

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 3-2012:

MERGED MISSOULA CLASSIFIED)	Case No. 1527-2012
EMPLOYEES ORGANIZATION,)	
MEA-MFT, NEA-AFT,)	
)	
Petitioner,)	
)	
vs.)	
)	
MISSOULA COUNTY PUBLIC)	
SCHOOLS DISTRICT #1,)	
)	
Respondent.)	

**ORDER RECOMMENDING ENTRY OF SUMMARY JUDGMENT
AND DISMISSAL OF UNIT CLARIFICATION PROCEEDING**

I. Introduction.

Merged Missoula Classified Employees Organization, MEA-MFT, NEA-AFT (hereinafter MMCEO) filed a unit clarification petition seeking to determine whether six positions which have been historically excluded from the MMCEO bargaining unit should be included within that bargaining unit. The six positions at issue are the Executive Administrative Assistant, Human Resources Specialist, Superintendent's Office Specialist, the Business Specialist, the Certified Technician, and the Classified Technician.

On February 21, 2013, Respondent Missoula County Public School District #1 (hereinafter MCPS) filed a motion for summary judgment arguing that there was no material factual dispute that the six positions which petitioner seeks to include within the bargaining unit have been historically excluded from the bargaining unit and that no recent substantial changes have occurred to the duties of those positions that would permit the Board of Personnel Appeals to entertain this

unit clarification petition. On March 4, 2013, MMCEO responded and opposed the motion.

On March 5, 2013, the hearing officer held oral argument on the motion. At the oral argument, MMCEO conceded that the petition with respect to the Executive Administrative Assistant position and the Human Resources Specialist position should be dismissed as those positions had historically been excluded from the bargaining unit and no recent substantial changes had occurred to the duties of those positions to merit reconsideration of whether those positions should be part of the bargaining unit. MMCEO opposed dismissal with respect to the positions of Superintendent's Office Specialist, Business Specialist, Certified Technician, and the Classified Technician.

After considering the motion and supporting affidavits, as well as MMCEO's responses to requests for admissions, the hearing officer informed the parties that he would recommend to the Board that the motion for summary judgment be granted as no material issue of fact exists in the case and as a matter of law, the respondent is entitled to have the clarification petition dismissed. What follows is the hearing officer's rationale for recommending to the Board that the respondent's motion be granted.

II. Facts That Have Not Been Disputed.

1. Before July 1, 1994, MCPS operated as two separate school districts: the Missoula County Elementary School District and the Missoula County High School District.

2. On July 1, 1994, the elementary and high school districts unified to form what is now MCPS.

3. Prior to July 1, 1994, MMCEO was not in existence. Rather, there were several classified bargaining units within the Missoula County Elementary School District and the Missoula County High School District. Like MCPS, MMCEO was formed when classified units from the elementary district merged with the classified units from the high school district.

4. Negotiations with the newly-formed MMCEO were extensive and lasted more than one year. Although unification of the elementary and high school districts began July 1, 1994, MMCEO and MCPS did not agree to a collective bargaining agreement until July 1995.

5. The collective bargaining agreement between MCPS and MMCEO for the years 1994-1997 contained the following exclusions from the bargaining unit:

The following positions shall be excluded from the bargaining unit: The personal staff of the Superintendent, Assistant Superintendent and Directors including but not limited to Secretaries, Accounting, Payroll, Insurance, Marketing and Operations Specialists; Personnel Office Employees including but not limited to receptionist, secretaries and specialists . . .

The above language remained unchanged in the collective bargaining agreements between MCPS and MMCEO for the years 1997-2000, 2000-2003, and 2003-2005.

6. The collective bargaining agreement between MCPS and MMCEO for the years 2005-2007 contained a slight modification to the language, but the exclusions remained unchanged:

The following positions shall be excluded from the bargaining unit: The personal staff of Superintendent, Assistant Superintendents, Executive Directors and Directors, including but not limited to Secretaries, Accounting, Payroll, Insurance, Marketing and Operations Specialists; Personnel Office Employees including but not limited to receptionist, secretaries and specialists . . .

This language remained unchanged in the collective bargaining agreements between MCPS and MMCEO for the years 2007-2010, 2010-2011, 2011-2012 and 2012-2013. See Exhibits F through I.

7. The 2005-2007, 2007-2010, 2011-2012, and 2012-2013 collective bargaining agreements between the parties also specifically listed what positions were included in the unit. In doing so, the collective bargaining agreement indicates that the collective bargaining unit "is *limited* to the following positions:" Exhibits E, F, G, H, and I (emphasis added). The petitioner has never contended and the facts do not show that any of the positions at issue in this case are now or ever have been included in the MMCEO or any other bargaining unit.

8. The personal staff of the Superintendent includes the positions of Executive Administrative Assistant to the Superintendent and Superintendent's Office Specialist. The Superintendent supervises these positions.

9. Upon unification in 1994, the Assistant Superintendent for MCPS was assigned an exempt Secretary. In 2001, the title of this position changed to Executive Secretary for the Assistant Superintendent's Office. On May 1, 2002, the Assistant Superintendent's position became obsolete and a new position of Assistant Superintendent of Personnel Services was created. The Assistant Superintendent of Personnel Services was served by the staff of the Personnel Department (now Human Resources Department) and not by the Executive Secretary position. After May 2002, the Executive Secretary began working for the Superintendent's Office directly. In June of 2010, the title of the Executive Secretary position changed to Superintendent's Office Specialist. At all times from 1994 to the present, whether this position worked for the Assistant Superintendent or Superintendent, this position was excluded from MMCEO.

10. The personal staff of the Business Director (now Executive Director of Business and Operations) includes the Business Specialist position. The Executive Director of Business and Operations supervises the Business Specialist position.

11. The Business Specialist position has carried the same title since 1994. At all times since 1994 through the present, the Business Specialist position has been excluded from MMCEO's bargaining unit.

12. The Personnel Office (now Human Resources Office) employees include the Classified Technician, Certified Technician, and Human Resources Specialist positions. The Executive Director of Human Resources and Human Resources Supervisor supervise the Classified Technician, Certified Technician, and Human Resources Specialist positions.

13. The Classified Technician and Certified Technician positions have carried the same titles since unification in 1994. At all times since 1994 through the present, the Classified Technician and Certified Technician positions have been excluded from MMCEO's bargaining unit.

14. At the time of unification in 1994, there was no secretary position within the Personnel Department, even though such position would have been excluded from MMCEO pursuant to the language of the collective bargaining agreement. At some point between July 1, 1994 and July 1996, a Personnel Secretary/Receptionist position was created. In November 2003, the title of this position was changed to Executive Secretary of the Personnel Department. In July 2005, the title of this position was changed to Personnel Specialist. In January 2011, to reflect the change of the title of the department from Personnel to Human Resources, the title of this

position was changed to Human Resources Specialist. Since this position was created during the term of the 1994-1997 collective bargaining agreement between MCPS and MMCEO, it has been an exempt position, regardless of its title.

15. Since MMCEO became the exclusive bargaining representative for the classified bargaining unit, there have been nine collective bargaining agreements. The composition of the bargaining unit has changed between 1994 and the present; however, the Exempt Positions have remained excluded.

16. During negotiations in the spring of 2011, MMCEO raised the issue of changing the composition of the bargaining unit to include additional positions previously excluded. These negotiations resulted in the agreement that was in effect for the 2011-2012 school year. At that time, negotiators for MMCEO requested that the bargaining unit include the Business Specialist and other positions. MMCEO did not request inclusion of the personal staff of the Superintendent or the Human Resources Office employees (Classified Technician, Certified Technician, and Human Resources Specialist) at that time.

17. MMCEO filed its Unit Clarification Petition in February 2012. At that time, the agreement for the 2011-2012 school year was in effect. MCPS and MMCEO subsequently entered into a new agreement for the 2012-2013 school year that is currently in effect.

18. Carol White is Executive Administrative Assistant to the Superintendent and has served in that position since November 2009. Prior to that time, she served as the Executive Secretary in the Superintendent's Office. As Executive Secretary, White frequently acted as a substitute for her predecessor in the Executive Administrative Assistant's position (which was also called Executive Secretary at that time).

19. Tracy Long is the Superintendent's Office Specialist and has served in that position since December 2009.

20. The most recent job description for the position was updated in June of 2012; however, the title of the position was mistakenly left as Executive Secretary. The position is now titled Superintendent's Office Specialist.

21. The position of Superintendent's Office Specialist entails numerous duties and responsibilities as described in the job description. Superintendent Dr. Alex Apostle believes that the job description for the Superintendent's Office Specialist

mistakenly refers to the position as Executive Secretary. Long and Apostle both agree that in addition to serving as backup for the Executive Administrative Assistant, the Superintendent's Office Specialist serves as a communication liaison between the Superintendent's Office, members of the administrative team, and the public.

22. Since filling the position of Superintendent's Office Specialist in 2009, Long's communication duties have involved development and maintenance of MCPS webpages on behalf of the Superintendent's Office and Board of Trustees, developing intradistrict mailings and brochures on behalf of the Superintendent's Office regarding MCPS initiatives and opportunities, and data collection to assist the Superintendent and Board of Trustees regarding enrollment and levies. Long has been responsible for these duties since December 2009; however, these duties are now a larger focus of her work because of technology improvements within MCPS. If Long did not perform these duties, they would be performed by the Director of Public Affairs, which is not a unit position. Long's duties involve independent work and judgment and are more than clerical or secretarial in nature.

23. Long previously served as a secretary whose position was part of MMCEO's bargaining unit. Long's duties as Superintendent's Office Specialist are very different from the duties she performed as a secretary. Long did not observe any changes to her position when her title changed to Superintendent's Office Specialist in June 2010.

24. Although the focus of Long's duties has become centered on her acting as a liaison through various means of communication, Long has performed these duties since she began in the position in December 2009. Neither she or Apostle have observed nor has she been assigned any significant changes to her duties, responsibilities, or job practices.

25. Lenora Jacobs is the Business Specialist and has served in that position since May 2004.

26. The position of Business Specialist includes many duties and responsibilities detailed in the job description, including duties relating to legal document preparation and collective bargaining, such as compiling data for negotiations. This position entails independent work and judgment and is not solely a clerical or secretarial position. She has performed these duties at least since her current supervisor, Patrick McHugh, became Director of Business Services in January 2005.

27. Since January 2005, Jacobs has not been assigned nor has she observed any substantial changes to her duties and responsibilities.

28. Darlene Burtch is the Classified Technician and has been in that position since March 2010.

29. The position of Classified Technician includes many duties and responsibilities detailed in the job description. In addition to these duties, the Classified Technician also assists with the collective bargaining process by gathering research and often providing information regarding proposals and the final negotiation position of MCPS. The Classified Technician may be required to accompany the administrative team to negotiations with MMCEO. This position entails a substantial amount of independent work and judgment and is not clerical or secretarial in nature.

30. Since beginning in her position in March 2010, Burtch has not been assigned nor has she observed any substantial changes to her duties, responsibilities, and job practices.

31. Valerie Crumbley is the Certified Technician and has been in that position since June 2004.

32. The position of Certified Technician includes many duties and responsibilities detailed in the job description. In addition to these duties, the Certified Technician also assists with the collective bargaining process by gathering research and providing information regarding proposals and the final negotiation position of the MCPS. The Certified Technician may be required to accompany the administrative team to negotiations with the certified union. The position entails substantial independent work and judgment and is more than clerical or secretarial in nature.

33. Since beginning in the position in June 2004, Crumbley has not been assigned nor has she observed any substantial changes to her duties, responsibilities, and job practices.

34. Steven McHugh, Executive Director of Human Resources, and Caroline Wilson, Human Resources Supervisor, are responsible for supervising the Classified Technician and Certified Technician positions. Neither McHugh or Wilson has observed nor assigned any significant changes to the duties, responsibilities, and job practices of these positions since the last collective bargaining period.

35. The four positions at issue in this clarification petition have historically been excluded from the MMCEO bargaining unit since the first agreement between MMCEO and MCPS back in 1994. Exhibit AA, Petitioner's responses to requests for admission. None of the four positions has undergone any recent substantial changes in the duties and responsibilities of the positions.

III. Propriety Of Summary Judgment In A Unit Clarification Proceeding.

Motions may be made within contested case proceedings before the Board of Personnel Appeals. Admin. R. Mont. 24.16.212. In the event a motion is made, it must state the relief requested and shall be accompanied by affidavits setting forth the grounds upon which the motion is based. Answering affidavits, if any, must be served on all parties. *Id.*

The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials. *Klock v. City of Cascade*, (1997), 284 Mont. 167, 173, 943 P.2d 1262, 1266. Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where "the pleadings . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Peila, supra*.

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once a party moving for summary judgment has met the initial burden of establishing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law, the burden shifts to the nonmoving party to establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that the moving party is not entitled to judgment as a matter of law. *Meloy v. Speedy Auto Glass, Inc.*, 2008 MT 122, ¶18 (citing *Phelps v. Frampton*, 2007 MT 263, ¶16, 339 Mont. 330, ¶16, 170 P.3d 474, ¶ P16). If no such countervailing evidence is presented and the motion demonstrates that the movant is entitled to summary judgment, entry of summary judgment in favor of the movant is appropriate. *Klock, supra*, 284 Mont. at 174-75, 943 P.2d at 1267.

In the instant case, the parties do not dispute the underlying facts. Indeed, the union candidly admitted that it had no countervailing evidence to present and that it would have to rely on the evidence developed at hearing to determine whether there

had been a recent substantial change in job duties such that a unit clarification proceeding was viable. It is clear from the affidavits from the only witnesses with personal knowledge on the subject—the district administrators and the incumbents in the four contested positions—and the position descriptions that have essentially remained unchanged throughout several iterations of the collective bargaining agreement that (1) the positions at issue here have historically been excluded from the bargaining unit and (2) those positions have not undergone recent substantial changes in duties or responsibilities. Under this scenario, the unit clarification must be dismissed.

IV. The Respondent Has Demonstrated That The Positions At Issue Have Been Historically Excluded From The Bargaining Unit And Those Positions Have Not Undergone Recent Substantial Changes In Job Duties.

The petitioner has agreed that the Executive Administrative Assistant and the Human Resources Specialist positions have been historically excluded throughout the various bargaining iterations since 1994. Accordingly, the petitioner does not oppose excluding those positions from the unit. In addition, the petitioner clearly does not dispute that the long standing rule of the National Labor Relations Board (NLRB) is that unit clarification petitions are not appropriate to address unit placement for existing classifications unless there have been recent substantial changes “in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classifications continue to fall within the category—excluded or included—that they occupied in the past.” *Union Electric Co.*, 217 N.L.R.B. 666, 667 (1975).

As the respondent correctly notes, the Board of Personnel Appeals follows NLRB precedent to interpret Montana’s public employee collective bargaining law. *Missoula County High School District v. Board of Personnel Appeals*, (1986), 224 Mont. 50, 54, 727 P.2d 1327, 1330. It is also clear to this hearing officer that the Board of Personnel Appeals subscribes to the tenant set forth in *Union Electric Co.*, *supra*. See *Int’l. Union of Operating Engineers v. Flathead County*, UC No. 2-2011, order of remand, pp. 2-3 (holding that before determining whether the position in question could be included within the bargaining unit, there must have been a demonstration that the position had undergone a recent substantial change in duties).

The rationale underlying the requirement of a recent substantial change is straightforward. Where parties have historically bargained to include or exclude a position from a bargaining unit and there have been no recent substantial changes in the positions, an effort to force inclusion or exclusion through a unit clarification

upends labor stability. As a result, in order to promote labor stability the NLRB in such situations will not entertain the petition. *Bethlehem Steel Corp*, 329 N.L.R.B. 243, 244 (1999). In the absence of a demonstration that recent, substantial changes in the duties of the position have occurred such that the question of placement is placed in real doubt, “[c]larification is not appropriate . . . for upsetting an established practice of [the] parties concerning the unit placement of various individuals.” *Id.*, citing *Union Electric Co.*, *supra*.

The historical exclusion of the positions of Superintendent’s Office Specialist, the Business Specialist, the Certified Technician, and the Classified Technician is not in any doubt. The uncontroverted affidavits demonstrate as much and the petitioner’s admissions contained in Exhibit AA cement that finding. Thus, before a unit clarification petition can be entertained in the case at bar, there must be some showing that there have been recent substantial changes in the positions.

Changes are considered recent when they have occurred during the tenure of the most recent collective bargaining agreement. *Robert Wood Johnson University Hospital*, 328 N.L.R.B. 912, 915 (1999). In that case, the NLRB noted that during the five year period in question when there may have been changes, the union and management had negotiated two agreements which excluded the positions in question in that case from the unit. The NLRB further noted that the petitioner had not produced any evidence to show that a recent substantial change had occurred. *Id.*

The uncontroverted affidavits of the incumbents in these four positions leaves no room for doubt: no recent substantial changes have occurred in the duties of these positions to cast any doubt, much less real doubt, on whether they should or should not be included in the unit. Because the four positions at issue have historically been excluded from the unit, and because there has been no recent substantial changes in the duties of these positions, the unit clarification in this matter simply cannot be entertained.

In opposing the motion for summary judgment, the petitioner suggests that it is unclear whether the positions are within an excluded category and for this reason the motion for summary judgment should be denied. Petitioner’s response, page 3. That argument misses the point. The petitioner has agreed that all of the positions have been historically excluded from the unit through many iterations of the negotiation and resultant collective bargaining agreements up through and including the present agreement. It is that facet alone that creates the requirement for some demonstration that recent substantial changes have occurred. There simply is no fact

that even hints that the positions in question have undergone recent substantial changes in duties. Without such evidence, the petition cannot go forward.

Finally, the petitioner has also suggested that nothing in the *Bethlehem Steel* case “suggests that a merely subjective, self-serving account is sufficient to establish that a position is “historically excluded” for purposes of thwarting a unit clarification petition.” Petitioner’s response, page 3. That argument conflates the legal standards of the substantive law in this area—the requirement of evidence showing a recent substantial change—with a party’s procedural requirements for meeting an initial burden to establish the absence of any dispute of material fact and entitlement to judgment as a matter of law. It is this later consideration that drives the determination of the propriety of determining whether the movant has met its burden of showing that no material issue of fact exists.

A properly verified affidavit made upon personal knowledge containing evidence that is admissible at trial is competent evidence upon which to grant a motion unless an objection is raised that the affiant has no personal knowledge of the facts. 56 Am. Jur. 2d *Motions, Rules and Orders*, §23. The fact allegations contained in the affidavits in this case are made from personal knowledge and reflect competent evidence upon which summary judgment may be granted. MMCEO has not challenged the affidavits on the basis that they do not emanate from the personal knowledge of the affiants. Accordingly, granting summary judgment in this matter is appropriate as the affiants’ statements are based upon personal knowledge, the affidavits and requests for admissions demonstrate no material fact issue exists in this case, and the respondent is entitled to judgment as a matter of law. *See, e.g., Willson v. Taylor*, (1981), 194 Mont. 123, 129-30, 634 P.2d 1180, 1184 (district court properly granted summary judgment where it had before it requests for admissions answered by the party opposing the motion and affidavits from the movant supporting the motion which admissions and affidavits showed no material issue of fact and as a matter of law the movant was entitled to judgment).

V. Recommended Order.

Based on the foregoing, the hearing officer recommends that the Board of Personnel Appeals issue its final order granting summary judgment in favor of Respondent Missoula County Public School District #1 and dismissing Merged Missoula Classified Employees Organization, MEA-MFT, NEA-AFT’s petition for unit clarification. The parties’ bargaining has historically excluded the Superintendent’s Office Specialist, the Business Specialist, the Certified Technician, and the Classified Technician from inclusion in the bargaining unit. As there has

been no recent, substantial changes in the duties of those positions, the unit clarification petition should be dismissed.

DATED this 14th day of March, 2013.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: *Gregory L. Hanchett*
GREGORY L. HANCHETT
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.222, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than April 8, 2013. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.222, 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 201503
Helena, MT 59620-1503

CERTIFICATE OF MAILING

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

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DATED this 14th day of March, 2013.

Sandy Duncan

