also contends that because the department has entered into successive collective bargaining agreements containing recognition clauses that included the assistant chiefs in the bargaining unit, principles of waiver, estoppel, and abandonment prevent the removal of them from the unit. It cites two cases, *Timken Roller Bearing Co. v. NLRB* (6th Cir. 1963), 325 F.2d 746 and *Tide Water Associated Oil Co.* (1949), 85 NLRB 1096, for the proposition that an employer relinquishes its right to attempt to exclude supervisory employees from the unit when, as a part of the collective bargaining process, it agrees to their inclusion in the unit. However, the cases cited by Local 3261 involve waivers of bargaining rights, not waivers of issues

concerning composition of the unit, and are of no value in resolving the question in this case.

In addition, it appears that the recognition clauses, which have remained unchanged during the entire collective bargaining relationship, are based on the Board's original unit determination, and not on any bargaining between the parties. There is no evidence whatever that the composition of the unit has been the subject of bargaining between the parties.

Finally, although unit composition is generally considered to be a permissive subject of bargaining, the statute reserves the ultimate question on any unit composition issue for determination by the Board. Mont. Code Ann. § 39-31-202. *City of Evanston, **supra***, cited by Local 3261 for a different proposition, interprets a comparable state statute to defeat a contention that unit composition matters must be deferred to arbitration under a collective bargaining agreement rather than determined by the Board. 592 N.E.2d at 425-26. The collective bargaining agreement between the parties is not determinative of what constitutes an appropriate bargaining unit under the law.

Local 3261 also contends that removal of the assistant chiefs from the bargaining unit deprives them of vested rights accrued under the existing collective bargaining agreements, in violation of federal and state constitutional prohibiting laws impairing the obligation of contracts. "Constitutional questions are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of powers." *Jarussi v. Board of Trustees, **supra***. Thus, the question of the constitutionality of this application of the statute to the membership of the assistant chiefs in the collective bargaining unit is not properly before the Board.

Local 3261 has also sought an award of attorney's fees and costs, citing Mont. Code Ann. § 25-10-711. That statute provides that the prevailing party in a civil action brought by an agency of the state may recover attorney fees and costs if the claim of the agency was frivolous or pursued in bad faith. The statute does not provide a basis for an award of fees to the union, for several reasons.

First, this administrative proceeding is not a civil "action," which is a court proceeding, not an administrative one. Mont. Code Ann. § 25-1-101. The Montana Supreme Court has held that attorney's fees may not be awarded to the successful party in an administrative hearing without a contractual agreement or specific statutory authorization. *Thornton v. Commissioner of Dept. of Labor and Industry* (1981), 190 Mont. 442, 621 P.2d 1062. The Board has no specific statutory authority to award attorney fees in an unfair labor practice case. The Board has followed *Thornton*

in declining to award attorney fees. ***See e.g.*** *McCarvel v. Teamsters Local 45* (1983), ULP 24-77.

Second, Local 3261 is not the prevailing party.

Third, the union has made no showing that the department's claim was frivolous or pursued in bad faith.

Local 3261 is not entitled to attorney fees.

VII. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this case. Mont. Code Ann. § 39-31-207.

2. The assistant fire chiefs in the Montana Department of Military Affairs, Montana Air National Guard Fire Department are supervisory employees pursuant to Mont. Code Ann. § 39-31-103(11). As such, they are not properly included in the unit established by the Board for collective bargaining purposes.

3. As supervisory employees, the assistant fire chiefs are not public employees and therefore have no rights of self-organization under Mont. Code Ann. § 39-31-201.

4. The department is not estopped by waiver, estoppel or abandonment from seeking removal of the assistant chief positions from the unit.

5. Local 3261 is not entitled to attorney's fees or costs.

6. The constitutional issues raised by Local 3261 are not properly before the Board.

7. Exhibits M, S, 15 - 39, and 41 and the portions of the hearing record contained on tapes 3 and 4 contain information in which employees of the department have a constitutionally protected privacy interest. Therefore, those portions of the record must be sealed.

VIII. RECOMMENDED ORDER

1. The assistant fire chiefs in the Montana Department of Military Affairs, Montana Air National Guard Fire Department are supervisors and not properly included in the unit established by the Board for collective bargaining purposes. The Board's unit determination is therefore clarified accordingly.

2. Exhibits M, S, 15 - 39, and 41 and the portions of the hearing record contained on tapes 3 and 4 are hereby sealed. Neither counsel nor the representatives of the parties may disclose the documents or any information concerning their nature or contents to any other person without the order of the Board. Any witness who, by means of testimony at hearing, has knowledge of any sealed matter, shall not disclose the nature and contents of such matter under any circumstances, except to discuss it with counsel for Local 3261 or the labor relations representative of the department, if approached by counsel or the labor relations representative. Any employee of the Department of Labor and Industry or Board of Personnel Appeals who, because of the performance of job duties in connection with this case, and any transcriber utilized by the department for preparation of a transcript in this matter is similarly enjoined from disclosing the nature and contents of any sealed information beyond that specifically required for performance of those job duties or for purposes of submitting the file to district court in the event of any judicial review. Failure to obey this order can result in consequences, including but not limited to sanctions, civil damage claims by any aggrieved person or party for violation of privacy rights, and district court civil contempt proceedings.

DATED this 7th day of July, 2005.

BOARD OF PERSONNEL APPEALS

By: /s/ ANNE L. MACINTYRE
Anne L. MacIntyre, Chief
Hearings Bureau
Department of Labor and Industry

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than August 1, 2005. This time period includes the 20 days provided for in Admin. R. Mont. 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 59624-6518