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3 **BOARD OF PERSONNEL APPEALS**
4 **PO BOX 6518**
5 **HELENA MT 59604-6518**
6 **Telephone: (406) 444-2718**
7 **Fax: (406) 444-7071**

8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10 IN THE MATTER OF UNIT CLARIFICATION 5-2001:

11 HARLEM PUBLIC SCHOOLS,)

12 Petitioner,)

13 - vs -)

14 HARLEM CLASSIFIED EMPLOYEES, MEA-MFT,)

15 Respondent.)

16 FINAL ORDER

17 *****

18 The above-captioned matter came before the Board of Personnel Appeals (Board) on September 13,
19 2001. The matter was before the Board for consideration of the Notice of Exceptions filed by Catherine M. Swift,
20 attorney for Petitioner, to the Findings of Fact; Conclusions of Law; and Recommended Order issued by Anne L.
21 MacIntyre, Chief, Hearings Bureau, dated July 5, 2001.

22 Catherine M. Swift, attorney for the Petitioner, and Richard Larson, attorney for the Respondent,
23 appeared in person.

24 From a review of the file and careful consideration of the briefs and argument of the parties, the
25 discretion of the Board is moved as follows:

- 26 1. IT IS HEREBY ORDERED that the Hearing Officer's Findings of Fact; Conclusions of Law; and
27 Recommended Order is hereby affirmed and adopted by the Board.

28 DATED this 14th day of September, 2001.

BOARD OF PERSONNEL APPEALS

By: 
Jack Holstrom
Presiding Officer

Board members Holstrom, Schneider and Johnson voted aye.
Alternate member Dwyer voted aye.
Board member O'Neill dissents.

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

CERTIFICATE OF MAILING

I, *Catherine M. Swift*, do hereby certify that a true and correct copy of this document was mailed to the following on the 20th day of September, 2001:

CATHERINE M. SWIFT
GOUGH SHANAHAN JOHNSON & WATERMAN
PO BOX 1715
HELENA MT 59624-1715

RICHARD LARSON
CHRONISTER MOREEN & LARSON PC
PO BOX 1152
HELENA MT 59624-1152

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 5-2001:

HARLEM PUBLIC SCHOOLS,)	Case No. 1099-2001
)	
Petitioner,)	
)	
vs.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
HARLEM CLASSIFIED EMPLOYEES,)	AND RECOMMENDED ORDER
MEA-MFT,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Harlem Public Schools filed a petition to clarify the composition of a unit established for collective bargaining purposes on November 30, 2000. The proposed clarification was to delete the position of elementary secretary from the unit of classified employees. On December 28, 2000, Harlem Classified Employees, MEA-MFT, responded to the petition by denying that the position should be deleted from the unit. On January 4, 2001, the Board ordered that the case should be transferred to the Hearings Bureau for a hearing on the petition.

Hearing Officer Anne L. MacIntyre conducted a telephonic hearing in the case on May 14, 2001. Catherine M. Swift represented Harlem Public Schools. Richard Larson represented Harlem Classified Employees, MEA-MFT. Don Bidwell, Gaylynn McConnell, Barb Stiffarm, Jane Williams, Dwaine Lavinder, Ruth Ann Brown, and Kathy Getten testified as witnesses in the case. Exhibits J-1 through J-4, R-A, and P-1 were admitted into evidence.

II. ISSUE

The issue in this case is whether a unit proposed for collective bargaining purposes is appropriate pursuant to § 39-31-202, MCA, because of the inclusion in that unit of a confidential employee as provided in § 39-31-103(3), MCA.

III. FINDINGS OF FACT

1. Petitioner Harlem Public Schools (HPS) is a public school district (School District No. 12, Blaine County) operating an elementary school and high school, which are located in two separate buildings in two separate locations in Harlem, Montana. The elementary school is located about 8 blocks from the high school.

2. Respondent Harlem Classified Employees Association, MEA-MFT (the Association), is the exclusive representative for all non-certified employees of HPS, excluding managerial and supervisory personnel.

3. HPS is operated by a 5-member elected board of trustees.

4. Don Bidwell is the HPS superintendent; Kathy Eaton is the high school principal; and Dwain Lavinder is the elementary school principal. Each of these school management officials has a secretary. The high school also has an assistant principal/athletic director. Bidwell's office is in the high school building.

5. HPS bargains with the Association, the exclusive representative which represents a unit of classified employees of the district. Secretaries are included in the unit.

6. Bidwell's secretary, Michelle Sears, is designated as a confidential employee and is excluded from the unit. The elementary secretary position is currently included in the bargaining unit. The high school secretary position is also included in the unit.

7. The district's collective bargaining team formulates management policies to be negotiated at the table and responds to proposals presented by the classified unit.

8. Lavinder is currently on the district's collective bargaining team. The other members of the team are Bidwell and two members of the board of trustees.

9. The current position description for secretaries in the district (Exhibit J-2) lists the duties as typing correspondence, answering the phone and greeting visitors, filing, and other secretarial assignments as directed.

10. Jane Williams is the incumbent employee in the elementary secretary position. She is the assistant to the elementary principal. In that capacity, she performs routine secretarial duties, such as typing, answering the telephone, and assisting students and parents. She is responsible for student records, for making eligibility determinations for the free and reduced cost lunch program in the district, for kindergarten enrollments, and for disciplinary matters involving students. She is also in charge of the building in Lavinder's absence.

11. HPS has prepared a revised job description for the elementary secretary position to reflect a number of the duties and responsibilities presently assigned to Williams. The job description changes the title of the position to elementary secretary/administrative assistant. (Exhibit J-3)

12. Williams has no confidential labor relations duties. She is responsible for certain confidential information in the course of her duties, including student records and information concerning the lunch program. Because she is a member of the collective bargaining unit, HPS assigns her no labor relations duties now. The proposed job description contains no specific labor relations duties.

13. HPS would like to assign Williams certain responsibilities in connection with Lavinder's labor relations duties. These include proofreading and copying draft collective bargaining proposals written by Lavinder and sending them to Bidwell, providing historical background to the negotiation team for bargaining the contract for the classified unit, acting as a "sounding board" for Lavinder regarding possible proposals in the negotiation process, and assistance to Lavinder with reprimands, warnings, performance appraisals, and grievances. HPS does not wish to assign these responsibilities to Williams as long as her position is in the bargaining unit, believing that doing so would "put her on the spot."

14. In their current negotiations, HPS and the Association are considering adding a new category of employment for the position of administrative assistant to the classified employee schedule. This position would be paid a higher salary than the position of secretary.

IV. DISCUSSION

The District contends that the elementary principal's secretary, Jane Williams, should be excluded from the Harlem Classified collective bargaining unit as a confidential employee. The Association seeks a determination that the petition to exclude the position from the bargaining unit should be denied.

Montana law gives public employees the right of self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. § 39-31-201, MCA. The law further authorizes the Board of Personnel Appeals to decide what units of public employees are appropriate for collective bargaining purposes. § 39-31-202, MCA. However, because the statute excludes “confidential employee” from the definition of “public employee” (§ 39-31-103(9), MCA), a confidential employee does not have the rights guaranteed by § 39-31-201, MCA, and is not appropriately included in a unit for collective bargaining purposes.

A confidential employee is “any person found by the [Board of Personnel Appeals] to be a confidential labor relations employee” § 39-31-103(3), MCA. The issue in this case is whether Williams is a confidential labor relations employee.

In analyzing this case, it is appropriate to consider cases decided under federal law. Section 9(b) of the National Labor Relations Act gives the National Labor Relations Board (NLRB) comparable authority to determine appropriate bargaining units. Thus, the Montana Supreme Court and the Board of Personnel Appeals follow federal court and NLRB precedent to interpret the Montana Act. State ex rel. Board of Personnel Appeals v. District Court, 183 Mont. 223, 598 P.2d 1117 (1979); Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals, 195 Mont. 272, 635 P.2d 1310 (1981); City of Great Falls v. Young (Young III), 211 Mont. 13, 686 P.2d 185 (1984).

Unlike the Montana statute, the National Labor Relations Act contains no statutory provision for excluding confidential employees from bargaining units. However, the NLRB has historically excluded confidential employees when a labor relations nexus is present. The federal cases contain two distinct theories for excluding confidential employees:

1. Confidential employees are those “who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the area of labor relations.” B. F. Goodrich Co., 115 NLRB 722, 724 (1956) (footnote omitted, emphasis deleted). “[T]he test is whether [the employee] is expected to, and in fact does, act in a confidential capacity in the normal course of her duties.” Siemens Corp., 224 NLRB 1579 (1976). Such employees are excluded from units established for collective bargaining purposes.

2. Employees who regularly have access to confidential information concerning anticipated changes which may result from collective bargaining

negotiations are excluded from collective bargaining units. Pullman Standard Division of Pullman, Inc., 214 NLRB 762, 762-763 (1974).

In NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981), the U. S. Supreme Court upheld the NLRB's practice of requiring that a "labor nexus" be present in order to exclude employees from collective bargaining units. The exception is construed narrowly in order not to deprive employees of their rights to bargain collectively. Hendricks County, 454 U.S. at 180-181, citing with approval Ford Motor Co., 66 NLRB 1317, 1322 (1946).

In UC 2-87, Livingston School District No. 4 and 1 v. Montana Education Association/Livingston Classified Employees Association, the Board adopted a hearing officer's decision which held that for an employee to be excluded, both tests must be met. In other words, to be a confidential labor relations employee, the employee must assist an official who formulates, determines, and effectuates labor relations policies **and** must have access to confidential labor relations information in the normal course of employment.

Whether the tests are applied in the disjunctive or conjunctive, the result in this case is the same. In order to be excluded from the unit, the work performed by the elementary principal's secretary must have a labor relations nexus. Under either test, the work performed by Jane Williams does not have a labor relations nexus.

Although Williams is the assistant to the elementary principal who is involved in labor relations administration, Williams does not assist him with regard to labor relations matters. The relevant inquiry is whether the employee is expected to and does in fact act in a confidential capacity regarding labor relations matters in the normal course of her duties. In Hendricks County, the Supreme Court upheld an NLRB decision finding that the personal secretary to the chief executive officer of a corporation was not a confidential secretary because she did not act in a confidential capacity with respect to labor relations matters. 454 U.S. at 190-191. In a footnote explaining its rationale, the Court stated:

We do not suggest that personal secretaries to the chief executive officers of corporations will ordinarily not constitute confidential employees. *Hendricks* is an unusual case, inasmuch as Weatherman's tasks were "deliberately restricted so as to preclude her from" gaining access to confidential information concerning labor relations. . . . Whether Hendricks imposed such constraints on Weatherman out of

specific distrust or merely a sense of caution, it is unlikely that Weatherman's position mirrored that of executive secretaries in general.

454 U.S. at 191, fn. 23 (citations omitted).

This case is similarly unusual. The duties of the HPS elementary secretary have been deliberately structured in order to avoid providing assistance to the elementary principal with labor relations matters. Initially, this was because the elementary principal was not a member of the district's collective bargaining team. Since Lavinder became principal and became a member of the bargaining team, HPS has not assigned Williams to assist him with labor relations matters, believing that to do so would put her on the spot because she is a member of the bargaining unit.¹ Lavinder performs his own clerical work regarding labor relations matters or obtains assistance from the secretary to the superintendent, not from Jane Williams. Therefore, Williams does not act in a confidential capacity with respect to labor relations matters.

Nor does Williams have access to confidential labor relations information in the normal course of her duties. The record contains evidence that Williams has access to confidential information relating to students, especially regarding eligibility for the lunch program. This is not confidential labor relations information.

The dilemma posed by this case is that HPS seeks to remove the elementary secretary position from a unit established for collective bargaining purposes based upon duties it wishes to have the employee perform in the future, not based upon duties she is presently performing. However, the test for determining whether a position is properly included in a collective bargaining unit is whether the employee is expected to act in a confidential capacity and does in fact act in a confidential capacity. Siemans Corp., 224 NLRB at 1579.

In UD 7-89, Montana Education Ass'n, NEA v. Missoula County High School, the Board's hearing examiner held:

Section 39-31-202 MCA requires that the Board of Personnel Appeals consider certain factors when determining an appropriate

¹Further, loss of bargaining unit work due to reassignment of unit members is a mandatory subject of collective bargaining. Kohler Co., 273 NLRB 1580, 1583 (1985); Fry Foods, Inc., 241 NLRB 76, 88, enforced, NLRB v. Fry Foods, Inc., 609 F.2d 267 (6th Cir. 1979).

bargaining unit. In making that determination the Board of Personnel Appeals must apply those factors as they exist at the time of the petition. It would be impossible for the Board to consider and evaluate conditions that do not exist. To do so would require the Board to separate out ghosts or dreams of what may or may not ever exist. The Board has only considered prospective circumstances under very rare exception, UD 19-87, Board of Regents and Montana Federation of Teachers, AFT, AFL-CIO et al, August 23, 1988. Therefore, no consideration has been given to job duties or conditions that did not exist at the time of the hearing.

UD 7-89 at 38.

The factor which gave rise to the consideration of prospective duties or conditions in the Board of Regents case, i.e. the necessity to realign bargaining units prior to the effective date of a legislative reorganization, is not present in this case. HPS has not presented other compelling circumstances which would support consideration of prospective circumstances. Because the elementary secretary does not in fact act in a confidential capacity with respect to labor relations matters, and does not in fact have access to confidential labor relations information, her position appropriately remains in the bargaining unit.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this case. § 39-31-207, MCA.
2. The Harlem Public Schools elementary secretary position is not a confidential labor relations employee pursuant to § 39-31-103(3), MCA.
3. The Harlem Classified Employees Association, including the position of elementary secretary, is an appropriate unit for collective bargaining. § 39-31-202, MCA.

VI. RECOMMENDED ORDER

The petition for unit clarification filed by Harlem Public Schools is denied and therefore dismissed.

DATED this 5th day of July, 2001.

BOARD OF PERSONNEL APPEALS

By: Anne L. MacIntyre
ANNE L. MACINTYRE
Chief, Hearings Bureau
Department of Labor and Industry

Pursuant to ARM 24.26.215, this RECOMMENDED ORDER will become the Final Order of the Board unless written exceptions are postmarked no later than July 30, 2001. This time period includes the 20 days provided for in ARM 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

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

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

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing document was, 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:

Catherine M. Swift
Gough, Shanahan, Johnson & Waterman
P.O. Box 1715
Helena MT 59624

Richard Larson
Chronister, Moreen & Larson P.C.
P.O. Box 1152
Helena MT 59624

DATED this 5th day of July, 2001.

A handwritten signature in cursive script, appearing to read "Audrey H. Papp", written over a horizontal line.