

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

1
2
3 IN THE MATTER OF UNIT)
CLARIFICATION NO. 4-79;)
4 LEWIS AND CLARK COUNTY,) FINDINGS OF FACT,
Petitioner,) CONCLUSION OF LAW
5 vs) AND RECOMMENDED
6 MONTANA PUBLIC EMPLOYEES) ORDER
ASSOCIATION, INC.)
7 Respondent.)
8

9 * * * * *

10 I. INTRODUCTION

11 Petitioner filed for unit clarification under ARM 24.26.534
12 on August 10, 1979 seeking to exclude an administrative secretary
13 and two deputy probation officer positions from a bargaining
14 unit of Lewis and Clark County employees represented by Respondent.
15 After determining that question of fact existed, the matter
16 was heard under authority of 39-31-207 MCA on November 20,
17 1979. Petitioner was represented by Mr. Leonard York; Respondent
18 was represented by Mr. Barry Hjort.

19 II. ISSUES

20 1. Whether the administrative secretary to the admin-
21 istrative assistant to the Board of Commissioners of Lewis and
22 Clark County is a confidential labor relations employee under
23 39-31-103 (12) MCA.

24 2. Whether the deputy probation officer position should
25 be excluded from the bargaining unit on the grounds that: (a)
26 the Petitioner is not the employer, (b) they lack a sufficient
27 mutuality of interest with other members of the unit, or (c)
28 they are professional employees.

29 III. FINDINGS OF FACT

30 1. Respondent is the exclusive representative of "...
31 all chief Deputies and Assistant Deputies in the office of the
32 Clerk and Recorder, Auditor, Treasurer, and Clerk of the
Court; all Probation officers in the Probation Department; all
Secretaries, Bookkeepers, Clerks and Stenographers in the

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1 Courthouse of Lewis and Clark County, Helena, Montana as
2 certified by the Board of Personnel Appeals, State of Montana,
3 October 21, 1976..." under the terms of the parties' current
4 collective bargaining agreement.

5 2. The administrative assistant to the Board of Commis-
6 sioners of Lewis and Clark County performs duties involved
7 with the preparation and review of the budget, personnel
8 administration, labor relations and special assignments. He
9 deals directly with four labor unions, sits in on contract
10 negotiations, prepares typewritten proposals and counter-
11 proposals for review by the County Attorney and Board of
12 Commissioners, develops policy recommendations and develops
13 bargaining strategies for review. He also is responsible for
14 the administration of five collective bargaining agreements
15 including the handling of grievances. His office houses the
16 county's comprehensive personnel files which contain, among
17 other things, information on labor relation matters.

18 3. The administrative secretary is responsible directly
19 to the administrative assistant. She performs all the office
20 clerical work including the typing and filing duties. She
21 also transcribes recordings from grievance hearings, has one
22 of the two keys to the personnel files, answers general questions
23 regarding labor relations policy when the administrative
24 assistant is out and performs the necessary clerical duties
25 involved when fact-finding or unfair labor charge proceedings
26 are in process. She takes notes at conferences of the Commis-
27 sioners and their administrative assistant dealing with bar-
28 gaining strategies and labor relations in general.

29 4. Petitioner and Respondent have agreed to exclude two
30 administrative secretaries in the County Commissioners' office
31 and one para-legal position in the County Attorney's office
32 from the Bargaining unit on the basis they are confidential.
The Commissioner's secretaries perform some of the work of the

1 secretary to the administrative assistant, but only when she
2 is absent from work.

3 5. The formal title of the subject position is Personnel
4 Technician/Administrative Secretary.

5 6. The youth court judge of each judicial district in
6 the state appoints persons to fill probation officer positions.
7 The duties of such positions are enumerated in 41-5-703 MCA.
8 He also appoints persons to fill deputy probation officer
9 positions and fixes their salaries within the statutory minimum
10 and maximum, i.e. not less than 60% or more than 90% of the
11 Chief Probation Officer's salary. The minimum salary provision
12 of the law was enacted by the 1979 Legislature effective July
13 1, 1979.

14 7. The existing collective bargaining agreement entered
15 into by the parties is in effect until June 30, 1980. Pertinent
16 parts of that contract are: (a) Respondent is the exclusive
17 representative for, among others, all probation officers in
18 the Probation Department and (b) special provision was made by
19 the parties to exclude deputy probation officers from that
20 part of the overtime clause (Article VI, Section 1) which
21 requires Petitioner to pay at one and one-half the regular
22 rate for all hours over eight in a day; they receive overtime
23 pay only where they work more than forty hours in a week.

24 8. Deputy probation officers work irregular hours.
25 They are on occasion called out at night and on weekends.
26 Their irregular hours because of call-outs is roughly compar-
27 able to those of a deputy sheriff.

28 9. Senate Bill No. 106 of the 1979 Legislature, was en-
29 acted, effective July 1, 1979, to provide salary increases for
30 probation officers and a minimum salary for deputy probation
31 officers. Section 41-5-705 MCA was amended by SB106 to read:

32 Deputy probation officer-salary. The judge having juris-
diction of juvenile matters may also appoint such additional
persons, giving preference to persons having the qualifica-

1 tions suggested for appointment as the chief probation
2 officer, to serve as deputy probation officers as the
3 judge deems necessary, their salaries to be fixed by the
4 judge. Such salaries shall not exceed 90% or be less
5 than 60% of the salary of the chief probation officer.

6 10. Deputy probation officers work in more than one
7 county. If there were a disagreement between the County
8 Commissioners and the District Court over the salary setting
9 of a deputy probation officer, the Court would order the
10 Commissioners to fund the salary as set by the Court.

11 11. The Probation Department is comprised of five
12 positions, chief probation officer, two deputy probation
13 officers, one restitution worker and one secretary.

14 12. The deputies are professional employees.

15 IV. OPINION

16 The 1979 Legislature amended the Collective Bargaining
17 for Public Employees Act to exclude persons found by this
18 Board to be confidential labor relations employees. As was
19 pointed out in the hearing examiner's decision in Montana
20 Public Employees Association vs. Montana Department of Labor
21 and Industry, UD18-79, issued October 22, 1979, the criteria
22 used by the Board of Personnel Appeals to determine whether
23 one is a confidential labor relations employee should be those
24 set forth in Siemens Corp., 224 NLRB 216, 92 LRRM 1455 (1976).
25 There the NLRB held that if the employee acts in a confidential
26 capacity, during the normal course of duties, to a person who
27 is involved in formulating, determining and effectuating the
28 employer's labor relations policy, he or she should be excluded
29 from any appropriate unit. Prior to Siemens the NLRB had held
30 to a stricter definition of confidential employee. In B.F.
31 Goodrich, 115 NLRB 722, 37 LRRM 1383 (1956) it ruled that the
32 definition used in Ford Motor Co., 66 NLRB 1317, 17 LRRM 394
33 (1946) should be strictly followed. In Ford it held that
34 those employees who assist and act in a confidential capacity
35 to persons who exercise managerial functions in the field of

1 labor relations should not be in a bargaining unit of rank and
2 file workers. The NLRB went on to say in Goodrich that only
3 those employees who assist and act in a confidential capacity
4 to persons who formulate, determine and effectuate management
5 policies in the field of labor relations should be excluded.

6 Applying the facts here to the criteria suggested in
7 UD18-79, I am compelled to conclude the administrative secretary
8 to the administrative assistant is a confidential labor relations
9 employee. The record shows she performs a wide range of
10 clerical duties including typing, filing, answering general
11 inquiries and transcribing. She takes notes at strategy
12 conferences of the Commissioners and the administrative
13 assistant, and performs the necessary clerical duties involved
14 with grievance, fact-finding and unfair labor practice charges.
15 Her supervisor is clearly a person who is involved in formulating,
16 determining and effectuating his employer's labor relations
17 policy. He is responsible for the administration of the County's
18 personnel system including its relations with labor organizations.
19 He makes labor policy recommendations to the Commissioners,
20 sits in on negotiations and administers the contracts after
21 they are executed. The only question raised in this case was
22 whether this secretary should be excluded on the basis of
23 confidentiality, the status of three other positions have been
24 agreed upon by the parties and was not presented for determina-
25 tion here.

26 The second question raised was whether the two deputy
27 probation officer positions should be excluded because Petitioner
28 is no longer the employer, there is insufficient community of
29 interest with other members of the unit or they are professional
30 employees and should not be in a bargaining unit with non-
31 professional employees. Although the NLRB is prohibited from
32 placing professional employees in the same unit with non-
33 professionals unless they, the professionals, desire to be in

1 the same unit, our act contains no such prohibition. This
2 Board's practice has long been to include both in the same
3 unit, if they have a sufficient mutuality of interest with
4 other employees. Therefore, if their professional status is
5 the only reason for excluding them I must conclude they are
6 properly placed in the bargaining unit with other county
7 employees represented by the Respondent.

8 A review of the evidence on the record, relative to the
9 deputy probation officers, and a comparison of that evidence
10 and any reasonable inference which could be made with the
11 factors set forth in 24.26.611 ARM leads to the conclusion
12 that they do have a community of interest with other employees
13 in the unit. Certainly they have as much a mutuality of
14 interest with the other employees as do, for example, employees
15 of the Clerk of Court or Auditor. Their interest in wages,
16 hours and fringe benefits must surely be the same as that of
17 the other unit employees. There is nothing on the record to
18 indicate otherwise. With respect to the history of collective
19 bargaining, there is nothing to indicate there has been anything
20 prior to the certification of this unit. And, as noted earlier,
21 this Board's practice has been to certify broad units. The
22 deputy probation officers are supervised by the chief probation
23 officer; other members of the unit are supervised by their
24 elected officials or chief deputies. If it is found that the
25 Commissioners are the employers of all persons in the unit,
26 then one could only conclude that supervision, in its broadest
27 sense, is common. Personnel policies are the same for probation
28 officers as for other employees--state law and the existing
29 agreement make them so. There is nothing on the record to
30 indicate that the extent of integration of work functions and
31 interchange among the probation officers and other employees
32 in the unit is any different than that of a Clerk of Court
employee and a Treasurer employee. Therefore, if Lewis and

1 Clark County is the employer of the subject employees, there
2 is no lacking of a community of interest to exclude them from
3 the bargaining unit. The fact that they are required to work
4 irregular hours at times is an insufficient reason to exclude
5 them. Other employees in numerous other bargaining units are
6 subject to call-back. Such matters are better dealt with at
7 the table and ultimately in a written collective bargaining
8 agreement--as the parties have done.

9 Whether Lewis and Clark County, through its Board of
10 Commissioners, or the District Court is the public employer
11 for purposes of collective bargaining under Title 39 Chapter
12 31 MCA is a question which needs a more detailed examination.
13 It also is a novel issue for the Board of Personnel Appeals.
14 Petitioners contend that the Judiciary not the County is the
15 public employer because the County does not set the deputy
16 probation officers' wages, hours or working conditions nor
17 does it hire, assign, lay off or fire them. Our law defines
18 public employer as:

19 ...the state of Montana or any political subdivision
20 thereof, including but not limited to any town, city,
21 county, district, school board, board of regents, public
22 and quasi-public corporation, housing authority or other
23 authority established by law, and any representative or
24 agent designated by the public employer to act in its
25 interest in dealing with public employees. 39-31-103 (1)
26 MCA.

27 From the above definition it is clear that the governing
28 body of the political subdivision was meant to represent the
29 public employer's interests in the collective bargaining
30 process. Yet, it is also clear that the District Courts are
31 not a part of County government and that, therefore, they are
32 not included in the "political subdivision" which the County
33 Commissioners are to represent. Section 41-5-705 MCA gives
34 responsibility to the District Court judge for appointing and
35 fixing the salaries of deputy probation officers within the
36 stated limits. The statute says nothing about hours or other

1 working conditions. Other county officials have similar authority
2 over their employees.

3 Section 39-31-103 (2) MCA defines "public employee" for
4 purposes of the Act as:

5 ... a person employed by a public employer in any capacity
6 except elected officials, persons directly appointed by
7 the governor, supervisory employees and management
8 officials, ... or member of any state board or commission
9 who serve the state intermittently, school district
10 clerks and school administrators, registered professional
11 nurses performing service for health care facilities,
12 professional engineers and engineers-in-training, and
13 includes any individual whose work has ceased as a conse-
14 quence of or in connection with any unfair labor practice
15 or concerted employee action.

16 Deputy probation officers are, obviously not excluded
17 from coverage by the above definition.

18 Section 39-31-301 MCA sets forth the identities of those
19 responsible for bargaining with the exclusive representative:

20 The chief executive officer of the state, the governing
21 body of a political subdivision, the commissioner of
22 higher education, whether elected or appointed, or the
23 designated authorized representative shall represent the
24 public employer in collective bargaining with an exclusive
25 representative.

26 Perhaps the only relevant conclusion which can be drawn
27 from a review of all the pertinent parts of the Act is that
28 deputy probation officers are public employees and are, there-
29 fore, entitled to all the rights, privileges and benefits of
30 such employees. Nothing is stated specifically regarding the
31 identity of their employer for purpose of collective bargaining.
32 Without question, the District Court appoints them, sets their
33 salary and through the chief probation officer assigns their
34 work. However, as was reasoned by the U.S. Supreme Court in
35 NLRB v. ATKINS & Co., 331 U.S. 398, 20 LRRM 2108 (1947), "the
36 terms 'employee' and 'employer' in this statute carry with
37 them more than the technical and traditional common law defini-
38 tions. They also draw substance from the policy and purpose of
39 the Act, the circumstances and background of particular employ-
40 ment relationships and all the hard facts of industrial life.

1 And so the Board in performing its delegated function of
2 defining and applying these terms, must bring to its task an
3 appreciation of economic realities, as well as a recognition
4 of the aims which Congress sought to achieve by this statute.
5 This does not mean that it should disregard the technical and
6 traditional concepts of 'employer' and 'employee.' But it is
7 not confined to those concepts. It is free to take account of
8 the more relevant economic and statutory considerations. And
9 a determination by the Board based in whole or in part upon
10 the considerations is entitled to great respect by a reviewing
11 court, due to the Board's familiarity with the problems and its
12 experience in the administration of the Act." (Emphasis added)

13 There is no clear delineation in our Act of who the
14 public employer is for purposes of collective bargaining for
15 the probation officers. Therefore, I believe it is necessary
16 that this Board look to the aims which the Legislature sought
17 to achieve when it enacted the law. Our problem with this
18 particular factual circumstance, although novel to this Board,
19 has not been altogether unheard of in other jurisdictions.
20 The state of Pennsylvania dealt with a similar problem in
21 Sweet v. Pennsylvania Labor Relations Board, 322 A.2d 362,
22 87 LRRM 2248 (1974). There the Pennsylvania Supreme Court
23 ruled that judges of the Court of Common Pleas were the employer
24 of at least some of the employees included in the bargaining
25 unit composed of Court-related employees. In Sweet v. PLRB,
26 99 LRRM 2486 (1978) the court ruled that the County Commissioners
27 were the representatives for collective bargaining purposes
28 because the Legislature had, since Sweet I, amended the law to
29 make the Commissioners the bargaining representative. The
30 statute expressly provided commissioners of counties of the
31 third through eighth class with exclusive authority to represent
32 all managerial interests in collective bargaining. The amend-
ment also stated that the exercise of such responsibilities

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1 by the commissioners would not affect the hiring, firing, and
2 supervision right vested in the judges.

3 Again the Pennsylvania Supreme Court in Ellenbogen v.
4 Allegheny County, 99 LRRM 248 (1978) said: "We think that the
5 legislative judgment expressed in this amendment...should
6 apply to all judicial districts." The Court went on to point
7 out several important public interests promoted by the amendment,
8 they are summarized as follows:

- 9 1. It promoted fiscal responsibility by allowing the
10 county commissioners to make managerial decisions
11 affecting the tax dollar. It permitted officials
12 charged with providing revenue to assess whether
13 employee proposals at the bargaining table were
14 feasible and consistent with the overall administra-
15 tion of county fiscal and governmental affairs.
- 16 2. It avoided the difficulty of having too many decision
17 makers and promoted swift and efficient bargaining
18 proceedings. It also advanced the public interest
19 in the settlement of labor disputes.
- 20 3. It recognized that judges are too scarce and too
21 essential to the administration of justice to require
22 them to perform the nonadjudicatory function of
23 managerial representative at the bargaining table.
- 24 4. It avoided the difficult questions of the propriety
25 of judges deciding appeals arising from proceedings
26 in which they sat before the Board and at the bar-
27 gaining table.
- 28 5. It made clear that by appointing county officials to
29 sit on behalf of judges it in no way detracted from
30 the authority of judges to hire, fire, and supervise
31 employees.

32 The Pennsylvania Legislature's reasoning appears sound
and, in my opinion, good public policy. A review of several
other cases reinforces that opinion. In the absence of specific
legislation courts have come to a number of conclusions with
respect to who the employer should be. For example, in Ulster
County v. CSEA Unit, Sheriff's Dept., 79 LRRM 2265 (1971), a
county and its sheriff were held to be joint employers because
each had an important degree of control over the employment
relationships. The court stated "The statute mandates that
employers negotiate with respect to the terms and conditions
of employment... Obviously, these negotiations cannot be
effective if employees are obliged to negotiate with an employer
who is without power with respect to the matter in dispute."

1 In Costigan v. Local 696, 90 LRRM 2328, (1975) the Pennsylvania
2 court ruled that where a city paid most of the employee salaries
3 and other compensation costs and exercised considerable control
4 over fringe benefits accorded employers it was a joint employer
5 with the register of wills who had exclusive power to hire,
6 fire, promote, and to direct the work of individuals working
7 in his office. No single entity controlled the terms of the
8 employment relationships. And, "The duty to pay an employee's
9 salary is often coincident with the status of employer, but
10 not solely determinative of that status." Sweet v. P.L.R.B., 87
11 LRRM 2248 (1974). In AFSCME, Local 2390 v. City of Billings,
12 93 LRRM 2753 (1976) the Montana Supreme Court held that the
13 Library board of trustees was not a wholly independent and
14 autonomous entity separate and apart from the local governing
15 body. The board of trustees was granted independent powers to
16 manage and operate the library, but they were an adjunct of
17 local government, the City of Billings.

18 It is abundantly apparent that the District Courts are
19 not adjuncts of Montana County government; however, I do not
20 believe such relationships must exist as a prerequisite to a
21 determination that the policy of the Act is best promoted by
22 declaring the County Commissioners the employer for purposes
23 of collective bargaining. Such policy does not infringe upon
24 the judiciary's independence. In fact, all the reasoning set
25 forth in Ellenbogen, supra, seems applicable here.

26 No insurmountable difficulties for labor, management or
27 the judiciary should arise if the County is the public employer
28 for collective bargaining purposes. Since the inception of
29 the subject unit the Commissioners representative have negoti-
30 ated for all the employees in the existing unit including the
31 deputy probation officers. In order to abide by the 1979 law
32 providing that the judge set the salaries of these employees,

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1 the Commissioners need only confer with the judge. To hold
2 that the probation officers belong in a unit of their own
3 would, for all practical purposes, deny them their right to
4 organize and bargain collectively. They are small in number
5 and would be relatively ineffective as a bargaining unit.
6 Problems relative to overtime pay for the deputies have been
7 worked out by the parties.

8 To summarize, the employees right to organize and bargain
9 effectively with their employer outweighs any advantage which
10 might be found in removing them from the unit. In the absence
11 of legislation to the contrary, I believe this Board's policy
12 should be to keep the deputy probation officers in the existing
13 unit--for the reasons discussed above.

14 V. CONCLUSION OF LAW

15 The administrative secretary to the administrative
16 assistant to the Lewis and Clark County Board of Commissioners
17 is a confidential labor relations employee within the meaning
18 of 39-31-103 (12) MCA.

19 The deputy probation officers are properly a part of the
20 existing bargaining unit, as modified above, which is appropri-
21 ate under 39-31-202 MCA.

22 VI. RECOMMENDED ORDER

23 That the petition to exclude the administrative secretary
24 position from the bargaining unit be granted and that the
25 petition to exclude two deputy probation officers be denied.

26 VII. NOTICE

27 Exceptions may be filed to these Findings of Fact, Conclu-
28 sion of Law and Recommended Order within twenty (20) days of
29 service thereof. If no exceptions are filed with the Board of
30 Personnel Appeals within that period, the Recommended Order
31 shall become the Order of the Board. Exceptions shall be
32 addressed to the Board of Personnel Appeals, Capitol Station,
Helena, Montana 59601.

1 Dated this 25 day of April, 1980.

2 BOARD OF PERSONNEL APPEALS

3
4 
5 Jack H. Calhoun
6 Hearing Examiner

7 CERTIFICATE OF MAILING

8
9 I, Jennifer Jacobson, do hereby certify and state that I
10 did on the 4th day of April, 1980 mail a true and correct
11 copy of the above FINDINGS OF FACT, CONCLUSION OF LAW AND
12 RECOMMENDED ORDER to the following:

13
14 
15 Jennifer Jacobson

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