

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-83:

Board of Trustees of School)
District No. 1 Butte-Silver)
Bow, Montana,)
Petitioner,)
vs.)
Butte Teamsters Union,)
Local No. 2,)
Respondent.)

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND
RECOMMENDED ORDER

* * * * *

A unit clarification petition was filed with this Board on March 2, 1983, pursuant to ARM 24.26.630, requesting that the bargaining unit represented by Respondent be declared inappropriate because it is comprised of employees who are excluded under Section 39-31-103(2)(b) MCA. A hearing was held on May 24, 1983 under authority of Section 39-31-207 MCA. Petitioner was represented by its counsel, Donald C. Robinson and Robert C. Brown; Respondent was represented by its counsel D. Patrick McKittrick. After receiving, hearing and reviewing all evidence on the record, including the sworn testimony of witnesses, I find as follows:

FINDINGS OF FACT

1. The bargaining unit in question here is comprised of 17 principals and assistant principals, 12 program directors and the assistant superintendent employed by School District No. 1, Butte, Silver Bow County. The Superintendent and the Director of Business Affairs are not in a bargaining unit.

2. The unit has remained essentially unchanged since 1969, at which time it was represented for collective bar-

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gaining purposes by the Butte Administrators' Association.

3. Petitioner recognized the Butte Administrators' Association as the exclusive representative of the unit beginning in 1969 and negotiated collective bargaining agreements with its representatives for each year through June 30, 1973. At the time of the hearing the parties were negotiating another contract.

4. During the early spring of 1973 the Butte Administrators' Association began negotiating with the School District. During late spring and early summer of that year the Teamsters' Union came in and negotiated the new agreement with the District.

5. The Teamster's representative and the representative of the School District reached agreement on the terms of the new contract during the last part of June, 1973.

6. The effective date written on the contract was July 1, 1973; however, it was not actually signed until sometime in August. It recognized the Teamsters as the exclusive representative for the unit.

7. There is a total of nine bargaining units, represented by various other unions including the subject unit, with which the School District bargains and maintains a contractual relation.

8. The duties and responsibilities of persons who occupy positions in the unit represented by the Butte Teamsters Union include the following:

- a. making recommendations to the Superintendent or the Board of Trustees,
- b. evaluating the performance of subordinate personnel
- c. disciplining subordinates,
- d. assigning and scheduling the work of subord-

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inates,

- e. developing a budget,
- f. approving the expenditure of budgeted funds,
- g. making policy recommendations to the School Board,
- h. implementing Board policy.

9. The collective bargaining agreement between the parties contains a provision which bases salaries, in part, on supervisory responsibilities.

10. Since July 1, 1973 there have been five strikes by unions other than the Butte Teamsters Union against the School District. In each case the members of the Teamsters unit honored the picket lines and did not render assistance in keeping the school open. Of a total of nine bargaining units in the District, the Teamsters Union represents only the unit here.

11. In January, 1983 the Butte Teamsters unit went on strike and closed the schools for four days.

12. Grievances involving discharge, discipline, transfers, seniority and work scheduling have been filed over the years by the Butte Teamsters Union members against the School District; some have gone to arbitration.

13. Members of the bargaining unit in question have testified at arbitration hearings involving the teachers bargaining unit. No problems have arisen from those occasions.

14. Members of this bargaining unit have served on committees with School Board members and with the public. No difficulty has been encountered.

15. Members of the unit have appeared at hearings and defended District policy.

16. Members of the unit do not participate in the

1 District's negotiations with other unions, nor have they ever
2 been asked to do so.

3 17. On one occasion the members of the Butte Teachers
4 Union filed a grievance against one of the members of this
5 bargaining unit over a teacher's assignment.

6 18. On at least one occasion the assistant superin-
7 tendent was required to reprimand a principal.

8 19. After Petitioner filed its unit clarification
9 petition it negotiated for a new contract with Respondent,
10 but only after advising Respondent, in writing, that Peti-
11 tioner would not waive its right to pursue the matter
12 pending before this Board.

13 20. The contract in effect at the time the petition
14 for unit clarification was filed stated "This agreement
15 shall be effective as of July 1, 1982, and shall continue in
16 effective for one years (sic) until the 30th day of June,
17 1983." Both parties understood that the agreement was for a
18 full year.

19 21. Members of the bargaining unit participate in a
20 union pension and health and welfare plan which was bar-
21 gained for with Petitioner beginning in 1973. They have ac-
22 cumulated past service credits some of which were granted
23 for benefit purposes when they first became contributors.
24 Continued participation requires that they work under a
25 collective bargaining agreement providing for pension con-
26 tributions. Members rights in the pension vest after 10
27 years of continuous contribution.

28 ISSUES

29
30 1. Whether Section 39-31-109 MCA, the grandfather
31 clause, is applicable to this case.

32 2. If the grandfather clause is applicable, are the

1 positions supervisory or managerial?

2 3. If the positions are supervisory or managerial,
3 does their inclusion in a bargaining unit create an actual
4 substantial conflict?

5 4. Whether the question raised by the unit clarifica-
6 tion is properly before this Board.

7 5. Whether the petition was timely filed pursuant to
8 Section 24.26.630(1) ARM.

9 6. Should the petition be dismissed because it was
10 filed during the term of a collective bargaining agreement?

11 7. Does Section 39-31-109 MCA prohibit a determina-
12 tion by this Board in this matter?

13 8. Whether the test adopted by this Board and the
14 Montana Supreme Court in City of Billings Montana vs.
15 Billings Firefighters Local No. 521 and Board of Personnel
16 Appeals, (1982) _____, Mont. _____, 651 P.2d 627, violates
17 the U.S. and Montana Constitutions.

18 9. What effect did the negotiation of a new agreement
19 have on this proceeding?

20 10. Is the doctrine of equitable estoppel applicable
21 here?

22 11. Of what significance was the 1983 Legislature's
23 considerations of the grandfather clause?

24
25 DISCUSSION

26
27 The primary issues brought on by the unit clarification
28 petition center around the applicability of the grandfather
29 clause, Section 39-31-109 MCA, to the facts of the instant
30 case. Respondent has raised several issues which should
31 logically be addressed prior to examining those directly
32 stemming from the filing of the petition.

1 Respondent contends that questions of representation
2 cannot be reviewed by this Board in a unit clarification
3 proceeding because Section 39-31-202 MCA and Section
4 24.26.630 ARM provide the exclusive means by which appro-
5 priate unit questions may be brought and Sections 39-31-207
6 and 208 MCA provide the exclusive vehicle for raising issues
7 of representation. According to Respondent, since the major
8 premise of Petitioner's case centers around a representation
9 question, this petition should be dismissed. The primary
10 question raised by the filing of the unit clarification pe-
11 tition was whether the positions in question were super-
12 visors or management officials. A resolution of that issue
13 will necessarily require an examination of applicable law,
14 including City of Billings, supra, and Montana Public
15 Employees Association v. Department of Administration,
16 Labor Relations Bureau, UC 6-80; however, there was no
17 question of representation raised by the filing of the unit
18 clarification petition itself. The question presented by
19 the petition was what is the appropriate unit under the law,
20 not who is the exclusive representative.

21 Next Respondent urges that the petition was not timely
22 filed. Section 24.26.630(1) ARM provides that a unit clari-
23 fication petition may not be filed if the parties are en-
24 gaged in negotiations or within 120 days of the expiration
25 of the agreement. The petition was filed on March 2, 1982.
26 There were exactly 120 days remaining before the contract
27 expired on June 30th. Although the contract states that the
28 effective dates are July 1, 1982 until June 30, 1983, it
29 also states that it is in effect for one year. One year
30 from July 1, 1982 is July 1, 1983. All evidence on the
31 record indicates the parties believed they had a contract
32 covering each full year from July 1, 1973. There is

1 nothing to indicate a gap of one day between the expiration
2 of the old contract and the beginning of the new contract.
3 Wallace-Murray Corp., 78 LRRM 1046 (1971) is not applicable
4 here because Section 24.26.630(1) ARM specifically allows
5 the filing of a unit clarification petition within the time
6 limits and under the conditions mentioned above. That the
7 petition was filed during the term of a collective bar-
8 gaining agreement is not significant inasmuch as the re-
9 quirements of Section 24.26.630 ARM were complied with. To
10 prohibit the filing of a unit clarification petition during
11 the term of an agreement would, in effect, proscribe all
12 such filings.

13 Respondent suggests that this Board is specifically
14 prohibited by Section 39-31-109 MCA from determining the
15 appropriateness of the bargaining unit in question because
16 the unit and the agreement were in effect prior to the ef-
17 fective date of the Collective Bargaining for Public Emp-
18 ployees Act. However, it is precisely that circumstance,
19 i.e., where Sections 39-31-109 and 201 MCA are in conflict,
20 that gave rise to the adoption of the two-prong test by the
21 Court in City of Billings, supra. The appropriateness or
22 inappropriateness of the unit depends on whether an appli-
23 cation of the test criteria shows conflict or a lack there-
24 of.

25 Respondent contends that the test for resolving con-
26 flicts between Sections 39-31-109 and 201 MCA as adopted by
27 this Board and affirmed by the Montana Supreme Court vio-
28 lates both the Montana and U.S. Constitutions, the Montana
29 Administrative Procedure Act and the policy of the Montana
30 Collective Bargaining for Public Employees Act. The Board
31 of Personnel Appeals has in the past deferred constitutional
32 questions to the courts. Since no rule making was involved

1 when the two-pronged test was adopted, the notice and hear-
2 ing provisions of the Montana Administrative Procedure Act
3 were inapplicable. Adjudicated cases may serve as vehicles
4 for the formulation of agency policies. See NLRB v. Wyman
5 Gordon Co., 394 U.S. 759 (1969) and Montana, ex rel. Board
6 of Personnel Appeals v. District Court, 598 P.2d 1117, 103
7 LRRM 2297 (1979). With respect to the policy of the Act,
8 the Court in City of Billings, supra, indicated the policy
9 of the Act was promoted by the adoption of the test.

10 At the time of the hearing in this matter the parties
11 had scheduled negotiations for a new contract. The Dist-
12 rict, however, prior to entering negotiations advised Res-
13 pondent in writing that it did not waive its right to pursue
14 this proceeding. In June the parties entered into an agree-
15 ment. Respondent urges that absent any evidence that the
16 agreement was reached subject to the unit clarification
17 proceeding, the issue is moot and barred by the current
18 collective bargaining agreement. A letter from counsel for
19 Petitioner to Mr. Roberts (Findings No. 19) did just that,
20 it advised Respondent that the District would negotiate
21 subject to the unit clarification proceeding. The instant
22 case is similar to Stafford-Lowdon Co., 105 LRRM 1538
23 (1980), cited by Respondent, where the National Labor Rela-
24 tions Board considered a unit clarification petition despite
25 the existence of a new contract between the parties.

26 Respondent advances the argument that Petitioner should
27 be estopped from contesting the existence of the bargaining
28 unit since Petitioner has, from 1969 on, entered into col-
29 lective bargaining agreements with the representatives of the
30 bargaining unit. It does not appear from the record, how-
31 ever, that Petitioner has falsely represented or concealed
32 facts related to this matter.

1 Respondent contends that since the 1983 Legislative
2 Assembly considered, and ultimately rejected, an amendment
3 to the Act which would have excluded supervisory personnel
4 from collective bargaining units, it expressed an intent to
5 preserve the rights of employees such as those in the sub-
6 ject bargaining unit. That the amendment was not passed
7 does not furnish insight as to why it failed.

8 The Collective Bargaining for Public Employees Act
9 excludes from its coverage several categories of public emp-
10 loyees and officials. Specifically, Section 39-31-103(2)(b)
11 MCA provides:

12 "Public employee" does not mean: . . .
13 (iii) a supervisory employee . . .
14 (iv) a management official . . .
15 (viii) a school administrator . . .
16 . . .

17 The statute goes on to define a supervisor as an emp-
18 loyee who has authority to hire, transfer, suspend, lay off,
19 recall, promote, discharge, assign, reward, discipline,
20 direct and adjust grievances of other employees or to ef-
21 fectively recommend such action using independent judgment.
22 Likewise, a management official is defined as a representa-
23 tive of management who has authority to act for the agency
24 on any matters related to the implementation of agency
25 policy. School administrator, however, is not defined.

26 There is no dispute over the supervisory status of the
27 employees who comprise the bargaining unit in question here.
28 They all, according to the job descriptions in evidence,
29 possess one or more of the elements of authority set forth
30 in the definition of supervisor. Whether they are "school
31 administrators" is not at all clear. Section 20-4-402 MCA
32 states the district superintendent is the executive officer
of the trustees and is responsible for the implementation

1 and administration of their policies. That definition sug-
2 gests there is only one administrator in each school dis-
3 trict. For purposes of analysis of the facts and issues
4 present in this matter, it is sufficient to conclude that
5 the employees in the bargaining unit under challenge here
6 are supervisors. It is not necessary to decide whether they
7 are management officials or school administrators.

8 Section 39-31-109 MCA is the part of the Act which is
9 at the center of the controversy between the parties. It
10 states:

11 Nothing in this chapter shall be construed to
12 remove recognition of established collective
13 bargaining agreements already recognized or in
14 existence prior to the effective date of this act.

15 It is readily apparent that the two Sections, 39-31-103
16 and 109 MCA, are in conflict when there exist, in a grand-
17 fathered bargaining unit, persons who hold supervisory posi-
18 tions. The Montana Supreme Court, in City of Billings v.
19 Billings Firefighters, Local No. 521, ___ Mont. ___, 651
20 P.2d 627 (1982), adopted a two part test, which this Board
21 had earlier used, to reconcile such conflict. The test
22 requires that the following questions be answered in light
23 of the facts of each case:

- 24 (1) Is the position in question that of a super-
25 visor or management official?
26 (2) If it is, does the inclusion of that position
27 in the bargaining unit create an actual substan-
28 tial conflict which results in the compromising of
29 the interests of any party to its detriment?

30 The Court reasoned that "the test adopted by the BPA
31 allows for grandfathering and also prevents conflicts in-
32 tended to be avoided by the exclusion of supervisors and
management officials from the unit. If the presence of a
supervisory or management position within the unit becomes
the source of strife and unrest; the position will be re-
moved from the unit. If there is no strife or unrest,

1 evidenced by actual substantial conflict, the grandfathered
2 unit will be allowed to remain 'as is'." The Court went on
3 to acknowledge that the Board recognized that where the two
4 Sections come into conflict, the conflict must be settled in
5 light of the policy of the Act:

6 39-31-101. Policy. In order to promote public
7 business by removing certain recognized sources of
8 strife and unrest, it is the policy of the state
9 of Montana to encourage the practice and procedure
of collective bargaining to arrive at friendly
adjustment of all disputes between public employ-
ers and their employees.

10 Petitioner argues that Section 39-31-109 MCA, the grand-
11 father clause, does not apply in this case because the
12 Teamsters Union did not become the exclusive representative
13 of the bargaining unit until July 1, 1973 - on the same day
14 the Collective Bargaining for Public Employees Act became
15 effective. This Board, in Montana Public Employees Associ-
16 ation v. Department of Administration, Labor Relations
17 Bureau, UC 6-80 (1981), decided that the grandfather clause
18 has no application when there has been a change of exclusive
19 representatives in a grandfathered bargaining unit.

20 It is apparent, as Petitioner urges, that the Teamsters
21 Union was first recognized in writing by the District when
22 the 1973 agreement became effective on July 1st. However,
23 the School District bargained with the Teamster representa-
24 tive as such during late spring and early summer of 1973 and
25 reached agreement with him on a new contract during the last
26 part of June. Before July 1, 1973 there were no means,
27 short of voluntary employer recognition, for a bargaining
28 unit comprised of public sector employees in Montana to
29 change exclusive representatives. The Act was not, at the
30 time, in effect. Although the Teamsters Union did not
31 appear as the exclusive representative in the parties'
32 contract until July 1, 1973, the District had in fact rec-

1 ognized it as such prior to that time. Such de facto recog-
2 nition cannot be ignored nor can the grandfather clause be
3 held to be inapplicable. Three facts are salient: (1) the
4 School District recognized the Teamsters Union as the exclu-
5 sive representative of the bargaining unit, (2) the District
6 bargained with the Teamsters Union, and (3) the District
7 reached an agreement with the Teamsters Union. All three
8 actions occurred prior to July 1, 1973 and compel the con-
9 clusion that this unit is grandfathered and the grandfa-
10 thered exclusive representative is the Teamsters Union.

11 The difficult question brought by this matter is the
12 second part of the two part test: is there an actual sub-
13 stantial conflict resulting in the compromise of the inte-
14 rests of any party to its detriment?

15 There are three areas of potential conflict in the fact
16 situation presented here. First, there is the intra-unit
17 conflict possibility. Second, there is a possibility for a
18 conflict between this unit and other employee groups repre-
19 sented by different unions. Third, is the possibility of
20 conflict between the bargaining unit and management. Of the
21 first type, there is no evidence on the record that an
22 actual substantial conflict among persons in the bargaining
23 unit exists. There was testimony from the Superintendent
24 that the Assistant Superintendent has had to reprimand
25 fellow bargaining unit members, but there is no evidence
26 that he was unable to do so successfully. There would
27 appear to be no inherent conflict in having one bargaining
28 unit member superior in the organization to another bar-
29 gaining unit member. Further, there is no evidence of an
30 actual conflict between principals and assistant principals.
31 Of the second kind of conflict suggested, there is, again,
32 no evidence of conflict. The type of conflict we would look

1 for here is the inability of a member of this grandfathered
2 bargaining unit (e.g., a principal) to adequately supervise,
3 discipline, etc. a member of another bargaining unit (e.g.,
4 a teacher or a janitor). The fact that the principals,
5 assistant principals and program directors are in their own
6 bargaining unit and are represented by a different union
7 vitiates against a finding of conflict between them and
8 those employees supervised by them who are in another bar-
9 gaining unit, represented by a different union. There also
10 is no evidence on the record to substantiate such conflict.

11 The third type of conflict listed above is the kind
12 which exists between the parties here. Members of the bar-
13 gaining unit in question have honored the picket lines of
14 other unions which have gone on strike against the District,
15 they have gone on strike themselves, and they have filed
16 grievances challenging actions taken by the District. There
17 can be little doubt that such conduct might be against the
18 wishes of the District. However, it is also conduct, which
19 when engaged in by members of traditional bargaining units,
20 would be protected by the Act. The conduct engaged in by
21 Respondent is not different from the conduct of any other
22 union which deals with the District. The activities engaged
23 in by the union which give rise to the conflict Petitioner
24 complains of is protected conduct. Strikes, both economic
25 and unfair labor practice, are protected concerted activity.
26 NLRB v. Erie Register Corp., 373 US 221, 53 LRRM 2121
27 (1963); NLRB v. MacKay Radio & Tel. Co., 304 US 333, 2 LRRM
28 610 (1938); State Department of Highways v. Public Employees
29 Craft Council, 165 Mont. 349, 529 P.2d 785 (1974). Employ-
30 ees are also engaged in protected concerted activity when
31 they respect picket lines established by other employees.
32 Teamsters Local 79 v. NLRB (Redwing Carriers, Inc.), 50 LRRM

1 1440 (1962), enforced 325 F.2d 1011, 54 LRRM 2707 (CA DC,
2 1963), cert. denied, 377 US 905, 55 LRRM 3023 (1964). The
3 filing of grievances under the terms of a collective bar-
4 gaining agreement is protected conduct. John Sexton & Co.,
5 217 NLRB 80, 88 LRRM 1502 (1975); Ernst Steel Corp., 212
6 NLRB 78, 87 LRRM 1508 (1974); Southwestern Bell Tel. Co.,
7 212 NLRB 43, 87 LRRM 1446 (1974).

8 The bargaining unit in question here has existed for
9 several years and was voluntarily recognized by the School
10 District long before the Act was passed. If any meaning is
11 to be given to the grandfather clause, as it applies to this
12 unit, the conflict between the bargaining unit and the Dist-
13 rict must be viewed as less than substantial. It is conduct
14 which, when engaged in by other unions, is protected.

15 The conflict dealt with by the Court in City of
16 Billings, supra, was the kind which may exist when super-
17 visors are placed in a unit with employees over whom they
18 exercise supervisory authority. When the evidence shows
19 that such a relationship creates actual substantial conflict
20 they must be removed from the unit. In that situation the
21 conflict arises, not from the fact that the bargaining unit
22 might act in a manner contrary to management's wishes, but
23 from the fact that it places the supervisor in a position of
24 having to represent both his interests as a member of a
25 bargaining unit and the employer's interests at the same
26 time. In the instant case that conflict is not present.
27 All members of the unit are supervisors. There was no
28 evidence to show actual intra-unit conflict; therefore, the
29 sort of actual substantial conflict which the Court contem-
30 plated in City of Billings, supra, cannot be said to exist
31 here. There is no conflict within the unit. The grand-
32 father clause establishes the unit in question as a grand-

1 fathered bargaining unit. City of Billings, supra. There
2 is no intra-unit conflict. The type of alleged conflict
3 asserted by the School District is the type which is pro-
4 tected both by the Collective Bargaining for Public Employ-
5 ees Act and by the National Labor Relations Act. I, there-
6 fore, find no actual substantial conflict which would war-
7 rant the dissolution of the entire unit. The policy of the
8 Act favors collective bargaining. The most the School
9 ~~District accuses the unit of is engaging in~~ conduct which is
10 protected by the Act and which is part and parcel of the
11 collective bargaining process. For the above reasons and
12 given the absence of conflict within the unit, the policy of
13 the Act would seem to be better promoted by leaving this
14 unit intact.

15
16 CONCLUSIONS OF LAW

17
18 Section 39-31-109 MCA, the grandfather clause is appli-
19 cable in this case. The positions in question are super-
20 visory as that term is used in Section 39-31-103(2)(b) MCA.
21 There is no actual substantial conflict within the bar-
22 gaining unit as it presently exists.

23
24 RECOMMENDED ORDER

25
26 Since there is no actual substantial conflict within
27 the bargaining unit as it exists, the petition to declare it
28 inappropriate is dismissed.

29
30 NOTICE

31
32 Exceptions to these findings of fact, conclusions of

1 law and recommended order may be filed within twenty days of
2 service. If exceptions are not filed, the recommended order
3 will become the final order of the Board of Personnel
4 Appeals.

5 Dated this 14th day of March, 1984.

6
7 Board of Personnel Appeals

8 BY Jack H. Calhoun
9 Jack H. Calhoun
Hearing Examiner

10 CERTIFICATE OF MAILING

11 The undersigned does certify that a true and correct
12 copy of this order was mailed to the following on the 14th
day of ~~February~~, 1984:

13 March
D. Patrick McKittrick
14 McKITTRICK LAW FIRM
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Jack H. Calhoun