

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

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IN THE MATTER OF UNIT CLARIFICATION NO. 3-97:

CUT BANK EDUCATION ASSOCIATION,)
MEA, NEA,)
)
Petitioner,)
)
vs.)
CUT BANK PUBLIC SCHOOLS,)
)
Respondent.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

By stipulated agreement, an in-person hearing was conducted by Gordon D. Bruce in the above entitled matter in Cut Bank, Montana, on May 1, 1997. Petitioner, Cut Bank Education Association, MEA/NEA, appeared with counsel, Richard A. Larson. Respondent, Cut Bank Public Schools, was represented by Arlyn L. Plowman, Montana School Board Association. Joint Exhibits J-1 through J-8, Respondent's Exhibits E-1 through E-5, and Petitioner's Exhibits A through L were admitted into evidence on the record. Tina Gauthier, the affected employee in this action, gave sworn testimony as did Dennis Roseleip, Superintendent, Cut Bank Public Schools (CBPS); Scott Laird, Business Manager/Clerk, CBPS; and Don Paulson, Counselor, Cut Bank High School.

By agreement, final arguments were filed with the Hearing Officer on June 18, 1997 at which time the record was closed and the matter deemed fully submitted for determination.

1 II. BACKGROUND

2 The Petitioner, Cut Bank Education Association, MEA/NEA, filed
3 a petition for unit clarification with the Board of Personnel
4 Appeals on October 28, 1996. The petition sought to amend the
5 current recognized bargaining unit to include Ms. Gauthier, who
6 instructs sixth graders for 4 1/2 weeks in a study skills program.
7 The petition also requested that Tina Gauthier be offered a
8 professional teacher's contract.

9 Cut Bank Public Schools or the District (Respondent),
10 responded to the petition in a November 13, 1996 letter by Dennis
11 Roseleip, District Superintendent. That response noted that Tina
12 Gauthier serves as an "At-Risk" Tutor supervised by the Middle
13 School Counselor. Further, the Respondent asserted that the Office
14 of Public Instruction or the Board of Public Education, rather than
15 the Board of Personnel Appeals, has jurisdiction to interpret and
16 enforce Section 20-4-201, MCA. Respondent further contends that:

- 17 1) Tina Gauthier, subject of this Unit
18 Clarification, is an "At-Risk" Tutor and as
19 such, is not and has not been a member of the
20 bargaining unit represented by the Cut Bank
21 Education Association; and
22 2) Ms. Gauthier is employed and compensated
23 pursuant to the District's policies affecting
24 non-teaching classified personnel in a
25 position dependent upon funding from federal
26 sources through Carl Perkins Grant Programs.

27 Finally, the Respondent contends that:

28 Tina Gauthier is not employed as a teacher.
Therefore, she has insufficient community of
interest with district employees hired under
teaching contracts pursuant to Section 20-4-201,
MCA, to be added to a bargaining unit limited to
employees hired under teaching contracts.

1 **III. ISSUE**

2 The parties stipulated that the question before the Hearing
3 Officer is:

- 4 1) Whether the Board of Personnel Appeals has
5 jurisdiction to interpret and administer the
6 provisions of Montana Code Annotated Title 20,
7 Chapter 4; and
8 2) Whether Tina Gauthier, an "at-risk" tutor and a
9 classified employee, should be added to an existing
10 bargaining unit composed of employees under
11 teaching contracts as required by Section 20-4-204,
12 MCA.

10 **IV. CLARIFICATION**

11 At the beginning of the hearing, the parties stipulated that
12 the petition addressed only the *one-hour per day* that Ms. Gauthier
13 serves as a study skills instructor.

14 **V. FINDINGS OF FACT¹**

15 *Uncontested Facts:*

16 1. Ms. Gauthier is employed and compensated pursuant to the
17 District's policies affecting non-teaching classified personnel in
18 a position dependent upon funding from federal sources through Carl
19 Perkins Grant Programs.

22
23 ¹All proposed findings, conclusions and supporting arguments
24 of the parties have been considered. To the extent that the
25 proposed findings and conclusions submitted by the parties, and
26 the arguments made by them, are in accordance with the findings,
27 conclusions and views stated herein, they have been accepted, and
28 to the extent they are inconsistent therewith, they have been
rejected. Certain proposed findings, conclusions and arguments
may have been omitted as not relevant or as not necessary to a
proper determination of the material issues presented. To the
extent that the testimony of various witnesses is not in accord
with the findings herein, it is not credited.

1 *Additional Facts:*

2 2. At all times relevant to this petition, the Petitioner
3 and Respondent School District were parties to a collective
4 bargaining agreement (Exhibit E-1). Section 5 of that collective
5 bargaining agreement page 1, Exhibit E-1) defined the bargaining
6 unit as follows:

7 This unit being composed of all certificated or licensed
8 teaching personnel under current contract, with the
9 exception of the Superintendent and Principals.

10 3. Ms. Gauthier has been employed by Respondent for several
11 years. During the 1996-97 school year, Ms. Gauthier provided
12 tutoring services and for one class period each day taught a study
13 skills course at Cut Bank Middle School. (Testimony Mr. Roseleip
14 and Ms. Gauthier)

15 4. Ms. Gauthier's position is fully funded with federal
16 grants and is a prevention and intervention program dedicated to
17 helping "at-risk" students and preventing students from becoming
18 "at-risk." It is coincidental that Ms. Gauthier possesses a
19 teaching certificate since no such certificate is required for her
20 position. (Testimony Dennis Roseleip and Don Paulson)

21 5. The position held by Ms. Gauthier does not require
22 certification or licensure, and she is employed by the Cut Bank
23 Public Schools as an "At-Risk" Tutor for students in grades six
24 through twelve. Her duties include instructing sixth grade
25 students in a 4 /2 week study skills program for one-hour per day.
26 (Testimony Ms. Gauthier and Mr. Roseleip)

27 6. She receives wages and benefits as a classified/support
28 employee and shares working conditions with the support
staff/classified employees. She is not required to attend faculty

1 meetings or perform faculty functions/duties. (Testimony Mr.
2 Roseleip and Mr. Laird)

3 7. Ms. Gauthier will not be assigned study skills
4 instruction responsibilities for the 1997-98 school year. Study
5 skills instruction will be provided by eleven advisee/volunteers
6 who may or may not be certificated or licensed and could include a
7 full range of personnel including custodians and other non-
8 instructional employees/volunteers. (Exhibit E-6)

9 8. Ms. Gauthier earns \$8.30 per hour for a seven hour day
10 (Testimony Ms. Gauthier). She is employed and compensated pursuant
11 to the District's policies affecting non-teaching classified and
12 support personnel, and she received the notice of nonrenewal policy
13 applicable to the non-teaching personnel. (Testimony Mr. Roseleip
14 and Mr. Laird). Teachers, however, are covered by the collective
15 bargaining agreement (Exhibit E-1, Appendix B), and are compensated
16 on an annual salary basis that considerably exceeds that of Ms.
17 Gauthier. She receives approximately \$10,458.00 annually (\$8.30 an
18 hour x 7 hours each workday for about 180 days each year).

19 9. Teachers covered by the collective bargaining agreement
20 (Hereafter "Teachers") (Exhibit E-1), are not paid for school
21 holidays. Tina Gauthier, as a classified/support staff employee,
22 receives paid holidays pursuant to Sections 2-18-603, MCA.
23 (Testimony Mr. Roseleip and Mr. Laird)

24 10. Teachers earn 12 days of sick leave per year, with a
25 maximum accumulation of 100 days which may be cashed out after ten
26 years of service at one-half of the substitute rate. (See Section
27 9, page 5, Exhibit E-1)

28

1 11. As a non-teaching school district employee identified in
2 Section 2-18-601(4), MCA, Tina Gauthier earns and uses sick leave
3 at the rate of 12 days for a 2080 hour year with unlimited accrual
4 and one-quarter pay cash out upon termination after a 90-day
5 qualifying period. Accordingly, Ms. Gauthier does not accrue sick
6 leave as quickly as teachers covered by the collective bargaining
7 agreement, but her accumulation is unlimited and she is eligible
8 for a lump-sum payment after a much shorter qualifying period (90
9 days vs. 10 years) at a much higher rate. (See Section 2-18-618,
10 MCA) (Testimony Mr. Laird and Exhibits E-5a through E-5i)

11 12. Teachers are supervised by their respective Principal.
12 Tina Gauthier is supervised by Middle School Counselor, Don
13 Paulson, who is not a Principal. Mr. Paulson does not supervise
14 any teachers. (Testimony Mr. Paulson)

15 13. Teachers have individual teacher contracts pursuant to
16 Section 20-4-201, MCA, and may be eligible for tenure. Tina
17 Gauthier does not have an individual employment contract and is not
18 eligible for tenure. (Testimony Mr. Roseleip)

19 14. Respondent assigns certain duties such as hall
20 supervision, dance chaperoning, and morning lobby supervision
21 duties. Ms. Gauthier performed a similar duty for three days,
22 three years ago; however, teachers perform these duties for three
23 or more days several times per year. (Testimony Ms. Gauthier and
24 Mr. Roseleip)

25 15. Respondent evaluates prior to March 1, but usually
26 evaluates support/ classified personnel, including Tina Gauthier,
27 nearer the end of the school year. (Testimony Mr. Roseleip)

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1 16. Teachers have to pay \$48.20 per month to participate in
2 the District's group insurance plan. As an "At-Risk" Tutor, Ms.
3 Gauthier would be required to pay \$126.00 per month if she
4 participated in the same insurance plan. (Exhibit E-1, p. 10 and
5 Testimony Mr. Laird)

6 17. Teachers usually teach and prepare courses that last at
7 least a full semester if not all year. These courses require a
8 certified/licensed teacher pursuant to the Office of Public
9 Instruction/Board of Public Education rules and regulations. Ms.
10 Gauthier instructs a study skill program which only lasts for 4 1/2
11 half weeks and is repeated eight times per year in a position that
12 does not require licensure/certification. (Testimony Mr.
13 Roseleip)

14 18. The District may have treated Tina Gauthier like a
15 teacher in certain respects, because she was subject to the
16 District's "Teacher Professional Growth Program" and received
17 periodic evaluations that were a part of that program (Testimony
18 Ms. Gauthier). A substantial difference is that Respondent
19 requires teachers to work 187 days per year, including seven pupil
20 instruction related days and Ms. Gauthier is not subject to that
21 requirement. (Testimony Mr. Roseleip)

22 19. Ms. Gauthier assigned grades (Testimony Ms. Gauthier and
23 Exhibit L) and Respondent requires her to prepare materials for a
24 substitute teacher (see Exhibit K) in the event of her absence from
25 the class (Testimony Ms. Gauthier) but unlike teachers, Respondent
26 did not require Ms. Gauthier to work on pupil instruction related
27 days or attend pupil instruction related activities. For example,
28 Respondent releases her at noon on the last day of school and does

1 not require her to participate with teachers in their PIR
2 activities that afternoon. Nor does Respondent require her to
3 attend the two preschool pupil instruction related days.
4 (Testimony Mr. Roseleip)

5 20. Respondent has several non-teaching employees in addition
6 to Tina Gauthier who possess teacher certification/licensure.
7 Respondent does not employ these non-teaching certificated/licensed
8 personnel as teachers nor consider or treat them as teachers.
9 (Testimony Mr. Roseleip)

10 21. Respondent lists Ms. Gauthier with other non-teaching
11 personnel in Petitioner Exhibits B, ("*Schools In Focus*") which
12 provides the "latest up-to-date information from teachers, coaches
13 and *other staff*" to parents of students. Respondent includes
14 tutoring in class schedules and school agenda (Exhibit I), and the
15 *Cougar Hotline* (See Exhibit F); however, Respondent does not list
16 Ms. Gauthier in any of these materials as a member of the *Faculty*
17 for the 1996-1997 school year. (Exhibit E-4c)

18 22. Study skills instruction is not funded by the District's
19 general fund. Study skills instruction, like the rest of the "At-
20 Risk" Tutor Program is dependent upon federal funds as are several
21 vocational programs offered by the District such as shop and home
22 economics. Unlike the "At-Risk" Program, however, vocational
23 instruction is not totally dependent upon federal money and is
24 funded using different allocations and criteria. (Testimony Mr.
25 Roseleip)

26 23. The Office of Public Instruction and the Board of Public
27 Education have established certification and accreditation
28 standards for the vocational education programs partially funded by

1 federal dollars. The Office of Public Instruction/Board of Public
2 Education have not established similar certification or
3 accreditation criteria for "At-Risk" Tutor Programs including study
4 skills which is wholly dependent upon federal money. (Testimony
5 Mr. Roseleip)

6 VI. DISCUSSION

7 The Montana Supreme Court has approved the practice of the
8 Board of Personnel Appeals (hereafter Board) following federal
9 court and National Labor Relations Board (hereafter NLRB)
10 precedence as guidelines for interpreting the Montana Collective
11 Bargaining For Public Employees Act. (*State ex rel Board of*
12 *Personnel Appeals vs. District Court*, 183 Mont. 223 (1979), 598
13 P.2d 1117)

14 Section 39-31-303, MCA, requires that public employees and
15 their representatives recognize the prerogative of public employers
16 to determine the job classifications and personnel by which
17 government operations are to be conducted. Respondent argues that
18 this implies the Board of Personnel Appeals has no authority to
19 dictate to the School District the means, job classifications or
20 personnel by which the study skills instruction is to be performed.
21 Respondent cites Section 20-4-201, MCA, in the proposition that the
22 trustees of the district shall have the authority to employ any
23 person who holds the proper credentials to perform the duties
24 prescribed by the trustees. Pursuant to the statute, it appears
25 the trustees have authority to determine *that study skills*
26 *instruction does not require certification or licensure.*

27 Respondent then contends that any disagreement with the
28 trustees' decision must be pursued with the County Superintendent,

1 the Office of Public Instruction or the Board of Education who have
2 jurisdiction over Title 20 of the Montana Code Annotated because
3 Section 20-3-210 and 20-3-107, MCA, give the County Superintendent
4 of Schools and the State Superintendent of Public Instruction
5 exclusive jurisdiction over all questions or issues arising out of
6 Title 20 of the Montana Code Annotated. Here too, based on the
7 statute, the State Superintendent of Public Instruction has the
8 authority and jurisdiction to *determine whether Tina Gauthier*
9 *should be issued a teaching contract.*

10 Notwithstanding Respondent's arguments on jurisdiction
11 concerning Title 20, it is clear that pursuant to **Section 39-31-**
12 **202**, MCA, determinations of the appropriate units for purposes of
13 collective bargaining between Montana public employers and the
14 exclusive representative of public employees are matters properly
15 before the **Board**, and as the District is a public employer under
16 Montana's Collective Bargaining for Public Employees Act ("Act"),
17 it is subject to the jurisdiction of the Board for unit
18 clarification purposes.

19 Taken to its logical conclusion, Respondent's contention--that
20 it has unfettered discretion to categorize employees as it sees
21 fit--would render the Act largely irrelevant. Clearly, the
22 employer cannot arbitrarily exclude anyone (or any position) it
23 chooses from the bargaining unit, as it is the Board's *express*
24 responsibility under the Act to ensure that an appropriate
25 bargaining unit is recognized in resolving this dispute. Section
26 39-31-202 MCA, provides the following "community of interest"
27 factors:
28

1 In order to assure employees the fullest freedom in
2 exercising the rights guaranteed by this chapter,
3 the board or an agent of the board shall decide the
4 unit appropriate for the purpose of collective
5 bargaining and shall consider such factors as
6 community of interest, wages, hours, fringe
7 benefits, and working conditions of the employees
8 involved, the history of collective bargaining,
9 common supervision, common personnel policies,
10 extent of integration of work functions and
11 interchange among employees affected, and the
12 desires of the employees. (emphasis added)

13 See also, A.R.M. 24.26.630, Petitions for unit clarification of
14 bargaining unit.

15 Respondent cites *Wallace-Murray Corporation*, 192 NLRB No. 160,
16 78 LRRM (1046) (1971) in support of its argument that this case
17 should be dismissed because there have been no recent changes in
18 Ms. Gauthier's duties and responsibilities. In *Wallace-Murray*,
19 however, the matter was dismissed *without prejudice*, the NLRB
20 stating: "Accordingly, without prejudice to the filing of a
21 clarification petition at an appropriate time, we hereby dismiss
22 the Employer's petition herein."

23 Further, in *Wallace-Murray*, the facts were significantly
24 different:

25 From 1937 to 1943 the parties executed collective-
26 bargaining agreements covering such unit, specifically
27 excluding 'watchmen'. However, in their 1943 contract
28 and in all subsequent contracts, the parties have
specifically included 'watchmen' in the contract unit.
In the 1967 agreement the parties, for the first time,
made reference to the watchmen as 'guards,' and this
terminology was carried over to the current (1970 through
1973) collective-bargaining agreement. The parties
stipulate that the 'guards' in question (formerly
referred to as watchmen) are in fact guards....

In the instant case, we clearly have a petition filed by Ms.
Gauthier for unit clarification under circumstances and facts
unlike those found in *Wallace-Murray*. The case is therefore not

1 dispositive of this matter, and dismissal on grounds is not
2 warranted based on the overall record pertinent to Ms. Gauthier's
3 petition.

4 Here, the statutory criteria, including "community of
5 interest," have considerable significance in weighing all the
6 factors which must be considered in establishing an appropriate
7 unit. Decisions of the National Labor Relations Board, including
8 *Armstrong Rubber Co.*, 144 NLRB 1153, 49 LRRM 1956 ((1963), *Budd*
9 *Co.*, 136 B/LRB 1153m 49 LRM 1956 (1963); see also *NLRB v Lundy*
10 *Packing Company*, 150 LRRM 2705, 68 F.3d 1577 and *Safeway Store,*
11 *Inc.*, 256 NLRB 918, 107 LRRM 1338 (1981), dictate a community of
12 interest test.

13 Certain factors on the record reflect a community of interest
14 in this case; however, many substantive factors contained in the
15 above findings clearly point to a contrary result, including the
16 following:

17 Ms. Gauthier's compensation is substantially less at an
18 hourly wage of \$8.30 per hour or about \$10,807 per year
compared to \$18,230 to \$41,330 paid to teachers.

19 Bargaining unit members are hired under individual
20 employment contracts and hold positions which require
certification or licensure.

21 Ms. Gauthier earns annual/vacation leave pursuant to
22 state statute while teachers do not and unlike teachers,
she has a different cash-out of accumulated sick leave.

23 Respondent requires teachers to attend pupil instructed
24 activities but does not require Ms. Gauthier to do so;
25 teachers have duties not shared by Ms. Gauthier, and teachers
may obtain tenure under their contract which is not available
to Ms. Gauthier.

26 Notwithstanding that certain factors reflect some community of
27 interest, the overall record reflects that Ms. Gauthier lacks the
28 necessary community of interest with members of the bargaining

1 unit. Moreover, NLRB standards appear to require that if employees
2 are to be added to a bargaining unit, there must be an overwhelming
3 community of interest with the preexisting unit. The NLRB has
4 stated, in *NLRB v Lundy Packing Company*, 150 LRRM 2705, 68 F.3d
5 1577 (1995), that in accretion cases new employees can be added to
6 an existing bargaining unit "only when the additional employees
7 have little or no separate group identity and thus cannot be
8 considered to be a separate appropriate unit and when the
9 additional employees share an overwhelming community of interest
10 with the preexisting unit to which they are accreted."

11 **VII. CONCLUSIONS OF LAW**

12 1. The Board of Personnel Appeals has jurisdiction to
13 consider this petition pursuant to Section 39-31-202, MCA.

14 2. Here, Ms. Gauthier does not have the requisite community
15 of interest with the members of the Petitioner union to include her
16 position in the bargaining unit.

17 **VIII. RECOMMENDED ORDER**

18 Pursuant to ARM 24.26.630(5)(b), the petition for unit
19 clarification is **Denied**.

20 DATED this 29th day of August, 1997.

21 BOARD OF PERSONNEL APPEALS

22 By: Gordon D. Bruce
23 Gordon D. Bruce
24 Hearing Officer
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1 NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER
2 shall become the Final Order of this Board unless written
3 exceptions are postmarked no later than September 23, 1997.
4 This time period includes the 20 days provided for in ARM
5 24.26.215, and the additional 3 days mandated by Rule 6(e),
6 M.R.Civ.P., as service of this Order is by mail.

7 The notice of appeal shall consist of a written appeal of the
8 decision of the hearing officer which sets forth the specific
9 errors of the hearing officer and the issues to be raised on
10 appeal. Notice of appeal must be mailed to:

11 Board of Personnel Appeals
12 Department of Labor and Industry
13 P.O. Box 6518
14 Helena, MT 59604

15 * * * * *

16 CERTIFICATE OF MAILING

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

21 Richard Larson
22 J Dennis Moreen
23 CHRONISTER, MOREEN & LARSON, P.C.
24 PO Box 1152
25 Helena MT 59624-1152

26 Arlyn L Plowman
27 Montana School Boards Association
28 One South Montana Avenue
Helena MT 59601

DATED this 29th day of August, 1997.

Christine Roland