

1 BEFORE THE BOARD OF PERSONNEL APPEALS

2 * * * * *

3 IN THE MATTER OF UNIT MODIFICATION #2, 1975)
 4)
 5 CASHIER AND ASSISTANT CASHIER,)
 WATER DEPARTMENT, CITY OF LIVINGSTON)
 6)
 Petitioners,)
 7)
 CITY OF LIVINGSTON, MONTANA)
 8)
 Employer,)
 9)
 AMERICAN FEDERATION OF STATE, COUNTY,)
 AND MUNICIPAL EMPLOYEES, AFL-CIO)
 10)
 Counter-petitioner.)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER AS RECOMMENDED
TO THE BOARD OF PERSONNEL
APPEALS.

11 * * * * *

12 I. INTRODUCTION

13 On 20 June, 1975, Mr. Jess E. Miller and Ms. Sue J. Bidwell, Cashier and
 14 Assistant Cashier, respectively, of the City of Livingston Water Department filed
 15 a petition for unit modification with the Board of Personnel Appeals (hereafter
 16 referred to as the Board). The petitioners proposed to be excluded from the
 17 certified collective bargaining unit: American Federation of State, County and
 18 Municipal Employees, AFL-CIO, Local 2711 (hereafter referred to as AFSCME).
 19

20 On 8 July, 1975, AFSCME filed a counter-petition with the Board.

21 Pursuant to the Rules and Regulations of the Board, specifically MAC 24-3.8
 22 (10) - S8070, a hearing was held on 26 August 1975, in the City Council Chambers,
 23 Livingston, Montana, to determine whether the petitioners proposed exclusion from
 24 the bargaining unit is appropriate for the purpose of collective bargaining.

25 As the duly appointed hearing examiner of the Board, I conducted the hearing
 26 in accordance with the provisions of the Montana Administrative Procedure Act
 27 (Section 82-4301 to 82-4225, R.C.M. 1947). Mr. Robert L. Jovick, Acting City
 28 Attorney, represented the petitioners. Mr. Stan Gerke, Field Representative,
 29 Montana State Council No. 9, AFSCME, represented Local 2711.

30 II. EXHIBITS AS EVIDENCE

31 Petitioner's Exhibit A - City of Livingston: City Codes pertaining to the
 32 Water Department;

1 5. AFSCME counter-petition states in pertinent part:

2 "2. Neither the employees in question nor the City of Livingston
3 objected to the inclusion of said employees at any time during the
unit determination hearing or election.

4 3. The two employees in question were determined as members of
5 the proposed unit and ruled eligible to vote in the representation
election by an agent of the Board of Personnel Appeals."

6 AFSCME further contends in the counter-petition that the positions could not be
7 interpreted as "elected officials", "supervisory" nor "managerial". And in reference
8 to the bargaining unit itself, AFSCME stated:

9 "Allowing these two employees to be exempt from the established
10 unit would be unnecessary fragmentation of the unit and would
result with an undesirable precedent."

11 B. STATUTES:

12 6. The statute pertaining to management officials is 59-1602(4), R.C.M. 1947:

13 (4) "Management official means representatives of management
14 having authority to act for the agency on any matters
relating to the implementation of agency policy."

15 7. The statute pertaining to an appropriate unit for collective bargaining
16 is 59-1602(2), R.C.M. 1947:

17 (2) "In order to assure employees the fullest freedom in exercising
18 the rights guaranteed by this Act, the Board or an agent of the
Board shall decide the unit appropriate for the purpose of
19 collective bargaining, and shall consider such factors as
community of interest, wages, hours, fringe benefits and other
20 working conditions of the employees involved, the history of
collective bargaining, common supervision, common personnel
21 policies, extent of integration of work functions and inter-
change among employees affected, and the desire of the employees."

22 An examination of the petitioners, the brief, the statutes, and the evidence
23 at the hearing raises the following issues:

24 (a) whether the two positions are managerial;

25 (b) whether the two positions are appropriately included as part of this
26 bargaining unit.

27 In an effort to present an orderly analysis of the facts, though some will
28 overlap, I am listing them into the following categories: (1) managerial;
29 (2) community of interest: (a) wages, hours, fringe benefits and other working
30 conditions: (b) common supervision and common personnel policies; (c) extent of
31 integration of work functions and interchange among employees; (3) history of
32 collective bargaining; (4) extent of union organization; (5) desire of the employees.

1 C. MANAGERIAL

2 8. The petitioners contend they should be excluded from the bargaining unit
3 because their positions are managerial in nature. To support this contention the
4 petitioners presented the following evidence and testimony:

5 The city codes pertaining to the Water Board. Section 29-5:

6 "The Board of Water Commissioners shall employ a cashier for the
7 waterworks department, who shall have full and complete charge
8 of the collections for the department. The cashier shall receive
9 a salary fixed by the Board and Shall be answerable to the board
10 only and may be discharged by the board."²

11 The petitioners further contend that the cashier acts as the ex-officio
12 secretary of the water board. Section 29-6:

13 "(a) The cashier of the waterworks department shall collect all revenues

14 (b) The cashier shall be financial receiving officer of the waterworks
15 department. He shall keep a complete set of accounts and controls....
16 He shall prepare all claims against the waterworks department and
17 present same for approval by the Board....

18 (d) The cashier shall keep on file all records of the board and all
19 records made by the superintendent. He shall make monthly reports
20 to the board and to the city council, showing the financial status
21 and operating conditions of the waterworks department.³

22 (e) The cashier shall report all delinquent water rental...to the board.
23 He shall be vigilant to detect and warn against abuses, and
24 infringements of regulations adopted by the board.

25 (f) He shall perform all other duties as may be directed by the board."

26 9. Mr. William Gonder, Chairman of the Water Board testified, "that the
27 superintendent and the cashier and the assistant cashier carry out the policy of
28 the department." (tr. p. 3) He added that the water board meets once a month and
29 considers the cashier's position as one whereby board policy can be implemented.
30 Mr. Gonder also made reference to the city code when he testified that the cashier
31 and assistant cashier are appointed by the water board and they are directly
32

28 2. The water board for the City of Livingston is a three member board. Two citizen
29 members are appointed for a six year term by the mayor and approved by the city
30 council. Third member is also a member of the city council.

31 3. The cashier does not regularly attend city council meetings. The monthly water
32 department report is usually given to the city council by the councilman, who also
serves on the water board. The cashier or the assistant cashier attends and keeps
minutes of the water board meetings.

1 answerable to the board.⁴

2 Mr. Tom Sharp, City Superintendent, testified that he exercises no supervision
3 over the cashier or assistant cashier.⁵

4 The petitioners testified that they are under the supervision of the water board.

5 Mr. Jess Miller, Cashier, testified that he conducts correspondence on behalf
6 of the water board with the Montana Public Service Commission, U.S. Department of
7 Housing and Urban Development, other agencies, and the public. He stated that he
8 is not only responsible for the implementation of water board policies, but also
9 has policy input by making recommendations. An example cited was his role in the
10 development of a preliminary budget for the water department.

11 Mr. Jovick, in his brief, points out that, 'neither the cashier or the
12 assistant cashier draws any overtime pay, for they are considered to be part of
13 management (emphasis added) and, as such, are not compensated for additional time
14 required to do their assigned duties."⁶

15 AFSCME presented no evidence or testimony that would be contrary to the above
16 mentioned employment relationship between the water board and the petitioners.

17 D. COMMUNITY OF INTEREST

18 A paramount consideration in determining an appropriate bargaining unit is
19 the identification of the bargaining unit as described in Section 59-1606(2).

20 10. Mr. Gonder testified that the water board is responsible for the distribu-
21 tion, construction, maintenance, and financial affairs of the department. On a
22 day-to-day basis the superintendent is responsible for the distribution, construction,
23 and maintenance aspects and the petitioners are responsible for the financial affairs.

26 4. Mr. Gonder testified that the two appointments are not approved by the mayor
27 or the city council.

28 5. Mr. Sharp is the city superintendent and the superintendent of waterworks.

29 6. During the hearing Mr. Gerke raised the issue that the practice of no overtime
30 pay may be in violation of the Fair Labor Standards Act. Certain administrative
31 employees are exempt if they meet a series of tests set out in regulations. I am
32 not familiar enough with the Fair Labor Standards Act to determine if the petitioners
should be exempt. Furthermore, it is beyond the scope of this hearing.

1 The evidence illustrates that the petitioners basically perform accounting,
2 bookkeeping, recordkeeping and clerical duties. Whereas the other water department
3 employees operate the water plant, work on waterlines, perform skilled manual labor.

4 The other city employees in this unit are not involved with or under the
5 jurisdiction of the water board:

6 (a) wages; hours, fringe benefits and other working conditions.

7 11. The employees in the water department are paid the following wages:

8 Cashier - \$935 per month.

9 Assistant Cashier - \$550 per month. According to Mr. Miller,
10 "In my absence she draws my salary. When I am on vacation or
11 sick she (Ms. Bidwell) draws \$935 per month." (tr. p. 34)

12 Working Supervisor - \$636.90 per month, plus \$25 per month
13 as a certified operator of a water plant, plus \$100 per month
14 for supervisor differential, and longevity.

15 Operator - \$636.90 per month, plus \$25 per month as a certified
16 operator of a water plant, and longevity.

17 Serviceman - Hourly salary based on \$636.90 per month.

18 All water department employees work an eight hour day - forty hour week.

19 The exceptions are to meet emergencies or special operating necessities.

20 12. The salaries of the water department employees are paid from water
21 department funds. Other city employees are paid from funds in their respective
22 departments. The record indicates that the water department and the other city
23 employees receive similar sick, vacation and other fringe benefits.

24 13. The testimony indicates that the basic working condition differences between
25 the petitioners and the other employees in the unit is that they work in an office,
26 whereas the other employees work "at the plant or shop", and "outside".

27 (b) common supervision and common personnel policies:

28 14. The cashier, assistant cashier, and the water superintendent are appointed
29 by the water board and those persons report directly to the board. They carry out
30 the policies of the water board in between the monthly meetings. The other water
31 department employees are hired by and under the supervision of the superintendent.
32 Mr. Gonder testified that the petitioners are answerable to the board, not the

7. *The assistant cashier, of course, works under the supervision of the cashier. Nevertheless, she does perform the duties during his absence and she is appointed by the water board.*

1 superintendent.

2 The superintendent and the cashier (or the assistant cashier) are expected to
3 attend the board's meetings.

4 15. There was no evidence presented, by either party, indicating different
5 personnel policies among the water and the other departments.

6 (c) Extent of integration of work function and interchange among employees
7 affected:

8 16. Mr. Sharp testified that there is little integration of work functions
9 because the petitioners duties are very distinct from the other water department
10 employees. Though he does not exercise supervision over the petitioners, nevertheless,
11 there is some integration of work functions because there must be a link or
12 cooperation between water distribution and revenues and expenditures of funds. Mr.
13 Sharp described it as "a parallel thing." An example cited was when a citizen calls
14 the petitioners office about a water problem or service, they will in turn inform
15 the superintendent, who will direct further action. The petitioners may also write
16 up "work slips" for the "crew", but they cannot direct that the work be done.

17 The superintendent will frequently check with the petitioners about water
18 service and problems; however, the other employees infrequently come in contact
19 with the petitioners in the performance of their duties.

20 17. Mr. Sharp, Mr. Miller and Ms. Bidwell contend that the basic skills
21 required to perform the cashier and assistant cashier duties are very different
22 from the other employees.

23 In response to Mr. Jovick's question, "... comparing just the relative
24 descriptions you've given us of these three positions and the job they entail
25 (working supervisor, operator, serviceman) do you feel that they are in anyway
26 interchangeable with the position of cashier...?" Mr. Sharp's answer was, "No
27 way." The superintendent elaborated by stating that, "Anyone with a reasonable
28 degree of intelligence could perform the manual labor part of it. But they
29 couldn't perform the particular functions (operate water treatment plant-chemicals,
30 etc.)." (tr. p. 17) Mr. Sharp also didn't think that the persons trained in the
31 maintenance and operation of the water system would be able to perform bookkeeping
32 duties or visa versa without extensive training.

1 18. The record is established that in order to perform the duties of cashier
2 the person must be very familiar with bookkeeping. Only a person educated or
3 experienced in that occupation would be hired for the position. In contrast, the
4 operator of the water plant must obtain an operators certificate from the State
5 Department of Health and Environmental Sciences. That person must have extensive
6 knowledge of chlorination, electricity, production wells, water pressure, etc.

7 19. Mr. Gerke contends that a water plant operator, sanitation worker, or
8 other city employees could, after a certain amount of training, become a cashier
9 or assistant cashier. He further concludes, "I'm sure a person filling the job
10 duties of cashier or assistant cashier could perform other jobs within the same
11 jurisdiction as City of Livingston." (tr. p. 19)

12 20. There was no evidence presented to indicate a past practice of a cashier
13 being transferred to one of the other water department positions or visa versa.

14 E. HISTORY OF COLLECTIVE BARGAINING

15 21. The City of Livingston and AFSCME signed the first collective bargaining
16 agreement effective 1 July 1974. (Joint Exhibit A) The scope of the bargaining
17 unit included the petitioners.

18 22. Ms. Bidwell testified that she was, "not really aware of negotiations.
19 I haven't been included in any of them. All negotiations have been out in the shop
20 with the outside crew." (tr. p. 14-15)

21 F. EXTENT OF UNION ORGANIZATION

22 23. See Finding of Facts number one, two and three.

23 24. Mr. Gerke argues that:

24 "AFSCME Union is an industrial type whereas we have everybody
25 in the union from zookeepers to librarians to operating
26 engineers, sanitation workers - several categories of employment
you find in public employment. They shift from classification
to classification..." (tr. p. 19)

27 G. DESIRES OF EMPLOYEES

28 The following testimony was presented on this point:

29 25. Mr. Jovick: "And relative to a particular question here, to the
30 unionization of the employees in the water department,
were you aware that this occurred sometime last year?"

31 Ms. Bidwell: "Yes, and at the time that we voted I was told that this
32 had no bearing on whether you were included or excluded
from the union."

1 Mr. Jovick: "So really, your vote in the election didn't
2 really indicate your real intent as far as
what you wanted, as to the union?"

3 Ms. Bidwell: "No."

4 Mr. Jovick: "And could you state for the Board, whether or
5 not you desire to become a member of the union?"

6 Ms. Bidwell: "Personally, no, I prefer not to be in the union." (tr. p. 11)

7 Under cross-examination by Mr. Gerke, Ms. Bidwell stated she did vote in the
8 election, "under the impression that everybody was available to vote."

9 Under further cross-examination she testified that she would prefer being in a
10 clerk's union because of the qualifications required for her position.

11 26. Mr. Miller testified that he voted in the election "and I was also under
12 the impression that Ms. Bidwell was -- that our voting in the union had no bearing
13 as to whether we would be included in the bargaining unit or not."

14 Mr. Jovick: "How do you feel now as to your position, you
15 yourself being included in the bargaining unit?"

16 Mr. Miller: "I feel that duties are so different we should not
be part of this bargaining unit." (tr. p. 33)

17 Under cross-examination by Mr. Gerke, Mr. Miller also stated, "if there was a
18 clerk's union, that would be the one that our position should be in." (tr. p. 33)

19 DISCUSSION

20 Section 59-1602(2), R.C.M., 1947, authorizes the Board to decide the unit
21 appropriate for the purpose of collective bargaining. Through MAC 24-3.8(10) - S8089
22 the Board may conduct hearing on unit modification and to determine the appropriateness
23 of the modification petitioned for.

24 As the agent appointed by the Board, it is my responsibility to determine if
25 the modification is appropriate.

26 In order to properly discuss a unit clarification it is necessary to consider
27 the events and factors which were involved in determining the appropriateness of this
28 unit.

29 According to the City of Livingston unit determination record on file with the
30 Board, I find the following sequence of events lead to a unit determination.

31 The city employees (Labor Committee) and the City of Livingston signed a collective
32 bargaining agreement effective 2 January 1973. The contract included the employees

1 in the street, parking meter, sewage and sanitation, cemetery, garbage, park, and
2 the water departments. The so called Labor Committee was recognized by the City
3 as the bargaining group or exclusive representative for the above employees.
4 Prior to the expiration of the 1973 contract the city bargaining group voted to
5 affiliate with AFSCME.

6 On January 22, 1974 a "negotiating session" was held with the employees bargaining
7 group, including the AFSCME field representative Mr. Gerke. At that time, Edmund
8 Carrell Jr. refused to negotiate with the group or Mr. Gerke. The mayor stated an
9 election should be held to prove that the employees wanted a union. In essence,
10 it appears that the mayor raised the issue of exclusive representative in accordance
11 with Section 59-1602(6) of the Montana Public Employees Collective Bargaining Act,
12 which defines an exclusive representative as:

13 "a labor organization which has been designated by the
14 Board as the exclusive representative of employees in
15 an appropriate unit or has been so recognized by the
public employer." (Emphasis added)

16 The mayor's action clearly indicates that he no longer recognized the so called
17 bargaining group as the exclusive representative and thereby raised a question of
18 representation.

19 It was the above action which precipitated the AFSCME petition for a New Unit
20 Determination and Election, filed with the Board on 22 March 1974.

21 Findings of Facts, one, two, and three adequately described the events which
22 lead up to the certification of an exclusive representative for the employees of
23 the City. However, the question is how was the certified unit previously determined to
24 be appropriate. I think it would be helpful to all parties involved to explain the
25 procedures used by the Board in this unit determination. A procedure used for all
26 unit determination cases under similar circumstances.

27 AFSCME petitioned the Board (Finding of Fact No. 1) for a unit determination and
28 election describing the appropriate unit as the same one as subsequently certified
29 (Finding of Fact No. 3). The employer did not file a counter-petition taking
30 issue with the description of the proposed unit (MAC 24-3.8(10) - S8030(4)).
31 Therefore, in accordance with MAC 24-3.8(10) - S8070(8)(a) the Board dispensed with
32 a hearing on the proposed unit and issued a "Determination of Appropriate Unit" on
15 April 1974. The order was signed by the then Chairman of the Board,

1 Mr. Patrick F. Hooks. The above order was in accordance with the Board's Rules
2 and Regulations. The rules, in effect, illustrate the Board's policy of "non-
3 interference" if labor and management agree on the appropriateness of a unit.
4 The Board's Rules and Regulations also allow for future modification (MAC 24-3.8
5 (10) - S8089).⁸ The above order was issued per the employer-union agreement, not
6 per the result of a formal unit determination hearing. I need to give this distinction
7 some consideration because without the formal hearing I can only assume that the
8 factors outlined in Section 59-1602(2) were not considered nor applied to the
9 petitioners positions.

10 Therefore, the employees as part of their argument for exclusion did not need
11 to point out how their positions have changed since the unit determination; but
12 needed only to argue that they were inappropriately included in the first place.

13 The purpose of unit determination, either by agreement or hearing, is to
14 create a stable bargaining unit, to avoid confusion and misunderstanding about the
15 scope of a unit and therefore avoid subsequent conflicts which may lead to
16 disruptions of meaningful collective bargaining and good labor relations. Determining
17 an appropriate unit is a major first step in removing conflicts.

18 The first question that must be addressed is: Can the factors applied to
19 unit determination also be applied to unit modification? On this point I find
20 no Board precedent. It should be noted that perhaps because of the success of
21 the Board's "non-interference" policy very few unit modification petitions have
22 ever been filed. Though NLRB precedent is not binding on this Board, I find it
23 a useful guide on this point, especially since this Board's and the NLRA Rules and
24 Regulations pertaining to unit modification are similar in several areas.

25 In *Kalamazoo Paper Box Corp*⁹ the National Labor Relations Board (hereafter
26 referred to as NLRB) enumerated the factors to be considered in determining the
27 community of interest:

28 Factors which warranted consideration in determining the existence of substantial
29 difference in interests and working conditions include:

31 8. *National Labor Relations Board Rules and Regulations (102.60(b)) provide a means*
32 *whereby either party to a bargaining unit, whether or not established by formal NLRB*
representation procedures, may obtain a modification of the unit.

1 "A difference in method of wages or compensation; different hours of work;
2 different employment benefits; separate supervision; the degree of dissimilar
3 qualifications, training and skills; differences in job functions and amount of
4 working time spent away from the employment or plant situs...; the infrequency
or lack of contact with other employees; lack of integration with the work functions
of other employees or interchange with them; and the history of collective
bargaining."

10

5 While the *Kalamazoo* case dealt specifically with truck drivers seeking severance
6 from a production unit, the principles announced in that case have been given general
7 application. (emphasis added) A case in point regarding general application is the
8 *Cambell Son's Corp* case.

11

9 As special and distinct interests of a particular group were weighed against
10 the community of interest shared with other employees in the *Kalamazoo and Cambell*
11 cases. The application of the above principle has been applied by way of the
12 *Kennecott* case to unit modification.

12

13 The important item in the above cases is that the NLRB enumerated the factors
14 to be considered and applied them to both unit determination and unit modifications.
15 Based on NLRB precedences I feel it is appropriate to apply the community of interest
16 factors to this unit modification case.

17 In an effort to present an orderly discussion and conclusion of the various
18 factors as they apply in this case, I will follow the Findings of Fact format.

19 Managerial

20 Section 59-1602(4) clearly exempts managerial employees, from a collective
21 bargaining unit. The Montana law defines a managerial official as one who represent
22 management with the authority to act for the agency on any matters relating to the
23 implementation of agency policy.

24
25 9. 136 NLRB No. 10, 49 LRRM 1715 (1962)

26 10. The statement in case of *Kalamazoo* is as follows:

27 Neither unit of paper box company's truck drivers, nor unit of truck drivers,
28 shipping department employees may be severed from production and maintenance unit,
29 since neither truck drivers, alone, nor shipping department as such, constitute
30 functionally distinct group with special interests distinguishable from those of other
31 employees. (1) Truck drivers are under same supervision, receive same benefits, work
same hours, are paid on same basis, and are on same seniority list as other employees,
(2) Truck drivers regularly and frequently interchange with other employees to such an
extent that they may not be said to constitute separately identifiable unit, and
(3) shipping department employees also interchange duties with production employees.

32 11. *NLRB v Cambell Son's Corp* 407 F2d 969

12. *Kennecott Copper Corp* 176 NLRB No. 13 71 LRRM 1188 (1969)

1 The NLRB has consistently excluded from bargaining units "managerial" employees -
2 those who formulate and effectuate management policies by expressing and making
3 operative the decisions of their employer.¹³

4 After reviewing NLRB decisions on the point, an appeals court¹⁴ decided that the
5 NLRB seems to use two tests in determining who is a managerial employee. He is
6 either (1) one who, while not a supervisor, is so closely related to or aligned
7 with management as to present a potential conflict of interest between employer and
8 employees; or (2) one who formulates, determines, or effectuates an employer's
9 policies, and who has discretion in the performance of his job, but not if the
10 discretion must conform to the employer's established policies.

11 This Board has never attempted a "precise definition" of the term "managerial
12 employee". Nevertheless in determining whether individuals are managerial employees
13 a guideline has been whether certain non-supervisory employees have a sufficient
14 community of interest with the general group of employees constituting the bulk of
15 a unit so that they may appropriately be considered a part thereof. In other words,
16 where the interest of certain employees seem to lie more with those persons who
17 formulate, determine, and oversee agency policy than with those in the proposed
18 unit who merely carry out the resultant policy the Board tends to exclude them from
19 the unit.

20 I conclude that Ms. Bidwell cannot be excluded from this unit based solely on
21 the Montana statute and the Board's criteria. Although she does represent
22 management and assists in the implementation of some policy during the infrequent
23 absence of the cashier, the record indicates that her authority to act for the water
24 board is limited in time frame and scope.

25 I find that her interests are closely aligned with her supervision and the
26 water board, but not to the degree of presenting a potential conflict of interest
27 between employer and the employees. I could find no evidence that Ms. Bidwell has
28 the discretion to formulate or determine the water board's policies. She does on
29 rare occasions assist in the implementation of water board policies.

30 I recognize that she is appointed by the water board for a definite term and
31

32 13. *Palace Laundry Dry Cleaning Corp 21 LRRM 1039*

14. *Retail Clerks v NLRB, CA Dist. Col., (1966)*

1 does serve as the cashier in his absence. However, after a total review of the
2 record it becomes a clear that she is under the close supervision of the cashier.
3 The record also indicates that her duties involve a great deal of clerical-
4 bookkeeping work. There were no examples presented which illustrated "managerial"
5 decisions made on her part. I find that her salary, which is the lowest in the
6 water department, does not indicate that she performs managerial duties.

7 In total, some points or arguments can be made to exclude Ms. Bidwell, namely
8 she serves as a cashier at times and has a two year appointment, but those areas are
9 not significant enough to exclude her under the managerial factor.

10 Mr. Miller is the cashier and is required to perform the duties and assume the
11 responsibilities as outlined in the city codes.

12 Mr. Gonder testified that the water board meets once a month and that Mr. Miller
13 acts as the ex-office secretary and is responsible for implementing Board policies
14 on a day-to-day operational basis.

15 The testimony of Mr. Miller indicates that Mr. Miller's interests are more
16 closely aligned with the water board, who he is directly responsible to, than to the
17 bulk of the unit. Though there are no examples of so called "managerial" decisions
18 there is no doubt that he can and does act on behalf of the board on numerous
19 occasions. In total, major arguments have been made to exempt Mr. Miller as a
20 managerial official. However, because the responsibilities of the water board are
21 limited, in comparison to the total operations of city government, I conclude he
22 should not be exempt solely on the managerial factor.

23 In summary, I am giving Ms. Bidwell minor weight towards exemption and Mr.
24 Miller major, but not total, weight for exemption under the managerial factor.

25 Community of Interest

26 The Community of interest is a fundamental factor and it is therefore necessary
27 to evaluate the conditions in order to determine where the predominant community
28 of interest exists or does not exist. I have previously discussed the NLRB cases
29 and the community of interest factors as they apply to unit determination and unit
30 modification.

31 Findings of Facts number ten, thirteen, sixteen, and seventeen persuasively
32 outline the different job duties, skills, physical working area of the office

1 (petitioners), as compared to the bulk of the unit (shop).

2 The NLRB has a long established policy of excluding office employees from units
3 of manual workers if there are separate working areas, little interchange among
4 other employees, minor integration of work function, and distinct skills. 15

5 The Findings of Facts (ten through twenty) clearly illustrate that the petitioners
6 do not share a substantial community of interest with the service and maintenance
7 employees of the water department nor with the other city employees in the unit.

8 In resolving the unit issue, the Board's primary concern is to group together only
9 employees who share a substantial community of interest. It is not the Board's

10
11 15. (A) *Extencicare of West Virginia* 6 June 1973, 203 NLRB No. 170 83 LRRM 1242

12 *Employees in medical records department and business office of employer's for*
13 *profit hospital are excluded from unit of technical, service, and maintenance employees,*
14 *since they are essentially office workers who have little contact with other employees.*

15 (B) *Georgetown University* 10 November 1972 200 NLRB No. 14 82 LRRM 1046

16 *The NLRB agreed with the Union's request for a unit of service and maintenance*
17 *employees only. The employer contended the unit should be an overall unit to include*
18 *all non-academic personnel.*

19 *The following employees are excluded from unit of service and maintenance employees*
20 *of private non-profit university: (1) office clericals, since the Board has long-*
21 *established policy of excluding office clericals from units of manual workers; (2)*
22 *technical employees, since they have community of interest separate and distinct from*
23 *other non-academic employees, it appearing they have separate line of supervision,*
24 *that they are trained to become proficient in a technical line, that they receive*
25 *close supervision by other technicians, and that nature of their work is substantially*
26 *different from that of service and maintenance employees.*

27 (C) *Shattuck School (Minnesota)* 189 NLRB No. 118 77 LRRM 1164

28 *Office clerical employees excluded from proposed unit of maintenance and service*
29 *workers because they work under direction of comptroller, who carries out the office*
30 *and business function of school.*

31 *Perform bookkeeping and record-keeping tasks, and usual office correspondence,*
32 *billing and payroll. They do not interchange with the maintenance and service employees,*
33 *who have strictly maintenance and service functions.*

34 (D) *North Dade Hospital (Florida)* 86 LRRM 1262 May 13, 1974 210 NLRB No. 82

35 *Billings clerks and admitting clerks are excluded from unit of hospital and clinic*
36 *employees, since they perform clerical functions and have little involvement with*
37 *employees engaged in care or treatment of patients.*

38 (E) *Captial City, Inc. (Kansas)* 10 July 1974 212 NLRB No. 52 86 LRRM 1497

39 *The NLRB decision was to separate the pressroom employees from the employees engaged*
40 *in retail sale of office furniture, supplies and printed material. (blueprint)*

41 *The employer contended the two groups of employees should be one appropriate overall*
42 *unit. However NLRB rules that because the pressroom and blueprint employees have dis-*
43 *tinct skills, do not interchange with other employees, have separate work area and*
44 *separate immediate supervision, earn higher wages than other employees, and have limited*
45 *contact with other employees there should be two different units. All employees receive*
46 *the same fringe benefits. They also work under different foremen.*

1 policy to compel labor organizations to represent the most comprehensive grouping.

2 Under the community of interest category, I conclude that the petitioners herein
3 have satisfied the major requirement placed upon them in Section 59-1602(2), R.C.M.
4 1947. However, I do find some areas under this category whereby there is a common
5 community of interest among the employees in the unit. Therefore, I must give
6 major weight, but not total, for the petitioners exemption under the community of
7 interest factor.

8 Desires of Employees

9 The effectiveness of the collective bargaining process depends in large part
10 on the coherence of the employees in the unit. There is seldom any real problem in
11 determining the employees' desires when there is no dispute among them as to the
12 appropriate unit. However, when there is a modification petition before the board,
13 especially one presented by the employees, then the desires of the employees becomes
14 a critical factor. The petitioners testified that they do not desire to be a member
15 of this unit.

16 The U.S. Court of Appeals, Tenth Circuit (Denver) 1964¹⁶ held that the NLRB made a
17 mistake and the employer was denied full hearing on critical issue of appropriate unit
18 for representation proceeding when NLRB completely ignored or failed to give consider-
19 ation to expressed desires of salaried drivers as to whether they wished to be included
20 in unit of laundry's in-plant production and maintenance employees.

21 The Court ruled that while desires of employees with respect to their inclusion
22 in a bargaining unit is not controlling, it is a factor which NLRB should take into
23 consideration in reaching its ultimate decision.

24 This Board will decide each case the unit appropriate for modification for the
25 purpose of collective bargaining. In performing this function, the Board must maintain
26 the two-fold objective of insuring to employees their rights to self-organization and
27 freedom of choice in collective bargaining and of fostering public employment peace and
28 stability through collective bargaining.

29 In determining the appropriate unit the Board delineates grouping of employees
30 within which freedom of choice may be given collective expression. At the same time
31 it creates the context within which the process of collective bargaining must function.
32 Because the scope of the unit is basic to and permeates the whole of the collective

16. *NLRB v Ideal Laundry and Dry Cleaning Co.* 56 LRRM 2036

1 bargaining relationship, each unit determination or unit modification, in order to
2 further effective expression of the statutory purposes, must have a direct relevancy to
3 the circumstances within which collective bargaining is to take place. Such a determin-
4 ation should not create a state of chaos, but rather foster stable collective
5 bargaining. To ignore the expressed desires of ten percent of this unit could hardly
6 be said to assure to employees the fullest freedom in exercising the rights guaranteed
7 by this Act or foster stable labor relations as contemplated by the Public Employees
8 Act.

9 AFSCME argues that because the city did not file a counter-petition to the Union's
10 unit determination petition nor did the city challenge the votes of the two petitioners;
11 therefore, they should be included in the unit. 17

12 I can only point out that the two petitioners were included in the unit.
13 Because of the nonaction of the employer does it mean that the two employees should
14 continue to be a part of this unit forever? I think not. There are several reasons
15 for the Board allowing unit modification petitions, (1) when the duties and
16 responsibilities of a position have changed, since the original unit determination, as to
17 create some doubt about the continuing appropriateness of those positions inclusion;
18 (2) if the employees petition that they were originally inappropriately included;
19 (3) changes in political subdivision organization; or (4) changes in union structure.
20 In this case, the employees never had the opportunity to formally present their
21 arguments and desires for exclusion in either the unit determination or election
22 proceedings.

23 Moreover, my determination here rests upon a finding required by the pertinent
24 facts presented that the two employees do have special and distinct interests, which
25 outweigh and override the community of interest shared with other city employees.
26 In these circumstances it would result in creating a fictional mold where the parties
27 would be required to force their bargaining relationship.

28 EXTENT OF UNION ORGANIZATION

29 The evidence indicates that the extent of union organization, as outlined on the
30

31
32 *17. Finding of Fact No. 25 and 26 indicate some confusion on the part of the
petitioners as to the purpose and meaning of the election and their inclusion in the
unit.*

1 petition, was a major factor considered and applied in the unit determination.

2 Mr. Gerke points out that AFSCME is an industrial type union. That this union
3 has locals which encompass many different occupations and job classifications.

4 In a nationwide review of certified AFSCME bargaining units in Government
5 Employees Relations Report ¹⁸ I find that some AFSCME units include all departments
6 in a major city, and some units include all the statewide employees of a major state
7 department.

8 It appears that many of the larger broad based units alluded to in the Report
9 were established by the extent of the union organization with management agreeing to
10 the scope of the unit. In the matter of Unit Modification I find little guidance,
11 especially as it involves an AFSCME unit.

12 It is not denied that the broader bargaining unit contended by AFSCME in this case,
13 could be an appropriate unit. Section 59-1602(2) does list the extent of union
14 organization as a criteria in determining or modifying a unit.

15 In looking at NLRA precedences I find Section 9(c)(5) provides that, "In
16 determining whether a unit is appropriate the extent to which the employees have
17 organized shall not be controlling."

18 The U.S. Supreme Court has said that this provision clearly was intended to
19 overrule NLRB decisions where unit determined could only be supported on the basis of
20 the extent of organization. But, the Court added, the provision was not intended to
21 prohibit the NLRB from considering extent of organization as one factor, though not
22 the controlling factor, in its unit determination. ¹⁹

23 I conclude that to keep the petitioners in the unit solely on the basis of the
24 extent of union organization would be contrary to Section 59-1602(2) and to all
25 factors mentioned in that section. Especially in view of the fact that the Montana
26 statute is silent on this factor as a part of unit determination or unit modification.

27 D. Bargaining History

28 The success of bargaining patterns may be judged by their history. This Board is
29 loath to disturb existing units, whether established by agreement or by certification,
30 when bargaining in those units have been successful over a period of time. However,

31 _____
32 18. *Bureau of National Affairs, Inc., Washington D.C.*

19. *NLRB v Metropolitan Life Ins. Co. U.S. Supreme Court, 1965 58 LRRM 2721*

1 this does not preclude correction of errors or alternation of units to adjust to
2 change circumstances.

3 GENERAL CONCLUSIONS

4 Though this is the first extensive decision on this matter, I think the question
5 of unit modification will continue to be a difficult and perhaps an elusive problem
6 to the Board for sometime. A definite policy, I believe can only be developed over
7 a long period of time on a case-to-case method.

8 In a thorough review of the record it is clear that AFSCME failed to effectively
9 counteract some of the petitioner's contentions. Furthermore in a number of categories
10 AFSCME didn't even attempt to do so.

11 In this case, I conclude that the petitioners herein have satisfied the requirement
12 placed upon them. And, in view of the difference between them and the bulk of the unit
13 in various degrees in every category (managerial, community of interest, history of
14 collective bargaining, desires of employees) I find that the unit, excluding cashier
15 and assistant cashier satisfies the obligation placed on the Board in determining
16 a continuous appropriate unit.

17 I cannot emphasize enough that this decision to exclude the petitioners is based
18 on the fact that they were able to present testimony and evidence illustrating
19 differences between their positions and the rest of the unit in every category.

20 It is not my intent to establish a Board precedent to allow every employee who
21 may feel a union is not adequately representing his preceived interests to file a
22 unit modification petition.

23 CONCLUSION OF LAW

24 I find that the petitioners positions are distinct and different enough from
25 the other employees in the bargaining unit therefore the modification petition
26 is appropriate.

27 RECOMMENDED ORDER

28 It is ordered that Mr. Jess E. Miller and Ms. Sue J. Bidwell, Cashier and
29 Assistant Cashier, respectively, of the City of Livingston Water Department be
30 excluded from the certified bargaining unit: American Federation of State, County
31 and Municipal Employees, AFL-CIO, Local 2711 effective on the date of this decision.
32

1 NOTICE: It is further recommended to the proper parties consider a wavier
2 of MAC 24-3.8(10) - S8089 (11)(b); specifically the following provision: "If
3 the clarification or modification is found to be appropriate the Board shall
4 schedule an election or pre-election conference. It is additional recommended
5 that the parties inform, in writing, the Board's Executive, By 19 April 1976,
6 of their decision whether or not to waiver the above rule.

7 NOTICE: Exceptions may be filed to these Findings of Fact, Conclusion of Law,
8 and Recommended Order within twenty (20) days service thereof. If no exceptions
9 are filed with the Board within the period of time, the Recommended Order shall
10 become a Final Order. Exceptions shall be addressed to the Board of Personnel
11 Appeals, 1417 Helena Avenue, Helena, Montana 59601.

12 Dated this 19th day of March 1976.

13 BOARD OF PERSONNEL APPEALS

14 BY 
15 Ray Saetan
16 Hearing Examiner
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32