

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,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND RECOMMENDED ORDER
)	
CITY OF BILLINGS,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On May 15, 2012, Montana Public Employees Association (MPEA) 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).

Thereafter, the respondent filed a motion for summary judgment arguing that sergeants and lieutenants were supervisory personnel within the meaning of Mont. Code Ann. § 39-31-103(11)(a). After briefing, this tribunal recommended that the Board of Personnel Appeals grant summary judgment to the City, finding that the undisputed facts proved that the sergeants and lieutenants were supervisory personnel within the meaning of the statute and recommending that the Board dismiss the petition.

In an order dated June 25, 2013, the Board remanded the matter for an evidentiary hearing. In conformity with the Board's order, the matter was set for hearing on November 6, 2013 at the behest of the parties. This tribunal convened an evidentiary hearing on that date in Billings, Montana. Carter Picotte, attorney at

law, represented MPEA. Christopher Sweeney and Andrew Forsyth, attorneys at law, represented the City.

Immediately prior to the hearing, MPEA withdrew the portion of its petition requesting to form a bargaining unit for lieutenants. That left as the sole issue for hearing the question of whether the sergeants were or were not supervisory personnel within the meaning of Mont. Code Ann. § 39-31-103(11).

The parties stipulated to the admission of each party's exhibits, namely, MPEA's Exhibits 1, 2, and 3 and the City's Exhibits A through II. At the suggestion of the hearing officer, and with the parties' agreement, City's Exhibits O, P, Q, R, FF, GG, HH, and II were ordered sealed as those exhibits contain information regarding discipline of specific officers. Those officers' privacy interests outweigh the public's right to know that information. Accordingly, those exhibits are sealed, to be reviewed only by a tribunal having proper authority to do so. Police Chief Rich St. John, Assistant Police Chief Joel Slade, Lieutenant David Cardillo, Sergeant Neal Lawrence, Sergeant Scott Conrad, and City Human Resources Officer Carla Stanton all testified under oath. The parties submitted the matter upon the testimony and exhibits presented and declined the opportunity to make closing statements. Based upon the evidence presented at hearing, the City has demonstrated preponderantly that sergeants are supervisory personnel within the meaning of Mont. Code Ann. § 39-31-103(11) and therefore cannot be part of a collective bargaining unit. In light of this, the hearing officer recommends that MPEA's petition be dismissed.

II. ISSUE

Are City of Billings police sergeants supervisory personnel within the meaning of Mont. Code Ann. § 39-31-103(11) and therefore excluded from the proposed bargaining unit?

III. FINDINGS OF FACT

1. MPEA is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6).

2. The City of Billings Police Department is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10).

3. The current job description for a sergeant in the Billings Police Department 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. The sergeants participate in the creation of the job descriptions by providing human resources with input as to the actual duties that sergeants perform. Testimony of Stanton.

4. 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.

5. There are 20 sergeants in the Billings Police Department. They each oversee and supervise five or more patrol officers. There are 80 patrol officers in the Billings Police Department. On weekends, sergeants are the only supervising staff on duty in the department. Patrol officers are members of a collective bargaining unit.

6. 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 sergeants to exercise independent judgment.

7. As part of the collective bargaining agreement, patrol officers receive a set amount of annual and personal leave. Each February, the police department generates a master list setting out blocks of time for vacations. Officers can also request other days off (say, for example, to go hunting). Sergeants have the discretion to grant or deny such requests. Sergeants do not need the permission or consent of any other member of the Billings Police Department to make those

decisions. In addition, sergeants have the discretion to approve overtime for a patrol officer. Testimony of Chief St. John.

8. On a day-to-day basis, sergeants assign patrol officers to their beat (assigned patrol area). This is carried out in the sole discretion of the sergeant. Sergeants also have the discretion to assign multiple officers to a beat (if, for example, a particular beat is in need of more manpower).

9. Sergeants also conduct annual written performance evaluations of their patrol officers. The sergeants also identify any conduct or behavior on the part of the patrol officers that might need work or might warrant 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. While it is possible that a superior could change something in an evaluation, as a practical matter, that never happens. A sergeant's performance evaluation is essentially "rubber stamped." Indeed, as Chief St. John testified, and the hearing officer finds, 99% of the evaluations are adopted "as is." Moreover, as Deputy Chief Slade testified, and the hearing officer finds, in the extremely unlikely event that a lieutenant or superior wanted to change an evaluation, that superior would not do so without first consulting the sergeant who completed the evaluation. As with the scheduling and assignments, sergeants exercise their independent judgment when evaluating their patrol officers.

10. 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 (known as a "written verbal" since the discipline, though verbal, must be documented). A sergeant can also issue letters of reprimand, which are placed in the patrol officer's employment file. A sergeant's letter of reprimand can adversely impact a patrol officer's ability to seek a promotion or to receive a pay raise. Testimony of Chief St. John. Sergeants can also initiate and impose up to a one day suspension, although it has to be coordinated with Human Resources. Respondents Exhibit 1, page 2. 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 are allowed to and in fact do access a patrol officer's disciplinary file when determining which discipline to impose. Sergeants exercise their independent judgment when disciplining a patrol officer or creating and implementing corrective action. As Chief St. John and Deputy Chief Slade made clear in their testimony, and the hearing officer finds, sergeants are an integral part of management and supervision of patrol officers.

11. Every one of the sergeants who testified in this matter has disciplined one or more of his subordinate officers at some point and has exercised that power on a regular and recurring basis. Sergeant Lawrence has meted out discipline to patrol officers throughout his seven year stint as a sergeant and has never had one disciplinary action changed by a superior. Sergeant Lawrence does not clear his written remands with any superior. He just gives it to the officer to whom he has issued it. Sergeant Conrad has also meted out discipline on several occasions during his six year stint as a sergeant. In all of that time, he has had only one reprimand ever changed by a superior. *See also*, Sealed Exhibits O, P, Q, R, FF, GG, HH, and II.

12. 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. As with sergeants’ other duties and responsibilities, they exercise their independent judgment when nominating someone for a reward under the Star Award program.

IV. DISCUSSION¹

The parties agreed at hearing that there is no dispute that the authority that sergeants exercise over patrol officers is undertaken on a regular, recurring basis as contemplated by Mont. Code Ann. § 39-31-103(11)(a). The parties differ on whether the sergeants’ authority constitutes authority to “assign, reward or discipline other employees or to effectively recommend such actions.” The evidence presented at hearing demonstrates preponderantly that the sergeants exercise such power and, therefore, cannot 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

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

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). The statutory definition of supervisory authority is articulated 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 a 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 employees under Mont. Code Ann. § 39-31-103(11)(a).

Applying the criteria set out in Montana Code Annotated § 39-31-103(11)(a), the evidence demonstrates preponderantly that the sergeant positions are supervisory employees. At least three of the statutory criteria exist in the case. Sergeants can grant or deny time off requests for their subordinates. They annually evaluate their subordinate patrol officer. They have the ability to initiate and to undertake issuing written verbal warnings and written reprimands. The written reprimands go into an officer’s personnel file and can affect that officer’s potential for promotion and salary increase for at least one year.

Sergeant Lawrence's testimony is particularly compelling in this regard. He initiates discipline against his charges which includes both written verbal reprimands and written reprimands and the ability to choose between the two. He has exercised this authority several times during his stead as a sergeant and not once in six years has he had any of his recommended disciplinary measures changed. Indeed, he writes warnings to officers and then gives those warnings to the officers prior to the warning being reviewed by a superior. Sergeant Lawrence's, Chief St. John's, and Deputy Chief Slade's testimony convince the hearing officer that sergeants initiate and propose the recommended discipline using independent judgment. At a minimum, there really is no question that sergeants effectively recommend both when to discipline and the appropriate discipline. On the discipline factor alone, the sergeants are textbook examples of supervisory employees.

An Illinois case similar to the case before this tribunal has concluded that police sergeants 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 exercised 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' 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.

Even more so than the sergeants in the Illinois case, the Billings Police Department's sergeants here have the ability to decide whether to impose discipline up to and including a one day suspension. The sergeants do indeed exercise independent judgment in initiating and imposing the type of discipline. Indeed, the independent judgment that the sergeants exercise is, as both Chief St. John and Deputy Chief Slade testified, an integral part of the Billings Police Department's command structure. As the chief noted, his sergeants are "great at what they do" and he must rely on them to carry out the proper supervision of patrol officers and ultimately, ensure proper functioning of the police department. Unquestionably, sergeants in the Billings Police Department are supervisory personnel within the meaning of Mont. Code Ann. § 39-31-103(11)(a). As such, they cannot be part of a collective bargaining unit.

V. CONCLUSIONS OF LAW

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

2. Sergeants are supervisory personnel as contemplated by the language in Mont. Code Ann. § 39-31-103(11) and are therefore properly excluded from the bargaining unit.

VI. RECOMMENDED ORDER

As the sergeants are supervisory personnel within the meaning of Mont. Code Ann. § 39-31-103(11), they cannot form or become part of a collective bargaining unit. Accordingly, the hearing officer recommends that the petition in this matter be dismissed.

DATED this 19th day of December, 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 January 13, 2014. 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