

**BEFORE THE STATE BOARD OF MEDIATION  
STATE OF MISSOURI**

DEPARTMENT OF CORRECTIONS AND )		
HUMAN RESOURCES, )		
	)	
Petitioner, )		
	)	
v. )		Public Case No. UC 89-003
	)	(Cross Reference 83-002)
	)	
MISSOURI STATE COUNCIL 72, )		
AFSCME, )		
	)	
Respondent. )		

**JURISDICTIONAL STATEMENT**

This case appears before the State Board of Mediation upon the filing by the Department of Corrections and Human Resources of the State of Missouri (the Department) of a petition for clarification of a bargaining unit established by a previous decision of the State Board of Mediation. The bargaining unit is represented by the American Federation of State, County and Municipal Employees, Missouri State Council 72. The Department primarily contends that 224 of 237 Corrections Officer II's (CO II's) are now supervisors or confidential employees and therefore should be excluded from the appropriate bargaining unit.<sup>1</sup> In defense of the bargaining unit as it is currently comprised, i.e., including CO II's, State Council 72 argues that there has been no substantial change in the duties of CO II's and, for that reason, the Department has not established a prerequisite to the reconsideration of the composition of the bargaining unit.

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<sup>1</sup> The Department does not contest the continued inclusion in the unit of the 13 remaining CO II's.

The State Board of Mediation is authorized to hear and decide the issues concerning appropriate bargaining units by virtue of Section 105.525, RSMo 1986. A five day hearing was held from November 1 to November 3, 1988 and November 17 through November 18, 1988 at which representatives of State Council 72 and the Department of Corrections were present. The case was heard by State Board of Mediation Chairman, Mary Gant, employer member Milton Talent and employee member David Langston.

At the hearing, the parties were given full opportunity to present evidence. The Board, after a careful review of the evidence, sets forth the following findings of fact and conclusions of law.

#### **FINDINGS OF FACT**

On August 2, 1984, the State Board of Mediation determined an appropriate unit for certain employees of the Department. In this decision the State Board of Mediation specifically found that CO II's were not supervisors and that they should be included within the bargaining unit.

The relative rankings within the hierarchy of the guard force at the Department has remained constant from the time of the Board's initial decision on CO II's to the time of the hearing in this case. The lower five ranks of this hierarchy, listed in descending order of authority, together with the number in each position in 1983 (the year in which data was available in the 1984 case), and in 1988 is as follows:

<u>Position</u>	<u>1983</u>	<u>1988</u>
Corrections Supervisor II (also known as Major)	7	14
Corrections Supervisor I (also known as Captain)	35	51
Corrections Officer III (also known as Lieutenant)	61	89

Corrections Officer II (also known as Sergeant)	125	230
Corrections Officer I	969	1,876

At some correctional institutions there are other levels of supervisors above the Major. These other levels consist of up to four (4) levels of Correctional Superintendents. All correctional facilities but one have at least a Major on the premises. There is a Lieutenant at every institution.

The number of institutions operated by the Department increased from 12 in 1983 to 15 in 1988 and the number of inmates has increased since 1983.

CO II's at issue in this case have two to fifteen Corrections Officer I's (CO I's) assigned to them. The average number of CO I's assigned to a CO II has been constant since 1984. The duties of CO I's and CO II's are specified in post orders issued by the superintendent of each correctional facility. These post orders are kept in books in each work area and have been since 1984. Post orders contain detailed descriptions of the duties CO I's and CO II's are to perform. These officers must abide by their post orders, except in emergencies. After an emergency situation, the CO II must account to his or her superior officers for his or her activities. CO II's are sometimes influential in getting post orders changed to meet their particular circumstances, but the final decision remains with the superintendent. Input on changes in the post orders is also accepted from CO I's on the same basis.

Some latitude remains under the post orders for CO II's to assign particular duties to particular CO I's and to direct the performance of these duties. For example, a CO II may pull a CO I serving as a roving officer in the facility yard from that duty to help in a housing unit. The current authority of CO II's to give orders to subordinates is the same as that which existed in 1984. When a CO II is faced with a situation beyond the ordinary, he or she usually seeks direction from superior officers.

CO II's are in closer and more constant contact with CO I's than higher ranking officers. There is, however, regular contact between such higher ranking officers and CO I's. Lieutenants make rounds three or four times a day and generally spend from 10 to 15 minutes in the housing units on each visit. Additionally, Captains make daily rounds of the facility grounds and Majors spend a significant amount of time walking around facility grounds and observing the personnel. Any of these higher ranking officers can correct a CO I on the spot. In general, though, they follow the chain of command and pass instructions concerning CO I's through CO II's. CO II's may not change these instructions.

On the same note, the chain of command is more rigidly enforced now with respect to CO I's than it was in 1984. In other words, CO I's are expected to take complaints, suggestions, and other communications to their CO II's to be passed up to higher ranking officers if necessary. In 1984, CO I's were more likely to bypass CO II's and go directly to higher ranking officers.

CO II's have constant access to their superior officers through radios and telephones. In the event of an emergency, CO II's have the authority to act to protect the safety and security of inmates and security personnel without first contacting their superiors for instructions. Once the emergency ends, the CO II must report and account for his or her actions.

CO II's occasionally serve as acting shift commanders in smaller correctional facilities during early morning and evening shifts. Such duty entails greater authority on the part of the CO II than normal. At such times, there is some higher ranking officer on call, designated the duty officer, to make decisions with respect to situations with which the CO II is confronted. No CO II is permanently assigned as acting shift commander. Rather, CO II's are routinely rotated from shift to shift. Temporarily assigning CO II's as acting shift commanders is a practice that existed in 1984.

Periodic staff meetings are held at correctional facilities at which the participants, including CO II's, discuss policy and staff performance at their particular institution. CO II's also regularly participated in such meetings in 1984.

Beginning sometime after 1984, CO II's began to receive formal management training. Another change occurring after 1984 is that CO II's began to wear white shirts. The white shirt is perceived by inmates as indicating that the wearer has a role of authority and can take action to resolve their complaints.

The personnel decisions within the Department are made by the directors of its various divisions. The minimum qualifications for appointment or promotion to a position within the Department are set by the State Personnel Division. CO II's influence the promotion process at the Department in three respects.

First, CO I's applying for a promotion to CO II may obtain up to three additional points to the score they achieve on the merit system test they must take based upon the overall grade the CO I is given on his or her job evaluation. These job evaluations, called performance appraisals, are completed on each CO I by CO II's. After being filled out by CO II's, these CO I performance appraisals are reviewed by higher ranking officers before being placed in each CO I's personnel file. If the CO II and the reviewer initially disagree on the rating to be given, they confer so that an agreement on the ratings can be reached. In at least one case, the reviewer has completely disagreed with the CO II's evaluation and ordered the evaluation form changed. In addition to performance appraisals, CO II's also maintain performance logs on CO I's in which they place notations of their behavior, good and bad.

Performance appraisals and performance logs came into use in the Department sometime after 1984. Prior to that time, job evaluations of CO I's were done by service reports prepared by CO II's. Formal performance logs were not kept in conjunction with service reports. While performance appraisals are more detailed than service reports and provide spaces for comments, both service reports and performance appraisals

consist primarily of very brief notations (checks on the performance appraisals; number score on the service report) on preprinted forms. CO II's presently receive formal training in how to complete performance appraisals. No such formal training was given when service reports were used. While service reports were still in use, applicants for promotions were also able to obtain up to 3 points to be added to a qualifying test score. There is no material difference in the effect a service report had upon a CO I's relative position on the promotional register and the effect a performance appraisal now has on the CO I's relative position.

The second influence of CO II's upon the promotion process is that, when a CO II position is to be filled, a CO II may sit on the hiring committee which interviews the CO I's eligible for the promotion. The committee recommends a candidate for promotion to the superintendent of the particular correctional facility involved, who in turn makes a recommendation to the division director. In some facilities at least, CO II's do not typically sit on such hiring committees, the committees being composed of higher ranking officers only. Hiring committees, which operated similarly to those which are convened now to interview applicants and make recommendations, also existed in 1984.

The third influence CO II's have on promotions is the reliance the actual decision maker places on their performance appraisals and performance logs of CO I's in deciding who to promote. Opinions of CO II's with respect to the job performance of CO I's were also considered and carried weight with those making personnel decisions in 1984.

Decisions as to discipline and discharge of the Department's employees are also made by division directors. CO II's affect these decisions in three ways. First, The CO II who spots a problem with a CO I is encouraged to counsel the CO I about the problem. Second, as an outgrowth of this counseling, the CO II may establish a written "action plan" for the CO I to use to improve his or her performance. An "action plan" states the area where the CO I needs to improve and provides performance goals for

the CO I to meet within a specific period of time. Failure by a CO I to successfully complete an "action plan" may result in the division director taking adverse personnel action, including dismissal. CO II's receive training in counseling and in establishing "action plans". Counseling and "action plans" along with performance appraisals and performance logs comprise a comprehensive system of job performance evaluation. Even before the performance appraisal system was instituted, CO II's could provide counseling to CO I's, but the process is more formal and documented now.

The third effect of CO II's on decisions as to discipline and discharge is the reliance the actual decision makers place upon the reports of CO II's in making these decisions. Such reliance also existed in 1984. Reports by CO II's of misconduct by CO I's are not the sole factor relied upon by decision makers. Administrative Review Committees are convened to independently investigate reports of misconduct.

Decisions as to which shift a CO I will be assigned, when a CO I may take time off, when a CO I may take vacation, and when a CO I will be assigned overtime are made by officers higher in rank than CO II's. This was also the case in 1984. In an emergency situation, a CO II may hold CO I's on the job after their shift is over, but the CO II must report this action to superior officers after the emergency is resolved. CO II's had this authority to hold CO I's over in emergencies in 1984.

The role of CO II's in the grievance process has changed since 1984. In 1987, CO II's became the ones to whom CO I's would initially take their grievances. The typical response of a CO II when faced with a CO I's grievance, however, is to refer it to the second level of the grievance process due to his or her lack of authority. The grievance process has four levels. Nearly all grievances go through channels and proceed to the central office. The director of the Department makes the final decision on all grievances.

As pointed out above, CO II's are the next to the lowest rank in the guard force. Their compensation is likewise the second lowest among guard force employees.

Pursuant to Missouri's merit system pay plan, there are seven ranks in the guard force which receive greater compensation than do CO II's. The pay differential between CO II's and CO I's is the same now as it was in 1984. CO II's, as well as CO I's, receive time and a half pay for overtime work. All higher ranks receive only their regular hourly compensation for overtime work or receive no extra compensation for overtime.

CO II's spend most of their time working along side, or in place of, CO I's in the performance of the same duties. The prime function of a CO II is the direction of inmates, not the direction of CO I's. In these respects, there has been no change since 1984.

A few CO II's serve as investigators who act outside the typical chain of command. These CO II investigators probe into suspected violations by the Department's employees of the policies and procedures governing staff personnel. They also investigate suspected criminal activity of both inmates and employees. These investigators report directly to the superintendent of their facility. Their reports may be reviewed by someone other than the superintendent only with the superintendent's permission. These reports have been used both in disciplinary proceedings against Department employees and in criminal prosecutions of inmates and employees. CO II investigators spend 90% of their time investigating inmates and 10% of their time investigating the conduct of fellow employees. CO II's served as investigators in 1984 and their current duties in such a post have not substantially changed since that time.

Special attention must be directed to Patricia Faherty, a CO II in the Central Transportation Unit of the Department. This unit, which handles most inmate transportation in the corrections system, began operation in October of 1986. Faherty is assigned to the medical services branch of the unit where she directs 30 subordinate officers. Typically, she handles all scheduling of her 30 subordinates. She is also responsible for deciding when it is necessary for the officers in her branch to work overtime. Additionally, Faherty is instrumental in meting out discipline to her

subordinates. For example, she makes irregular rounds of hospitals in which inmates are patients to insure that her subordinates are properly carrying out their duties. If they are not, she takes disciplinary action against them. Further, in most cases when a subordinate officer comes to her with a grievance, Faherty exercises her own discretion in trying to resolve it. Moreover, she assisted in drafting the post orders governing her subordinates and she takes part in the interview process for filling open positions in the medical services branch. Her recommendations as to who should be transferred in are usually accepted.

There are officers who outrank Faherty in the Central Transportation Unit, but they do not interfere with her decisions with respect to personnel. They take over her responsibilities only when she is off duty. Faherty's position in the medical services branch of the Central Transportation Unit is one which did not exist in 1984. No other position like Faherty's exists in the Department. The duties and responsibilities she has are unique.

### **CONCLUSIONS OF LAW**

The Department's primary contention is that 224 of the 237 CO II's in its guard force are supervisors and, hence, that these officers are not appropriately within the bargaining unit established in 1984 in Case No. 83-002 because this unit also contains non-supervisory employees. In Case No. 83-002, the Board expressly determined that CO II's did not possess sufficient supervisory authority to warrant their exclusion from the bargaining unit. The Department argues that this determination is now obsolete and subject to being reopened due to changes in the duties and responsibilities of CO II's occurring since 1984 which resulted in their acquiring significant supervisory authority.

The question of when a class of employees may be excluded from a bargaining unit after it has been specifically included in the unit is one facet of the general issue of the appropriateness of a bargaining unit. "Issues with respect to appropriateness of bargaining units . . . shall be resolved by the State Board of Mediation." Section

105.525, RSMo 1986. Missouri's Public Sector Labor Law (PSLL), Sections 105.500 - 105.530, RSMo 1986, provides no direction as to how the Board should resolve the question in this case. Thus, the decision is one committed to the discretion of the Board. Cf. City of Kirkwood v. State Board of Mediation, 478 S.W.2d 690, 695 (Mo.App. 1972) ("In the absence of any criteria in the [PSLL] as to the means to be used by the Board in resolving [issues as to majority representative status] it would appear that the General Assembly left the means to be used to the discretion of the Board.")

The question here of exclusion of a class of employees from a unit previously found to be appropriate is one of first impression to the Board. Without the guidance of statute or prior Board decision to guide it in the resolution of such question, it is appropriate for the Board to examine decisions from other jurisdictions to gain assistance in its quest to resolve the question justly. See Teamsters, Local 245 v. City of Springfield, Public Case No. R 86-032 (SBM 1987).

Public employee relations agencies in at least two states have adopted a "substantial change" test for use in determining when a particular class of employees, existent at the time a bargaining unit is certified, may subsequently be excluded from, or included in, the unit. In Florida, the Public Employees Relations Commission decided that unit clarifications in such cases are inappropriate if the job functions in the disputed categories are substantially unchanged and the employees are performing the same basic job as they were at the time of certification. City of Dunedin, Fire Fighters, Local 2327, Case No. 8H-UC-766-1001 (Fla. PERC 1976). See also Fla. Admin. Code Rule 38D-17.24(5)(g). Similarly, the Massachusetts Labor Relations Commission held that the central issue in a case concerning the inclusion of a particular position in a unit from which it had previously been excluded was the degree of change in the duties of the position. Amesbury School Committee, Case No. CAS-2081 (Mass. LRC 1977). In such cases, there must be evidence that the employees' duties have undergone

changes tantamount to the creation of a new classification. Peabody School Committee, Case No. CAS-2053 (Mass. LRC 1976).

This substantial change test is well suited to protecting the rights of both public employers and public employees under the PSSL. If the question of the appropriateness of the inclusion of a particular classification of employees in a particular bargaining unit could be reopened and relitigated before the Board at any time, neither public employees nor their employers could count on the finality of unit certifications of the Board. The composition of bargaining units, which are the foundation upon which the PSSL is built, could be subjected to periodic litigation before the Board, even though there is little or no change in unit employee duties. Such periodic challenges would burden the general public because the Board would be committing its time and other resources to hearing and deciding multiple cases involving identical parties and issues. Controversies over what bargaining unit is appropriate would never be settled. It would also open up the possibility that changes in Board membership would result in the Board reversing its prior unit certifications, in whole or in part, simply because the new members weigh the same facts differently than did their predecessors. Instability of this kind in Board decisions could lead to chaos in the administration of the PSSL. Periodic challenges to unit composition would also subject any meeting and conferring between employer and employees to repeated turmoil. Such turmoil would hamper public employees and their employers in the cooperative resolution of issues relating to the conditions of public employment and, thus, would undermine the purpose of the PSSL.

Much of the unrestrained litigation and turmoil in the meet and confer process outlined above can be averted by the imposition by the Board of the threshold requirement that substantially changed employment conditions must be alleged and proven before it will consider the question of excluding a particular classification of employees from a unit previously found to be appropriate. The requirement of such allegations and proof should inhibit parties from challenging the inclusion of particular

employees in an already certified unit unless there is at least arguably a substantial change in their job functions. The requirement of proof of substantial change should also insure that turnover in board membership alone does not result in reversals of prior unit certifications. For these reasons, the Board holds that, where a class of employees has been expressly included in a bargaining unit, it will not subsequently consider the exclusion of that class of employees from that unit upon the petition of the public employer or of the majority representative unless the petitioner first establishes that the duties of those employees in the class have undergone substantial change.<sup>2</sup> A substantial change in the duties of a class of employees is one which alters the basic nature of their job.

In this case, the Department asserts that the duties of CO II's have undergone a substantial change since 1984, when the Board determined CO II's were not supervisory employees, and that upon a review of their new duties, CO II's must now be considered the supervisors of the CO I's in their work unit. The Board has consistently held that supervisors cannot be included in the same bargaining unit as the employees they supervise. MNEA, Springfield Educational Support Personnel v. Springfield R-12 School District, Public Case No. UC 88-021 (SBM 1988); See also Golden Valley Memorial Hospital v. Missouri State Board of Mediation, 559 S.W.2d 581, 583 (Mo.App. 1977).

In determining whether the Department has met its burden of establishing a substantial change in duties of CO II's, the Board considers as especially relevant evidence of changes which relate to the factors which the Board examines when it decides the supervisory status of particular employees. These factors are as follows:

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<sup>2</sup> The related question of including a particular classification of employees in a unit from which it had been previously excluded is not at issue here. That question will be resolved when it is at issue.

- (1) The authority to effectively recommend the hiring, promotion, transfer, discipline, or discharge of employees.
- (2) The authority to direct and assign the work force, including a consideration of the amount of independent judgment and discretion exercised in such matters.
- (3) The number of employees supervised and the number of other persons exercising greater, similar, or lesser authority over the same employees.
- (4) The level of pay including an evaluation of whether the supervisor is paid for his skill or for supervision of employees.
- (5) Whether the supervisor is primarily supervising an activity of primarily supervising employees.
- (6) Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees.

CO II's have experienced some change in duties relating to their ability to recommend the hiring, promotion, transfer, discipline, and discharge of employees. Beginning sometime after 1984, CO II's began evaluating CO I's by performance appraisals. These performance appraisals may result in CO I's obtaining up to three additional points to their score on the merit system test, which increases their chances of promotion. The results a CO I achieves on his or her performance appraisal and the contents of his or her performance log also are given some weight by those making personnel decisions. CO II's, however, evaluated the job performance of CO I's in 1984 by preparing service reports. A CO I's overall score on his or her service report could also result in up to three extra points being added to his or her merit system test score. Service report results were also considered and given some weight by those making personnel decisions in 1984. While performance appraisals and performance logs may provide somewhat more detailed information than service reports did, the change over from one system to the other is a change in degree, not in kind. This change in degree

is not substantial because the service reports used in 1984 fulfilled the same roles as the performance appraisals and logs do now.

A related change in duties is that CO II's now are expected to conduct routine counseling of CO I's about their job performance. Out of these counseling sessions, CO II's may develop action plans for CO I's to assist them in improving certain problem areas. In 1984, CO II's also provided counseling to subordinates, although in a less formal and documented way. The differences between 1984 and the present in this respect are, again, differences in degree only. The change in counseling practices is insubstantial because it has not altered the basic nature of a CO II's job. CO II's have been, and remain responsible for assisting CO I's in improving their performance. At most, the change in counseling practices has simply expanded upon an already existing job function.

All other influences CO II's currently have with respect to hiring, promotion, transfer, discipline, and discharge of employees are essentially unchanged from 1984.

In regard to the authority of CO II's to direct and assign the work force, there is minimal evidence of change since 1984. The duties of both CO I's and CO II's are still spelled out in detail in post orders which both ranks are obliged to follow. A CO II's authority to give orders to subordinates is the same now as it was in 1984. The attendance of CO II's at staff meetings and the temporary assignment of CO II's as acting shift commanders are practices that existed in 1984.

Changes related to a CO II's authority to direct and assign the work force have occurred in four respects. First, more formal management training is provided to CO II's now than in 1984, but this alone does not indicate a change in the duties the CO II's perform. Second, CO II's have begun wearing white shirts since 1984. While this change may have enhanced the perception of CO II's figures of authority, it has nothing

to do with, and indicates no change in their duties. Third, the role of CO II's in the grievance process has changed since 1984, in that they are now the ones to whom CO I's must take their grievances. This is a change, however, in form only, and not in substance. Due to their lack of authority to effectively resolve grievances brought to them, CO II's, as a rule, immediately refer them to the second level of the grievance process. Fourth, the chain of command is more rigidly enforced now than in 1984. However, CO II's were links in that chain in 1984. When approached in that year by CO I's who did follow the command structure, CO II's had the same duty as they have now, to serve as a conduit to higher ranking officers or to handle the situation themselves. Thus, the more faithful enforcement of the chain of command simply institutionalized a duty of CO II's already existent in 1984. No basic job function has been altered.

There has been little or no change since 1984 in the average number of CO I's assigned to CO II's. On the other hand, the number of officers ranking higher than CO II's has not increased as rapidly as the number of CO II's. Thus, there are relatively fewer officers in the Department who are superior in rank to CO II's now than in 1984. This alone, however, without evidence of actual duty changes, is no indication of a change in the basic nature of the job performed by CO II's.

CO II's are currently the next to the lowest in rank in the guard force, just as they were in 1984. Their relative position in the Department's pay scale also remains unchanged. Further, CO II's continue to be compensated for overtime at time and a half.

CO II's now primarily supervise inmates, not employees. Such supervisory authority over CO I's as is possessed by CO II's is thus an adjunct to their primary goal of proper incarceration of inmates. Most of a CO II's time is spent in working along side, or in place of, CO I's in performance of the same duties. Therefore, any supervision of

CO I's by CO II's is in the capacity of working supervisor. In any event, this is no change from what existed in 1984.

As can be seen from the foregoing review of the Department's evidence of changes in duties of CO II's, such changes as have occurred subsequent to the Board's 1984 decision that CO II's be included in the bargaining unit have not been substantial. The basic nature of the job performed by CO II's has not been altered. Those changes in duties of CO II's which did occur were simply outgrowths of duties already performed by them. As the Department has not met its burden of showing substantial change in the duties of CO II's, the Board will not reconsider its 1984 decision with respect to CO II's generally.

Next, the Board turns its attention to the Department's claim that CO II investigators must be excluded from the bargaining unit because they are confidential employees. The Board need not determine the confidential status of these employees. CO II's also served as investigators in 1984 and their duties in such capacity have not changed substantially since that time. The Board's decision expressly included all CO II's in the bargaining unit. Because the duties of CO II investigators have not substantially changed, the Board will not reconsider their inclusion in the unit.

Finally, the Board will consider the supervisory status of CO II Patricia Faherty. Her position is a new one and, thus, Board consideration of her status is not subject to the substantial change test. In considering Faherty's supervisory status, the Board will examine Faherty's duties and responsibilities in light of the six factors outline above. Faherty's position in the medical services branch of the Central Transportation Unit was created in October of 1986 and is a unique one within the Department. Faherty schedules the shifts of her 30 subordinates, assigns overtime to them when needed, disciplines them for failure to carry out their duties, and largely uses her own discretion

in trying to resolve their grievances. She performs these functions largely without interference from her superiors. She also was instrumental in drafting post orders for her subordinates and she plays a substantial role in the process of determining who will transfer into her work unit. There is no indication that Faherty herself takes part in the actual transportation of inmates to hospitals. Upon examination of Faherty's duties and authority in the medical services branch, the Board concludes that she is a true supervisor. As such, she must be excluded from the bargaining unit.

**DECISION**

It is the decision of the State Board of Mediation that all Corrections Officer II's in the Department of Corrections, with the exception of Patricia Faherty, shall remain in the appropriate bargaining unit established by the Board in Case No. 83-002. Faherty, as the possessor of true supervisory authority, shall be excluded from this unit.

Signed this 26th day of May, 1989.

STATE BOARD OF MEDIATION

(SEAL)

/s/ Mary L. Gant  
Mary L. Gant, Chairman

/s/ Milton Talent  
Milton Talent, Employer Member

/s/ David Langston  
David Langston, Employee Member