

1 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
2 OF THE STATE OF MONTANA,
3 IN AND FOR THE COUNTY OF LEWIS AND CLARK

4 * * * * *

5 IN THE MATTER OF UNIT DETERMINATION #11, 1976

6 MONTANA SOCIETY OF ENGINEERS,)
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Petitioner,

vs.

THE BOARD OF PERSONNEL APPEALS, a
division of the Department of Labor and
Industry, an administrative agency; THE
BOARD OF REGENTS OF HIGHER EDUCATION OF
THE STATE OF MONTANA; LAWRENCE PETTIT,
Commissioner of Higher Education of the
State of Montana; MONTANA STATE UNIVER-
SITY; and MONTANA STATE UNIVERSITY
CHAPTER OF THE AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS;

Respondents.

Civil No. 41317

RECEIVED

DEC 9 1977

BOARD OF PERSONNEL APPEALS

* * * * *

JUDGMENT

* * *

This matter having come on for hearing on September 9,
1977, and the Court finding that the Petitioner, Montana
Society of Engineers, is entitled to judgment, it is in
accordance with Rule 58, M. R. Civ. P.,

ORDERED, ADJUDGED AND DECREED that the Petitioner,
Montana Society of Engineers, have judgment against the
Board of Personnel Appeals, a division of the Department of
Labor and Industry of the State of Montana, an administra-
tive agency; the Board of Regents of Higher Education of
the State of Montana; Lawrence Pettit, Commissioner of
Higher Education of the State of Montana; Montana State
University; and Montana State University Chapter of the
American Association of University Professors, Respondents,

FILED Dec 6 1977
CHARA GILREATH, Clerk of District Court
SUSAN KETRON Deputy



1 according to the Order and Opinion, dated November 29, 1977,
2 together with costs of suit as prayed for herein.

3 WITNESS the Honorable Gordon R. Bennett this 6th day
4 of December, 1977, in accordance with Rule 58, M. R. Civ. P.

5 GORDON R. BENNETT

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7 District Judge

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3 IN AND FOR THE COUNTY OF LEWIS AND CLARK

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5 IN THE MATTER OF UNIT DETERMINATION #11, 1976:

6 MONTANA SOCIETY OF ENGINEERS,)

7 Petitioner,)

8 vs.)

9 THE BOARD OF PERSONNEL APPEALS, a)

10 division of the Department of Labor and)

11 Industry, an administrative agency; THE)

12 BOARD OF REGENTS OF HIGHER EDUCATION OF)

13 THE STATE OF MONTANA; LAWRENCE PETTIT,)

14 Commissioner of Higher Education of the)

15 State of Montana; MONTANA STATE UNIVER-)

16 SITY; and MONTANA STATE UNIVERSITY)

17 CHAPTER OF THE AMERICAN ASSOCIATION OF)

18 UNIVERSITY PROFESSORS;)

19 Respondents.)

Civil No. 41317

RECEIVED

DEC 9 1977

BOARD OF PERSONNEL APPEALS

20 * * * * *

21 NOTICE OF ENTRY OF JUDGMENT

22 * * *

23 TO: BOARD OF PERSONNEL APPEALS, a division of the Department
24 of Labor and Industry of the State of Montana, an admini-
25 strative agency; THE BOARD OF REGENTS OF HIGHER EDUCATION
26 OF THE STATE OF MONTANA; LAWRENCE PETTIT, Commissioner of
27 Higher Education of the State of Montana; MONTANA STATE
28 UNIVERSITY; and MONTANA STATE UNIVERSITY CHAPTER OF THE
29 AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, and THEIR
30 ATTORNEYS OF RECORD:

31 YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE: That the
32 Clerk of the District Court has entered judgment on the
Court's Order awarding judgment in favor of Petitioner and
against Respondents on November 29, 1977, in accordance with

FILED Dec 6 1977

CLARA GILBERT, Clerk of District Court

By SUSAN KEITH Deputy



1 Rule 58, M. R. Civ. P. You will further take notice that
2 the date of entry of judgment was December 16th, 1977.

3 DATED this 16th day of December, 1977.

4 COUGH, SHANAHAN, JOHNSON & WATERMAN

5 s/Ronald F. Waterman
6 Ronald F. Waterman
7 Attorneys for Petitioner
8 301 First National Bank Building
9 Post Office Box 1686
10 Helena, Montana 59601

11 CERTIFICATE OF SERVICE

12 I, RONALD F. WATERMAN, one of the attorneys for the
13 Petitioner in the above-entitled action, do hereby certify
14 that a copy of the within JUDGMENT and NOTICE OF ENTRY OF
15 JUDGMENT was mailed, postage fully prepaid thereon at Helena,
16 Montana, on this 16th day of December, 1977, and directed
17 to the following attorneys:

18 Mr. Barry L. Hjort
19 Attorney at Law
20 1420 Cedar Street
21 Helena, Montana 59601

22 Mr. Jerry Painter
23 Attorney
24 BOARD OF PERSONNEL APPEALS
25 1417 Helena Avenue
26 Helena, Montana 59601

27 Ms. Emilie S. Loring
28 HILLEY & LORING
29 Attorneys at Law
30 1713 Tenth Avenue South
31 Great Falls, Montana 59405

32 s/Ronald F. Waterman
Ronald F. Waterman

1 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
2 OF THE STATE OF MONTANA,
3 IN AND FOR THE COUNTY OF LEWIS AND CLARK

4 * * * * *

5 IN THE MATTER OF UNIT DETERMINATION #11, 1976:

6 MONTANA SOCIETY OF ENGINEERS,)

7 Petitioner,)

8 vs.)

9 BOARD OF PERSONNEL APPEALS, et al.,)

10 Respondents,)

11 and)

12 MONTANA STATE UNIVERSITY,)

13 Petitioner,)

14 vs.)

15 BOARD OF PERSONNEL APPEALS, et al.,)

16 Respondents.)

RECEIVED
DEC 2 1977
BOARD OF PERSONNEL APPEALS

Civil Nos. 41317 and 41320

17 * * * * *

18 ORDER AND OPINION

19 * * *

20
21 This is a consolidated petition for judicial review,
22 taken by both Montana State University, Petitioner herein,
23 denominated as Counter-Petitioner in the proceedings before
24 the Board of Personnel Appeals, and the Montana Society of
25 Engineers, another Petitioner herein, denominated as Inter-
26 venor in the proceedings before the Board of Personnel
27 Appeals. Petitioner, Montana State University, is a land
28 grant university for the State of Montana (Section 75-8410,
29 R.C.M. 1947), and is the employer of all faculty members
30 affected by the unit determination order issued by the Board
31 of Personnel Appeals. Montana State University is one of
32 six institutions of higher education under the administration

MARY TATCHELL

1 and control of the Board of Regents of Higher Education and
2 subject to the oversight of the Commissioner of Higher
3 Education. Petitioner, Montana Society of Engineers, is the
4 Montana chapter of a national professional association
5 consisting of registered professional engineers and engi-
6 neers in training. It represents all such individuals
7 within the College of Engineering at Montana State Uni-
8 versity and has intervened in the unit determination matter
9 pending before the Board of Personnel Appeals without ob-
10 jection by any of the parties.

11 This controversy commenced in May of 1976 when Respon-
12 dent, Montana State University Chapter of the American
13 Association of University Professors, a professional organi-
14 zation, filed a petition for election and bargaining unit
15 determination with the Board of Personnel Appeals, a quasi-
16 judicial board within the Department of Labor and Industry
17 of the State of Montana, pursuant to the procedures set
18 forth in Section 59-1601, et seq., R.C.M. 1947. Petitioner,
19 Montana State University, counter-petitioned, sought inclu-
20 sion within and exclusion from the proposed collective
21 bargaining unit of certain employees. Montana Society of
22 Engineers intervened, sought exclusion from the proposed
23 collective bargaining unit of all registered professional
24 engineers and engineers in training within the faculty of
25 the College of Engineering at Montana State University.
26 Both the petition and counter-petition were amended, and a
27 hearing was held on September 8, 1976, covering all of the
28 matters then pending. On January 5, 1977, the hearings
29 examiner issued his proposed Findings of Fact, Conclusions
30 of Law and Recommended Order. Exceptions to those proposals
31 were filed by both Petitioners herein; and, on March 1,
32 1977, the Board of Personnel Appeals held a hearing upon the

1 matter. Following the filing of briefs on April 8, 1977,
2 the Board of Personnel Appeals entered its Final Order.

3 The Final Order of the Board of Personnel Appeals held,
4 consistent with the hearings examiner's recommendations,
5 that registered engineers and engineers in training of the
6 College of Engineering at Montana State University should be
7 included within the proposed collective bargaining unit.
8 With regard to the issue of the inclusion or exclusion of
9 the Cooperative Extension Service agents, hereinafter called
10 CES faculty members, the Board of Personnel Appeals revised
11 its hearings examiner's proposal and excluded all such
12 persons, including the state specialists located on the
13 campus at Montana State University. Thereafter, both Peti-
14 tioners separately petitioned for judicial review pursuant
15 to Section 59-1616, R.C.M. 1947 and Section 92-4216, R.C.M.
16 1947. Their initial petitions were timely filed. Both
17 Petitioners also sought to stay any election pending the
18 outcome of this judicial review. Petitioner, Montana
19 Society of Engineers' application for a stay was granted ex
20 parte. Thereafter, the Board of Personnel Appeals obtained
21 an order vacating the stay to permit preparation for an
22 election and setting a hearing to determine whether the stay
23 should be continued. Following such a hearing, the stay was
24 continued as set forth in the Court's Order of June 8, 1977.

25 A briefing schedule was, thereafter, adopted; and this
26 matter was heard on September 9, 1977. At such hearing, all
27 parties were represented by counsel; and oral argument was
28 presented on all issues pending. This Order and Opinion
29 decides the issues pending in both petitions for judicial
30 review as raised by all the parties to the proceedings.

31 There are several issues raised by the parties. Peti-
32 tioner, Montana State University, contends that the Board of

1 Personnel Appeals erred in excluding from the proposed
2 collective bargaining unit all CES faculty members as there
3 was a sufficient community of interest between those faculty
4 members and other faculty members within Montana State
5 University to require inclusion within the unit. The Board
6 of Personnel Appeals and the American Association of Uni-
7 versity Professors, Respondents, resisted this argument.
8 Petitioner, Montana Society of Engineers, contends that all
9 registered engineers and engineers in training are required
10 by controlling statute to be excluded from the proposed
11 collective bargaining unit. Further, should that position
12 prevail, Petitioner, Montana Society of Engineers, also
13 contends that the entire faculty of the College of Engi-
14 neering at Montana State University must be excluded as the
15 remaining faculty shares a closer identity of interest with
16 the excluded professional engineers and engineers in train-
17 ing than with the members of the unit. Also, regardless of
18 a decision on the above questions, the Petitioner, Montana
19 Society of Engineers, urges that the Board of Personnel
20 Appeals erred in including the entire faculty of the College
21 of Engineering within the proposed unit, contending that
22 such faculty lacked a sufficient community of interest with
23 the remaining proposed collective bargaining unit. Peti-
24 tioner, Montana State University, and Respondents, Board of
25 Personnel Appeals and American Association of University
26 Professors, resist those arguments.

27 An initial question is necessary to resolve, before
28 reaching any of the merits of this case. Both Respondents,
29 Board of Personnel Appeals and American Association of
30 University Professors, urge that the Board of Personnel
31 Appeals' Final Order of April 8, 1977, is not a final
32 decision for purposes of the Montana Administrative Proce-

1 dure Act, Section 82-4216, R.C.M. 1947, and that, therefore,
2 this Court lacks jurisdiction to decide the underlying
3 issues raised by the petitions for judicial review of both
4 parties. No party questions the venue in this case, and the
5 Court concludes here that it has venue over the parties.
6 The Court also concludes that it has jurisdiction over these
7 matters and all of the parties. The Court has already
8 decided this jurisdictional question when it concluded to
9 continue the stay herein, pending outcome of the petitions
10 for judicial review and adopts by reference herein its Order
11 of June 8, 1977, in which it held that the Board of Person-
12 nel Appeals' Order, dated April 8, 1977, denominated "Final
13 Order", was a final decision relative to the composition of
14 the collective bargaining unit at Montana State University
15 for purposes of the Montana Administrative Procedure Act,
16 Section 82-4216, R.C.M. 1947, and was, therefore, reviewable
17 by the district court.

18 Turning to the merits and the issue of whether the
19 Board of Personnel Appeals erred in excluding all CES
20 faculty members from the proposed collective bargaining
21 unit, it is necessary to consider the scope of this Court's
22 power in reviewing the actions of an administrative agency.

23 Section 82-4216, R.C.M. 1947, of the Montana Admini-
24 strative Procedure Act provides the following guidelines for
25 the Court when reviewing action taken by an administrative
26 agency:

27 "(7) The court shall not substitute its
28 judgment for that of the agency as to the weight
29 of the evidence on questions of fact.... The
30 court may reverse or modify the decision if sub-
 stantial rights of the appellant have been prej-
 udiced because the administrative findings, in-
 ferences, conclusions or decisions are:

31 (a) in violation of constitutional or statutory
 provisions;

32 (b) in excess of the statutory authority of the
 agency;

- 1 (c) made upon unlawful procedure;
- 2 (d) affected by other error of law;
- 3 (e) clearly erroneous in view of the reliable,
4 probative and substantial evidence on the whole
5 record;
- 6 (f) arbitrary or capricious or characterized by
7 abuse of discretion or clearly unwarranted exer-
8 cise of discretion; or
- 9 (g) because findings of fact, upon issues essen-
10 tial to the decision, were not made although re-
11 quested.

12 The "clearly erroneous" standard of review of administrative
13 decisions provides a broader review than the "arbitrary or
14 capricious" standard because it mandates a review of the
15 entire record and all the evidence rather than just a search
16 for substantial evidence to support the administrative
17 finding or decision. Norway Hill Preservation and Protec-
18 tion Association v. King County Council, 1976, 87 Wash.2d
19 267, 552 P.2d 674.

20 Montana has adopted the "clearly erroneous" test and
21 has accepted the definition that "'A finding is "clearly
22 erroneous" when although there is evidence to support it,
23 the reviewing court on the entire evidence is left with the
24 definite and firm conviction that a mistake has been commit-
25 ted.'" Brurud v. Judge Moving & Storage Co., Inc., 1977,
26 563 P.2d 558, 559.

27 Administrative agency action is further limited in that
28 its findings of fact must be based upon the evidence in the
29 record before it. Section 82-4209(7), R.C.M. 1947. In the
30 present case, there is no contention that there was an
31 absence of evidence in the record to support the Board of
32 Personnel Appeals' Order; therefore, the issue is whether
the Order was clearly erroneous, that is whether the con-
clusion reached leaves the reviewing court with the firm
conviction that a mistake had been made.

1 The Petitioner, Montana State University, has not made
2 such a showing in the present case relative to the exclusion
3 by the Board of Personnel Appeals of all CES faculty members
4 from the proposed collective bargaining unit. The body of
5 Montana State University employees covered within the group
6 consists of over 100 county extension agents, located off
7 campus in county extension offices throughout the state, and
8 approximately 30 state specialists, located on the Montana
9 State University campus.

10 In dealing with the appropriateness of a collective
11 bargaining unit, the Board of Personnel Appeals must con-
12 sider various factors to determine whether a community of
13 interest exists between certain employees and members of the
14 unit. Section 59-1606(2), R.C.M. 1947. Here, the Board of
15 Personnel Appeals concluded that there existed significant
16 factors which weighed heavily against inclusion of the CES
17 faculty members within the proposed collective bargaining
18 unit. Among other things considered, which support the
19 conclusion reached, are the factors that the CES faculty
20 members are engaged in a public dissemination of information
21 to persons throughout the state and such persons receive no
22 college credit for such programs; the involvement of direct
23 federal funding in the program; the federal appointment
24 procedures applicable to the program; the availability of
25 federal retirement, health and life insurance programs to
26 such faculty members; and, the lack of integration of work
27 functions and other differentiation features between the CES
28 faculty members and the members of the proposed collective
29 bargaining unit. While there was evidence offered which
30 might have supported a different conclusion, i.e. supporting
31 the hearings examiner's Findings of Fact, Conclusions of Law
32 and Recommended Order placing the state specialists within

1 the proposed collective bargaining unit, the Final Order of
2 the Board of Personnel Appeals is not clearly erroneous.

3 Since, upon judicial review, this Court cannot sub-
4 stitute its own judgments for that of the agency as to the
5 weight of the evidence on questions of fact, Section 82-4216(7),
6 R.C.M. 1947, and since there has not been a showing that the
7 conclusion reached was clearly erroneous, the decision of
8 the Board of Personnel Appeals to exclude all CES faculty
9 members from the proposed collective bargaining unit is
10 hereby affirmed.

11 Turning next to the issues raised by Petitioner,
12 Montana Society of Engineers, the Court concludes, on the
13 same basis as decided above, that the Board of Personnel
14 Appeals' conclusion that the College of Engineering did not
15 lack a community of interest with the remaining members of
16 the proposed collective bargaining unit should be affirmed.
17 That, however, does not resolve all of the issues presented
18 by Petitioner, Montana Society of Engineers. Two other
19 issues must be addressed; first, whether the registered pro-
20 fessional engineers and engineers in training are required
21 to be excluded from the proposed collective bargaining unit
22 by statute and, second, should exclusion of the registered
23 professional engineers and engineers in training be re-
24 quired, whether the entire faculty of the College of Engi-
25 neering should be excluded from the proposed collective
26 bargaining unit as the non-excluded faculty members of the
27 College of Engineering have a closer community of interest
28 with those excluded by statute than with the other members
29 of the proposed collective bargaining unit.

30 The definition of who is a public employee and included
31 within a collective bargaining unit is given by Section
32 59-1602(2), R.C.M. 1947. That statute states that a public

1 employee is a person employed by a public employer except
2 "professional engineers and engineers in training", among
3 others. There are no restrictions or limitations upon the
4 definition, and the Court concludes that the language used
5 is neither vague nor ambiguous. Repeatedly, the Supreme
6 Court of Montana has followed the rule of statutory con-
7 struction that:

8 "In construing a statute, the intent of the legis-
9 lature is controlling. Such intention must first
10 be determined from the plain meaning of the words
11 used, and if interpretation of the statute can be
12 so determined, the courts may not go further and
13 apply any other means of interpretation. Where
14 the language of a statute is plain, unambiguous,
15 direct and certain, the statute speaks for itself
16 and there is nothing left for the Court to construe.
17 The function of the Court is simply to ascertain
18 and declare what in terms or in substance is con-
19 tained in the statute and not insert what has been
20 omitted." Security Bank and Trust Co. v. Connors,
21 1976, Mont. ___, 550 P.2d 1313, 1317, 33 St.
22 Rep. 501, 506.

23 Applying this rule to the present case compels the
24 conclusion that the registered professional engineers and
25 engineers in training who are faculty members of the College
26 of Engineering at Montana State University are required to
27 be excluded from the proposed collective bargaining unit.
28 The error of the Board of Personnel Appeals is abundantly
29 clear from examination of its Final Order and the hearings
30 examiner's opinion adopted by reference. In the face of the
31 clear, unambiguous and direct statute, the Board of Person-
32 nel Appeals attempted to search for a "legislative intent"
which would justify a result contrary to that otherwise
directed by the plain words of the controlling statute. In
this case, the statute is not susceptible to differing
interpretation; and, therefore, no legislative intent need
be sought.

Since a court, in considering a petition for judicial
review, may reverse a decision of an administrative agency

1 where the decision of the agency violates statutory pro-
2 visions, reversal is authorized here.

3 Some of the arguments raised both by the Board of
4 Personnel Appeals and Montana State University must be
5 mentioned. Initially, these parties urge that to apply the
6 statute and require exclusion will reach an illogical
7 result. First, the parties pose the hypothetical example
8 that a ruling in conformity with the statute might require
9 an employee to be excluded from a collective bargaining unit
10 because that person was a registered engineer, though not
11 otherwise engaged in engineering activity. The hypothetical
12 raised, however, has no application here. The only parties
13 who seek exclusion in this instance are faculty members of
14 the College of Engineering otherwise engaged in the practice
15 of engineering.

16 Second, the parties contend that a ruling consistent
17 with the statute would result in exclusion from the proposed
18 collective bargaining unit of registered professional engi-
19 neers or engineers in training while other faculty members
20 of the College of Engineering, who are not registered under
21 the engineering registration laws of the state of Montana,
22 would not be so excluded. While such a result is possible,
23 the result does not compel a different conclusion than that
24 indicated above. The evidence in the record shows that all
25 of the registered engineers and engineers in training are
26 engaged in the practice of engineering. If unregistered
27 engineers are also engaged in the practice of engineering,
28 which includes the teaching of advanced engineering sub-
29 jects, Section 66-2350(3), R.C.M. 1947, those persons should
30 become registered. Their lack of registration, however,
31 does not serve to affect the registered professional engi-
32 neers and engineers in training and eliminate the latter's

1 statutory exclusion from the definition of public employee.
2 The illogical result complained of could be resolved simply
3 through Montana State University requiring all of its faculty
4 members of the College of Engineering engaged in the practice
5 of engineering be registered as required by law.

6 Finally, the parties contend that should the registered
7 engineers and engineers in training be required to be ex-
8 cluded such interferes with the constitutional powers of the
9 Board of Regents over personnel matters as provided by
10 Article X, Section 9(2)(a), 1972 Constitution of Montana.

11 That argument is incorrect. First, it is the Board of
12 Personnel Appeals, not the Board of Regents, which estab-
13 lishes, pursuant to law, the collective bargaining units to
14 be created in this case; and, therefore, the limitations of
15 Section 59-1602(2), R.C.M. 1947, affect only the exercise of
16 powers by the Board of Personnel Appeals. To the extent
17 that Section 59-1602(2), R.C.M. 1947, may restrict the Board
18 of Regents' powers, such act is a proper and necessary
19 exercise of the legislative powers of the state, governing
20 all public employees. An exercise of such legislative power
21 does not, this Court holds, restrict the Board of Regents'
22 powers anymore than the Board of Regents is limited by being
23 required, under state law, to pay certain minimum wages, by
24 not being permitted to act in a discriminatory manner toward
25 its employees or being required to conduct its business
26 during open meetings.

27 Here, however, clearly, the limitation as to who can be
28 included within a proposed collective bargaining unit is a
29 limitation directed toward the Board of Personnel Appeals
30 and, therefore, such law does not conflict with the con-
31 stitutional provisions relied upon by both the Board of
32 Personnel Appeals and Montana State University.

1 Accordingly, the decision of the Board of Personnel
2 Appeals, holding that registered professional engineers and
3 engineers in training need not be excluded from the proposed
4 collective bargaining unit, is hereby reversed; and the
5 matter is remanded to the board to ascertain the number of
6 persons in each category who must be excluded from the
7 proposed collective bargaining unit.

8 The second issue raised by Petitioner, Montana Society
9 of Engineers, is that if registered professional engineers
10 and engineers in training must be excluded, the entire
11 faculty of the College of Engineering should be excluded as
12 the non-registered faculty members have a community of
13 interest closer to the excluded faculty members than to the
14 members of the proposed collective bargaining unit. Neither
15 the hearings examiner nor the Board of Personnel Appeals
16 made any findings upon this point since it was dependent
17 upon a finding that Section 59-1602(2), R.C.M. 1947, re-
18 quired exclusion. Although Petitioner, Montana Society of
19 Engineers, urges that this Court should determine whether
20 the exclusion of the entire College of Engineering is re-
21 quired, the Court concludes it cannot do so.

22 The function of judicial review is to examine findings
23 of fact and conclusions of law first reached by the admini-
24 strative agency. When an agency has not made findings of
25 fact or conclusions of law in the first instance, however,
26 the Court, upon review, should not enter any findings, but
27 can only remand the case for further proceedings consistent
28 with its opinion. To do otherwise would be tantamount to
29 the Court substituting its own judgment for that of any
30 agency, an act prohibited by statute. See Section 82-
31 4216(7), R.C.M. 1947.

32 Based upon the foregoing Opinion, it is hereby

1 allow the Board of Personnel Appeals to conduct an election
2 during the spring of 1977, if one was to be allowed, and
3 after considering the record, oral arguments and the briefs
4 of the parties, the Court did make a ruling upon such date,
5 as confirmed by this Order.

6 The Court holds that the Board of Personnel Appeals'
7 Order, dated April 8, 1977, denominated "Final Order", is a
8 final decision of the Board of Personnel Appeals relative to
9 the question of the composition of the collective bargaining
10 unit at Montana State University for purposes of the Montana
11 Administrative Procedures Act, Section 82-4216, R.C.M. 1947,
12 and is, therefore, reviewable by the District Court. The
13 Court notes that, in the event such order was not final, it,
14 nevertheless, is immediately reviewable as a review of the
15 final agency decision, after an election and before or after
16 certification of the Board of Personnel Appeals would not
17 provide an adequate remedy at law for the parties, Petitioner
18 herein, challenging the composition of the collective bargain-
19 ing unit. It is clear that the Petitioner, Montana Society
20 of Engineers, and Respondent, Montana State University, who
21 also challenges the Board's Order, represent, in total, over
22 200 persons, or one-third of the possible collective bargain-
23 ing unit, and to compel an election now with the challenges
24 unresolved would cause confusion and present a high pos-
25 sibility that a second election would be necessary. Thus,
26 Respondent, Board of Personnel Appeals', Motion to lift the
27 stay raises the possibility of a multiplicity of proceedings,
28 whereas, proceeding to resolve the controversy first,
29 before conducting the election, avoids completely such
30 possibility. Further, there is ~~no~~ no showing that it is
31 either necessary or essential to conduct an election in the
32 spring of 1977 as opposed to a later time. Indeed, the

1 record reflects that the proceedings before the Board of
2 Personnel Appeals have not been conducted in any unusual or
3 accelerated fashion.

4 Finally, Respondent, Board of Personnel Appeals, urges
5 that to delay the election pending resolution of the con-
6 troversy invites all parties dissatisfied with the ruling of
7 that Board to seek delays which would frustrate the Board's
8 rulings. The Court finds, in the present case, that Peti-
9 tioner has made a sufficient showing which establishes that
10 it is not merely seeking judicial review of the Board of
11 Personnel Appeals' Order, and a stay thereof for purposes of
12 delay, but that there exists a valid controversy between the
13 parties; and, further, the Court finds from the showing of
14 the Petitioner that the present case in controversy is one
15 in which there exists a sufficient likelihood of success
16 upon the merits to justify staying the election until a
17 final decision upon the merits.

18
19 For the foregoing reasons:

20 IT IS HEREBY ORDERED that the Respondent, Board of
21 Personnel Appeals', Motion to lift the stay of election is
22 hereby denied; and,

23 IT IS FURTHER ORDERED that the portion of the Court's
24 Order of May 13, 1977, permitting Respondent, Board of
25 Personnel Appeals, to take whatever action is necessary to
26 prepare for an election at Montana State University is
27 hereby vacated.

28 DATED this 8 day of June, 1977.

29 GORDON R. BENNETT

30 _____
31 District Judge
32

6/8/77

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 13851

IN THE MATTER OF THE APPLICATION FOR TEMPORARY ADMISSION OF CHARLES JOSEPH McCLAIN, JR., TO PRACTICE BEFORE THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK.

FILED

JUN 8 - 1977

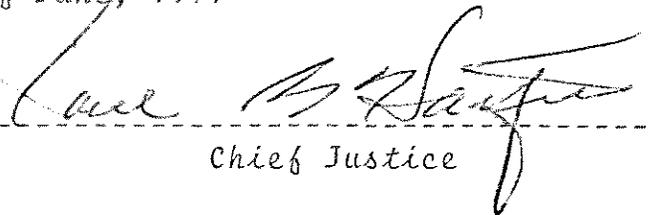
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

ORDER

A motion having been made by Jerry L. Painter for an order granting Charles Joseph McClain, Jr., of San Francisco, California, admission to practice before the district court of the first judicial district of the State of Montana, in and for the County of Lewis and Clark, in the Judicial Review proceedings before said court entitled "Montana State University v. Board of Personnel Appeals, a Division of the Department of Labor and Industry of the State of Montana; Montana State University Chapter of the American Association of University Professors; Montana Society of Engineers," cause No. 41320, and "Montana Society of Engineers v. Board of Personnel Appeals, a Division of the Department of Labor and Industry of the State of Montana, an administrative agency; the Board of Regents of Higher Education of the State of Montana, Lawrence K. Petitt, Commissioner of Higher Education of the State of Montana; Montana State University; and Montana State University Chapter of the American Association of University Professors," cause No. 41317, and the Court being of the opinion that this matter should be addressed to the district court of the first judicial district of the State of Montana, in and for the County of Lewis and Clark;

THEREFORE, DOES HEREBY REMAND said motion to the district court of the first judicial district of the State of Montana, in and for the County of Lewis and Clark and the judges residing therein for determination of said matter.

DATED this 8th day of June, 1977


Chief Justice

5/6/77

PETER G. MELOY

RESIDING JUDGE

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF LEWIS AND CLARK

* * * * *

MONTANA SOCIETY OF ENGINEERS,)
)
) Petitioner,)
)
) vs.)
)
) BOARD OF PERSONNEL APPEALS, a)
) Division of the Department of)
) Labor and Industry of the State of)
) Montana, an administrative agency;)
) THE BOARD OF REGENTS OF HIGHER)
) EDUCATION OF THE STATE OF MONTANA;)
) LAWRENCE PETTIT, COMMISSIONER OF)
) HIGHER EDUCATION OF THE STATE OF)
) MONTANA; MONTANA STATE UNIVERSITY;)
) and MONTANA STATE UNIVERSITY)
) CHAPTER OF THE AMERICAN ASSOCIA-)
) TION OF UNIVERSITY PROFESSORS,)
)
) Respondents.)

No. _____

* * * * *

ORDER

* * *

Upon application of Petitioner for a stay of all proceedings pending, the determination of the legal issues involved in the Petition for Judicial Review filed this date, and after a review of the Petition and underlying law and upon consideration of the matter:

IT IS HEREBY ORDERED:

That the Application for Stay of the Petitioner is hereby granted and all of the parties to this procedure are hereby ordered to refrain and to take no action to call or to hold any election at Montana State University for the purpose of determining whether the Montana State University Chapter of the American Association of University Professors or any other entity should be designated as the bargaining agent for the proposed collective bargaining unit at Montana

FILED May 6 19 77
CLARA GILREATH, Clerk of District Court
By CLARA Gilreath Deputy

1 State University, until such time as the Petition for Judi-
2 cial Review and the issues raised therein by the Petitioner
3 are resolved by this Court.

4 DATED this 6 day of May, 1977.

5 GORDON R. BENNETT
6 _____
7 District Judge
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BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION #11, 1976.

MONTANA STATE UNIVERSITY CHAPTER OF THE
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

Petitioner,

MONTANA STATE UNIVERSITY,

Counter-Petitioner,

MONTANA SOCIETY OF ENGINEERS,

Intervenor.

F I N A L O R D E R

A Proposed Findings of Fact, Conclusion of Law, and Order (Proposed Order) was issued in the above-entitled matter on January 5, 1977. The Proposed Order provided in pertinent part that all registered engineers and engineers-in-training on the faculty of Montana State University (M.S.U.) shall be included in the proposed unit. Further, the Proposed Order provided for the exclusion of all faculty members of the County Extension Service but for the inclusion of those state specialists located on the campus of M.S.U. Exceptions were filed by the Montana Society of Engineers as to the inclusion of engineers and engineers-in-training. Exceptions were filed by Montana State University as to the exclusion of the faculty members of the County Extension Service. Briefs were filed with this Board and oral arguments were presented by all parties to this matter on March 1, 1977.

After having read the briefs submitted by the parties to this matter and after having heard oral arguments this Board issues the following as its Final Order:

This Board sustains the hearing examiner's Proposed Findings of Facts, Conclusions of Law and Order as to the inclusion of all engineers and engineers-in-training in the bargaining unit.

This Board concludes, however, that the inclusion of the state specialists of the County Extension Service was in error. We find that the state specialists should be excluded for the same reasons provided in the hearing examiner's Proposed Order for exclusion of the other faculty members of the County Extension Service.

1 IT IS THEREFORE ORDERED:

2 1. That the Proposed Findings of Fact, Conclusion of Law and Order
3 of the hearing examiner dated January 5, 1977, be amended to provide for the
4 exclusion of the state specialists of the County Extension Service; and

5 2. That the Findings of Facts, Conclusion of Law, and Order of the
6 hearing examiner in its amended form is adopted and is incorporated by
7 reference as the Final Order of this Board.

8 Dated this 8th day of April, 1977.

9 BOARD OF PERSONNEL APPEALS

10 BY

Brent Cromley
11 Brent Cromley
12 Chairman

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CERTIFICATE OF MAILING

I, Vonda Brewster, hereby certify and state that I did on the 8th day of April, 1977, mail a copy of the above FINAL ORDER to the following people:

Barry L. Hjort
Box 5600
Helena, MT 59601

Ronald Waterman
Gough, Booth, Shanahan & Johnson
P. O. Box 1686
Helena, MT 59601

Charles J. McClain, Jr.
American Association of University Professors
582 Market Street
San Francisco, CA 94104


VONDA BREWSTER

RECEIVED
JAN 6 1977

1/5/77

GOUGH, BOOTH, SHAGHAN
& KASER

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION)
#11, 1976:)

MONTANA STATE UNIVERSITY CHAPTER OF)
THE AMERICAN ASSOCIATION OF UNIVER-)
SITY PROFESSORS,)

Petitioners,)

MONTANA STATE UNIVERSITY,)

Counter-Petitioner,)

MONTANA SOCIETY OF ENGINEERS,)

Intervenor.)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER.

On May 18, 1976, a Petition of Unit Determination was filed with this Board by the Montana State University Chapter of American Association of University Professors. The petition was later amended. The unit description contained in the amended petition was:

"PETITIONER, Montana State University Chapter of the American Association of University Professors, wishes to amend its description of a proposed appropriate bargaining unit to read as follows:

INCLUDED in the unit are all members of the Academic Instructional Staff who teach .5 FTE or more.

EXCLUDED from the unit are all other employees of Montana State University."

On June 9, 1976, the Montana Society of Engineers petitioned this Board for intervention in the Unit Determination proceedings, petitioning that the Montana State University College of Engineering be excluded from the bargaining unit or in the alternative that all registered professional engineers and engineers in training be excluded from the proposed bargaining unit based on the theory that registered professional engineers and engineers in training are excluded by law, citing section 59-1602, R.C.M.

Exhibit "A"

1 1947.

2 On June 7, 1976, this Board received a counter-petition from
3 the employer, Montana State University, objecting to the proposed
4 unit of Petitioner. On September 7, 1976, the Employer amended
5 its petition, which stated in part:

6 "That the employer believes that an appropriate bargaining unit
7 ought to consist of all faculty members on half-time (.5 FTE) or
8 greater appointment on an academic or fiscal year basis, who hold
9 regular academic or research rank, and who are on a Board of
10 Regents academic contract as of October 1, 1976, exclusive of the
11 President, Vice Presidents, Deans, Associate and Assistant Deans
12 (including the Association Director of the Agricultural Experiment
13 Station), Directors and Superintendents (not to include the
14 Director of Forensics, Director of KEEP Program, and Director of
15 Intramurals and Recreation), Department Heads (including School
16 Directors and Educational Directors of the extended campuses of
17 the School of Nursing), visiting faculty, adjunct faculty (including
18 courtesy appointments), faculty on terminal contracts and one-year
19 nonrenewable contracts, persons on the Board of Regents professional
20 contracts, supervisory personnel in the Cooperative Extension
21 Service (Personnel and Training Officer, Management Information
22 Officer, and State and Area Program Coordinators), and any other
23 supervisory employee or management official falling within the
24 definitions of §59-1602(3) and (4), R.C.M. 1947."

25 A hearing was held on September 8, 1976, on the campus of the
26 Montana State University. After the hearing, each party submitted
27 a brief.

28 There are three main issues for this hearing examiner to rule
29 on:

30 (1) Should the College of Engineers or any of its faculty
31 members be excluded from the bargaining unit?
32

1 (2) Should the faculty members of the Cooperative Extension
2 Service be excluded from the bargaining unit?

3 (3) Should faculty members whose teaching responsibilities
4 are less than .5 FTE be excluded from the bargaining unit?

5 In order to avoid confusion, I will discuss each issue
6 separately.

7 I.

8 The first issue to be discussed is the College of Engineering
9 and its faculty. I see the issue as a three part question:

- 10 1. Should the College of Engineering be excluded from the
11 bargaining unit?
- 12 2. If the College of Engineering is not to be excluded
13 from the bargaining unit, then should the registered
14 engineers and the engineers in training be excluded
15 from the bargaining unit?
- 16 3. If the registered engineers and the engineers in
17 training are excluded from the bargaining unit, then
18 is such a condition created that the remainder of the
19 faculty of the College of Engineering should be excluded?

20 FINDINGS OF FACT

21 Section 59-1606(2) Revised Codes of Montana establishes the
22 criteria in part which this Board must use in determining an
23 appropriate unit for the purpose of collective bargaining. That
24 section reads as follows:

25 "(2) In order to assure employees the fullest freedom in
26 exercising the rights guaranteed by this act, the board
27 or an agent of the board shall decide the unit appropri-
28 ate for the purpose of collective bargaining, and shall
29 consider such factors as community of interest, wages,
30 hours, fringe benefits, and other working conditions of
31 the employees involved, history of collective bargaining,
32 common supervision, common personnel policies, extent of
integration of work functions and interchange among
employees affected, and the desires of the employees".

In applying those criteria to the testimony and evidence submitted
at the hearing, the following are my findings of fact:

1. COMMUNITY OF INTEREST: It is my finding that there is a common
community of interest existing between the College of Engineering
and the remainder of the university. The intervenor failed to
establish a lack of community of interest. Testimony elicited

1 from Dr. Irving Davis, Vice President for Academic Affairs for the
2 university, established that the College of Engineering is an
3 integral part of the University's overall function of providing
4 educational opportunities for the students attending Montana State
5 University. There was a failure on the part of intervenor of
6 showing any type of autonomy that existed in the College of
7 Engineering which was peculiar to the College of Engineering.

8 Students attending the College of Engineering must attend
9 classes outside the College of Engineering in order to comply
10 with the College of Engineering's graduation requirements. Dr.
11 Harry Townes, Professor of Engineering, testified that certain
12 minimum requirements with respect to courses in humanities, sciences,
13 and math were required in order for the College of Engineering to
14 be accredited by the Engineering Council for Professional Develop-
15 ment. (Tr. p. 15)

16 Testimony also established that there is equal professional
17 requirements for faculty members of the College of Engineering as
18 the remainder of the university. In fact, Dr. Davis testified
19 that licensing as an engineer has not been a requirement for
20 hiring. Although even if it had been, since other faculty members
21 such as nursing faculty, and faculty members of the architecture
22 department require licensing, the licensing factor would not make
23 the engineering faculty unique. (SEE: Dr. Shannon's testimony,
24 Tr. p. 2 and Harold Rose's testimony, Tr. p. 57)

25 For budgeting purposes, there is no line item budgeting
26 specifically for the College of Engineering. Rather, the University
27 System decides on the budget for the College of Engineering. This
28 is common with the rest of the university.

29 Dr. Townes testified that he represented the College of
30 Engineering on the University Council, the governing body composed
31 of faculty members. (Tr. p. 19)
32

1 2. WAGES, HOURS, FRINGE BENEFITS, AND OTHER WORKING CONDITIONS
2 OF THE EMPLOYEES INVOLVED:

3 The undisputed testimony of Dr. Dayton shows that the College
4 of Engineering has the same academic calendar as the rest of the
5 university.

6 Dr. Townes testified under examination from Mr. Waterman,
7 Counsel for the Montana Society of Engineers, as to Wages:

8 "Q: Dr., are you familiar with the pay structure of faculty
9 members at the College of Engineering?

10 A: I have looked at it at the Professor level. I have not
11 examined the associate or instructor level, or assistant level.

12 Q: Are you familiar with the pay level of other faculty
13 members of other colleges at MSU? Have you compared them?

14 A: Yes I have.

15 Q: Is it a fair and accurate statement to say structures of
16 the College of Engineering reflects salary factors outside, that is,
17 the engineering profession as a whole?

18 A: Yes, I think it does." (SEE: Transcript p. 13, lines
19 6-16)

20 Under cross-examination by Barry Hjort, Counsel for the University
21 System, Dr. Townes testified as to salaries:

22 "Q: Now, something that I missed with respect to the salary
23 testimony that you offered, were you indicating that the salary of
24 the engineers in the College of Engineering is not comparable in
25 some sense with engineering salaries in the private sector?

26 A: That's true. But that wasn't the testimony I originally
27 presented. What I originally presented was, or said was, that the
28 teaching salaries in the College of Engineering are affected by
29 salary levels in industry.

30 Q: I see. And by that you meant to suggest that as industry
31 salaries rise, so do the salaries in the College of Engineering?

32 A: They must. Otherwise engineering faculty deserts."
(Tr. p. 30-31)

1 No other testimony was presented concerning the wages of faculty
2 members of the College of Engineering as compared to faculty members
3 of the remainder of the University. Dr. Towne's testimony is
4 confusing to this hearing examiner, in the sense that it is incom-
5 plete. Dr. Townes testified that salaries for faculty members of
6 the College of Engineering must be related to the salaries earned
7 by engineers outside of the university setting, but he does not
8 testify as to whether or not it is comparable to the university
9 system at large. Since it does not logically follow that, since
10 the faculty's salaries of the College of Engineering is affected
11 by the salaries of private engineers the salaries of the College
12 of Engineer faculty are not comparable to that of the rest of the
13 university, I must assume that there is some degree of comparability
14 in salaries between faculty members of the College of Engineering
15 and the remainder of the university system.

16 Dr. Dayton's testimony established that the faculty members of
17 the College of Engineering have the same fringe benefits as the
18 remainder of the university. All faculty members of the College of
19 Engineering have the same sick leave, retirement benefits, insurance,
20 etc., as the rest of the university. At least there are no
21 differences on the basis of College of Engineering v. rest of the
22 university.

23 5. COMMON SUPERVISION: The uncontroverted testimony of Dr. Dayton
24 shows that the College of Engineering is set up structurally in the
25 same manner as the rest of the university. That is, there are
26 department heads, dean of the college, and the dean reports to
27 the Vice President of Academic Affairs. (SEE: Counter-petitioner's
28 Exhibit T) There are no differences in common supervision based
29 on a College of Engineering, v. rest of the university.

30 4. COMMON PERSONNEL POLICIES: Dr. Dayton's testimony establishes
31 that the College of Engineering have the same personnel policies
32 as the remainder of the university. That is, the procedure for

1 hiring and firing is the same as the rest of the university,
2 evaluation purpose and procedures are the same as the rest of the
3 university, and salary and tenure determinations are the same as
4 the rest of the university.

5 5. EXTENT OF INTEGRATION OF WORK FUNCTIONS AND INTERCHANGE AMONG
6 EMPLOYEES AFFECTED.

7 It was established through testimony of Dr. Dayton that there
8 is significant integration of work functions and exchange among
9 employees affected. The College of Engineering uses the same
10 facilities for admissions and placement. Dr. Townes testified
11 that the College of Engineering's accreditation standards requires
12 certain courses be taken by its students in the fields of humanities,
13 sciences, and mathematics. Classrooms are shared amongst the various
14 colleges and schools of the university. The same library is used
15 by all. Faculty members of the College of Engineering are
16 represented on the university governing council. The College of
17 Engineering is not an autonomous college producing graduates with-
18 out the aid of the remainder of the university including its other
19 Colleges, library, administrative offices, and university
20 facilities.

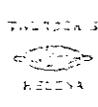
21 6. DESIRES OF THE EMPLOYEES:

22 A survey was conducted by Dr. Townes to determine whether
23 the academic staff of the College of Engineering should be excluded
24 from the proposed bargaining unit. (SEE: Intervenor's Exhibit #1)
25 Dr. Townes testified that of the 70 faculty members of the College
26 of Engineering who were mailed this questionnaire, 48 members
27 returned them.

28 The question on the questionnaire read as follows:

29 "The academic staff of the College of Engineering should
30 be excluded as a whole from the MSU-CBU"

31 The faculty member was then to check either the box marked
32



1 "Yes" or the one marked "No". Of those faculty members who
2 returned the questionnaires, eighty to eighty-five percent checked
3 the "Yes" box. Fifteen to twenty percent checked the "No" box.

4 This hearing examiner is convinced that the majority of the
5 faculty members of the College of Engineering desire to be excluded
6 from the proposed bargaining unit.

7 7. OTHER:

8 The Intervenor asserts that accreditation of the College of
9 Engineering and the licensure of many of its faculty members should
10 also be considered as a basis for excluding the College of Engineer-
11 ing from the bargaining unit. To this I cannot agree. Accredita-
12 tion does not increase the autonomy of the College of Engineering.
13 It does set certain requirements to be followed by the College
14 of Engineering, but does not affect the relationship of the
15 College of Engineering to the remainder of the university. The
16 placement of the College of Engineering in the bargaining unit
17 with the remainder of the university would in no way jeopardize
18 the College of Engineering's accreditation. As Dr. Shannon and
19 Mr. Rose testified, both their departments are accredited by outside
20 accreditation associations. Furthermore, Counter-petitioner's
21 Exhibit C shows that there are a large number of accreditation
22 agencies established for the purpose of accrediting academic
23 programs.

24 Likewise, there has been no showing that the licensure of
25 engineers in anyway prohibits the inclusion of the College of
26 Engineering in the bargaining unit. In fact, Dr. Dayton testified,
27 and his testimony was uncontroverted, that licensure is not required
28 in order for an engineer faculty to be hired, but rather a Ph.D.
29 is the usual requirement. Finally, Dr. Shannon and Mr. Rose
30 testified that licensure is required of faculty members in their
31 departments. Therefore, the College of Engineering is not unique
32 in that respect but rather shares the requirements with other

1 departments which are to be included in the bargaining unit.

2 Mr. Waterman, counsel for the Montana Society of Engineers,
3 requested that this hearing examiner take administrative notice of
4 U.D. #67, 1974, in the matter of the Unit Determination of
5 University of Montana Faculty Members, in which this Board excluded
6 the Law School from the bargaining unit comprised of the remainder
7 of the faculty members at the University of Montana. This hearing
8 examiner has reviewed that decision issued by this Board's then
9 chairman, Francis J. Raucci, and finds the decision to be inapplic-
10 able to the fact situation now before me. The Law School involved a
11 situation where a school existed almost autonomous to the remainder
12 of the University. That is, the school did its own recruitment and
13 placement, the facility is used almost exclusively by the Law
14 School itself, it teaches all of its own courses necessary for
15 graduation, the senate faculty was on bad terms with the Law School,
16 faculty pay is different from that of the rest of the university,
17 and the Dean of the Law School had direct access to the university
18 president. None of these conditions exist in the relationship of
19 the College of Engineering and the remainder of Montana State
20 University.

21 CONCLUSION

22 Although the overwhelming majority of faculty members of the
23 College of Engineering desire not to be included in the proposed
24 bargaining unit, I find in all other considerations delineated
25 in 59-1606(2), the College of Engineering must be included in the
26 proposed bargaining unit. Since an election will be held by this
27 Board, faculty members of the College of Engineering will have a
28 chance to again express their dissatisfaction with being placed in
29 the bargaining unit.

30 b.

31 Having thus concluded that the College of Engineering cannot
32 be excluded from the bargaining unit because of the lack of

1 community of interest and other factors, it becomes necessary to
2 address the second issue involved in this issue:

3 2. If the College of Engineering is not to be excluded from the
4 bargaining unit, then should the registered engineers and the
5 engineers in training be excluded from the bargaining unit?

6 It is intervenor's argument that section 59-1602(2) excludes
7 engineers and engineers in training from the proposed bargaining
8 unit. That section in pertinent part reads:

9 "(2) public employee means a person employed by a public
10 employer in any capacity, except. . . professional
11 engineers and engineers in training. . . ."

12 Since the argument is totally a legal argument, it is not necessary
13 for me to make findings of fact.

14 In order to determine whether or not engineers and engineers
15 in training are to be excluded, it becomes necessary to determine
16 what precisely was the intent of the Legislature in excluding
17 "professional engineers and engineers in training". Since a
18 professional engineer or an engineer in training need not necessarily
19 be employed as an engineer, but rather could be employed at any
20 number of professions, it would be possible for a professional
21 engineer to be employed at a job, and a nonengineer to be employed
22 in the exact same job in the desk right next to the engineer. It
23 would be absurd to interpret the intent of the legislature to exclude
24 the engineer but not exclude the nonengineer when in fact they are
25 employed at the same job doing the same work. Nor would it be
26 logical to interpret the intent of the Legislature to deny the non-
27 engineer the right to collective bargaining just because an engineer
28 is employed at the same job as the nonengineer, and therefore all
29 such positions must be excluded. Rather, the obvious intent of the
30 Legislature was to exclude those positions in which it is required
31 that an engineer be employed. Stated a little differently, it was
32 the obvious intent of the Legislature to exclude those positions

1 which require that an engineer be hired and only an engineer be
2 hired, because the position deals with the actual practice of
3 engineering.

4 That is not at all what we are concerned with here. Dr.
5 Dayton testified on direct examination, concerning the qualifica-
6 tions for a position on the College of Engineering faculty as
7 follows:

8 "Q: What are the requirements or standards or what must
9 initially be met in order to be hired at the College of Engineering?

10 A: Well, in general and in the last half decade or decade,
11 we have been looking for people with either a completed doctorate
12 degree or a doctorate degree very near completion or people who
13 have considerable professional practice, um, particularly in the
14 engineering technological area, who may not have advanced degrees,
15 uh, but where there is professional practice looked upon and
16 in some sense compensated, but I guess you would say the main
17 standard requirement is a doctorate and then go from that with
18 exceptions. But I would never recall the issue of registration
19 being raised in connection with hiring someone.

20 Q: The primary standard is the degree held?

21 A: And then, of course, secondarily, professional
22 experience and practice". (emphasis ours) (Tr. p. 40, lines 7-19.)
23 The requirement for employment is primarily the degree, not neces-
24 sarily the registration. In fact, registration, according to Dr.
25 Dayton's testimony is secondary, because it is ancillary to profes-
26 sional experience and practice.

27 Intervenor argues that this Board ought to turn to section
28 66-2550(3) to determine the definition of the practice of
29 engineering. That section reads:

30 "(3) 'Practice of engineering' means any service or
31 creative work, the adequate performance of which requires
32 engineering education, training, and experience, in the
application of special knowledge of the mathematical,
physical, and engineering sciences to such services or

1 creative work as consultation, investigation,
2 evaluation, planning and design of engineering
3 works and systems, planning the use of water,
4 teaching of advanced engineering subjects,"
5 (emphasis ours)

6 This hearing examiner does not find that definition to be
7 controlling on Montana Public Employees Collective Bargaining Act.
8 Dr. Townes testified on cross examination concerning nonengineers
9 and nonengineers in training teaching advanced engineering courses
10 as follows:

11 "Q: I believe you indicated of those individuals in
12 College of Engineering who are either not engineers-in-training or
13 registered professional, that is, by percentages of 35% per category
14 --are performing engineering in some sense?

15 A: Uh-huh.

16 Q: And, can you indicate in what sense, and it wasn't
17 indicated in response to your question or Mr. Waterman's question
18 in what sense they are practicing engineering?

19 A: They're practicing engineering in the sense that Montana
20 statute considers the teaching of engineering to be practicing
21 engineering. Now, uh, in that sense--I'll stop there.

22 Q: The teaching of advanced engineering?

23 A: Yes, correct.

24 Q: And I believe that you indicated to recapitulate the,
25 in fact, some percentage, although you are not certain of the amount
26 of these 35% teach advanced engineering?

27 A: Yes". (Tr. p. 25, lines 5-21.)

28 Dr. Townes' testimony establishes that approximately 35% of
29 those faculty members who are not either engineers or engineers-
30 in-training are teaching advanced engineering courses. If this
31 Board were to accept the definition of practice of engineering as
32 defined in section 66-2350(3), we would be excluding one faculty
33 member who is an engineer but including another faculty member who
34 is not an engineer, yet both could be doing the exact same job.

1 As stated previously, this hearing examiner finds that result not
2 to be the intention of the Legislature. Furthermore, Dr. Townes'
3 testimony bolsters Dr. Dayton's testimony that licensure of an
4 engineering professor is secondary, in light of the fact that there
5 are faculty members teaching advanced engineering who are not
6 licensed.

7 Therefore, I cannot exclude engineers and engineers-in-training
8 from the proposed bargaining unit because they are licensed and teach
9 advanced engineering courses. I do not find that the position of
10 faculty member of the College of Engineering requires that only
11 an engineer or engineer-in-training be employed to fill that position.
12 Therefore, I conclude that engineers and engineers-in-training who
13 serve as faculty members in the College of Engineering are not
14 excluded from the proposed bargaining unit as a matter of law.
15 Having so concluded, I find it unnecessary to address the third
16 question of this issue.

17 II.

18 The second issue to be decided is whether or not the faculty
19 members of the Cooperative Extension Service (hereinafter CES)
20 should be excluded from the proposed bargaining unit.

21 Again, the criteria this Board must use in determining an
22 appropriate unit for the purpose of collective bargaining is set
23 forth in 59-1606(2). In applying those criteria to the testimony
24 and evidence submitted at the hearing, the following are my findings
25 of fact:

26 FINDINGS OF FACT

27 8. The CES is comprised of a 100+ county extension agents and
28 some 30 state specialists. The county extension agents are located
29 off campus, the 30 state specialists are located on campus. The
30 CES is the branch of MSU which disseminates technology to people
31 throughout the state. In a memorandum of understanding, the U.S.
32 Department of Agriculture, Montana State University, and Montana

1 Cooperative Extension Service dated May 16, 1966, agreed to certain
2 conditions for the relationship between the three organizations.
3 (SEE: Petitioner's Exhibit I.)

4 9. CES generally works with people not enrolled at MSU and
5 there is generally no college credit for the instruction given.
6 The instruction given is generally short seminars on a given topic
7 as opposed to in depth courses of study given at the university.

8 10. Funding for CES is approximately 30% to 40% federal, 20%
9 from counties and the remainder state and special grants. The
10 majority of the funding comes from nonstate funds. (Dr. Hoffman's
11 testimony)

12 11. CES faculty are represented on the University Council.
13 Participation by CES faculty in university governance is limited
14 because of the geographical location of many of them makes such
15 participation impossible. CES faculty, therefore participate by
16 answering polls and questionnaires. (Testimony of Charles Eggen)

17 11. WAGES, HOURS, FRINGE BENEFITS, AND OTHER WORKING CONDITIONS:

18 Because there is federal funding a majority of CES faculty
19 members have federal appointments. These appointments allow a
20 majority of CES faculty members to participate in the federal
21 programs for retirement, health, and life insurance. Dr. Carl
22 Hoffman, Director and Vice President of CES, stated that participa-
23 tion in these programs depended on where the funding came from.
24 But that since a large majority of the positions deal with federal
25 funds, that a large majority participate in the federal fringe
26 benefit programs.

27 The large majority of CES personnel are on 12 month contracts
28 as opposed to the majority of the other faculty members on 10 month
29 contracts. (However, there are nonCES faculty on 12 month contracts
30 such as at the agriculture experiment station, but this is the
31 exception rather the usual.)

32 12. COMMON SUPERVISION: The supervision of CES faculty is rela-

1 tively the same as the rest of the university on the state level.
2 (SEE: Petitioner's Exhibit No. 1) Because of the relationship
3 between CES and the federal government, there is the additional
4 supervision factor of the Federal Extension Service of the U. S.
5 Department of Agriculture. Dr. Hoffman testified that plans must
6 be submitted to the Department of Agriculture indicating that work
7 will be carried out in the area of agriculture and related areas,
8 home economics, youth work, and community development work. The
9 U. S. Department of Agriculture must approve of these proposals.
10 Further, the U. S. Department of Agriculture must approve of the
11 hiring of the director of CES and its other faculty members.
12 Although, Dr. Hoffman does testify that such concurrence is almost
13 certain to be a rubber stamp approval.

14 13. COMMON PERSONNEL POLICIES:

15 Again the personnel policies of CES seem to be the same except
16 for the relationship of CES to the federal and county governments,
17 and because of the geographical location of its faculty members.
18 Since a large majority of CES faculty have federal appointments
19 they cannot actively engage in political activities. The hiring
20 and firing of CES faculty is the same except that the hiring of
21 CES faculty members requires the additional concurrence of the
22 Board of County Commissioners of the county the CES member is
23 located and the U. S. Department of Agriculture.

24 Evaluation of the faculty for purposes of tenure and salary is
25 somewhat the same except that it lacks peer review. That is again
26 because of the geographical location of its CES faculty members and the
27 fact that only one extension agent may be located in the more
28 sparsely populated counties, which makes peer review impractical.

29 A majority of CES faculty members are hired with only a bachelor
30 degree. This is quite different from other university faculty
31 which generally require a minimum of a master's degree. Publica-
32 tion is not generally required for promotional purposes. Although

1 such a statement could be challenged on a definition basis. That
2 is, Dr. Hoffman argued that the dissemination of the information
3 to the general public was a form of publication to be considered
4 in promotional decisions.

5 14. EXTENT OF INTEGRATION OF WORK FUNCTIONS AND INTERCHANGE AMONG
6 EMPLOYEES AFFECTED:

7 Although the CES faculty works closely with the agricultural
8 experiment station of the university, and disseminates the new
9 information learned from the experiment station to the general
10 public, and although there are state specialists located on the
11 campus who help solve more complicated problems for the CES faculty,
12 there seems to be little integration of work functions and inter-
13 change among employees between faculty members of CES and the
14 rest of the university's faculty. Again this is because of the
15 geographical location of the CES faculty and because of the
16 difference in clientele between the two groups. On the one hand
17 the nonCES faculty members work in an academic setting teaching
18 in a degree oriented program. On the other hand is the CES
19 faculty disseminating information on a public service program.
20 Although both are important functions of MSU, they both differ
21 considerably in nature. And because of the geographical location
22 of CES faculty members, there is little if any interchange between
23 the two groups aside from those previously mentioned.

24 15. DESIRES OF THE EMPLOYEES: Professor Larry Bishop testified
25 that he conducted a survey of CES faculty members located off the
26 campus as to whether or not they desired to be included in the
27 proposed bargaining unit. (SEE: Petitioner's Exhibit III) Of
28 the 110 questionnaires mailed, 73 questionnaires were returned.
29 Of those 73 questionnaires returned, only 21 indicated they wanted
30 to be part of the bargaining unit.

31 There was, however, testimony challenging the survey. Counter
32 Petitioner's Exhibit D is a letter from the 7 members of the Board

1 of Directors of the Montana Cooperative Extension Association
2 indicating that they thought CES faculty members ought to be
3 included in the bargaining unit. Counter petitioner's exhibits
4 E through J are letters written individually by the same 7 members
5 of the Board of Directors of the Montana Cooperative Extension
6 Association (it should be noted that the Board is comprised of 12
7 members) stating that they misunderstood the questionnaire and
8 were not aware of its full impact. Two of the members of the
9 above named board testified at the hearing, Charles Eggan and Lila
10 Walker.

11 Mr. Eggan, aside from reiterating what was stated in his
12 letter, Counter Petitioner's Exhibit E, stated further that al-
13 though he was opposed to collective bargaining, he did want to
14 be included in the unit in order to vote on the question of
15 collective bargaining. Mr. Eggan in explaining his position stated
16 that he wanted to convey the message that CES was a part of the
17 university. There is no doubt that conveying such a message is
18 important to CES faculty members. My job, however, is to determine
19 work integration SOLELY FOR THE PURPOSES OF COLLECTIVE BARGAINING.
20 There can be no doubt of the importance CES faculty members play
21 in the role of MSU in its service to the people of Montana.

22 Reviewing Petitioner's Exhibit III, this hearing examiner finds
23 that the questionnaire can be confusing to a person not familiar
24 with collective bargaining. The questionnaire first states that
25 it is a poll "to determine the attitude of the Cooperative Extension
26 staff members on the question of collective bargaining", but the
27 actual statement to answer presented to the staff is:

28 "I believe the staff of Montana State University Cooperative
29 Extension should be part of the collective bargaining unit at
30 Montana State University".

31 The staff member is then to check either the "Yes" box or the "No"
32 box.

1 My discussion on this question shall be very brief. From the
2 testimony presented by the petitioner I can find no justification
3 for this criterion to be used by this Board in determining the
4 proper bargaining unit. Rather, I find that the testimony of
5 Vice President William Johnstone, that a faculty member can be
6 assigned teaching responsibilities of .5 FTE a portion of the
7 quarter, then be changed to less than .5 FTE teaching responsibility
8 later in that same quarter, makes such a criterion a nuisance and
9 nonsensical. Further, the testimony of Stephen Chapman convinces
10 me that such a criterion would be artificial and would really
11 serve no purpose in determining an appropriate bargaining unit.
12 I therefore find that .5 FTE teaching responsibility to be an
13 improper criterion to determine an appropriate bargaining unit in
14 this matter.

15 CONCLUSION OF LAW

16 A stipulation was entered into at the pre-hearing conference
17 between the Petitioner and the Counter-petitioner concerning the
18 composition of the proposed unit. This hearing examiner accepts
19 that stipulation in toto and incorporates it in the conclusion as
20 to an acceptable bargaining unit.

21 1. I conclude, therefore, that the following is an appropri-
22 ate unit for the proposed bargaining unit: All faculty members with
23 a .5 FTE appointment or greater, excluding the following: all
24 county extension agents of the Cooperative Extension Services
25 located off campus; all visiting faculty members; all adjunct
26 faculty members; all emeritus faculty members; assistant and
27 associate deans; vice presidents and directors; such principal
28 administrative assistants, as the associate director of the
29 agricultural experiment station, and the finance officer, management
30 information officer, personnel and training officer, state program
31 coordinator, area program coordinator from the Cooperative Extension
32 Services; superintendents of the experiment station; all department

1 heads including school directors and education director of
2 extended campuses of the school of nursing; and directors with
3 the exception of the director of forensics, the director of the
4 KEEP program, and director of intramural and recreation; and
5 individuals who are contracted for and the employment relationship
6 established by a Letter of Appointment.

7 PROPOSED ORDER

8 1. Upon this proposed order becoming a final order, then
9 an election is to be scheduled in compliance with MAC 24-3.8(18)-
10 SS150(1) et. seq.

11 2. A stipulation was entered into by all parties that the
12 cutoff date for purposes of ascertaining eligibility to vote in any
13 election held subsequent to these proceedings be October 1, 1976.
14 This hearing examiner agrees to accept that stipulation, and for
15 the purposes of the election ordered in part I of this proposed
16 order, the cutoff date for ascertaining eligibility to vote shall
17 be October 1, 1976.

18 Dated this 5th day of January, 1977.

19 BOARD OF PERSONNEL APPEALS

20
21
22 BY Jerry L. Painter
23 Jerry L. Painter
Hearing Examiner

24 CERTIFICATE OF MAILING

25 I, Vonda Brewster, hereby certify and state that I did on the
26 5th day of January, 1977, mail a copy of the above Findings of Fact,
27 Conclusions of Law, and Recommended Order to the following:

28 Barry L. Hjert
29 Cannon & Gillespie
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Helena, MT 59601

30 Ronald Waterman
31 Gough, Booth, Shanahan & Johnson
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Vonda Brewster
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