

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 6-2012:

MONTANA PUBLIC EMPLOYEES	)	Case No. 2037-2012
ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
CITY OF BILLINGS,	)	
	)	
Respondent.	)	

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**ORDER RECOMMENDING SUMMARY JUDGMENT AND  
DISMISSAL OF MPEA'S PETITION FOR UNIT DETERMINATION**

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***I. Introduction.***

On May 15, 2012, Montana Public Employees Association filed a petition for new unit determination and election seeking to place all City of Billings Police Department sergeants and lieutenants into a collective bargaining unit. On May 30, 2012, Respondent City of Billings filed a counter petition and motion to dismiss the petition arguing that the sergeants and lieutenants were supervisory personnel within the meaning of Mont. Code Ann. § 39-31-103(11).

On December 5, 2012, the City filed a motion for summary judgment arguing that there was no material factual dispute that the two positions which the union seeks to include within the bargaining unit, sergeants and lieutenants, are supervisory positions and that as a matter of law those positions cannot be included within a bargaining unit. The motion was supported not only by position descriptions which show that both positions are supervisory but also an affidavit from the police chief showing that on a regular and recurring basis the incumbents in the positions exercise supervisory power.

On January 16, 2013, Petitioner MPEA responded in opposition to the motion. The response contains no legally cognizable facts that would counter the City's factual contentions. The essence of the responsive argument was that position

descriptions alone are not enough to demonstrate that the incumbents in the positions actually wield the supervisory power that the City claims they have. The responsive brief utterly fails to address the second supporting document to the City's motion, the chief's affidavit, which unequivocally demonstrates that the incumbents in the positions in fact do wield supervisory power on a regular and recurring basis. Instead, the responsive motion simply asserts that "[a]ffirmative proof that [lieutenants and sergeants] are excluded from the general right has yet to be made in a fashion which the board traditionally finds acceptable." MPEA response, page 2. The response does not set forth what MPEA perceives to be the type of evidence that the Board of Personnel Appeals traditionally finds as acceptable nor does MPEA cite to any of the Board's decisions to support the assertion.

Neither party requested oral argument. Pursuant to this tribunal's September 12, 2012 scheduling order, oral argument on the motion is, therefore, deemed waived. ¶*See also, SVKV, LLC., v. Harding*, 2006 MT 297, ¶36, 334 Mont. 395, 148 P.3d 584 (holding that district court properly granted summary judgment without oral argument where district court advised parties in its scheduling order that it would rule on any motion without oral argument unless a party requested oral argument). Having reviewed the motion, response, and reply, the hearing officer finds that summary judgment is appropriate in this matter and, for the reasons set forth below, grants summary judgment to the City.

## ***II. Facts That Have Not Been Disputed.***

### ***A. Sergeants***

1. The duties and responsibilities of a sergeant in the Billings Police Department demonstrate that they meet several of the criteria identified in Mont. Code Ann. § 39-31-103(11)(a), and are, therefore, supervisory employees. The current job description for a sergeant in the Billings Police Department (Exhibit A) identifies the duties, requirements, and expectations of a sergeant. The job description for sergeants is updated from time to time, and all sergeants are required to perform the duties, requirements, and expectations contained in any updates to the job description.

2. The "Job Summary" section of the job description provides that sergeants are responsible for "monitoring and reviewing work of officers and assisting or completing such work as necessary," among other things. *See* Exhibit A, p. 1. Further, under the "Essential Duties and Responsibilities" section of the job description is a subsection titled "Supervise Employees." Under that subsection, sergeants are specifically responsible for the following: (1) supervising employees by planning, prioritizing, assigning, supervising and reviewing the work of subordinate

officers assigned to various functions and programs including field patrol, investigations, and crime prevention; (2) reviewing the work of departmental personnel to ensure compliance with department policies and procedures; (3) reviewing reports submitted by officers to verify completeness and compliance with standards prescribed for those reports; (4) participating in the selection of assigned staff; providing and/or coordinating staff training; (5) working with employees to correct deficiencies; (6) implementing discipline procedures; (7) preparing officer time sheets and approving officer time off; and (8) ensuring adequate staffing.

3. The duties and requirements specified in the job description are an accurate representation of the actual duties, requirements, and expectations of a sergeant in the Billings Police Department. Those duties are performed by sergeants on a regular and recurring basis, and they require the exercise of independent judgment on behalf of the sergeants.

4. There are approximately 14 sergeants in the Billings Police Department, and each sergeant is either a patrol sergeant or a detective sergeant. Patrol sergeants oversee and supervise approximately five patrol officers. Detective sergeants are involved in long-term investigations and they oversee and supervise one or more patrol officers. When a patrol sergeant or detective sergeant is absent from work, the patrol officers under the supervision of the absent sergeant are supervised by another sergeant.

5. As part of their supervision responsibilities, sergeants regularly create the work schedule for their patrol officers and assign their patrol officers to different tasks, assignments, and cases. Sergeants are also responsible for coordinating and scheduling vacation time for their patrol officers. Sergeants are required to exercise their independent judgment in performing the scheduling for their patrol officers and making work assignments, and sergeants do not need the permission or consent of any other member of the Billings Police Department to make those schedules and assignments.

6. Sergeants also conduct written performance evaluations of their patrol officers once a year in which the sergeants identify the strengths and deficiencies in the patrol officers' performance. The sergeants also identify any conduct or behavior on the part of the patrol officers that merits discipline. The sergeants' written evaluations are then delivered to the sergeants' supervising lieutenant, and the lieutenant can add further comments if he or she wishes. Although sergeants conduct only one written evaluation of their patrol officers per year, the sergeants are continuously evaluating their patrol officers and will immediately report any conduct

and/or behavior on the part of the patrol officers that merits discipline. As with the scheduling and assignments, sergeants exercise their independent judgment when evaluating their patrol officers.

7. Sergeants also have the ability to discipline patrol officers. The discipline can take several forms. A sergeant can give a patrol officer a verbal warning or verbal reprimand. A sergeant can also issue letters of reprimand, which are placed in the patrol officer's employment file. In addition to verbal and written discipline, sergeants are allowed to create and implement corrective action with respect to a patrol officer's conduct or behavior. Sergeants exercise their independent judgment when disciplining a patrol officer or creating and implementing corrective action.

8. Sergeants are allowed to reward patrol officers as well. The Billings Police Department utilizes a program called the "Star Award" program. Under the Star Award program, sergeants are allowed to nominate their patrol officers, and others in the Billings Police Department, for a reward for performing their duties in an exceptional manner. Once someone is nominated for a reward by a sergeant, a captain in the Billings Police Department can then approve the reward based upon the sergeant's recommendation. The rewarded individual is given "downtown bucks" by the Billings Police Department, which are similar to gift cards and can be spent at various businesses throughout the city. As with sergeants' other duties and responsibilities, they exercise their independent judgment when nominating someone for a reward under the Star Award program.

#### *B. Lieutenants*

9. Lieutenants have many of the same duties and responsibilities as sergeants, except that lieutenants supervise sergeants. Like sergeants, the duties and responsibilities of lieutenants demonstrate that they meet a number of the criteria identified in Mont. Code Ann. § 39-31-103(11)(a), and they are, therefore, supervisory employees and prohibited from joining a bargaining unit.

10. As with sergeants, the duties, requirements, and expectations of a lieutenant are identified in a written job description. All lieutenants are subject to the duties, requirements, and expectations contained in any updates to that job description.

11. The "Job Summary" section of the job description for lieutenants shows that lieutenants are "[r]esponsible for supervising, planning and coordinating the activities and operations of assigned programs or operations within the Police Department, such as Patrol operations and services for an assigned shift, investigation

services and activities, or Training and Recruiting programs.” Exhibit C, p. 1. The essential duties section of the job description reveals that lieutenants (1) coordinate the organization, staffing, and operational activities for the assigned programs or operations within the police department; (2) direct, coordinate and reviews the work plan for the assigned operations or program; (3) meet with staff to identify and resolve problems; (4) assign work activities and projects and monitor work flow; (5) and review and evaluate work product, methods and procedures.

12. According to the job description, lieutenants are responsible for: (1) selecting, training, motivating and evaluating assigned personnel; (2) providing and/or coordinating staff training; (3) working with employees to correct deficiencies; (4) implementing discipline and termination procedures; (5) reviewing the work of departmental personnel to ensure compliance with department policies and procedures; (6) reviewing reports submitted by officers to verify completeness and compliance with standards prescribed for those reports; (7) assuming immediate command of police activities in the event of an emergency; (8) responding to major crime and accident scenes; (9) supervising investigations, interviews and interrogations in the field; and (10) personally conducting highly complex or sensitive investigations.

13. The job description further states that lieutenants also (1) assume the responsibility for the recruitment of personnel; (2) implement and oversee applicant testing; (3) conduct background investigations; and (4) provides recommendations for hiring personnel.

14. As with sergeants, the duties and requirements specified in the job description are an accurate representation of the actual duties, requirements, and expectations of a lieutenant in the Billings Police Department. Further, as with sergeants, the duties and requirements specified in the job description are performed by lieutenants on a regular and recurring basis, and they require the exercise of independent judgment on behalf of the lieutenants. Those duties and responsibilities are similar to those of sergeants, except that lieutenants oversee and supervise sergeants, and lieutenants are paid more than sergeants as the rank of lieutenant is higher than the rank of sergeant.

15. There are seven lieutenants in the Billings Police Department, and each lieutenant is either a patrol lieutenant, a detective lieutenant, or an administrative lieutenant. As part of their regular supervision responsibilities, lieutenants oversee and supervise sergeants, they assign sergeants to different tasks, assignments, and cases, and they coordinate the vacation time for the sergeants. Lieutenants make these schedules and assignments without the permission or consent of any other member of the Billings Police Department. Lieutenants also conduct

yearly written evaluations of sergeants, in which they identify the strengths and deficiencies in the sergeants' performance, and they identify any conduct or behavior on the part of the sergeants that merits discipline. The lieutenants' evaluations are delivered to their supervising captain for additional comments, if any. Lieutenants also review the sergeants' written evaluations of the patrol officers, and the lieutenants have the ability to add additional comments to those evaluations.

16. In addition to the yearly written evaluation of sergeants, lieutenants continuously evaluate their sergeants and will immediately report any conduct and/or behavior on the part of the sergeants that merits discipline. Lieutenants exercise their independent judgment with respect to all of the duties described above.

17. Lieutenants can discipline sergeants in the same manner that sergeants can discipline patrol officers. Lieutenants can give sergeants verbal warnings, verbal reprimands, and written letters of reprimand. Written letters of reprimand are placed in the offending sergeants' employment file. Further, under the Star Award program described above, lieutenants are allowed to nominate sergeants or others in the Billings Police Department for a reward. Upon the approval of a captain, the rewardee is given downtown bucks to spend at a local business in the city. Lieutenants exercise their independent judgment in both disciplining and rewarding sergeants.

### ***III. Propriety of Summary Judgment in a Unit Determination Proceeding.***

Motions may be made within contested case proceedings before the Board of Personnel Appeals. Admin. R. Mont. 24.16.212. In the event a motion is made, it must state the relief requested and shall be accompanied by affidavits setting forth the grounds upon which the motion is based. Answering affidavits, if any, must be served on all parties. *Id.*

The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials. *Klock v. City of Cascade*, (1997), 284 Mont. 167, 173, 943 P.2d 1262, 1266. Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where "the pleadings . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Peila, supra.*

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter

of law. Once a party moving for summary judgment has met the initial burden of establishing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law, the burden shifts to the nonmoving party to establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that the moving party is not entitled to judgment as a matter of law. *Meloy v. Speedy Auto Glass, Inc.*, 2008 MT 122, ¶18 (citing *Phelps v. Frampton*, 2007 MT 263, ¶16, 339 Mont. 330, ¶16, 170 P.3d 474, ¶ P16). If no such countervailing evidence is presented and the motion demonstrates that the movant is entitled to summary judgment, entry of summary judgment in favor of the movant is appropriate. *Klock, supra*, 284 Mont. at 174-75, 943 P.2d at 1267.

#### ***IV. The City Has Demonstrated That Lieutenants and Sergeants Are Supervisory Employees Who Should Not Be Included in the Proposed Unit.***

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. However, because the statute excludes supervisory employees from the definition of “public employee,” 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)(b)(iii).

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). 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.”

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). 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 Board of Personnel Appeals has upheld this hearing officer's determination that sergeants and lieutenants employed at the Montana State Prison were supervisory personnel. *MEA-MFT v. Montana Dept. Of Corrections*, UD 226-2007. In doing so, the Board ruled that sergeants and lieutenants who on a regular and recurring basis disciplined subordinates, trained subordinates, and assigned subordinates' work tasks met the definition of supervisory employee under Mont. Code Ann. § 39-31-103(11)(a).

An Illinois case that is strikingly similar to the one at bar has also concluded that police sergeants and lieutenants who had the authority to impose either oral reprimands or to initiate and serve personal incident reports which became part of the offending subordinate's file wielded the supervisory power that exempted them from the protections of the Illinois collective bargaining act. *Metropolitan Alliance of Police v. Illinois Labor Relations Board*, 354 Ill. App. 3d 672, 820 N.E. 2d 1107 (2004). In that case, the police department had a progressive discipline policy that provided first for an oral reprimand, then for issuance of a personal incident report, third for a written reprimand, and on the final level, for suspension without pay. 820 N.E. 2d at 1109. The sergeants' and lieutenants' power to discipline subordinates was limited to issuing oral reprimands and personal incident reports. The sergeants and lieutenants were required by department policy to impose discipline for infractions. Under these circumstances, the Illinois Court of Appeals found that the sergeants and lieutenants held supervisory power.

Applying the criteria set out in Montana Code Annotated § 39-31-103(11)(a), the undisputed evidence demonstrates preponderantly that both the sergeant and lieutenant positions are supervisory employees. Sergeants and lieutenants supervise, schedule, and can grant or deny time off requests for their subordinates. They have the ability to initiate and to undertake issuing verbal or written reprimands. All of these things are done on a regular and recurring basis. Sergeants and lieutenants in the City of Billings Police Department are textbook examples of supervisory employees.

MPEA has in effect done nothing to respond to the City's well-founded motion. MPEA's response is nothing more than an assertion. MPEA has failed to offer any affidavits or other evidence to show that there are any disputed facts. Indeed, MPEA has not even responded with any countervailing assertion to the chief's affidavit as the response states no more than that "the employees will testify as to the actual work they perform and the actual authority exercised by them . . . ."



Response, Page 1. There is no suggestion that the employees will testify that they do not wield supervisory power or that they do not do so on a regular and recurring basis. MPEA has had several months to develop additional facts to support its charge and provide a basis upon which this hearing officer could find that there are genuine issues of material fact. It has not done so. Given that the uncontroverted facts of this case meet the City's burden to demonstrate preponderantly that lieutenants and sergeants are supervisory employees, summary judgment is required.

*V. Order.*

Based on the foregoing, the hearing officer recommends that the Board of Personnel Appeals issue its final order granting summary judgment in favor of the City of Billings and dismissing MPEA's petition for unit determination. The sergeants and lieutenants of the City of Billings Police Department are supervisory employees within the meaning of Mont. Code Ann. § 39-103(11)(a) and cannot be part of a bargaining unit.

DATED this 4th day of March, 2013.

BOARD OF PERSONNEL APPEALS

By: /s/ GREGORY L. HANCHETT  
GREGORY L. HANCHETT  
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 March 27, 2013. 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