

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

IN THE MATTER OF UNIT CLARIFICATION NO. 4-97:

LEWIS AND CLARK COUNTY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	<b>FINDINGS OF FACT;</b>
	)	<b>CONCLUSIONS OF LAW;</b>
	)	<b>AND RECOMMENDED ORDER</b>
MONTANA PUBLIC EMPLOYEES'	)	
ASSOCIATION,	)	
	)	
Respondent.	)	

\* \* \* \* \*

**I. INTRODUCTION**

The hearing in this matter took place on June 24, 1997. Sheila D. Cozzie, Personnel Officer, and K. Paul Stahl, Esquire, represented the Petitioner, Lewis and Clark County (County). Carter N. Picotte, Esquire, represented the Respondent, Montana Public Employees' Association (MPEA). Sheila Cozzie, Cathy O'Brien, Tom Davis, and Ed R. Tinker, Jr. gave sworn testimony.

The County's proposed Exhibits A - F were admitted into the record without objection. The Respondent's proposed Exhibits 1 and 2 were also admitted without objection. After the hearing the County submitted an organizational chart as agreed (Exhibit G).

The Board's Agent, Kathy van Hook, found that a question of fact exists concerning appropriate bargaining unit pursuant to ARM 24.26.630 (5). Ms. van Hook's preliminary investigation and ORDER dated December 30, 1996, forwarded this case for a contested hearing in keeping with the administrative rule.

The record was deemed submitted upon receipt of the parties' proposed findings of fact and conclusions of law on September 9,

1 1997. The Hearing Officer listened to the four hearing tapes in  
2 their entirety shortly before writing this decision.

## 3 **II. ISSUES**

4 The County's October 1, 1996, Unit Clarification Petition  
5 seeks to remove landfill heavy equipment operators from their  
6 historical inclusion in the MPEA Health Department contract, which  
7 the County signed July 1, 1996, and which runs until June 30, 2000.  
8 The County seeks to place the four landfill employees under the  
9 Public Works Department contract due to the County's reorganization  
10 of public works.

11 The larger of the two MPEA units, the Lewis and Clark County  
12 Road/Bridge/Shop Department operates under a separate MPEA contract  
13 with the County, which runs from July 1, 1996 until June 30, 1999.  
14 Both bargaining units are recognized by the Board of Personnel  
15 Appeals (Board). In the Respondent's December 12, 1996, answer to  
16 the petition, and at the pre-hearing conference, the parties'  
17 representatives addressed whether unit clarification or a unit  
18 determination was the appropriate procedural means for the County's  
19 desired action. As the Board hears both types of petitions, the  
20 parties decided to proceed with the hearing framed as a unit  
21 clarification.

## 22 **III. RULINGS ON PROPOSED FINDINGS OF FACT**

### 23 Respondent's Proposed Findings

24 1. "The parties hereto are also parties to two collective  
25 bargaining agreements which have relevance in this matter. (Joint  
26 Exhibits #1 and #2)." The Respondent's proposed finding no. 1 is  
27 accepted as accurate based upon Exhibit Nos. 1 & 2, A & B, and the  
28

1 consistent testimony of Cathy O'Brien, Sheila Cozzie, Ed Tinker,  
2 and Tom Davis.

3       2. "At the trial of this matter, the employer had the burden  
4 of proof to show that its petition to remove landfill equipment  
5 operators from the present bargaining unit under the Health  
6 Department Contract and place them in the Road and Bridge  
7 Bargaining Unit was justified on the evidence." The Respondent's  
8 proposed finding no. 2 is a conclusion of law and its substance is  
9 addressed later in this decision.

10       3. "There was no proof that there has been any substantial  
11 change in the duties of the landfill employees at any material  
12 time." The Respondent's proposed finding no. 3 is accepted based  
13 upon the consistent testimony of Ed Tinker, Cathy O'Brien, Sheila  
14 Cozzie and Tom Davis. Duties reflected in undated County position  
15 descriptions (PDs) for Landfill operators (Exh. C), and Road and  
16 Bridge operating engineers (Exh. D), were not alleged to have  
17 changed at any material time.

18       4. "There was no proof, nor allegation that any of these  
19 employees have become, or are, in any way, supervisory employees."  
20 The Respondent's proposed finding no. 4 is accepted based upon the  
21 consistent testimony of all witnesses.

22       5. "Exhibits were introduced by the petitioner in the form  
23 of position descriptions (Exhibits C and D) which demonstrate that  
24 there are large dissimilarities between the position requirements  
25 and duties of road and bridge crew members and landfill equipment  
26 operators. The positions involved vary substantially [sic]  
27 different skills and knowledge and duties and involved a wholly  
28 separate work place. The positions are not fungable [sic]." The

Respondent's proposed finding no. 5 is accepted for the following reasons: the PDs, and the testimony of Ed Tinker, Tom Davis, Cathy O'Brien and Sheila Cozzie establish that more diverse and complex skills are required for road and bridge operating engineers than for the landfill equipment operators. Because both groups of County employees operate equipment which weighs more than 25,000 pounds, a commercial driver's license is required of both groups. The County now classifies both as heavy equipment operators on the same pay matrix. Workplaces are different, but both involve public works.

6. "There are small but significant differences in the wage and benefit packages between the two bargaining units, as set forth in the two collective bargaining agreements. Moreover, the evidence showed that weather [sic] the benefit packages contain large or small differences, the landfill employees affected by the petition, prefer the package they have under the present contract." The Respondent's proposed finding no. 6 is accepted based upon the uncontradicted testimony of Ed Tinker, Tom Davis and Cathy O'Brien. That testimony established a unanimous preference by the landfill employees for negotiated differences in bonus pay; a personal day-off ("well-day"); work schedules bid by seniority, posted 10 days in advance with a possible week day off; fewer emergency occasions to be called into work during bad weather; and most important, separate seniority lists.

7. "There was no evidence offered that any benefit in efficiency or economy would accrue to the employer as a result of granting the present petition." The Respondent's proposed finding no. 7 is largely accepted. The petitioner argued administrative

1 efficiency, and ease of processing grievances. However, there was  
2 no evidence of any problems processing grievances at any time  
3 according to Cathy O'Brien's uncontradicted testimony. The  
4 County's designated representative has always been Sheila Cozzie  
5 for both bargaining units. Cathy O'Brien services the Health  
6 Department contract and Mel Wojcik services the Road and Bridge  
7 Contract for MPEA.

8 8. "The only basis for justifying the petition offered at  
9 trial was proof that a paper reorganization had taken place at an  
10 earlier time [June 26, 1996], and that the only result, other than  
11 the decrement to the employees proposed in the petition would be  
12 the paper squaring of the employers [sic] organizational charts,  
13 which in no way changed the duties, or even the immediate  
14 supervision of the affected employees." The factual assertions  
15 contained in the Respondent's proposed finding no. 8 are accepted.  
16 Organizational efficiency is the apparent benefit to the County.  
17 Although some similar job duties exist, the two groups perceive a  
18 different community of interests and do not wish joinder. There  
19 was no showing of any organizational problems or conflicts caused  
20 by either bargaining unit prior to the County's change in public  
21 works on or around June 26, 1996. (Testimony of C. O'Brien, S.  
22 Cozzie, T. Davis and E. Tinker)

23 9. "In the context of this case, it is significant that the  
24 landfill equipment operators do not wish to be moved under the new  
25 contract, and they are not wanted in the road and bridge crew  
26 bargaining unit." The Respondent's proposed finding no. 9 is  
27 accepted based upon the testimony of Ed Tinker, a 13 year employee  
28 of the landfill. The landfill employees are unanimous in their

1 strong desire not to be moved. Tom Davis, shop steward of the road  
2 and bridge crew, testified to unanimous resistance by his unit to  
3 having the four landfill employees moved into his unit as proposed.  
4 Cathy O'Brien also testified to concerns expressed by landfill  
5 employees.

6 10. "Finally, there are significant seniority issues which  
7 are not resolved by moving the employees from one bargaining unit  
8 to another, and, those seniority issues [sic] significant  
9 considerations, in the absence of any proof of benefit to the  
10 employer in any substantial manner, or any other justification for  
11 the proposed action of the employer." The Respondent's proposed  
12 finding no. 10 is accepted based upon the credible testimony of  
13 Cathy O'Brien, Tom Davis and Ed Tinker and on the specific  
14 controlling contract language and provisions detailed in the  
15 DISCUSSION section of this decision (Exhs. A & B, 1 & 2).

16 11. "Each of the collective bargaining agreements is binding  
17 on each of the parties." The Respondent's proposed finding no. 11  
18 is accepted based upon the testimony of Cathy O'Brien and Sheila  
19 Cozzie, and on the contracts themselves, Exhs. A & B, 1 & 2.

#### 20 Petitioner's Proposed Findings

21 12. "Lewis and Clark County went through an organizational  
22 restructuring. This restructuring began when the County opened a  
23 new regional landfill. The operation and oversight of this  
24 landfill was assigned to the Public Works Director. These Landfill  
25 employees were placed under the supervision of the Public Works  
26 Director. In the past, oversight of the landfill had been under  
27 the Health Officer. This restructuring prompted Lewis and Clark  
28 County to request these employees be moved to the Public Works

1 collective bargaining unit." The County's proposed finding no. 1  
2 is accepted to the extent it details action the County took on or  
3 around June 26, 1996, shortly before the controlling contracts at  
4 issue became effective July 1, 1996. Although the health officer  
5 had held organizational-chart authority over the landfill  
6 employees, there were no allegations or evidence of any active  
7 supervision or any organizational difficulties associated with that  
8 previous structure. Will Selser continues to have responsibility  
9 for day-to-day supervision of the landfill employees.

10 13. "Lewis and Clark County did implement a change in the  
11 administrative structure of this department. The entire landfill  
12 operation was moved from the Health Department to the Public Works  
13 Department.

14 "Leaving the Landfill Operators in their current bargaining  
15 unit (Health Department) makes it difficult to following [sic]  
16 grievance procedures as outlined. Under the current contract they  
17 are to appeal a grievance to the department head. This would mean  
18 a grievance would be appealed to the Health Officer.

19 "However, the Health Officer has no affiliation with these  
20 individuals. This person is not the landfill employees'  
21 supervisor, would not have any insight into a grievance or the  
22 events leading to a grievance, or, any knowledge of the landfill  
23 operations.

24 "In addition, the Public Health Officer is supervised by the  
25 Board of Health, as outlined in state statute, [sic] and the Public  
26 Works Director is supervised by the Board of County Commissioners."

27 Proposed finding no. 1 contained in the County's reply brief,  
28 is rejected, with the exception of paragraph one, which reflects



1 action taken by the County. Paragraphs two through four are  
2 rejected as arguments largely disproved at the hearing. There were  
3 no allegations nor any evidence of difficulties processing  
4 grievances through the existing mechanisms and chain of command, in  
5 place for approximately nine years. When problems or grievances go  
6 beyond Will Selser, the immediate supervisor of the landfill  
7 workers, Sheila Cozzie, becomes the County's designee as a matter  
8 of longstanding practice. Sheila Cozzie continues to represent  
9 both the Health Department and the Public Works Department in  
10 working with either Cathy O'Brien, MPEA's Health Contract servicer,  
11 or Mel Wojcik, MPEA's Public Works Contract servicer. There is  
12 overlap in the membership of the Boards of Health and County  
13 Commissioners, and all employees ultimately work for the County.  
14 (Testimony of C. O'Brien, T. Davis, E. Tinker, and S. Cozzie)

15 14. "Prior to 1988 the Landfill employees were non-union.  
16 During a restructuring in 1988, these employees were automatically  
17 placed in the Health Department unit, and became members of that  
18 union." The County's proposed finding no. 2 is rejected based on  
19 lack of evidence. No person who testified knew the actual date the  
20 landfill workers became part of the MPEA Health Department unit.  
21 The representation of 1988 came from the County's attorney.  
22 Although this may be an accurate date, there is no support in the  
23 record. According to Cathy O'Brien's credible testimony, contract  
24 provisions stem from long bargaining efforts, and, therefore,  
25 cannot properly be considered "automatic."

26 15. "The Landfill employees, by definition, are not members  
27 of the Health Department bargaining unit. Article II, Recognition  
28 of Exclusive Representative, Section 2. Appropriate Unit states



1 that '...exclusive representative shall represent all part-time and  
2 full-time employees of the Employer, employed by the Department  
3 whose headquarters are located at 316 North Park, and 1930 9th  
4 Avenue, Helena, Montana, and, as certified by the Board of  
5 Personnel Appeals dated July 12, 1977...' Employer is further  
6 defined on page 1 of the contract as 'Lewis and Clark City-County  
7 Health Department.' The County's proposed finding no. 3 is  
8 rejected. The law will not permit the County to deny the validity  
9 of the contract it signed and that has long controlled the work  
10 relationship between itself and the landfill employees. The  
11 County's primary offices remain at 316 North Park. This proposed  
12 finding appears to be an artificial semantic distinction. (Exhs.  
13 A & B, 1 & 2).

14 16. "Currently, the operators at the Landfill work under the  
15 Health Department contract. This requires that grievances be first  
16 filed with the Department Head, the Health Officer. However, the  
17 Health Officer has not [sic] supervisory or regulatory authority  
18 over these individuals. Their supervisor is the Public Works  
19 Director. In addition, the Health Officer and the Public Works  
20 director are not supervised by the individuals. The Board of  
21 Health hires, supervises and terminates the Health Officer and the  
22 Board of County Commissioners hire, supervise and terminate the  
23 Public Works Director." The County's proposed finding no. 4, much  
24 as its amended proposed finding no. 1 above, is rejected for  
25 reasons cited in FINDING No. 12. No grievance processing problems  
26 were even alleged. However, the weight of the evidence, and even  
27 some begrudging admission by the Respondent's counsel show that the  
28

1 proposed move would foster administrative convenience for the  
2 County.

3 17. "Lewis and Clark County attempted to work with Montana  
4 Employee's Association to move these employees to the Public Works  
5 unit. Initially, representatives from both units (Mel Wocjik,  
6 Public Works, and Cathy O'Brien, Health Department) agreed to the  
7 move. However, later [sic] decided they did not want to move these  
8 employees. The County attempted to address all of the concerns of  
9 the representatives, but we were unable to satisfy the union. At  
10 that point, Lewis and Clark County contacted the Board of Personnel  
11 Appeals for advice. The County was advised by Paul Melvin, that  
12 unit clarification was the appropriate avenue." The County's  
13 proposed finding no. 5 goes to the heart of the dispute. Sheila  
14 Cozzie testified that she never asked the landfill employees about  
15 their concerns or wishes. Cathy O'Brien admitted that unsuccessful  
16 discussions had taken place between the parties' representatives.  
17 Testimony established that from the perspective of the affected  
18 County employees, serious seniority concerns exist. Other  
19 employee concerns involve provisions achieved through negotiated  
20 bargaining. Because this finding goes to the ultimate issue, and  
21 because the County was unsuccessful at the bargaining table, its  
22 chosen means of achieving this goal will be addressed in the  
23 DISCUSSION section of this decision below. Because Paul Melvin did  
24 not testify or submit anything in writing, his precise advice is  
25 unknown. Although he may have recommended unit clarification as  
26 the appropriate mechanism for pursuing this matter, Melvin's  
27 statement is neither relevant or binding.

1        18. "The Landfill employees, by definition, are not members  
2 of the Health Department bargaining unit. Article II, Recognition  
3 of Exclusive Representative, Section 2. Appropriate Unit states  
4 that '...exclusive representative shall represent all part-time and  
5 full-time employees of the Employer, employed by the Department  
6 whose headquarters are located at 316 North Park and 1930 9th  
7 Avenue, Helena, Montana, and, as certified by the Board of  
8 Personnel appeals (sic) dated July 12, 1977...' Employer is  
9 further defined on page 1 of the contract as 'Lewis and Clark City-  
10 County Health Department.' The County's proposed finding no. 6  
11 repeats their proposed finding no. 3, and was rejected in FINDING  
12 No. 15 above.

13        19. "All of the employees involved in this matter are members  
14 of the Montana Public Employee's Association. They are, however,  
15 represented by two separate union contracts." The County's  
16 proposed finding no. 7 is accurate but incomplete. This proposed  
17 finding downplays the differences testified to by members of the  
18 two separate MPEA groups affected here. Both Ed Tinker, a landfill  
19 worker, and Tom Davis, a road and bridge worker, testified that  
20 their respective members unanimously oppose the proposed move.  
21 Moreover, Tom Davis, testified that the road and bridge crew would  
22 take active measures to protect their present positions at the  
23 expense of the newly proposed minority members, that is, the  
24 landfill employees. Cathy O'Brien credibly testified that in her  
25 opinion, as a matter of well-settled contract law, by simple  
26 majority vote on their contract, the existing 23 or so road and  
27 bridge crew employees can effectively deny seniority rights to the  
28 four landfill workers contemplated in this move.

1        20. "All individuals are classified on the County pay  
2 schedule as Heavy Equipment Operators. This position is a grade  
3 14, with a salary range of \$12.56 per hour to \$14.78 per hour.  
4 Both contracts have been settled for at least two years. The  
5 Public Works contract's pay plan is slightly more accelerated than  
6 the Health Department. Operators in public works will be at the  
7 market rate of \$14.78 by January 1998, while the health department  
8 employees won't be at the market rate until July 1998." The  
9 County's proposed finding no. 8 is accepted as an accurate  
10 representation of the County's pay plan based upon Sheila Cozzie's  
11 testimony. Details of the County's implementation of its pay plans  
12 to achieve market rate for both groups of employees (Health  
13 Department and Public Works) are appended to Exhibits A&B, 1 & 2.

14        21. "Duties performed by these individuals are similar. They  
15 are not identical. However, there are more similarities in duties  
16 of these two positions (operator at public works and operator at  
17 landfill) than there are between the positions at the health  
18 department. The Health department unit consists of professional  
19 medical staff and the administrative staff needed to operate the  
20 health clinic. This is the unit that the landfill operators are  
21 currently under." The County's proposed finding no. 9 is accurate  
22 but incomplete. Because landfill equipment operators and road and  
23 bridge crew operating engineers operate quite different equipment  
24 weighing more than 25,000 pounds, both sets of employees are  
25 required to possess commercial drivers' licenses. Testimony of Ed  
26 Tinker and Tom Davis documented significant differences in their  
27 respective duties and skills (more in DISCUSSION section). The  
28 County's undated position descriptions set out many differences.

1 The road and bridge crew operating engineers require more skills  
2 and the ability to execute engineers' directions (Exhs. C and D).  
3 Not all Health Department workers share close similarities, such as  
4 nurses, secretaries and the County sanitarian. "Community of  
5 interest," ARM 24.26.611 (1) (a), encompasses more than job duties  
6 and is addressed further in the DISCUSSION section of this  
7 decision.

8 22. "Lewis and Clark County's fringe benefit package is the  
9 same for all employees of the County, whether inside a bargaining  
10 unit or not." The County's proposed finding no. 10 is accepted to  
11 the extent it refers to insurance and certain county-wide benefits.  
12 It is rejected to the extent it fails to address several benefit  
13 distinctions achieved through collective bargaining and reflected  
14 in the two different contracts and based on the testimony of Sheila  
15 Cozzie, Cathy O'Brien, Ed Tinker and Tom Davis. The affected  
16 workers testified to their strong desire to retain such benefit  
17 distinctions. Certain advantages exist in the public works unit.

18 23. "There are some differences in the two union contracts.  
19 One specific difference is the issue of a well day. Under the  
20 current contract, the operators receive a well day (day off with  
21 pay), if for a period of six months they do not use any sick leave.  
22 This benefit would be lost under the public works contract.  
23 However, payroll records show that these particular employees have  
24 not qualified for the well day during the last four years.

25 Other differences include:

26 Pay when working a holiday: Currently they receive double  
27 time (2), and under the proposed unit they would receive  
28 double time and one-half (2 1/2)

1 Weekend work: Landfill employees are required to work on  
2 the weekends on certain shifts and public works  
employees are not.

3 Comp time accrual: Landfill employees can accrue up to 24  
4 hours of comp time. Under the new contract that is  
increased to 40.

5 Overtime: Under their current contract landfill employees  
6 do not receive overtime pay until reaching 40 hours in a  
work week. Under the new contract they would receive  
7 overtime pay after eight hours in a work day.

8 The County's proposed finding no. 11 is accepted to the extent  
9 it highlights certain differences in the two binding contracts. It  
10 is rejected as to whether any current landfill operators have  
11 recently qualified for a "well day." Although possibly accurate,  
12 no testimony or documentary evidence was offered to support this  
13 portion of the proposed finding.

14 24. "Seniority is an issue for the landfill employees. Lewis  
15 and Clark County would agree to separate seniority lists for the  
16 road employees and the landfill employees. It would work much the  
17 same as in the current contract, as these individuals are already  
18 separated by seniority lists. These employees would not be  
19 required to start over with no seniority. We would consider them  
20 transfers as they are transferring from one department to another.  
21 When transferring any employee at the County, all seniority and  
22 benefits are retained with that employee to their new department.  
23 This has been past practice county-wide and has occurred between  
24 these two units in the past, when one landfill employee transferred  
25 to the road department." The County's proposed finding no. 12 is  
26 an accurate statement of its intentions. It is rejected to the  
27 extent it purports to interpret contract law, because the  
28 signatories to the two contracts running until July 1999, and July

1 2000, are the only persons with voting rights. In essence, the  
2 County cannot by fiat and good intention transfer seniority rights  
3 (the pertinent Articles VIII and XXII of the Road/Bridge/Shop  
4 contract are explained in the DISCUSSION section below). No  
5 testimony or documentary evidence supports any landfill employees  
6 achieving such a transfer of seniority. Protection of seniority  
7 constitutes the most serious and meritorious issue at stake for the  
8 landfill workers. Hearsay testimony concerning seniority transfer  
9 which may have taken place for a now retired supervisor (Bill "TJ"  
10 Blagent [sp]) is not applicable or controlling.

#### 11 **IV. FINDINGS OF FACT**

12 25. The Road and Bridge crew are not required to work  
13 weekends, except for emergencies, including snow removal. The  
14 landfill equipment operators must work weekends, and pick up trash  
15 along the perimeter of the site. The road and bridge crew  
16 employees do not want to be assigned to the landfill duties. Both  
17 groups work outside in all types of weather. (Testimony of S.  
18 Cozzie, T. Davis and C. O'Brien)

19 26. Before and after the County's June 1996 reorganization of  
20 public works, no problems have occurred between the County and  
21 either bargaining unit in the processing of grievances. The  
22 mechanics of processing grievances have not changed. Sheila Cozzie  
23 usually serves as the County's designee. Cathy O'Brien had  
24 processed three grievances in calendar 1997 for her Health  
25 Department unit. (Testimony of C. O'Brien)

26 27. In the event of County layoffs, the landfill employees  
27 have serious concerns that the voting block of the road and bridge  
28 crew employees would imperil their jobs, despite their current



1 seniority under the separate Health Department contract. The 23 to  
2 4 voting edge, and explicit testimony of Tom Davis, Shop Steward,  
3 confirmed that the road and bridge crew employees would exercise  
4 their voting rights in a manner which could jeopardize the jobs of  
5 the landfill employees. The road and bridge crew employees possess  
6 greater skill levels as evidenced by the job requirements (compare  
7 position descriptions, Exhs. C and D). The members of each unit  
8 object to being moved against their will. Cathy O'Brien recounted  
9 employee-expressed causes for friction regarding possible merger,  
10 including how overtime is dispensed. (Testimony of C. O'Brien, T.  
11 Davis, and E. Tinker)

12 28. According to the terms of the contracts, seniority starts  
13 with the day of hire under the contract, not with the date of hire  
14 with the County. The two County-MPEA contracts at issue do not  
15 have reciprocity clauses for transfer of seniority to different  
16 County departments (explicated in the DISCUSSION section). The  
17 members of each unit have voting rights to refuse to re-open or  
18 even consider an "addendum" to the existing contracts, prior to the  
19 expiration of the contracts. (Exhs. A & B, 1 & 2; testimony of C.  
20 O'Brien)

21 29. The County does not consider landfill employees and road  
22 and bridge crew employees fungible. At the time of hearing the  
23 County had no plans to have workers in the different units assigned  
24 to the other's work. The County ratified the respective position  
25 descriptions detailing different skills. (Testimony of S. Cozzie;  
26 Exhs. C and D)

27 30. The parties in this case are also parties to two  
28 collective bargaining agreements which are relevant in this matter.

1 (Exhs. 1 & 2, A & B; testimony of C. O'Brien, S. Cozzie, E. Tinker  
2 and T. Davis)

3 31. The parties did not allege nor offer proof of any  
4 substantial change in the duties of the landfill employees at any  
5 material time. The duties of the road and bridge operating  
6 engineers were not alleged to have been changed at any material  
7 time. (Testimony of E. Tinker, C. O'Brien, S. Cozzie and T. Davis;  
8 Exhs. C & D)

9 32. The parties did not allege nor offer proof that any of  
10 these employees have become, or are, in any way, supervisory  
11 employees. (Testimony of the witnesses was consistent on this  
12 point)

13 33. The position descriptions of these two groups of  
14 employees (Exhs. C & D) demonstrate significant differences in the  
15 duties, skills and work places of the two groups. The County and  
16 the Respondent do not consider the positions fungible. Because  
17 both groups of employees operate heavy equipment, the workers are  
18 required to have a commercial driver's license. The County now  
19 classifies both groups of employees as heavy equipment operators on  
20 the same pay matrix. Workplaces are different, but both involve  
21 public works. (Testimony of E. Tinker, T. Davis, C. O'Brien and  
22 S. Cozzie)

23 34. The benefit packages set forth in the two collective  
24 bargaining agreements demonstrate small but significant  
25 differences. Members of the two bargaining units prefer the  
26 separate benefits they have under their respective contracts.  
27 (Testimony of E. Tinker, T. Davis and C. O'Brien)

1        35. The Petitioner offered no substantial evidence that the  
2 County would gain any significant benefit or economy if this  
3 petition were granted. Granting the petition would afford the  
4 County some administrative efficiency. The County offered no  
5 evidence that processing grievances through existing mechanisms has  
6 been a problem or would be improved by granting the petition.  
7 Cathy O'Brien services the Health Department contract, and Mel  
8 Wojcik services the Road and Bridge contract for the MPEA.  
9 (Testimony of C. O'Brien)

10       36. The Petitioner offered no evidence of any change of  
11 duties for the two groups of employees, or of change in the  
12 immediate supervisors. The County would gain some organizational  
13 efficiency. The two groups do not wish joinder. The County's  
14 basis for the unit change is to reconcile the reorganization action  
15 it took June 26, 1996. (Testimony of C. O'Brien, S. Cozzie, T.  
16 Davis and E. Tinker)

17       37. Landfill operators are unanimous in not wanting to be  
18 moved. Road and bridge crew employees are unanimous in not wanting  
19 to be moved. Cathy O'Brien detailed concerns which had been  
20 expressed to her. (Testimony of E. Tinker, T. Davis and C.  
21 O'Brien)

22       38. The Respondent's witnesses presented bona fide concerns  
23 by the landfill operators for job seniority and job security. The  
24 County's proposed offers and request to move the workers failed to  
25 overcome controlling contract language and contract provisions  
26 detailed in the DISCUSSION section of this decision. (Testimony of  
27 C. O'Brien, T. Davis and E. Tinker)

1        39. The two separate collective bargaining agreements are  
2 binding on each of the parties. (Testimony of C. O'Brien and S.  
3 Cozzie; Exhs. A & B, 1 & 2)

4        40. Lewis and Clark County initiated an organizational  
5 restructuring. This restructuring began when the County opened a  
6 new regional landfill. The operation and oversight of this  
7 landfill has been assigned to the Public Works Director. The  
8 County's reorganization now places the landfill employees under  
9 Public Works; formerly they were under the Health Department.  
10 Although the Health Officer held organizational authority over the  
11 landfill employees, the parties offered no evidence of any active  
12 supervision or organizational difficulties associated with the  
13 County's previous structure. The County's formal reorganization of  
14 public works occurred June 26, 1996, shortly before the two  
15 controlling contracts became effective, July 1, 1996. Will Selser  
16 continues to have responsibility for the landfill employees.

17        41. Lewis and Clark County implemented the organizational  
18 realignment described earlier. The County offered no evidence of  
19 any difficulties processing grievances through existing mechanisms  
20 and the chain of command in effect for approximately nine years.  
21 When problems or grievances go beyond Will Selser, the immediate  
22 supervisor of the landfill employees, Sheila Cozzie becomes the  
23 County's designee as a matter of longstanding practice. Sheila  
24 Cozzie continues to represent both the Health Department and the  
25 Public Works Department in negotiating with either Cathy O'Brien,  
26 MPEA's Health Contract servicer, or with Mel Wojcik, MPEA's Public  
27 Works Department Contract servicer. There is overlap in the  
28 membership of the Board of Health and the County Commissioners.

1 All the employees at issue ultimately work for the County.

2 (Testimony of C. O'Brien, T. Davis, E. Tinker and S. Cozzie)

3 42. All of the employees involved in this matter are members  
4 of the MPEA. However, the landfill employees and public works'  
5 operating engineers are covered and represented by two separate  
6 contracts. The County and the MPEA negotiated these two contracts.  
7 Both Ed Tinker, a landfill employee, and Tom Davis, a road and  
8 bridge crew employee, testified to their respective members'  
9 unanimous opposition to this proposed move. The two groups  
10 perceive different interests. In fact, Davis credibly testified  
11 that the road and bridge crew employees would take active measures  
12 to protect their perceived interests at the expense of the newly  
13 proposed minority members, the landfill employees. Cathy O'Brien  
14 credibly testified that in her opinion, as a matter of well-settled  
15 contract law, by simple majority vote on their contract, the  
16 existing 23 or so road and bridge crew employees can effectively  
17 deny seniority rights to the four landfill employees contemplated  
18 in this move. (Testimony of C. O'Brien, T. Davis and E. Tinker)

19 43. The County classifies all employees at issue as heavy  
20 equipment operators on its pay schedule. The landfill position is  
21 grade 14, with a salary range of \$12.56 per hour to \$14.78 per  
22 hour. The existing contracts are marked as Exhibits 1 & 2 and A &  
23 B. The County's pay plan to achieve market rate for all employees  
24 is slightly more accelerated for Public Works than for the Health  
25 Department. The County expects the later department to be at  
26 market rate by July 1998. Details of the County's implementation  
27 of its pay plans for both groups are appended to Exhibits A & B, 1  
28 & 2. (Testimony of S. Cozzie)

1 44. Certain fringe benefits are the same for all County  
2 employees, such as insurance. The road and bridge crew employees  
3 and the landfill employees achieved certain different benefits  
4 through negotiated bargaining which are reflected in their  
5 contracts. The respective groups have strong preferences for their  
6 benefit distinctions. (Testimony of E. Tinker, T. Davis and S.  
7 Cozzie)

8 45. The two groups have different contracts. One specific  
9 difference is a well-day under the Health Department contract.  
10 This rewards landfill employees with one day off if no sick leave  
11 is used in a six month's period. Public works does not have this  
12 benefit.

13 Other differences include:

14 Pay when working a holiday: Currently they receive double  
15 time (2), and under the proposed unit they would receive  
16 double time and one-half (2 1/2)

17 Weekend work: Landfill employees are required to work on  
18 the weekends on certain shifts and public works  
19 employees are not.

20 Comp time accrual: Landfill employees can accrue up to 24  
21 hours of comp time. Under the new contract that is  
22 increased to 40.

23 Overtime: Under their current contract landfill employees  
24 do not receive overtime pay until reaching 40 hours in a  
25 work week. Under the new contract they would receive  
26 overtime pay after eight hours in a work day.

## 27 V. DISCUSSION

28 The parties have met the threshold petition requirements for  
unit clarification. The Board's agent, Kathy van Hook, conducted  
a preliminary investigation of this Petition and issued her ORDER  
dated December 30, 1996. Having found that a question of fact  
exists, her ORDER forwarded this case to the hearings bureau for a  
contested hearing pursuant to ARM 24.26.630. At the pre-hearing

1 telephone conference in this matter, the Respondent's  
2 representatives did not dispute that the County's petition contains  
3 the individual elements named in ARM 24.26.630. The County's  
4 petition in this matter sets out those requisite items. (Hearing  
5 file)

6 The Board has authority to determine an appropriate bargaining  
7 unit. The statutory criteria and administrative rules to be used  
8 in unit clarification petitions are identical (§39-31-202, MCA and  
9 ARM 24.26.611). The Board's statutory grant of authority also  
10 enunciates the policy behind these nine factors:

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

23 The County contends that its proposed move will promote  
24 administrative convenience, ease the processing of grievances, and  
25 that its reorganization of public works will be better reflected if  
26 its petition is granted. The County argued that it has classified  
27 both groups of employees as heavy equipment operators, and that  
28 their duties are similar. The County said it offered to maintain  
29 separate seniority lists. The County argued that the wishes of the  
30 affected employees should not be the deciding factor in whether  
31 unit clarification is granted.

32 The MPEA argued that the two groups of employees strongly wish  
33 to maintain their negotiated differences. The Respondent further



1 argued that the separate contracts, signed by the County, are  
2 controlling. The MPEA argued that seniority and job security of  
3 the landfill employees is at stake and not addressed by the  
4 County's offers.

5 The County failed its burden of proof to disturb the existing  
6 contracts. The County did not show any difficulties with the  
7 existing grievance process, in place for approximately nine years.  
8 The MPEA demonstrated substantial differences in skills and duties  
9 between the two groups of employees. The County did not  
10 demonstrate any applicable reciprocity clauses for seniority  
11 between the two contracts. The concern of the landfill employees  
12 for job security if they become minority members in a majority  
13 contract has been proven a valid concern. The MPEA demonstrated  
14 negotiated differences in benefits strongly preferred by the two  
15 groups of employees. The County failed to show why the contracts  
16 are not binding, or why the two contracts should be set aside for  
17 mere administrative convenience.

18 This discussion covers, in turn, (1) the nine factors the  
19 Board must consider in evaluating petitions for unit clarification,  
20 (2) the County's offer to maintain separate seniority lists and how  
21 that offers comports with the contracts in place, and (3) case law  
22 and precedent cited by the County.

23 1. **The nine factors for the Board to consider (§ 39-31-202, MCA)**

24 Community of interest

25 Community of interest is a general rubric fundamental to a  
26 bargaining group's composition. This term is not expressly defined  
27 but incorporates all the succeeding eight elements (ARM 24.26.611  
28 (b) - (i)). The Board uses factors adopted from the National Labor

1 Relations Board (NLRB) in evaluating an appropriate unit. The NLRB  
2 enumerated these factors in Kalamazoo Paper Box Corp.,  
3 136 NLRB 134, 48 LRRM 1715 (1962). The Board need not determine  
4 the "most" appropriate unit, only that the unit shares a community  
5 of interests (See The Developing Labor Law, 448 - 452 (3rd ed., P.  
6 Hardin, ed. 1992)).

#### 7 Wages

8 The County has classified both the landfill workers and the  
9 road and bridge crew employees as grade 14 heavy equipment  
10 operators. The wages of the road and bridge crew employees are  
11 slightly more advanced than those of the landfill workers toward  
12 the County's goal of market-based pay (FINDING No. 20). Overtime  
13 wages are greater under the road and bridge crew's contract  
14 (FINDING No. 23). Therefore, a close comparison exists between the  
15 two groups. No evidence was offered as to how the landfill  
16 equipment operators compare to other members of the Health  
17 Department contract.

#### 18 Hours

19 Both groups work a 40-hour week, but considerable differences  
20 exist. In the summer, the road and bridge crew employees work four  
21 10 hour days, with some working Monday to Thursday, and some  
22 Tuesday to Friday. This group is subject to emergency call-ins for  
23 street repairs and snow-plowing in the winter. They have weekends  
24 off. The landfill is staffed on weekends. The landfill equipment  
25 operators bid by seniority for favored shifts, often with a weekday  
26 off (FINDING No. 25 and testimony of C. O'Brien). Comp time  
27 accrual is different (FINDING Nos. 3, 5 and 23).

#### 28 Fringe benefits and other working conditions

1 The contracts provide for differences in the negotiated fringe  
2 benefits the two groups receive (FINDING Nos. 6, 22 & 23).  
3 Pursuant to 42 A.G. Op. 37 (1987) Montana counties must offer the  
4 same insurance benefits to their recognized bargaining units.  
5 Testimony of Ed Tinker, Tom Davis and Cathy O'Brien confirmed the  
6 preferences the two groups have in maintaining their current  
7 differences (bonus pay, well-day, and work schedule bidding, among  
8 others).

9 The history of collective bargaining

10 The landfill equipment operators and the road and bridge crews  
11 have no common history of collective bargaining. Sometime around  
12 1988, the Landfill workers became affiliated with the MPEA Health  
13 Department/County contract. The testimony of Ed Tinker, Tom Davis  
14 and Cathy O'Brien highlighted differences in duties and skills, and  
15 concerns to the extent that formal grievances would be filed if the  
16 petition advanced. Road and bridge crew employees do not want  
17 landfill duties; both groups perceive different interests. Cathy  
18 O'Brien's uncontradicted testimony established that the County's  
19 proposal would make the four landfill workers minority members in  
20 a majority contract.

21 Common personnel policies

22 The parties presented little if any evidence concerning  
23 personnel policies. Although some differences may exist between  
24 Public Works and Health, County-wide policies cover most issues.  
25 In terms of processing grievances, or day-to-day operations, no  
26 problems have been demonstrated with the status quo. Joinder would  
27 give the County some efficiencies.

1       Extent of integration of work functions and interchange among  
2 employees affected

3       Both groups operate heavy equipment. The landfill operators  
4 generally exercise less technical skill and fewer types of  
5 equipment. They need not read stakes, follow engineering plans, or  
6 perform blasting or other diverse requirements imposed on the road  
7 and bridge crew employees. The workers are not fungible and no  
8 change in duties is proposed (FINDING Nos. 3 & 29). No "exchange"  
9 of workers between the units is proposed. Both perform work  
10 outside at different locations in the arena of public works.

11       Desires of the employees

12       The desire of both groups is to remain separate (FINDING Nos.  
13 22, 24 & 27). Seniority, possible job loss by the landfill workers  
14 who could be "bumped," overtime and scheduling remain legitimate  
15 concerns. Cathy O'Brien, Ed Tinker and Tom Davis credibly  
16 testified on this factor.

17       The County has raised legitimate organizational reasons for  
18 considering joinder. However, the County has ignored the binding  
19 nature of the two contracts (explained below). Offers of separate  
20 seniority lists fail to address contract provisions the County  
21 bargained.

22       **2. The County's separate seniority list offer and contract law**

23       The current contracts (Exhs. A & B, 1 & 2) are controlling and  
24 dispositive of the County's unit clarification petition. The  
25 County signed separate contracts with effective dates running from  
26 July 1, 1996 to June 30, 1999 (Road/Bridge/Shop) and from July 1,  
27 1996 until June 30, 2000 (Health Department). Yet, on or about  
28 June 26, 1996, the County instituted organizational changes in

1 public works. Having been unsuccessful at informal negotiations  
2 with the two recognized MPEA groups, the County thereafter filed  
3 this petition for unit clarification October 1, 1996.

4 The Road and Bridge contract (Exh. A, p. 12) contains the  
5 following provisions:

6 ARTICLE VIII  
7 SENIORITY

8 1. Seniority is based on the length of continuous service  
9 worked by a permanent full-time employee for the County in the  
10 Road, Bridge, and Shop Departments. For purposes of seniority  
11 only, the Road, Bridge, and Shop Departments shall be considered a  
12 single combined department. The concept of the combined Road,  
13 Bridge, and Shop Departments shall be applied in the seniority  
14 provisions specified below:

15 b. Employees or former employees, subject to the time  
16 limitation conditions of Article VIII, Section 4, [employees who  
17 are promoted to supervisory status and are removed from the  
18 bargaining unit] who have successfully bid to another department,  
19 and who have successfully completed the thirty (30) day promotion  
20 probationary period conditions of Article XIX, Section 1 herein,  
21 shall have their departmental seniority bridged in all respects,  
22 i.e., vacation benefits, sick leave benefits, seniority merged into  
23 the new departmental seniority lists, etc., providing however, that  
24 the new department is also subject to this same Agreement.

25 As indicated in FINDING No. 28, no such "reciprocity" clause  
26 exists in the Health Department contract. Pertinent seniority  
27 provisions of the Health Department contract (Exh. B, p.6) are:

28 ARTICLE XII  
SENIORITY/LAYOFFS

Section 1. Seniority means an employee's length of continuous  
service with the Employer, [Health Department] since the last date  
of hire.

The other controlling contract provisions of these two  
separate contracts involves any changes in the contracts. The Road  
and Bridge contract (Exh. A, p.25) reads:

1 ARTICLE XXII  
2 TERM OF AGREEMENT

3 **Section 2. Changes in Agreement:**

4 During its terms this Agreement may be altered, changed,  
5 added to, deleted from or modified only through the voluntary,  
6 mutual consent of the parties in written and signed amendment of  
7 this Agreement.

8 The Health Department's contract provisions covering changes  
9 reads (Exh. B, p. 15) as follows:

10 ARTICLE XXVII  
11 SCOPE OF AGREEMENT

12 This Agreement constitutes the entire Agreement between  
13 the parties. The parties further acknowledge that during the  
14 course of collective bargaining, each party has had the unlimited  
15 rights to offer, discuss, accept or reject proposals. Therefore,  
16 for the term of this Agreement, no further collective bargaining  
17 shall be had upon any provision of this Agreement, nor upon any  
18 subject of collective bargaining, unless by mutual consent of the  
19 parties thereto.

20 These respective seniority and change of agreement provisions  
21 support the Respondent's position that the County's proposed  
22 "seniority merger" cannot be accomplished by County fiat. Voting  
23 to re-open the contract and then to agree to modification are  
24 required by the above terms (FINDING No. 28). Because the road and  
25 bridge crew employees now possess exclusive status within their own  
26 contract, and because their 23 members would continue to enjoy  
27 "majority status" if the four landfill workers were to join the  
28 road and bridge contract as new hires, seniority concerns of the  
landfill workers are bonafide.

3. **Case precedent cited by the County**

Montana recognizes that interpretations of the National Labor  
Relations Act are "instructive" in evaluating collective bargaining  
issues under state law Small v. McRae, 200 Mont. 497,  
651 P.2d 982 (1982), Great Falls v. Young, 211 Mont. 13,

1 686 P.2d 185 (1984), and Brinkman v. State, 224 Mont. 238, 729 P.2d  
2 1301 (1986).

3 The County cites the following three cases which are not  
4 controlling in this case: NLRB v. Ideal Laundry & Dry Cleaning  
5 Co., 56 LRRM 2036 (10th Cir. 1964), In re Baltimore Transit Co.,  
6 92 NLRB 120, 27 LRRM 1148 (1950), and State Labor Relations Bureau  
7 on Behalf of the Montana Historical Society v. Montana Federation  
8 of State Employees, MFT, AFT, AFL-CIO, Unit Clarification #5-85,  
9 September 9, 1986. In re Baltimore Transit, id., involved  
10 employees alleged to have supervisory status, which would be  
11 grounds to remove the workers from the bargaining unit; the NLRB  
12 found the workers to be clerical. None of the landfill employees  
13 at issue have had any change of duties and none are alleged to be  
14 supervisors. Ideal Laundry, id., holds that the wishes of the  
15 workers with respect to inclusion in a bargaining unit is a factor,  
16 but not the only factor to be considered. In the Montana  
17 Historical Society, id., the archivist position at stake was  
18 properly excluded from a bargaining unit due to the bona fide  
19 supervisory duties, facts not at issue here.

## 20 V. CONCLUSIONS OF LAW

21 1. The Board of Personnel Appeals and the Hearing Examiner  
22 have jurisdiction of this matter. § 39-31-202, MCA. In addition,  
23 § 39-31-105, MCA, directs that these administrative hearings be  
24 conducted according to the appropriate provisions of the Montana  
25 Administrative Procedures Act (MAPA), §§ 2-4-601 to 2-4-623 , MCA.

26 2. The Petitioner has failed to establish that justification  
27 exists to disturb the status quo and remove certain landfill  
28 employees from the Board-recognized MPEA Health Department



1 bargaining unit. The existing collective bargaining agreements  
2 cannot be set aside for mere administrative convenience; the  
3 Petitioner did not show any change in duties or supervisory status  
4 of any affected employees.

5 **VI. RECOMMENDED ORDER**

6 The County's October 1, 1996, petition to remove four full-  
7 time landfill equipment operators from the Lewis and County Health  
8 Department/MPEA contract is denied.

9 DATED this 19th day of February, 1998.

10 BOARD OF PERSONNEL APPEALS

11 By:

Stephen L. Wallace

12 Stephen L. Wallace  
13 Hearing Officer

14 NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER  
15 shall become the Final Order of this Board unless written  
16 exceptions are postmarked no later than March 16, 1998.  
17 This time period includes the 20 days provided for in ARM  
18 24.26.215, and the additional 3 days mandated by Rule 6(e),  
19 M.R.Civ.P., as service of this Order is by mail.

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

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

\* \* \* \* \*

CERTIFICATE OF MAILING

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

Thomas Schneider, Pres & Carter Picotte, Esq  
Montana Public Employees' Association  
P.O. Box 5600  
Helena MT 59604-5600

Sheila Cozzie, Personnel Officer & Paul Stahl, Esq  
Lewis and Clark County  
P.O. Box 1724  
Helena MT 59624-1724

DATED this 19<sup>th</sup> day of February, 1998.

Sandra K. Page