

**MONTANA SECOND JUDICIAL DISTRICT COURT,
SILVER BOW COUNTY**

CITY AND COUNTY OF BUTTE-SILVER
BOW MONTANA,

Petitioner,

vs.

BOARD OF PERSONNEL APPEALS,
MONTANA STATE DEPARTMENT OF
LABOR AND INDUSTRY, and
FEDERATION OF BUTTE-SILVER BOW
PUBLIC EMPLOYEES, LOCAL NO. 4372,
MEA-MFT, AFT, AFL-CIO.

Respondents.

FILED

JUN 15 2005

By LORI MALONEY CLERK
Deputy Clerk

Cause No. DV-03-71

OPINION and ORDER

This matter comes before the Court pursuant to the Petitioner's request for Judicial Review of a Final Order issued by the Board of Personnel Appeals, Montana Department of Labor and Industry. The matter has been fully briefed and oral arguments have been heard. The Court being fully informed now enters the following:

OPINION

BACKGROUND

The City and County of Butte-Silver Bow, Montana (hereinafter, "Petitioner") filed a Petition for Unit Clarification with the State of Montana Department of Labor and Industry, Board of Personnel Appeals on November 11, 2001, seeking the exclusion of the position of Administrative Budget/Control Clerk from the bargaining unit as a confidential labor relations employee. The Federation of Butte-Silver Bow Public Employees, Local No. 4372 (hereinafter, "Respondent") filed an answer on November 29, 2001, contesting the classification of the position as a confidential labor relations employee.

The position at issue in this matter is the Administrative Budget/Control Clerk working under Butte Silver-Bow County Sheriff John Walsh, currently filled by Geneta Bishop (hereinafter, "Bishop"). A hearing was held on May 8, 2002, on the issue of whether Bishop, serving as Administrative Budget/Control Clerk, should be classified as a confidential employee.

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The hearing was conducted by Hearings Officer Terry Spears of the Hearings Bureau, Department of Labor and Industry

Hearings Officer Spears made Findings of Fact, Conclusions of Law, and a Recommended Order, and determined that Bishop's position was a confidential position. The Respondent appealed this decision to the Board of Personnel Appeals (hereinafter, "the Board"). The Board remanded the matter to the Hearings Officer for further consideration in light of the Board's decision in *Flathead Valley Community College Classified Employee's Union, Local 4446, MFT, AFT, AFL-CIO v. Flathead Valley Community College Unit Clarification 1-2001*. The Hearings Officer reaffirmed his previous opinion, finding again that Bishop met the definition of a confidential employee. Subsequently, the Board, in its Final Order, modified the Hearing Officer's opinion, finding that Bishop is not a confidential employee, and thus should not be excluded from the bargaining unit. The Petitioner has requested Judicial Review of that Final Agency Decision.

STANDARD OF REVIEW

The Montana Administrative Procedures Act provides for judicial review of agency decisions at Mont. Code Ann., § 2-4-701. The standards of review are set forth in Mont. Code Ann. § 2-4-704; specifically Mont. Code Ann. § 2-4-704(2):

- (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
 - (a) the administrative findings, inferences, conclusions, or decisions are:
 - (i) in violation of constitutional or statutory provisions;
 - (ii) in excess of the statutory authority of the agency;
 - (iii) made upon unlawful procedure;
 - (iv) affected by other error of law;
 - (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
 - (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
 - (b) findings of fact, upon issues essential to the decision, were not made although requested.

Mont. Code Ann. § 2-4-704(2)

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This Court finds the Board's determination that the position of Administrative Budget/Control Clerk does not satisfy the criteria of a confidential employee is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Further, the substantial rights of the Petitioner have been prejudiced by the Board's erroneous conclusions of law.

The Court finds that Bishop, as Administrative Budget/Control Clerk, is a confidential employee; she acts in a confidential capacity to Sheriff Walsh, who exercises managerial functions in labor relation matters. The Court's decision is based on the evidence on the record, Montana law, and previous decisions of the Board, in particular, the Board's analysis of the confidential employee classification as set forth in *Flathead Valley*.

The Board relies heavily on the Board of Personnel's discussion of the classification of confidential employees in *Flathead Valley*. In the present case, the Board states in its Final Order, "the situation in this case is most analogous to that discussed by the Board of Personnel Appeals in *Flathead Valley*." *Final Order*, p. 8. However, the definition and requirements for confidential employee status set forth in *Flathead Valley* do not support the legal conclusions of the Board. Based on the confidential employee test used in *Flathead Valley*, the position of Administrative Budget/Control Clerk does satisfy the requirements of a confidential employee position.

In *Flathead Valley*, the Board recognizes two categories of confidential employees using the National Labor Relations Board's "labor nexus" test:

- (1) employees who act in a confidential capacity to persons exercising managerial function in labor relations matters; and
- (2) employees who have regular access to confidential information concerning anticipated changes that may result from collective bargaining negotiations.

Flathead Valley Community College Classified Employee's Union, Local 4446, MFT, AFT, AFL-CIO v. Flathead Valley Community College Unit Clarification 1-2001.

The Respondent lists numerous duties and actions which are not sufficient to confer confidential status to an employee (citing *Flathead Valley*) concluding that only an employee who has a role in making the final substantive decisions concerning the employer's labor relations policy, can be classified as a confidential employee. The confidential employee test, as set forth in *Flathead Valley*, does not necessarily require that a confidential employee serve as a manager, or make substantive decisions regarding labor relations.

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The confidential employee test is satisfied when either the employee acts in a confidential capacity to persons exercising managerial function in labor relations matters, or when an employee has regular access to confidential information concerning anticipated changes that may result from collective bargaining negotiations. The Respondent's argument the Bishop must have decision-making authority is not an accurate reading of Flathead Valley, where the employees at issue did not act in a confidential capacity to persons exercising managerial function in labor relations matters. Bishop does act in such a capacity to Sheriff Walsh, and thereby qualifies as a confidential employee under the Flathead Valley test.

Based on the evidence on the record, and supported by the Board's Findings of Fact in the Final Agency Decision, the Court finds that Bishop's position of Administrative Budget/Control Clerk satisfies the criteria of the first category of confidential employees recognized in Flathead Valley; namely, Bishop acts in a confidential capacity to Sheriff Walsh, who exercises managerial functions in labor relations matters.

1. Bishop acts in a confidential capacity to Sheriff Walsh

The Findings of Fact in the Board's Final Order concerning Bishop's position and duties support the conclusion that Bishop, serving as Administrative Budget/Control Clerk, acts in a confidential capacity to Sheriff Walsh. Walsh includes Bishop in discussions regarding possible approaches to funding issues and union wages, rates of pay, hours of employment, fringe benefits, and other conditions of employment that impact finances within the Law Enforcement Agency. *Finding of Fact No. 7.*

Bishop participates in confidential meetings with Sheriff Walsh and others where strategy and bargaining positions with the unions are discussed. The discussions at those meetings are to be confidential and not disclosed to the unions. *Finding of Fact No. 7.* Bishop has access to information about possible changes in personnel policy and labor relations under consideration by Sheriff Walsh. She is aware of, and sometimes involved in, developing those possible changes both before and after they are proposed. None of this information is part of the existing budget itself, which is available to the public (including union members). *Finding of Fact No. 7.*

The Administrative Budget/Control Clerk has provided the Sheriff with confidential information regarding possible options in dealing with the union representing the police officers within LEA. *Finding of Fact No. 9.* The Administrative Budget/Control Clerk has been requested to assist in union strategy sessions regarding negotiations with Butte-Silver Bow; and declined to participate fearing that such participation is in conflict with her duties to the Sheriff.

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Finding of Fact No. 9. Bishop is given and works with information that is confidential and not disclosed or available to the unions. *Finding of Fact No. 7.*

2. Sheriff Walsh exercises managerial functions in labor relations matters.

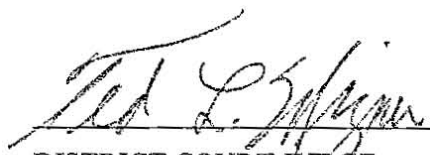
In the Board's Final Order, the Board modified the Hearings Officer's Discussion and Conclusions of Law, but did not change the Findings of Fact. The Findings of Fact, contrary to arguments and evidence offered by the Respondent, indicate that Walsh does exercise managerial functions in labor relation matters. Finding of Fact No. 3 states that Walsh is the person responsible for formulating and effectuating labor relations policies for the Law Enforcement Agency. *Finding of Fact No. 3.*

ORDER

IT IS HEREBY ORDERED that the decision of the Board of Personnel Appeals is **REVERSED.**

IT IS FURTHER ORDERED that Bishop be classified as a confidential employee.

DATED this 13th day of June, 2005.


DISTRICT COURT JUDGE

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 6-2002:

CITY AND COUNTY OF BUTTE-SILVER BOW, MONTANA,

Petitioner,

- VS -

FEDERATION OF BUTTE-SILVER BOW PUBLIC
EMPLOYEES, LOCAL NO. 4372, MEA-MFT, AFT, AFL-CIO,

Respondent.

FINAL ORDER

The above-captioned matter came before the Board of Personnel Appeals on February 27, 2003. The matter was before the Board for consideration of the EXCEPTIONS AND NOTICE OF APPEAL filed by J.C. Weingartner, attorney for the Respondent, to the ON REMAND: FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER issued by Terry Spear, Hearing Officer, dated January 8, 2002.

Appearing before the Board were J.C. Weingartner, attorney for the Respondent, and Sam Cox, Deputy County Attorney for Butte-Silver Bow. Both parties appeared in person.

After review of the record and consideration of the arguments by the parties, the Board concludes and orders as follows:

1. **IT IS HEREBY ORDERED** that the following portions of the Hearing Officer's "Discussion" contained within his "On Remand: Findings of Fact, Conclusions of Law and Recommended Order" are excepted and/or substituted as indicated below for being related to a conclusion of law ultimately determined by the Board to have been legally incorrect:

- A. The first full sentence at the top of page 6 commencing with the phrase "In this case, . . ." is deleted.
- B. The sentence "Bishop clearly has such access" in the first full paragraph on page 6 is deleted.
- C. The last sentence in the second full paragraph on page 6 commencing with the phrase "As noted above, . . ." is deleted.
- D. The phrase ". . . however, the role she now plays for him will provide such access, whatever his express intentions" is deleted from the last sentence in the third full paragraph on page 6.

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- E. In the second to last line of page 6 the name "Bishop" is modified to read "Bishop's" and the immediately following language "... has more than access to personnel and other confidential information. Her" is deleted.
 - F. At the top of page 7, in the paragraph continued over from page 6, the last sentence commencing with the phrase "The evidence does ..." is deleted.
 - G. In the second to last paragraph on page 7, the last three sentences commencing with the phrase "Sheriff Walsh expanded ..." are deleted.
 - H. In the last paragraph on page 7, the last sentence commencing with the phrase "In her current ..." is deleted.
 - I. In the paragraph located at the center of page 8, the last two sentences commencing with the phrase "Nonetheless, Bishop is ..." are deleted.
 - J. The entirety of the final full paragraph on page 8, including footnote #3 associated thereto, is deleted.
 - K. At the top of page 9, in the first sentence the word "established" is excepted and the phrase "failed in its burden to establish" is substituted therefore.
 - L. In the second sentence at the top of page 9, the word "entitled" is excepted and the phrase "not entitled" substituted therefore.

15 **2. IT IS FURTHER ORDERED** that the following language is inserted in the
16 Hearing Officer's "Discussion" in place of the previously deleted paragraph at the bottom
17 of page 8 of his "On Remand: Findings of Fact, Conclusions of Law and Recommended
18 Order." This language is inserted in order to reflect the appropriate discussion relevant to
19 the correct conclusion of law in this case.

20 In light of the above discussion, the situation in this case is most analogous
21 to that discussed by the Board of Personnel Appeals in *Flathead Valley*, **supra**,
22 wherein it was stated that:

23 "The human resource assistants at the College have access to
24 personnel and other confidential information, but the law is firmly
25 established that access does not make them confidential employees. They
26 have no role in making substantive decisions regarding collective
27 bargaining. The human resource assistants gather information on
28 grievances and union collective bargaining proposals, but gathering
information is not sufficient to establish that the employee is a confidential
employee. The human resource assistants testified that they will
brainstorm how a union proposal might be implemented, but that does not
appear to be confidential by definition. Even if they occasionally draft a
response to union proposals, nothing in the record shows the draft is the
employers' final position nor does it show that the human resource
assistants have access to the precise terms to which the employer would
agree in a collective bargaining agreement. Based on the foregoing, these
positions are not confidential."

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2 3. **IT IS FURTHER ORDERED** that Conclusion of Law #3, on page 9 of the Hearing
3 Officer's recommended order is legally incorrect and is hereby deleted. Moreover, the
4 phrase "... is that of a confidential employee ..." contained within Conclusion of Law #2
is hereby excepted as being legally incorrect and the phrase "... is not that of a
confidential employee ..." substituted in its place.

5 4. **IT IS FINALLY ORDERED** that the Hearing Officer's "Recommended Order" is
6 adopted as the Order of this Board, save for the phrase "The Board grants the request ..."
7 is hereby excepted and the phrase "The Board denies the request ..." substituted
therefore.

8 DATED this 10th day of March, 2003.

9 BOARD OF PERSONNEL APPEALS

10 BY: 
11 Jack Holstrom
12 Presiding Officer

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15 *****
Board members Holstrom, Schneider and Reardon concur.
Board members O'Neill and Johnson dissent.
16 *****

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20 *****
21 NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by
22 filing a Petition for Judicial Review with the District Court no later than thirty (30) days
23 from the service of this Order. Judicial Review is pursuant to the provisions of Section
24 2-4-701, et seq.
25
26
27
28 *****

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify that a true and correct copy of this document was mailed to the following on the 10th day of March, 2003:

J.C. WEINGARTNER
ATTORNEY AT LAW
222 BROADWAY
HELENA MT 59601

MICHAEL W. CLAGUE
SAM COX
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1/2/03

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 6-2002:

City and County of Butte-Silver Bow, Montana,	)	Case No. 780-2002
Petitioner,	)	ON REMAND:
vs.	)	FINDINGS OF FACT,
Federation of Butte-Silver Bow Public Employees,	)	CONCLUSIONS OF
Public Employees, Local No. 4372, MEA-MFT,	)	LAW AND
AFT, AFL-CIO,	)	RECOMMENDED ORDER
Respondent.)	

I. INTRODUCTION

On November 1, 2000, the City and County of Butte-Silver Bow, Montana ("BSB"), filed a petition to exclude the position of Administrative Budget/Control Technician (formerly the Budget/Control Clerk) within the BSB Law Enforcement Agency (LEA) clerical unit from the bargaining unit. BSB based the proposed exclusion on the confidential labor relations duties of the position.

The representative of the bargaining unit, Federation of Butte-Silver Bow Public Employees, Local No. 4372, MEA-MFT, AFT, AFL-CIO (the union), filed an answer to the petition on November 29, 2001, objecting to the exclusion on three bases: (1) the position as BSB now defined it was not confidential; (2) the position did not satisfy any statute or regulation justifying its exclusion from the bargaining unit; and (3) the position as BSB now defined it had duties that could properly be performed by a member of the bargaining unit.

On behalf of the Board of Personnel Appeals, Department of Labor and Industry Hearing Officer Terry Spear held a contested case hearing on May 8, 2002, in the Council of Commissioners' Chambers in Butte, Montana. Michael W. Clague, BSB deputy county attorney, was counsel for BSB. Sheriff John Walsh was BSB's designated representative attending the hearing. J. C. Weingartner, Attorney at Law, was counsel for the union. Deputy Clerk of District Court and union president Teri Fisher was the union's designated representative attending the hearing. The hearing officer excluded witnesses on the union's motion.

BSB Human Resources Division Director Tim Clark, Sheriff Walsh, BSB Administrative Budget/Control Technician Genita Bishop, BSB 911 Coordinator Kathy Lasky and Local No. 4372 President Teri Fisher testified. The hearing officer admitted Joint Exhibits 1-4 into the record.

After completion of post-hearing briefing, the hearing officer issued findings and conclusions and a proposed decision on July 5, 2002. The union filed

exceptions. On October 29, 2002, the Board of Personnel Appeals remanded the matter to the hearing officer to reconsider the conclusions and proposed decision, specifically addressing the confidential employee standards established by the Board in *Flathead Valley Community College Classified Employees' Union, Local 4446, MFT, AFT, AFL-CIO v. Flathead Valley Community College*, Unit Clarification 1-2001 (Final Order May 15, 2002). The parties filed their last briefs on remand on December 4, 2002.

II. ISSUE

The issue is whether the position of Administrative Budget/Control Technician (formerly the Budget/Control Clerk) within the LEA's clerical unit should be excluded from the union's bargaining unit because the position is that of a confidential employee.

III. FINDINGS OF FACT

1. The union is an organization in which member employees participate and which exists for the primary purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, fringe benefits, or other conditions of employment. BSB is a political subdivision of the State of Montana.

2. BSB and the union entered into a collective bargaining agreement dated October 17, 2001, that excluded from the bargaining unit clerical employees who are confidential employees pursuant to Mont. Code Ann. § 39-31-103(3).

3. Sheriff John Walsh is the elected head of the LEA. He became sheriff in January 2001. He is the person responsible for formulating and effectuating labor relations policies for the LEA. He attends collective bargaining sessions with the various unions that represent employees under his supervision, including the union in this case. He relies upon Tim Clark, BSB's Human Resources Division Director or Personnel Director, to accomplish his goals in the bargaining sessions. Clark is BSB's chief negotiator with the unions representing its employees, including the union in this case. When a union reaches a contractual agreement with Clark on behalf of BSB, Clark presents the contract to the Council of Commissioners. The Council has final authority in approving or rejecting the negotiated contract. Sheriff Walsh provides input to Clark and to the Council of Commissioners on behalf of the LEA.

4. The union currently represents 64 employees who work in 19 separate units of BSB. Five members of the union work in the LEA clerical unit and are under the supervision and control of Walsh. The Sheriff has no supervisory control over the other 59 members of Local 4372.

5. Genita Bishop currently works in the position of Administrative Budget/Control Clerk in the BSB LEA's clerical unit. She is and has been a member of the union. She has held office within the union and has been a member of the union's negotiating team for collective bargaining with BSB.

6. The Administrative Budget/Control Clerk is and has been the person most familiar with the Sheriff's Department's budget. Bishop, in that capacity, provided defined task information to the previous sheriff. The sheriff would ask for a specific answer to a specific question and she would provide the answer. She did not otherwise assist the previous sheriff in labor relations matters. She did not undertake any confidential labor relations work for the previous sheriff. She did not discuss with the previous sheriff possible proposals or tactics for future labor negotiations, nor did the previous sheriff share his thoughts about possible proposals or tactics.

7. Sheriff Walsh directed a revision to the job title and job description for Bishop, to reflect his reliance upon her for research and development of issues relative to labor relations matters and the Sheriff Department's budget. He now requires more input on these matters from Bishop than specific answers to his specific questions about budgeting. He asks her to research various means of allocation and use of the LEA budget. He includes her in discussions regarding possible approaches to funding issues and union wages, rates of pay, hours of employment, fringe benefits, or other conditions of employment that impact finances within the LEA. She participates in confidential meetings with the Sheriff and sometimes others where strategy and bargaining positions with the unions are discussed. The discussions at those meetings are to be confidential and not disclosed to the unions. As the Administrative Budget/Control Clerk, Bishop has access to information about possible changes in personal policy and labor relations under consideration by the Sheriff. She is aware of and sometimes involved in developing those possible changes both before and after they are proposed. None of this information is part of the existing budget itself, which is available to the public (including union members).

8. Since the revision of her job duties and title, Bishop has not become involved in any confidential meetings or work directly addressing the employment conditions or collective bargaining agreement of BSB with her union. The current collective bargaining agreement was reached before the revised job duties and title and the filing of the current petition, and that agreement is still operative. Soon, negotiations regarding that agreement will commence and Bishop, under the new job description, will become involved in confidential meetings or work directly addressing the employment conditions or collective bargaining agreement of BSB with her union.

9. Since the revision of her job duties and title, Bishop has provided confidential information to Sheriff Walsh regarding possible options in dealing with the union representing the police officers within LEA. Sheriff Walsh has also made Bishop privy to confidential information regarding strategies for those negotiations. Bishop has received requests to assist and participate in union strategy sessions regarding negotiations with BSB. She has declined to do so, fearing that such an act would be in conflict with her duties to the Sheriff.

10. The LEA clerical unit already has one non-union clerical employee, Carolyn Hooper, who works as the evidence technician. Sheriff Walsh believes she has a classification as a confidential employee, and the union declined BSB's offer to include that position in the bargaining unit on those grounds. Walsh is not sure of what Hooper does or why she has the classification, unless it is because she handles personnel files for the LEA.¹ Sheriff Walsh has no current need of two confidential employees. Hooper has neither training nor experience in the confidential work Sheriff Walsh obtains from Bishop, nor in the budget and financial work Bishop also performs that is not confidential. There is no evidence that Hooper's current position is properly excluded from the bargaining unit as a confidential employee.

IV. DISCUSSION

BSB argues that Bishop's position should be excluded from the union's bargaining unit because the position is that of a confidential employee. The union argues that BSB failed to establish the requisite confidentiality and that any proof of prospective confidential employee status is insufficient to justify the exclusion.

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. Mont. Code Ann. § 39-31-201. The law authorizes the Board of Personnel Appeals to decide what units of public employees are appropriate for collective bargaining purposes. Mont. Code Ann. § 39-31-202. However, confidential employees of public employers are not public employees, by definition. Mont. Code Ann. § 39-31-103(9)(b)(v). The statutory definition of "confidential employee," includes a confidential labor relations employee, Mont. Code Ann. § 39-31-103(3):

¹ Hooper previously supervised the LEA clerical unit as a member of management, *see*, *Hooper v. BSB*, Human Rights Case No. 9809008607 (4/29/02). Circumstances that led to her exclusion from the bargaining unit as a confidential employee (if such an exclusion exists) rather than a member of management are not in the present record.

(3) “Confidential employee” means any person found by the board to be a confidential labor relations employee and any person employed in the personnel division, department of administration, who acts with discretionary authority in the creation or revision of state classification specifications.

Because of this statutory exclusion, a confidential employee does not have the rights guaranteed by Mont. Code Ann. § 39-31-201 and is not appropriately included in a unit for collective bargaining purposes. The definition of statutory terms such as “public employer” and “public employee” in Montana’s collective bargaining statutes must be construed broadly in doubtful situations. *Local 2390 v. City of Billings* (1976), 171 Mont. 20, 555 P.2d 507, 508 (citing and applying federal labor law²). The exclusions must be construed narrowly in order not to deprive employees of their rights to bargain collectively. *NLRB v. Hendricks County Rural Electric Membership Corp.* (1981), 454 U.S. 170, 180-81, *citing with approval Ford Motor Co.* (1946), 66 NLRB 1317, 1322. The burden is upon BSB to establish the requisite confidential status in order to justify the requested exclusion.

The original conclusions and proposed decision relied upon the Board’s interpretation of federal labor cases. *Livingston School District Nos. 4 & 1 v. MEA/LCEA*, Unit Clarification 2-87 (September 2, 1988). The Board, on remand, directed that the hearing officer instead apply the confidential employee test it articulated in *Flathead Valley*, *supra*. The Board, on remand, directed the hearing officer only to reconsider conclusions of law and the proposed decision. The Board did not seek additional findings. The present findings, conclusions and proposed order therefore contain the same fact finding and some modifications of the discussion, conclusions and proposed decision.

The Board of Personnel Appeals has adopted the NLRB’s test for determining confidential employee status. The Board views the NLRB’s “labor nexus” test as only qualifying as confidential employees those employees who act in a confidential capacity to persons exercising managerial function in labor relations matters.

² Federal law properly applies to this analysis. Section 9(b) of the National Labor Relations Act gives the National Labor Relations Board (NLRB) comparable authority to determine bargaining units to that of the Board. The Board and Montana courts apply federal court and NLRB precedent to interpret the Montana Act. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals* (1981), 195 Mont. 272, 635 P.2d 1310; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

Hendricks County, op. cit. at 188-89. In this case, unlike *Flathead*, Genita Bishop does act in a confidential capacity to Sheriff Walsh. *Cf.*, Findings 7 and 9.

Alternatively, the NLRB holds that employees who have regular access to confidential information concerning anticipated changes that may result from collective bargaining negotiations are deemed confidential employees. *Id.* The Board, like the NLRB, refrains from broader definitions of confidential employees because many employees have arguably confidential relationships with management and because expansive application of the exclusionary rule would deprive many employees of their right to bargain collectively. *See, NLRB v. Los Angeles Hospital*, 640 F.2d 1017 (9th Cir. 1981); *In the Matter of Unit Determination 7-80* (holding that the confidential employee exclusion "should be applied narrowly"). Bishop clearly has such access.

Mere access to or handling of confidential material, even when it is confidential labor-related material, does not by itself confer confidential status upon the employee handling or with access to the material. *See, e.g., Greyhound Lines, Inc.* (1981), 257 NLRB 477, 480; *In the Matter of Unit Determination No. 24-79* (holding access to information that may be used during collective bargaining or responsibility for compiling labor relations information is not sufficient to confer confidential employee status). As noted above, Bishop has more than mere access to or handling of confidential material in her current position.

Access to confidential labor relations material such as minutes of management meetings, strike contingency plans, departmental strategic planning, and grievance responses is not sufficient to confer confidential status unless it can be shown that the employee at issue played some role in making the substantive decision being recorded. *Associated Day Care Services of Metropolitan Boston* (1984), 269 NLRB 178, 181; *Greyhound Lines* (1981), 257 NLRB 477, 480; *ITT Grinnell Corporation* (1977), 212 NLRB 734; *California Inspection Rating Bureau* (1974), 215 NLRB 780, 783. Employees who provide critiques of union bargaining proposals and personnel or statistical information upon which the employer's labor relations policy would be based, but who do not have access to the precise terms to which the employer would agree in a collective bargaining agreement, are not confidential employees. *Case Corp.* (1991), 304 NLRB 939. It is unclear whether Sheriff Walsh intends to provide Bishop with access to the precise terms to which BSB would agree in a collective bargaining agreement, however, the role she now plays for him will provide such access, whatever his express intentions.

Bishop has more than access to personnel and other confidential information. Her role does not extend to making substantive decisions regarding collective

bargaining. She gathers information, she brainstorms (makes suggestions) to Sheriff Walsh about how a union proposal might be implemented. She may even draft proposals (although that was not proved), but she certainly would not prepare or decide BSB's final position. The evidence does show that she will have access, through Sheriff Walsh, to the precise terms to which BSB would agree in a collective bargaining agreement.

In *Hendricks County*, *op. cit.* (cited and applied in *Flathead Valley*), 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 the requisite 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).

Sheriff Walsh's predecessor "deliberately restricted" her duties to deny her access to confidential information regarding labor relations, to use the words of *Hendricks County*. She was not previously a confidential employee. Sheriff Walsh expanded her duties to include those that, as explicitly stated in *Hendricks County*, ordinarily do make confidential employees. The union's argument that Bishop must have decision-making authority is not an accurate reading of *Flathead Valley*, where the employees at issue did not act in a confidential capacity to persons exercising managerial function in labor relations matters. Bishop does act in such a capacity to Sheriff Walsh, and thereby qualifies under the *Flathead Valley* test.

Walsh is neither the chief negotiator nor the ultimate decision-maker for BSB. He does provide input both to Clark, the chief negotiator, and to the Council of Commissioners, the ultimate decision-maker. In her current job, Bishop assists an official who formulates, determines and effectuates labor relations policies and she has access to confidential labor relations information in the normal course of her employment.

The basis for the exclusion must be actual present duties rather than prospective duties that might arise in the future. The test for determining whether a position is that of a confidential employee is whether the employee both is expected to act and does in fact act in a confidential capacity. *Siemens Corp.*, *op. cit.* at 1579. The Board and its hearing officers have stated this rule clearly:

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

Montana Education Ass'n, NEA v. Missoula Cnty High School, Unit Determination 7-89, p. 38 (July 26, 1989).

Bishop's union, the respondent in this case, has not yet begun negotiations on a new or renewed collective bargaining agreement. Nonetheless, Bishop is already actually acting in a confidential capacity, with regard to collective bargaining matters related to the police union. BSB is not seeking the clarification solely on the basis of prospective confidential labor relations responsibilities.

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). Although the union apparently has not filed a claim of unfair labor practice against BSB for failing to bargain prior to the change, there is a more pertinent reason why the union did not prevail on this argument. On the record in this case, the union can maintain its present level of representative by inclusion of the evidence technician in the unit.³ Thus, no loss of bargaining unit work necessarily results from the clarification.

³ The union refusal to include Hooper makes sense only in light of *Hooper v. BSB*, *op. cit.*, in which the hostility between some of the LEA clerical employees and their then supervisor was clear. No alternative reason appears in this case for that refusal.

Although this is an exceptionally close case, BSB has established that the unit clarification it seeks is proper under the existing law. Therefore, it is entitled to the relief sought by its petition.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this petition. Mont. Code Ann. § 39-31-207. BSB is a public employer and the union is a labor organization. Mont. Code Ann. §§ 39-31-103(6) and (10).

2. The position of Administrative Budget/Control Technician (formerly the Budget/Control Clerk) within the BSB Law Enforcement Agency clerical unit (currently filled by Genita Bishop) is that of a confidential employee, pursuant to *Flathead Valley Community College Classified Employees' Union, Local 4446, MFT, AFT, AFL-CIO v. Flathead Valley Comm. Coll.*, Unit Clarification 1-2001 (May 15, 2002).

3. The position of Administrative Budget/Control Technician within the BSB Law Enforcement Agency clerical unit is no longer appropriately included in the bargaining unit, since confidential employees are excluded from coverage by the Public Employees Collective Bargaining Act. Mont. Code Ann. § 39-31-103(9)(b)(v).


VI. RECOMMENDED ORDER

The Board grants the request of the City and County of Butte-Silver Bow, Montana, that the bargaining unit represented by Federation of Butte-Silver Bow Public Employees, Local 4372, MEA-MFT, AFT, AFL-CIO, be modified to exclude the position of Administrative Budget/Control Technician (formerly the Budget/Control Clerk) within the BSB Law Enforcement Agency clerical unit.

DATED this 8th day of January, 2003.

BOARD OF PERSONNEL APPEALS

By:



Terry Spear, Hearing Officer
Department of Labor and Industry

NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than January 31, 2003. 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 59624-6518

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:

MICHAEL CLAGUE
COUNTY ATTORNEYS OFFICE
BUTTE SILVER BOW CITY COUNTY GOVERNMENT
BUTTE MT 59701

J. C. WEINGARTNER
ATTORNEY AT LAW
222 BROADWAY
HELENA MT 59601

DATED this 8th day of January, 2003.

Sandy Duccan
Administrative Assistant, Hearings Bureau
Department of Labor and Industry

BOARD OF PERSONNEL APPEALS
PO BOX 6518
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Telephone: (406) 444-2718
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 6-2002:

CITY AND COUNTY OF BUTTE-SILVER BOW, MONTANA,

Petitioner,

- VS -

FEDERATION OF BUTTE-SILVER BOW PUBLIC EMPLOYEES,
LOCAL NO. 4372, MEA-MFT, AFT, AFL-CIO,

Respondent.

ORDER OF REMAND

The above-captioned matter came before the Board of Personnel Appeals (Board) on October 24, 2002. The matter was before the Board for consideration of the Exceptions and Notice of Appeal filed by J.C. Weingartner, attorney for the Respondent, to the Findings of Fact; Conclusions of Law; and Recommended Order issued by Terry Spear, Hearing Officer, dated July 5, 2002.

Appearing before the Board were J.C. Weingartner, attorney for the Respondent, and Michael W. Clague, Butte-Silver Bow Deputy County Attorney. Both parties appeared in person.

After review of the record and consideration of the arguments, the Board concludes and orders as follows

1. **IT IS HEREBY ORDERED** that this case is remanded to the Hearing Officer for reconsideration of the Discussion, Conclusions of Law and Recommended Order sections of his decision dated July 5, 2002.
2. **IT IS FURTHER ORDERED** that such reconsideration will specifically address the confidential employee standards established by this Board in the case of *Flathead Valley Community College Classified Employees' Union, Local 4446, MFT, AFT, AFL-CIO v. Flathead Valley Community College*, Unit Clarification 1-2001.

DATED this 29th day of October, 2002 .

BOARD OF PERSONNEL APPEALS

By: _____

Jack Holstrom
Presiding Officer

Board members Holstrom, Schneider and Reardon concur.
Board members Johnson and O'Neill dissent.

CERTIFICATE OF MAILING

I, *Jennifer Jacobson*, do hereby certify that a true and correct copy
of this document was mailed on the 30th day of October, 2002.

J.C. WEINGARTNER
ATTORNEY AT LAW
222 BROADWAY
HELENA MT 59601

MICHAEL W. CLAGUE
DEPUTY COUNTY ATTORNEY
BUTTE-SILVER BOW COUNTY
155 WEST GRANITE ST
ROOM 104 - COURTHOUSE BLDG
BUTTE MT 59701

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 6-2002:

City and County of Butte-Silver Bow, Montana,	)	Case No. 780-2002
	Petitioner,)
vs.	)	FINDINGS OF FACT,
Federation of Butte-Silver Bow Public Employees,	)	CONCLUSIONS OF
Public Employees, Local No. 4372, MEA-MFT,	)	LAW AND
AFT, AFL-CIO,	)	RECOMMENDED ORDER
	Respondent.)

I. INTRODUCTION

On November 1, 2000, the City and County of Butte-Silver Bow, Montana ("BSB"), filed a petition to exclude the position of Administrative Budget/Control Technician (formerly the Budget/Control Clerk) within the BSB Law Enforcement Agency (LEA) clerical unit from the bargaining unit. BSB based the proposed exclusion on the confidential labor relations duties of the position.

The representative of the bargaining unit, Federation of Butte-Silver Bow Public Employees, Local No. 4372, MEA-MFT, AFT, AFL-CIO (the union), filed an answer to the petition on November 29, 2001, objecting to the exclusion on three bases: (1) the position as BSB now defined it was not confidential; (2) the position did not satisfy any statute or regulation justifying its exclusion from the bargaining unit and (3) the position as BSB now defined it had duties that could properly be performed by a member of the bargaining unit.

On behalf of the Board of Personnel Appeals, Department of Labor and Industry Hearing Officer Terry Spear held a contested case hearing on May 8, 2002, in the Council of Commissioners' Chambers in Butte, Montana. Michael W. Clague, BSB deputy county attorney, was counsel for BSB. Sheriff John Walsh was BSB's designated representative attending the hearing. J. C. Weingartner, Attorney at Law, was counsel for the union. Deputy Clerk of District Court and union president Teri Fisher was the union's designated representative attending the hearing. The hearing examiner excluded witnesses on the union's motion.

BSB Human Resources Division Director Tim Clark, Sheriff Walsh, BSB Administrative Budget/Control Technician Genita Bishop, BSB 911 Coordinator Kathy Lasky and Local No. 4372 President Teri Fisher testified. The hearing examiner admitted Joint Exhibits 1-4 into the record.

Upon completion of the hearing, the hearing examiner (at the request of the parties) set a schedule for post-hearing briefs. With the filing of the last such brief on June 26, 2002, the case was ready for decision.

II. ISSUE

The issue here is whether the position of Administrative Budget/Control Technician (formerly the Budget/Control Clerk) within the BSB Law Enforcement Agency (LEA) clerical unit should be excluded from the union's bargaining unit because the position is that of a confidential employee.

III. FINDINGS OF FACT

1. The union is an organization in which member employees participate and which exists for the primary purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, fringe benefits, or other conditions of employment. BSB is a political subdivision of the State of Montana.

2. BSB and the union entered into a collective bargaining agreement dated October 17, 2001, that excluded from the bargaining unit clerical employees who are confidential employees pursuant to §39-31-103(3) MCA.

3. Sheriff John Walsh is the elected head of the LEA. He became sheriff in January 2001. He is the person responsible for formulating and effectuating labor relations policies for the LEA. He attends collective bargaining sessions with the various unions that represent employees under his supervision, including the union in this case. He relies upon Tim Clark, BSB's Human Resources Division Director or Personnel Director, to accomplish his goals in the bargaining sessions. Clark is BSB's chief negotiator with the unions representing its employees, including the union in this case. When a union reaches a contractual agreement with Clark on behalf of BSB, Clark presents the contract to the Council of Commissioners. The Council has final authority in approving or rejecting the negotiated contract. Sheriff Walsh provides input to Clark and to the Council of Commissioners on behalf of the LEA.

4. The union currently represents 64 employees who work in 19 separate units of BSB. Five members of the union work in the LEA clerical unit and are under the supervision and control of Walsh. The Sheriff has no supervisory control over the other 59 members of Local 4372.

5. Genita Bishop currently works in the position of Administrative Budget/Control Clerk in the BSB LEA's clerical unit. She is and has been a member of the union. She has held office within the union and has been a member of the union's negotiating team for collective bargaining with BSB.

6. The Administrative Budget/Control Clerk is and has been the person most familiar with the Sheriff's Department's budget. Bishop, in that capacity, provided defined task information to the previous sheriff. The sheriff would ask for a specific answer to a specific question and she would provide the answer. She did not otherwise assist the previous sheriff in labor relations matters. She did not undertake any confidential labor relations work for the previous sheriff. She did not discuss with the previous sheriff possible proposals or tactics for future labor negotiations, nor did the previous sheriff share his thoughts about possible proposals or tactics.

7. Sheriff Walsh directed a revision to the job title and job description for Bishop, to reflect his reliance upon her for research and development of issues relative to labor relations matters and the Sheriff Department's budget. He now requires more input on these matters from Bishop than specific answers to his specific questions about budgeting. He asks her to research various means of allocation and use of the LEA budget. He includes her in discussions regarding possible approaches to funding issues and union wages, rates of pay, hours of employment, fringe benefits, or other conditions of employment that impact finances within the LEA. She participates in confidential meetings with the Sheriff and sometimes others where strategy and bargaining positions with the unions are discussed. The discussions at those meetings are to be confidential and not disclosed to the unions. As the Administrative Budget/Control Clerk, Bishop has access to information about possible changes in personal policy and labor relations under consideration by the Sheriff. She is aware of and sometimes involved in developing those possible changes both before and after they are proposed. None of this information is part of the existing budget itself, which is available to the public (including union members).

8. Since the revision of her job duties and title, Bishop has not become involved in any confidential meetings or work directly addressing the employment conditions or collective bargaining agreement of BSB with her union. The current collective bargaining agreement was reached before the revised job duties and title and the filing of the current petition, and that agreement is still operative. Soon, negotiations regarding that agreement will commence and Bishop, under the new job description, will become involved in confidential meetings or work directly addressing the employment conditions or collective bargaining agreement of BSB with her union.

9. Since the revision of her job duties and title, Bishop has provided confidential information to Sheriff Walsh regarding possible options in dealing with the union representing the police officers within LEA. Sheriff Walsh has also made Bishop privy to confidential information regarding strategies for those negotiations. Bishop has received requests to assist and participate in union strategy sessions regarding negotiations with BSB. She has declined to do so, fearing that such an act would be in conflict with her duties to the Sheriff.

10. The LEA clerical unit already has one non-union clerical employee, Carolyn Hooper, who works as the evidence technician. Sheriff Walsh believes she has a classification as a confidential employee, and the union declined BSB's offer to include that position in the bargaining unit on those grounds. Walsh is not sure of what Hooper does or why she has the classification, unless it is because she handles personnel files for the LEA.¹ Sheriff Walsh has no current need of two confidential employees. Hooper has neither training nor experience in the confidential work Sheriff Walsh obtains from Bishop, nor in the budget and financial work Bishop also performs that is not confidential. There is no evidence that Hooper's current position is properly excluded from the bargaining unit as a confidential employee.

IV. DISCUSSION

BSB argues that Bishop's position should be excluded from the union's bargaining unit because the position is that of a confidential employee. The union argues that BSB failed to establish the requisite confidentiality and that any proof of prospective confidential employee status is insufficient to justify the exclusion.

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 authorizes the Board of Personnel Appeals to decide what units of public employees are appropriate for collective bargaining purposes. § 39-31-202 MCA. However, confidential employees of public employers are not public employees, by definition. §39-31-103(9)(b)(v) MCA. The statutory definition of "confidential employee," includes a confidential labor relations employee, §39-31-103(3) MCA:

¹ Hooper previously supervised the LEA clerical unit as a member of management, *see*, *Hooper v. BSB*, Human Rights Case No. 9809008607 (4/29/02). Circumstances that led to her exclusion from the bargaining unit as a confidential employee (if such an exclusion exists) rather than a member of management are not in the present record.

(3) “Confidential employee” means any person found by the board to be a confidential labor relations employee and any person employed in the personnel division, department of administration, who acts with discretionary authority in the creation or revision of state classification specifications.

Because of this statutory exclusion, 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. The definition of statutory terms such as “public employer” and “public employee” in Montana’s collective bargaining statutes must be construed broadly in doubtful situations. *Local 2390 v. City of Billings*, 171 Mont. 20, 555 P.2d 507, 508 (1976) (citing and applying federal labor law²). The exclusions must be construed narrowly in order not to deprive employees of their rights to bargain collectively. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 180-81 (1981), *citing with approval Ford Motor Co.*, 66 NLRB 1317, 1322 (1946). The burden is upon BSB to establish the requisite confidential status in order to justify the requested exclusion.

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 tests to verify confidential employee status and exclusion from the bargaining unit.

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). The confidentiality involved is that dealing with management policies in labor relations.³

² Federal law properly applies to this analysis. Section 9(b) of the National Labor Relations Act gives the National Labor Relations Board (NLRB) comparable authority to determine bargaining units to that of the Board. The Board and Montana courts apply 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).

³ Thus, Hooper’s handling of confidential personnel files would no more justify a confidential employee classification than the handling of confidential criminal justice information by all the clerical union members working for the LEA.

Confidential employees are also those who regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations. *Pullman Standard Division of Pullman, Inc.*, 214 NLRB 762, 762-763 (1974). In *Hendricks County*, *op. cit.*, the United States Supreme Court upheld the NLRB's practice of requiring that "labor nexus" in order to exclude employees from collective bargaining units.

In UC 2-87, *Livingston School District No. 4 and 1 v. Montana Education Association/Livingston Classified Employees Association*, September 2, 1988, the Board of Personnel Appeals 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 (1) assist an official who formulates, determines and effectuates labor relations policies **and** (2) must have access to confidential labor relations information in the normal course of employment.

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).

Sheriff Walsh has chosen to change Bishop's job. His predecessor "deliberately restricted" her duties to deny her access to confidential information regarding labor relations, to use the words of *Hendricks County*. Walsh is deliberately providing her with access to confidential information—his thoughts and strategies about collective bargaining as they relate to the budget—and deliberately relying upon her to provide him with confidential information about those thoughts and strategies. In so doing, he has qualified Bishop under both parts of the NLRB test.

Although Walsh is neither the chief negotiator nor the ultimate decision-maker for BSB, he provides input to Clark, the chief negotiator, and to the Council of Commissioners, the ultimate decision-maker for BSB. Thus, under her current job description, Bishop assists an official who formulates, determines and effectuates labor relations policies and she has access to confidential labor relations information in the normal course of her employment.

The basis for the exclusion must be actual present duties rather than prospective duties that might arise in the future. 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. *Siemens Corp.*, *op. cit.* at 1579. The Board and its hearing officers have stated this rule clearly:

Section 39-31-202 MCA requires that the Board of Personnel Appeals consider certain factors when determining an appropriate 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 exceptions, 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, *Montana Education Ass'n, NEA v. Missoula County High School*, July 26, 1989, p. 38.

Even though Bishop's union, the respondent in this case, has not yet begun negotiations on a new or renewed collective bargaining agreement, Bishop is already actually acting in a confidential capacity, with regard to collective bargaining matters related to the police union. Thus, BSB is not seeking the clarification solely on the basis of prospective confidential labor relations responsibilities.

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). However, on this record the union can maintain its present level

of representative by inclusion of the evidence technician in the unit.⁴ Thus, no loss of bargaining unit work necessarily results from the clarification.

Although this is an exceptionally close case, BSB has established that the unit clarification it seeks is proper under the existing law. Therefore, it is entitled to the relief sought by its petition.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this petition for unit clarification. §39-31-207 MCA. BSB is a public employer. § 39-31-103(10) MCA. The union is a labor organization. §39-31-103(6) MCA.

2. The position of Administrative Budget/Control Technician (formerly the Budget/Control Clerk) within the BSB Law Enforcement Agency clerical unit (currently filled by Genita Bishop) is no longer appropriately included in the bargaining unit pursuant to § 39-31-103(9)(b)(v) MCA that excludes confidential employees from coverage by the Public Employees Collective Bargaining Act.

VI. RECOMMENDED ORDER

The request of the City and County of Butte-Silver Bow, Montana, that the bargaining unit represented by Federation of Butte-Silver Bow Public Employees, Local 4372, MEA-MFT, AFT, AFL-CIO, be modified to exclude the position of Administrative Budget/Control Technician (formerly the Budget/Control Clerk) within the BSB Law Enforcement Agency clerical unit (currently filled by Genita Bishop) is hereby granted.

DATED: July 5, 2002

FOR THE BOARD OF PERSONNEL APPEALS

By:

Terry Spear
Hearings Bureau
Department of Labor and Industry

⁴ The union refusal to include Hooper makes sense only in light of *Hooper v. BSB, op. cit.*, in which the hostility between some of the LEA clerical employees and their then supervisor was clear. No alternative reason appears in this case for that refusal.

NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than July 29, 2002. 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.

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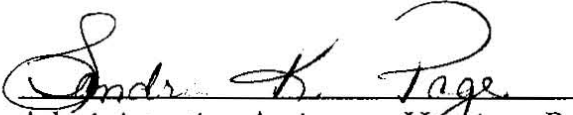
Certificate of Mailing

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:

MICHAEL CLAGUE
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BUTTE SILVER BOW CITY COUNTY GOVERNMENT
BUTTE MT 59701

J. C. WEINGARTNER
ATTORNEY AT LAW
222 BROADWAY
HELENA MT 59601

DATED this 5th day of July, 2002.


Sandra K. Page
Administrative Assistant, Hearings Bureau
Department of Labor and Industry