

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

IN THE MATTER OF UNIT CLARIFICATION NO. 1-94:

MONTANA PUBLIC EMPLOYEES')
ASSOCIATION,)
)
Petitioner,)
)
vs.)
)
COUNTY OF YELLOWSTONE, MONTANA,)
)
Respondent.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

Montana Public Employees' Association (Petitioner) filed a petition on August 23, 1993 seeking to include ten employees of Yellowstone County, Montana (Respondent) in the Petitioner courthouse bargaining unit. On September 30, 1993, the Respondent filed a response indicating most of the positions did not possess sufficient similarities as required by statute to justify inclusion but that some of the positions identified might, with further investigation, be accepted as properly being within the courthouse unit.

Prior to hearing, the parties agreed regarding the proper unit placement of four of the ten employees. The remaining six positions were employed in the disaster and emergency services office and the data processing office.

The contested positions for inclusion or exclusion from the courthouse unit are:

1. The second secretary within the Board of County Commissioners also known as the disaster and emergency services secretary.

1 2. The entire data processing unit, excluding the
2 data processing supervisor.

3 A hearing was held in this matter in Billings, Montana on
4 October 13, 1994. Parties present, duly sworn and offering
5 testimony included Montana Public Employees' Field Representative
6 Marilyn Huestis, Commissioner Secretary Priscilla Fairlee,
7 Administrative Officer James Kraft, Electronic Data Processing
8 Systems Coordinator Karen Weisser, Personnel Computer Support
9 Specialist Paige Wolf, Computer Programmer Connie Selvey,
10 Electronic Data Processing System Administrator Paul Christopher,
11 Data Processing Supervisor Steve Hellenthal, and Director of
12 Personnel Lou Babovich. Documents admitted into the record
13 included Respondent Exhibits 1, 2, and 3.

14 Petitioner was represented by Counsel Carter Picotte and the
15 Respondent by Counsel Brent Brooks. Respondent waived any
16 objection based on Administrative Rule 24.26.630 to proceeding with
17 the hearing. Respondent's post-hearing memorandum was received
18 April 18, 1995 and Petitioner reply brief received May 18, 1995.

19 **II. ISSUE**

20 Should the second secretary within the Board of County
21 Commissioners and data processing positions be included in the
22 Petitioner unit?

23 **III. FINDINGS OF FACT**

24 1. All of the affected employees, both administrative
25 secretary, Ms. Fairlee, and data processing unit members indicated
26 they did not wish to be included in the Petitioner unit. All are
27 paid on a salary basis, not the Petitioner unit pay matrix. Ms.
28 Fairlee is primary secretary to the administrative officer for the

1 Board of County Commissioners. His duties normally include
2 membership on the county's union negotiating team which discusses
3 collective bargaining matters. Ms. Fairlee is backup secretary for
4 the Board of County Commissioners' secretary and the Office of
5 Management and Budget. Ms. Fairlee and the primary secretary for
6 the Board of County Commissioners, Ms. Wood, have interchanged
7 duties for about four years. Ms. Wood has been agreed as excluded
8 from the unit on the basis of the confidentiality of matters which
9 she processes.

10 2. The data processing employees work with all courthouse
11 offices as computer support personnel. Karen Weisser, the
12 Electronic Data Processing System Coordinator, works primarily on
13 administration of computer systems for the areas like taxation,
14 finance, election, and jury selection. Her responsibilities
15 require not only a broad computer system knowledge but also
16 complete access to all systems and systems content which includes
17 confidential files and system programs. Because of staff
18 availability, scheduling, and work responsibilities, Ms. Weisser's
19 hourly work schedule, accordingly, varies from the standard eight
20 to five schedule followed by most unit employees.

21 3. Paige Wolf is a Computer Support Specialist. Her duties
22 include computer software and hardware installation, repair, staff
23 instruction, and acting as substitute for the computer network
24 administrator. She has complete access to all computer systems and
25 system information which include some confidential matters. Her
26 work and position is a stand-alone position and no other employees
27 in the data processing unit or the Petitioner unit could transfer
28 to her position and perform in an immediately functional capacity.

1 4. Connie Selvey is a Computer Programmer. She develops and
2 modifies computer programs and systems. Her work includes
3 analyzation of courthouse department computer system needs followed
4 by program or system development and application. In her work, she
5 is regularly exposed to or has access to confidential files and
6 information. Ms. Selvey's position and work is also a stand-alone
7 position and no other Petitioner unit member or data processing
8 unit member could transfer to her position in an immediately
9 functional capacity. The work schedule she follows does not always
10 start at 8 a.m. and end at 5 p.m. From time to time, depending
11 upon individual need and circumstances, she is required to work
12 some evenings or weekends.

13 5. Paul Christopher is an Electronic Data Processing Systems
14 Administrator. His work includes managing county multiple user
15 computer systems, technical staff liaison with staff and other
16 county departments, supervising hardware and software
17 recommendation and installation, as well as system security. He,
18 as does Ms. Wolf, has complete access to all computer programs and
19 information, including confidential file information. Both he and
20 Ms. Wolf have master keys to all courthouse county offices. His
21 work responsibilities are individual and no other person presently
22 employed in the Petitioner unit or the data processing unit is
23 capable of fulfilling his work responsibilities.

24 6. A technical employee of the Electronic Data Processing
25 unit, a Mr. Swimley, was a union member. He had a disciplinary
26 problem. The union was notified. Thereafter, Mr. Swimley was
27 terminated using the Petitioner unit disciplinary process.

1 IV. CONCLUSIONS OF LAW

2 1. Section 39-31-202, MCA and Administrative Rule 24.26.611
3 provide the criteria for unit inclusion as follows:

4 **39-31-202. To determine appropriate bargaining**
5 **unit - factors to be considered.** In order to
6 assure employees the fullest freedom in exercising
7 the rights guaranteed by this chapter, the board or
8 an agent of the board shall decide the unit
9 appropriate for the purpose of collective
10 bargaining and shall consider such factors as
11 community of interest, wages, hours, fringe
12 benefits, and other working conditions of the
13 employees involved, the history of collective
14 bargaining, common supervision, common personnel
15 policies, extent of integration of work functions
16 and interchange among employees affected, and the
17 desires of the employees.

18 24.26.611 APPROPRIATE UNIT (1) In considering
19 whether a bargaining unit is appropriate, the board
20 shall consider such factors as:

- 21 (a) community of interest;
- 22 (b) wages;
- 23 (c) hours;
- 24 (d) fringe benefits and other working conditions;
- 25 (e) the history of collective bargaining;
- 26 (f) common supervision;
- 27 (g) common personnel policies;
- 28 (h) extent of integration of work functions and
interchange among employees affected; and,
- (i) desires of the employees.

19 2. The Montana Supreme Court has approved the practice of
20 the Board of Personnel Appeals in using federal court and NLRB
21 precedents as guidelines in interpreting the Public Employees'
22 Collective Bargaining Act (the Act) as the state Act is so similar
23 to the federal Labor Management Relations Act (LMRA). State
24 Department of Highways v. Public Employees Kraft Council, 165 Mont.
25 349, 529 P.2d 785 (1974), 87 LRRM 2101; AFSCME Local 2390 v. City
26 of Billings, 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753 (1976); State
27 ex rel Board of Personnel Appeals v. District Court, 193 Mont. 223,
28 598 P.2d 1117, 103 LRRM 2297 (1979); Teamsters Local 45 v. State ex

1 rel Board of Personnel Appeals, 195 Mont. 272, 653 P.2d 1310, 110
2 LRRM 2012 (1981); City of Great Falls v. Young (Young III), 221
3 Mont. 13, 683 P.2d 185, 119 LRRM 2682 (1984).

4 3. Unit clarification in this case involves "accretion"
5 which is the process through which additional positions are added
6 to a unit without a union election proceeding. The following
7 consideration of each of the factors identified in ARM 24.26.611
8 leads to the conclusion that the data processing unit positions
9 should not be included in the unit.

10 (a) Community of interest.

11 In the global sense, the employees in the
12 Yellowstone County courthouse have a community of
13 interest perhaps described as county government
14 services. Community of interest among employees
15 involves persons who share common interest in
16 wages, hours, and other working conditions of
17 employment.

18 The data processing unit members are paid on a
19 salary basis, work varied hours, and have work unit
20 requirements which involve support, design, and
21 subject matter access crossing nearly all county
22 work functions. This work circumstance results
23 primarily from the advent and essential use of
24 computers in the work place. While their work
25 involves exposure to many or nearly all Petitioner
26 unit members, the community of interest of the data
27 processing unit is that of data processing. The
28 departments and offices described in the
recognition clause which identifies the Petitioner
unit involves processing of county business
responsibilities. The data processing unit
represents a support function to those persons or
offices. The contract recognition clause describes
the Petitioner unit (Exhibit 1) as follows:

24 ARTICLE II.

25 Recognition. The county recognizes the
26 Association as the sole exclusive
27 representative for all employees in the
28 following departments and offices as
certified by the Board of Personnel
Appeals: Clerk and Recorder, Auditor,
Treasurer, Civil Defense, Justice of the
Peace, Custodial/Maintenance, Coroner,

1 Superintendent of Schools, Elections,
2 Central Services, Clerk of Court,
3 Surveyor, County Attorney's
4 Secretarial/Clerical, Animal Control, and
5 all non-sworn Deputies and Clerical
6 employees in the Sheriff's Office,
7 Extension Office Secretary(s), and Weed
8 Department Secretary(s) and Court
9 Services. Exclusions: All managerial,
10 supervisory and confidential personnel,
11 sworn Deputy Sheriffs and Dispatchers,
12 District Court and Deputy County
13 Attorneys, County Commissioners
14 personnel, Health Department personnel,
15 Road and Bridge personnel, Public Welfare
16 personnel, Library personnel, Yellowstone
17 Exhibition and Metra personnel, Extension
18 Agents and Weed Department field workers.

19 (b) Wages.

20 The proposed unit members are salaried and not paid
21 according to the Petitioner unit pay matrix. This
22 factor shows a dissimilarity not a similarity on
23 the wage rates.

24 (c) Hours.

25 The Petitioner unit members, generally speaking,
26 work eight to five, Monday through Friday. The
27 data processing unit members also work, generally
28 speaking, these same hours but, because of use,
availability or need for computer technology,
adjustment or emergencies, are required to have the
availability and flexibility to have, at times, an
on-call status. This factor tends to separate
rather than include the data processing unit
positions from the Petitioner unit.

(d) Fringe benefits and other working conditions.

The data processing unit does have the same fringe
benefits but as noted in the wages and hours
factors, the working conditions are dissimilar.

(e) History of collective bargaining.

The only example offered relating to this factor
involved a data processing employee, Mr. Swimley.
He was considered a member of the unit and the
disciplinary action leading to his termination
followed the Petitioner unit disciplinary
procedure. The Respondent indicated this was
simply an error and/or limited only to use of the
Petitioner unit disciplinary process. Therefore,
this was insufficient to establish "a history"

1 which the Petitioner suggests is identified by this
2 single use of the disciplinary process. The
3 process which included the discipline of Mr.
4 Swimley does represent a history of collective
5 bargaining. This was the only history incident
6 representing a history of collective bargaining
7 offered by the Petitioner. This factor at the very
8 best would be neutral relevant to inclusion of the
9 entire data processing unit based on a history of
10 collective bargaining. Bargaining history is an
11 important factor but to represent "history" the
12 events or series of events must not be brief,
13 ambiguous or inconclusive. In this case, one
14 incident is insufficient to support inclusion of an
15 entire data processing unit based on one
16 disciplinary action relating to a former employee.

17 (f) Common supervision.

18 All county employees in a flow chart structure are
19 subject to common supervision. The data processing
20 unit, because of the technical and specialized
21 nature of the work involved, is not subject to the
22 same common supervision as other county office unit
23 members. This factor also shows a dissimilarity
24 between the data processing unit and the Petitioner
25 unit members.

26 (g) Common personnel policies.

27 All county employees, including the data processing
28 unit, are subject to the same personnel policies.
29 This factor supports inclusion of the data
30 processing unit in the Petitioner unit.

31 (h) Extent of integration of work functions and interchange
32 among employees affected.

33 Analysis of this factor in a global sense would
34 show interchange of work function which is the
35 county business operation. On balance, however,
36 other Petitioner unit members are not computer
37 technicians or programmers. They simply expect and
38 need the support provided by the data processing
39 unit. Most importantly, however, is the fact that
40 no other Petitioner unit members, and for that
41 matter few, if any, fellow data processing unit
42 members, can interchange with the individual data
43 processing unit employees or members. This factor
44 also weighs against inclusion of the data
45 processing unit in the Petitioner unit.

46 (i) Desires of employees.

47 None of the data processing unit employees
48 expressed a desire to be a member of the Petitioner

1 unit. The protection provided by the Montana
2 Collective Bargaining Act for Public Employees and
3 the National Labor Relations Act is provided for
4 "employees". In this case, the "employees" desire
5 was clearly to remain outside of and independent
6 from the Petitioner union.

7 4. The Respondent in post-hearing brief correctly identified
8 the position taken by the Montana Board of Personnel Appeals and
9 the National Labor Relations Board relating to accretion. That
10 analysis was as follows:

11 Unit Clarification has sometimes been referred to
12 generically as "accretion" by various state and
13 federal authorities. The overall guiding principle
14 with Unit Clarification or accretion is the concept
15 that in order to be successful, a petition must
16 show an "overwhelming community of interest"
17 between a small group of employees as compared to a
18 larger unit, because such a forced action places
19 the smaller group, against its will, into the
20 larger. Staten Island University Hospital v. NLRB,
21 24 F.3d 450, 455 (2nd Cir. 1994). Accretion
22 therefore is only successful if one group of
23 employees has no identity distinct from the other
24 in this process. Id. at 455. Equally important,
25 the Board of Personnel Appeals has historically
26 placed great emphasis upon the desires of the
27 employees when employing the unit determination and
28 unit clarification criteria.

"The Board of Personnel has long placed
great weight on the desires of employees
when making determination of appropriate
units for collective bargaining
purposes... there is no reason to
discontinue doing so. Under Section 39-
31-201, MCA, the policy of the State is
best promoted by allowing employees
desires considerable weight."

Unit Determination 1-86, Pages 8-9.

In applying the statutory criteria to the facts
from the testimony in this case, there must be a
consideration as to whether the employees to be
conscripted constitute a distinct, identifiable
group, whether there are differences in their
skills and functions, whether they have separate
supervision, the frequency of their contact with
other employees, the extent of integration and
interchangeability of their job, duties and

1 responsibilities with the unit as a whole and
2 differences concerning wages and hours. NLRB v.
3 French International Corporation, 999 F.2d 1409,
4 1410 (9th Cir. 1993). NLRB v. Stevens Ford Inc.,
5 773 F.2d 468, 473 (2nd Cir. 1985). Accretion is a
6 rare rather than a liberally applied theory since
7 it serves to conscript additional employees without
8 the benefit of a union election process thus
9 requiring that "it should be employed
10 restrictively, with close cases being resolved...
11 through the election process." Id. at 473
12 (citations omitted), Local 144 v. NLRB, 9 F.3d 218,
13 223 (2nd Cir. 1993). Further, because this is a
14 narrowly applied theory precluding self
15 determination, it should be applied only in
16 situations where the smaller group has lost its
17 separate independent identity. Local 144 v. NLRB,
18 supra, 9 F.3d at 223. In situations where two
19 groups of employees can be classified appropriately
20 into separate, viable bargaining units, accretion
21 is not permissible. Id. at 223. Moreover, where
22 the group to be assumed into the union without
23 election constitutes a separate bargaining unit,
24 the employees of that unit have a right to choose
25 whether or not they wish to elect a different
26 bargaining representative or no representative.
27 Id. at 223. NLRB v. Stevens Ford Inc., supra, 773
28 F.2d at 473.

Applying these principles to the facts of this
present accretion attempt, the ultimate question
becomes whether or not the union has met its burden
of proof in presenting facts which satisfy the
standards within Section 39-31-202.

5. The foregoing analysis leads clearly to the conclusion
that the data processing unit is not appropriately included in the
Petitioner unit.

6. Ms. Fairlee works interchangeably with the secretary for
the Board of County Commissioners who is excluded from the unit on
the basis of confidentiality. Because of her backup
responsibilities and the sheer volume of work, Ms. Fairlee works
with confidential information regularly and is aware of or may be
exposed to confidential negotiation or bargaining strategy. She is
found properly excluded from the unit on the basis of the need for

1 confidentiality. Ms. Fairlee also indicated her wish to remain
2 independent or not included in the Petitioner bargaining unit.

3 7. Based on the foregoing analysis, Ms. Fairlee and the data
4 processing unit are found not properly included in the Petitioner
5 unit.

6 **V. RECOMMENDED ORDER**

7 The second secretary within the Board of County Commissioners
8 and the data processing unit are not properly included in the
9 Petitioner unit.

10 DATED this 9th day of August, 1995.

11 BOARD OF PERSONNEL APPEALS

12
13 By: Joseph V. Maronick
14 JOSEPH V. MARONICK
15 Hearing Officer

16 NOTICE: Pursuant to ARM 24.26.215(2), the above RECOMMENDED ORDER
17 shall become the Final Order of this Board unless written
18 exceptions are postmarked no later than September 1, 1995.
19 This time period includes the 20 days provided for in ARM
20 24.26.215(2), and the additional 3 days mandated by Rule 6(e),
21 M.R.Civ.P., as service of this Order is by mail.

22 The notice of appeal shall consist of a written appeal of the
23 decision of the hearing officer which sets forth the specific
24 errors of the hearing officer and the issues to be raised on
25 appeal. Notice of appeal must be mailed to:

26 Board of Personnel Appeals
27 Department of Labor and Industry
28 P.O. Box 6518
Helena, MT 59604

1 * * * * *

2 CERTIFICATE OF MAILING

3 The undersigned hereby certifies that true and correct copies
4 of the foregoing documents were, this day served upon the following
5 parties or such parties' attorneys of record by depositing the same
6 in the U.S. Mail, postage prepaid, and addressed as follows:

7 Brent Brooks,
8 Deputy Yellowstone County Attorney
9 P.O. Box 35025
10 Billings, MT 59107

11 Carter Picotte
12 Attorney at Law
13 Montana Public Employees' Association
14 1426 Cedar Street
15 Helena, MT 59601

16 DATED this 9th day of August, 1995.

17 Kelley J. Newman
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