

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-93:

FLORENCE-CARLTON CLASSIFIED EMPLOYEES )  
ASSOCIATION, MEA/NEA, )  
Petitioner/Appellant, )

INTERLOCUTORY  
ORDER

- vs -

FLORENCE-CARLTON HIGH SCHOOL & )  
ELEMENTARY DISTRICT NO. 15-6, )  
Respondent. )

\* \* \* \* \*

The Findings of Fact; Conclusions of Law; and Order was issued by Gordon R. Bruce, Hearing Examiner, dated November 22, 1993.

Petitioner/Appellant's Exceptions to Findings of Fact; Conclusions of Law; and Recommended Order were filed by its Attorney Karl J. Englund on December 9, 1993.

Oral argument was scheduled before the Board of Personnel appeals at the March 30, 1994 meeting. Karl J. Englund, Attorney, submitted argument on behalf of Appellants. Dr. Ernest Jean submitted argument on behalf of Respondent.

After reviewing the record and considering the briefs and oral arguments, the Board order as follows:

1. IT IS ORDERED that the Findings of Fact; Conclusions of Law; and Recommended Order of the Hearing Examiner is vacated and the case remanded to the Hearing Examiner to conduct a new hearing.

2. IT IS ORDERED that the burden of proof be placed on the Respondent to prove the newly created position is a confidential employee as defined in Section 30-31-103(3) MCA, and that the utilization of this proper burden of proof be reflected in the proposed order.

DATED this 15<sup>th</sup> day of June, 1994.

BOARD OF PERSONNEL APPEALS

By Willis M. McKeon  
WILLIS M. MCKEON  
CHAIRMAN

Board members Henry and Schneider concur.

Board member Talcott dissenting.

\* \* \* \* \*

\* \* \* \* \*

CERTIFICATE OF MAILING

I, Emmifer Jacobson, do hereby certify that a true and correct copy of this document was mailed to the following on the 10th day of June, 1994:

KARL J. ENGLUND  
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DR. ERNEST JEAN, SUPERINTENDENT  
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\* \* \* \* \*

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-93:

FLORENCE - CARLTON CLASSIFIED )	
EMPLOYEE ASSOCIATION, MEA/NEA, )	
) Petitioner, )	
) )	
) )	FINDINGS OF FACT;
) )	CONCLUSIONS OF LAW;
) )	AND
FLORENCE - CARLTON HIGH SCHOOL )	RECOMMENDED ORDER
& ELEMENTARY DISTRICT 15-6, )	
) Respondent. )	

\* \* \* \* \*

**I. INTRODUCTION**

A formal hearing in the above entitled matter was conducted by telephone on August 19, 1993. The hearing was conducted under authority of Section 39-31-207, MCA, pursuant to ARM 24.26.630, and in accordance with the Montana Administrative Procedure Act, Title 2, Chapter 4 (MAPA). The Petitioner was represented by Karl J. England, Attorney at Law. The Respondent was represented by Don D. Klepper, Ph.D. Witnesses included Sandy Bushek, UniServ Director, MEA/NEA; Dr. William Ernest Jean, Superintendent; Eleanor McCullough, association member, and Debbie Michalik, incumbent in the Personnel/Labor Relations Assistant-Secretary/Receptionist position.

**II. BACKGROUND**

On September 30, 1992, the Petitioner filed its petition for Unit Clarification with this Board. Petitioner alleges that a newly created position of "Personnel/Labor Relations Assistant-Secretary/Receptionist" should be included within the existing classified employee bargaining unit. Petitioner argues that the

1 Respondent attempts to circumvent the bargaining unit by creating  
2 a new position purportedly performing as a confidential labor  
3 relations employee as defined in Section 39-31-103 (3), MCA,  
4 (1993).

5 **III. ISSUE**

6 Whether the position of Personnel/Labor Relations Assistant-  
7 Secretary/Receptionist should be included in the existing  
8 bargaining unit.

9 **III. FINDINGS OF FACT**

10 1. The Florence-Carlton Classified Employee Association,  
11 MEA/NEA, (hereinafter "Association") is the labor organization  
12 which represents certain individuals employed by the Florence-  
13 Carlton High School & Elementary District, 15-6 (hereinafter  
14 "School District"). (Exhibit J-1)

15 2. In the 1987 Agreement between the Board Of Trustees of  
16 School District 15-6 and the Association, the parties agreed that  
17 the Secretary to the superintendent as related to labor relations  
18 was that position held by incumbent, Dorothy Rhodes, which was  
19 excluded from the Association unit consisting of approximately  
20 fourteen (14) members. In 1987 the incumbent performed confidential  
21 labor relation duties for the Superintendent, and continues to act  
22 in that capacity for the Respondent, as revealed by her initials  
23 appearing on Board documents. (Testimony Sandy Bushek and Eleanor  
24 McCullough) (see Exhibit Nos. 2, 3, 4, & 5)

25 3. A new agreement was initiated between the Association and  
26 the School District effective July 1, 1992 through June 30, 1994.  
27 (See Exhibit No. 1)

28

1 4. In the Minutes of Board Meeting held July 9, 1991, it was  
2 noted that Debbie Michalik had been hired as the full-time  
3 temporary district "secretary-receptionist." (Exh. 2)

4 5. In the Minutes of Board Meeting held June 9, 1992, it was  
5 noted as follows:

6 Mr. Moore moved to offer Debbie Michalik a 10 month  
7 position to be evaluated in one year. Mr. Zachariasen  
8 seconded. Mr. Moore amended his motion to read work the  
9 same amount of time as the other secretaries. The motion  
passed with a vote of 4-1, with Mrs. Shughart casting the  
opposing vote. (Exh. 3)

10 6. The position description for the position held by  
11 incumbent, Debbie Michalik, lists 9 responsibilities under Section  
12 A - Personnel/Labor Relations Assistant and 8 responsibilities  
13 under Section B - Receptionist/Secretary. Among the  
14 responsibilities listed under "A-9" is that the position directly  
15 assists the district's labor relations representative and prepares  
16 labor relations cost-outs and other pertinent information  
17 during/for the labor relations process. (See Exhibit R-1)

18 7. The credible testimony of Dr. Jean, reveals that Debbie  
19 Michalik's position performs all the functions found in Section A  
20 of the position description, although he could not give any  
21 percentage breakdowns for work performed under Section A or Section  
22 B. (Testimony Dr. Jean)

23 8. Incumbent, Debbie Michalik, prepares computer generated  
24 analyses of the costs of various bargaining proposals used directly  
25 in collective bargaining (cost-out sheets); has access to  
26 confidential labor relations information, including personnel  
27 files, application files and financial records; and she did  
28 participate in the last round of collective bargaining between the  
Association and the School District. She has not, however,

1 attended executive sessions of the Board of Trustees. (Testimony  
2 Debbie Michalik)

3 9. Witnesses Sandy Bushek and Eleanor McCullough did not  
4 have personal knowledge of all the duties being performed by  
5 incumbent, Debbie Michalik, and could not attest to whether she  
6 performed confidential labor relations duties as described in the  
7 incumbent's position description. (Testimony Bushek and McCullough)

#### 8 IV. DISCUSSION

9 The Montana Supreme Court has approved the practice of the  
10 Board of Personnel Appeals in using federal court and NLRB  
11 precedents as guidelines in interpreting the Public Employees  
12 Collective Bargaining Act (the Act) as the state act is so similar  
13 to the federal Labor Management Relations Act (LMRA). State  
14 Department of Highways v. Public Employees Craft Council, 165 Mont.  
15 349, 529 P.2d 785 (1974); City of Great Falls v. Young (Young III),  
16 221 Mont. 13, 686 P.2d 185, 119 LRRM 2682 (1984).

17 "Confidential Employees" as defined in the Public Employees  
18 Collective Bargaining Act are not statutory employees entitled to  
19 the protection of the Act ([Section 39-31-103(9)(b) and (v), MCA,  
20 (1993)]). In 1981 the United States Supreme Court affirmed the  
21 NLRB's long-standing policy of narrowly defining "confidential  
22 employees" as those who "assist and act in a confidential capacity  
23 to persons who exercise 'managerial' functions in the field of  
24 labor relations", NLRB V. Hendricks County Rural Electric  
25 Membership Corp., 454 U.S. 170 (1981).

26 The Court found the Board had limited the "confidential  
27 employee" category to those employees who assist and act  
28 in a confidential capacity to persons who formulate,  
determine and effectuate management policies in the field  
of labor relations or who have regular access to  
confidential information concerning anticipated changes

1 of labor relations or who have regular access to  
2 confidential information concerning anticipated changes  
3 which may result from collective bargaining, (citations  
4 omitted). The Court concluded the Board's policy was  
5 "rooted firmly in the Board's understanding of the nature  
6 of the collective bargaining practice and Congress'  
7 acceptance of that practice." 454 US. at 190. Mukamal  
8 and Grenig, "Collective Bargaining: The Exclusion of  
9 "Confidential" and "Managerial" Employees, 22 Duquesne  
10 Law Review 1, (1983).

11 The Board of Personnel Appeals has consistently followed the  
12 NLRB's narrow exclusion of "confidential employees."

13 [T]he criteria used by the Board of Personnel Appeals to  
14 determine whether one is a confidential labor relations  
15 employee should be those set forth in Siemens Corp, 224  
16 NLRB 1579, 92 LRRM 1455 (1976). There the National Labor  
17 Relations Board held that if the employee acts in a  
18 confidential capacity, during the normal course of  
19 duties, to a person who is involved in formulating,  
20 determining and effectuating the employer's labor  
21 relations policy, he or she should be excluded from any  
22 appropriate unit. Lewis & Clark County v. MPEA, UC 4-79  
23 (1980). See also American Federation of State, County  
24 and Municipal Employees State Council No. 9 v. Havre  
25 School District 16-A, UD #7-89.

26 The Board has made it clear that it follows the "narrow"  
27 interpretation handed down by the NLRB, and not the "broad"  
28 interpretation as urged by the School District. The NLRB  
repeatedly has emphasized that the mere handling of or access to  
confidential business or labor relations information, including  
personnel and financial records, is insufficient by itself to  
render an employee "confidential." Nor does the typing of  
confidential labor relations memoranda suffice to imply  
confidential status. (See Ernst & Ernst Nat'l Warehouse, 228 NLRB  
590, 94 LRRM 1637 (1977) and U.S. Postal Serv., 232 NLRB 556, 97  
LRRM 1062 (1977) and Reymond Baking Co., supra)

Here, the mere fact that the incumbent did not attend  
executive sessions of the Board of Trustees does not, by itself,  
negate the collective bargaining "nexus" of her duties and

1 responsibilities. In Reymond Baking Co., 249 NLRB 1100, 104 LRRM  
2 1253 (1980), the NLRB concluded in part that the fact that a  
3 "relatively small percentage" of the employee's time is spent  
4 performing confidential duties does not detract from that  
5 employee's confidential status. And, the record reflects that  
6 incumbent Debbie Michalik did perform certain collective bargaining  
7 related duties of a confidential nature.

8 An examination of the responsibilities and duties performed by  
9 incumbent, Debbie Michalik, however, clearly reveals that this  
10 position specifically manages personnel folders and records,  
11 participates in negotiations, works with cost-out sheets, and other  
12 confidential labor relations information, i.e., incumbent was  
13 involved in the last round of collective bargaining between the  
14 Association and the school District.

15 The Association has, however, sent a clear message to the  
16 Board that it interprets the actions of the School District as an  
17 attempt to avoid having the new employee become a part of the  
18 bargaining unit. Nevertheless, the School District successfully  
19 rebutted such assertions by establishing on the record that they  
20 chose to interface such a position with the duties of labor  
21 relations and on-site bargaining. Moreover, there is nothing in  
22 the record that would support the Association's conclusion that the  
23 School District is limited to a single confidential employee.

24 **V. CONCLUSIONS OF LAW**

25 1. The Board of Personnel Appeals has jurisdiction in this  
26 matter pursuant to Section 39-31-202, MCA. Billings Montana vs.  
27 Fire Fighters Local 529, 113 LRRM 324, 651 p.2d 627, Montana  
28 Supreme Court (1982).



