

12/6/77

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

\* \* \* \* \*

IN THE MATTER OF UNIT DETERMINATION #11, 1976

MONTANA SOCIETY OF ENGINEERS,

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  
By 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

6  
7 District Judge  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

12/6/77

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

\*\*\*\*\*

IN THE MATTER OF UNIT DETERMINATION #11, 1976:

MONTANA SOCIETY OF ENGINEERS, )  
 )  
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 8 1977

BOARD OF PERSONNEL APPEALS

\*\*\*\*\*

NOTICE OF ENTRY OF JUDGMENT

\*\*\*

TO: BOARD OF PERSONNEL APPEALS, a division of the Department  
of Labor and Industry of the State of Montana, an admini-  
strative 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, and THEIR  
ATTORNEYS OF RECORD:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE: That the  
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 KETRON 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

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

\* \* \* \* \*

IN THE MATTER OF UNIT DETERMINATION #11, 1976:

MONTANA SOCIETY OF ENGINEERS,

Petitioner,

vs.

BOARD OF PERSONNEL APPEALS, et al.,

Respondents,

and

MONTANA STATE UNIVERSITY,

Petitioner,

vs.

BOARD OF PERSONNEL APPEALS, et al.,

Respondents.

RECEIVED  
DEC 2 1977  
BOARD OF PERSONNEL APPEALS

Civil Nos. 41317 and 41320

\* \* \* \* \*

ORDER AND OPINION

\* \* \*

This is a consolidated petition for judicial review, taken by both Montana State University, Petitioner herein, denominated as Counter-Petitioner in the proceedings before the Board of Personnel Appeals, and the Montana Society of Engineers, another Petitioner herein, denominated as Intervenor in the proceedings before the Board of Personnel Appeals. Petitioner, Montana State University, is a land grant university for the State of Montana (Section 75-8410, R.C.M. 1947), and is the employer of all faculty members affected by the unit determination order issued by the Board of Personnel Appeals. Montana State University is one of six institutions of higher education under the administration

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 82-4216, 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 latters'

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 ORDERED, ADJUDGED AND DECREED that the Board of Person-  
2 nel Appeals' Final Order excluding all CES faculty members  
3 from the collective bargaining unit is hereby affirmed; that  
4 the Board of Personnel Appeals' Final Order including regis-  
5 tered professional engineers and engineers in training of  
6 the faculty of the College of Engineering at Montana State  
7 University is hereby reversed with directions to determine  
8 the number of registered engineers and engineers in training  
9 on the faculty of the College of Engineering at Montana  
10 State University and to exclude the same from the proposed  
11 collective bargaining unit; and the case is otherwise re-  
12 manded in light of this ruling to the Board of Personnel  
13 Appeals for further proceedings to determine whether all of  
14 the faculty members of the College of Engineering at Montana  
15 State University should be excluded from the proposed col-  
16 lective bargaining unit, by reason of the exclusion required  
17 of the registered professional engineers and engineers in  
18 training.

19 DATED this 29th day of November, 1977.

20 GORDON R. BENNETT

21 \_\_\_\_\_  
22 District Judge  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

6/8/77

RECEIVED

JUN 9 1977

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF MONTANA, BOARD OF PERSONNEL APPEALS  
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 administra- )  
tive agency; THE BOARD OF REGENTS OF )  
HIGHER EDUCATION OF THE STATE OF )  
MONTANA; LAWRENCE K. PETTIT, COMMIS- )  
SIONERS 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. )

No. 41317

\* \* \* \* \*

DECISION AND ORDER

\* \* \*

This matter came on for hearing on the 18th day of May, 1977, pursuant to Motion made by the Respondent, Board of Personnel Appeals, to vacate that Order of this Court, dated May 6, 1977, staying the election in this matter and pursuant to that Order of this Court, dated May 13, 1977, vacating the stay to permit Respondent, Board of Personnel Appeals, to take such action as was necessary for preparation of an election in the event the entire stay was lifted.

The Petitioner, Montana Society of Engineers, Respondent, Montana State University, and Respondent, Board of Personnel Appeals, were represented by counsel and oral argument was had on the day of said hearing. Counsel for the Board of Personnel Appeals advised the Court that it was necessary to have a ruling upon the day of the hearing to

FILED June 8 19 77

CLARA GILREATH, Clerk of District Court

By \_\_\_\_\_ Deputy

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

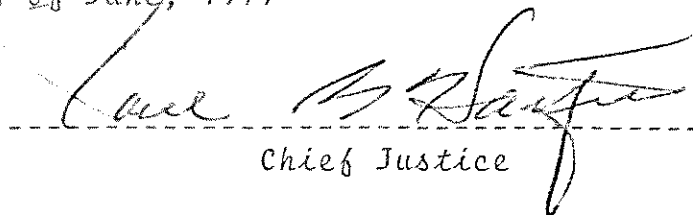
Thomas J. Kearney  
CLERK OF SUPREME COURT  
STATE OF MONTANA

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. Pettitt, 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  
6 GORDON R. BENNETT  
District Judge  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

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.

FINAL ORDER

\*\*\*\*\*

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 8<sup>th</sup> day of April, 1977.

9 BOARD OF PERSONNEL APPEALS

10 BY Brent Cromley  
11 Brent Cromley  
12 Chairman  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

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

GOUCH, BOOTH, SHAFAHAN  
2 2 1954

BEFORE THE BOARD OF PERSONNEL APPEALS

$$\frac{1}{2}, \frac{1}{3}, \frac{1}{4}, \frac{1}{5}, \frac{1}{6}, \frac{1}{7}, \frac{1}{8}, \frac{1}{9}, \frac{1}{10}, \frac{1}{11}, \frac{1}{12}, \frac{1}{13}, \frac{1}{14}, \frac{1}{15}, \frac{1}{16}, \frac{1}{17}, \frac{1}{18}, \frac{1}{19}, \frac{1}{20}$$

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.

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

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

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

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

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

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

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

A: Yes I have.

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

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

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

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

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

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

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  
member who is an engineer but including another faculty member who  
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 Since there is a difference between one's attitude toward  
2 collective bargaining and whether or not one is to be included in  
3 a proposed bargaining unit, confusion can arise. I therefore find  
4 that the survey conducted has little probative value and I will  
5 not give it much weight in reaching my final conclusion.

#### 6 DISCUSSION

7 Considering the geographical location of off campus CES  
8 faculty members, the consequential lack of interchange between  
9 CES faculty and the rest of the faculty; considering the different  
10 work functions between the two groups; considering the federal  
11 appointments and the resulting difference in fringe benefits,  
12 considering the relationship of the U. S. Department of Agriculture,  
13 County Commissioners, and CES; considering the differences in  
14 qualifications, promotional standards, and other personnel policies,  
15 I do not find off campus CES faculty to be properly a part of  
16 the proposed bargaining unit.

17 There are, however, approximately 50 state specialists located  
18 on campus and 11 or 12 of which have joint appointments. These  
19 faculty members I find to be properly part of the bargaining unit.  
20 Because they are located on the campus they are more likely to  
21 have interchange with other proposed unit members. Because of the  
22 number of joint appointments, they have the necessary integration  
23 of work functions. Because of the joint appointments there is a  
24 community of interest as well as most other criteria to be  
25 considered by this Board in determining whether or not the  
26 employees are properly included in a proposed bargaining unit, and  
27 these considerations will establish that they are proper employees  
28 to be included in the bargaining unit.

#### 29 III.

30 The third issue to be decided is whether or not faculty  
31 members whose teaching responsibilities are less than .5 FTE  
32 should be included in the bargaining unit.

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

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

#### PROPOSED ORDER

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

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

Dated this 5th day of January, 1977.

BOARD OF PERSONNEL APPEALS

BY

Jerry L. Painter  
Jerry L. Painter  
Hearing Examiner

#### CERTIFICATE OF MAILING

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

Barry L. Hjert  
Cannon & Gillespie  
1721 Eleventh Avenue  
Helena, MT 59601

Ronald Waterman  
Gough, Booth, Shanahan & Johnson  
P. O. Box 1636  
Helena, MT 59601

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

Vonda Brewster  
Vonda Brewster