

file

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT)
DETERMINATION NO. 1-80:)
MONTANA FEDERATION OF)
TEACHERS,)
Petitioner,)
and)
MONTANA PUBLIC EMPLOYEES)
ASSOCIATION, INC.)
Intervenor)
-vs-)
KALISPELL SCHOOL DISTRICT)
NO. 5,)
Respondent.)

FINDINGS OF FACT
CONCLUSION OF LAW
AND
RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

The Montana Federation of Teachers filed for a new unit determination and election on January 2, 1980 proposing a unit of Kalispell School District employees comprised of secretaries, clerks, bookkeepers, aides, library assistants, monitor, and multi-media employees. It proposed to exclude administrative personnel, teachers, tutors, custodians and food service and cleaning personnel. Respondent counter petitioned on January 16, 1980, disagreeing with Petitioner's proposed unit. Respondent's proposed unit was all full-time, permanent part-time and seasonal employees including secretaries, bookkeepers, clerks, food service workers, food store workers, teacher aides, library aides, monitors and tutors. Respondent's proposed exclusions were those excluded by the act. The Montana Public Employees Association petitioned to intervene on February 5, 1980.

During a pre-hearing conference held on February 21, 1980 and immediately prior to the formal hearing the parties agreed that the issue in dispute was whether food service employees and tutors should be in the unit proposed by Petitioner; whether

1 certain positions, as noted in detail below, should be excluded
2 because they are confidential; and, as Petitioner later urged,
3 whether some of those positions are supervisory. Petitioner was
4 represented by Mr. Cordell Brown; Intervenor by Mr. James Adams;
5 Respondent by Mr. Daniel Johns.
6

7 The parties stipulated to the following: (1) That the
8 temporary clerical person working on an as-needed basis for the
9 nurse would not be included in the unit and (2) that the Secretary
10 to the Superintendent of Schools, the Secretary to the Assistant
11 Superintendent of Schools and the Deputy Clerk would be excluded
12 from the unit.
13

14 II. ISSUES

15 1. Whether food service employees should be included in an
16 appropriate unit.

17 2. Whether tutors should be included in an appropriate
18 unit.

19 3. Are any or all of the following positions occupied by
20 confidential labor relations employees?

- 21 a. Secretary to the Personnel Director.
- 22 b. General Clerical Secretary/Telephone Receptionist.
- 23 c. Secretary to the Administrative Assistant.
- 24 d. Secretary to the High School Principal.
- 25 e. Secretary to the Junior High School Principal.
- 26 f. Secretary to the Assistant Principal (Linderman).
- 27 g. Secretary to the Principal (Edgerton).
- 28 h. Secretary to the Principal (Elrod).
- 29 i. Secretary to the Principal (Hedges).
- 30 j. Secretary to the Principal (Peterson).
- 31 k. Secretary to the Principal (Russell)
- 32 l. Secretary to the Director of Special Services.

1 County and Municipal employees represents the custodian and mainte-
2 nance employees. The Montana Education Association represents the
3 certified staff.

4 3. The employer issued a handbook during the 1978-79 school
5 year which covers all the employees which it contends should be
6 found to belong in the appropriate unit. The handbook, written
7 under the direction of the Personnel Director, deals with personnel
8 policies and procedures. The employees covered by the handbook
9 (Respondent's proposed unit) have met informally for several years
10 with some of Respondent's management officials and discussed
11 conditions of employment. The employer made all final decisions.
12 A salary schedule covering the personnel in question here is used
13 by the employer in conjunction with the handbook.

14 4. Approximately 35 food service workers are employed by
15 the district. Most work from 2 to 2½ hours per day; however,
16 several work from 6 to 8 hours per day. Food is prepared in a
17 central kitchen at the high school and transported to the various
18 elementary and junior high buildings for serving to students.
19 Most of the food service workers in the high school work in the
20 preparation of food; some sell tickets, act as hostess and count
21 tickets. In the lunch rooms the food service employees' job is to
22 serve food, act as hostess, receive money and send the money to
23 the bookkeeper at the high school. Food service workers have some
24 contact with the students and with the bookkeepers and other
25 clerical personnel. The employer expects them to help supervise
26 students while they are in the lunch room.

27 5. The hours of food service employees in the outlying
28 buildings are determined by the building principal who also schedules
29 the hours of teacher aides, secretaries and bookkeepers. The Food
30 Service Manager schedules the hours of the food service personnel
31 at the high school. Two employees who work at the student store
32 are considered food service workers by the employer.

1 6. Tutors work closely with teachers to provide special
2 educational services to some students. They perform duties such
3 as assisting in screening students for special services; assist in
4 ordering instructional materials, textbooks, audio-visual materials
5 and other equipment; keep records of services offered and techniques
6 used; assist in testing; participate in pupil evaluation, provide
7 supplemental instructional assistance and other tasks. Certification
8 as a teacher is not a requirement of incumbents of the position;
9 however, the district gives preference to persons with prior
10 teaching experience and/or to those with a degree in education.

11 7. Tutors are assigned and scheduled by the building principal
12 and work under his and the classroom teacher's direction. Most
13 are scheduled to work 3 1/4 hours per day. They are covered by
14 the terms set forth in the handbook.

15 8. The secretary to the Personnel Director performs clerical
16 duties, including the typing of correspondence, for the employer's
17 Personnel Director who handles all labor relations matters. The
18 Secretary assumes the clerical duties involved when the Director
19 prepares strategies and other materials for negotiations with
20 labor organizations, responds to grievances and unfair labor practice
21 charges. The Secretary maintains personnel files which contain
22 all labor relation matters in the district.

23 9. The General Clerk Secretary/Telephone Receptionist works
24 in the same office as the Secretary to the Personnel Director.
25 The primary responsibility of the position is to answer the phone
26 and forward calls to the proper party. The Secretary on occasion
27 assigns typing to the General Clerk. Both have equal access to
28 the personnel files. The General Clerk performs the same kind of
29 work as does the Secretary.

30 10. The Secretary to the Administrative Assistant is located
31 in a single secretary office and performs clerical duties for the
32 person who is in charge of the custodial and maintenance staff of
the district. His is the first line supervisor of that staff and,

1 as such, handles grievances from his subordinates. He also is
2 involved in any labor relations matters affecting custodial mainte-
3 nance employees. The Secretary types responses to grievances and
4 other materials to the extent her supervisor is involved.

5 11. The Secretary to the High School Principal performs
6 clerical duties for a person who is responsible for a building.
7 Her duties as secretary are to do the necessary typing, filing and
8 assisting tasks required from the Principal. He is a first line
9 supervisor with respect to labor relations matters and is involved
10 therein to the same extent as the Administrative Assistant.
11 There are one full-time plus several part-time clerical personnel
12 working in the same office as the Secretary who assigns work to
13 them.

14 12. The Secretaries to the Principal at the Junior High
15 School, the Assistant Principal (Linderman), the five Elementary
16 Principals and the Director of Special Services all perform duties
17 involved with the assisting of a first line supervisor who is
18 involved in labor relations to the extent of handling grievances
19 and other personnel matters at the first level. Each has access
20 to personnel files in their respective offices. One principal
21 serves on the district's negotiating team.

22 13. The Secretary to the Director of Special Services, the
23 Elementary School Principals, the High School Principal and Junior
24 High School Principal assign work and give time off to other
25 clerical or aide personnel as approved by the Principal or Director.

26 14. There have been two or three collective bargaining
27 proposals from principals to the Personnel Director during the
28 last two or three years.

29 15. Tutors are paid at a higher rate than are other employees
30 on Respondent's salary schedule. Food service hourly employees
31 are paid at next to the lowest rate. Secretaries, bookkeepers and
32 other clerical employees are placed at various levels on the
schedule.

1 work only a few hours per week, but because they perform a different
2 kind of service for the district. The situation here is somewhat
3 analogous to a comparison of unskilled, manual laboring type of
4 workers and office workers. Clearly, one could not expect that
5 the knowledge, skill and abilities required of a food service
6 worker would be the same or similar to that required of a bookkeeper
7 or a teacher aide. That is not to say a bookkeeper could not
8 also perform as a food server; however, it is to say a food server
9 with the minimum qualifications could not perform the duties of a
10 skilled bookkeeper. I find a lack of interchange among the employees
11 affected if food service workers are placed in the same bargaining
12 unit with aides and other clericals.

13 Respondent's salary schedule shows food service workers at
14 the lower levels on the classified employee pay plan. Although
15 not controlling it is a factor to be considered. It indicates
16 that the employer placed them at the lower levels because of their
17 skill level, or lack thereof.

18 The district's Personnel Director testified at length regarding
19 the "bargaining" which had taken place between members of Respondent's
20 proposed unit and management. I assume the objective was to suggest
21 a history of collective bargaining with the groups the employer
22 would have declared appropriate. The fact that the employer made
23 all decisions unilaterally negates any possibility of such finding.
24 The process described by the Director was a meet and confer arrange-
25 ment at best. To compare that process to collective bargaining
26 where there are statutory rights and obligations of both parties
27 would be naive.

28 Finally, the working conditions of food service workers is
29 not the same as that of clerical personnel; their (the food service
30 workers) conditions are considerably less sedentary and more
31 physical by the nature of the work.

32 A long list of National Labor Relations Board precedent is
unnecessary to cite. Suffice it to say that the Board's primary

1 concern should be to group together only those employees who have
2 substantial mutual interests in wages, hours and other conditions
3 of employment. In the case of the Kalispell School District I see
4 four major categories of employees similar to the basic five-unit
5 structure adopted by the NLRB in 1975 for bargaining units in
6 health care institutions. See Mount Airy Foundation, 217 NLRB
7 137, 89 LRRM 1067 (1975) for example. The NLRB has divided those
8 units into: (1) Registered nurses, (2) other professionals, (3)
9 technical employees, (4) business office clericals, and (5) service
10 and maintenance employees. Mercy Hospitals of Sacramento, 217 NLRB
11 131, 89 LRRM 1097 (1975); Barnert Memorial Hospital Association,
12 217 NLRB 132, 89 LRRM 1082 (1975); Sisters of St. Joseph of Peace,
13 217 NLRB 131, 89 LRRM 1097; Newington Children's Hospital, 217 NLRB
14 134, 89 LRRM 1108 (1975); Respondent's bargaining units should be: (1)
15 Teachers and tutors, (2) Custodial/maintenance, (3) Clerical and aides,
16 and (4) Special services including food service workers.

17 C. Tutors

18 As noted above, tutors should not be placed in the same
19 bargaining unit with clericals and aides nor do they belong in a
20 unit with food service workers; and for many of the same reasons,
21 the latter two groups would be inappropriate if grouped together
22 into one unit. Tutors receive a higher rate of pay than any of
23 the employees with whom we are dealing here. They are not required
24 to be certified teachers, but the employer seeks out those qualifi-
25 cations when filling a tutor position. For those reasons and
26 those discussed under A. above I believe the tutors must not be
27 placed in the same unit with those proposed by Petitioner. Although
28 I am of the opinion they should be placed in a unit with teachers,
29 if any unit at all, that is not at issue here. The only issue
30 regarding the tutors is whether they would be appropriately placed
31 in a unit of clerical and aides. They would not because there is
32 a lack of community of interest.

1 D. Confidential Labor Relations Employees

2 The Legislature excluded confidential labor relations employees
3 from coverage of the Collective Bargaining for Public Employees
4 Act on July 1, 1979; at the same time it left to this Board the
5 determination of what such an employee is. Although the National
6 Labor Relations Act does not exclude such employees, the NLRB has
7 a long established policy, through its decisions, of exempting
8 them. The Board of Personnel Appeals, because of the similarity
9 of our Act and the NLRA, has usually been guided by NLRB precedent.

10 In Ford Motor Co., 66 NLRB 1317, 17 LRRM 394 (1946) the NLRB
11 decided that those employees who assist and act in a confidential
12 capacity to persons who exercise managerial functions in the field
13 of labor relations should not be in a bargaining unit of rank and
14 file workers. Managerial employees were ". . . employees who are
15 in a position to formulate, determine and effectuate management
16 policies. These employees we have considered and still deem to be
17 'managerial' in that they express and make operative the decisions
18 of management."

19 The NLRB found in B.F. Goodrich Co. 115 NLRB 722, 37 LRRM,
20 383 (1956) that the definition of 'confidential employee' used in
21 the Ford case should be strictly followed. It went on to exclude
22 as confidential only those employees who assist and act in a
23 confidential capacity to persons who formulate, determine and
24 effectuate management policies in the field of labor relations.
25 Specifically, excluded as confidential were the secretaries to a
26 personnel director and an office manager because they were involved
27 in labor negotiations.

28 More recently the NLRB has held that the secretary to a
29 district manager, who was a member of the employer's bargaining
30 team, was a confidential employee because she acted in such capacity
31 to a person who was involved in formulating, determining and
32 effectuating the employer's labor relations policies. Siemen Corp.
224 NLRB 216, 92 LRRM 1455 (1976). That is the criteria which

1 should be adopted by this Board, i.e., if the employee for whom
2 the exclusion is sought acts in a confidential capacity, during
3 the normal course of his or her primary duties, to a person who is
4 significantly involved in formulating, determining and effectuat-
5 ing the employer's labor relations policy, the position must be
6 excluded from any appropriate unit. In applying that criteria to
7 the facts of any given case one must remember that from 1973 to
8 1979 there was no provision in the Act for confidential exclusions,
9 although the Legislature had previously considered it; therefore,
10 the term "confidential labor relations employee" should be construed
11 narrowly. It should not apply unless the supervisor has significant
12 involvement in formulating, etc. labor policies and then only if
13 the employee's primary duty is to assist such superior. Incidental
14 or occasional assistance should not warrant an exclusion nor
15 should less than significant involvement on the part of the superior
16 warrant one.

17 In applying the above noted test to the Secretary to the
18 Personnel Director position, I am compelled to conclude the incumbent
19 is a confidential labor relations employee. The record shows she
20 regularly performs a range of clerical duties assisting the Personnel
21 Director who is as involved as anyone else in the district in
22 formulating, determining and effectuating labor relations policies.
23 According to his testimony, he is the person responsible for the
24 district's labor relations. He plans strategy, negotiates contracts,
25 administers contracts and performs other personnel related tasks.
26 His secretary assists him to the extent that she types correspondence
27 and other documents, maintains files and acts in a confidential
28 capacity.

29 The same cannot be said about the General Clerical Secretary/
30 Telephone Receptionist position in the Personnel Director's office.
31 Her primary duty is to answer the phone and direct calls to the
32 proper party. She fills in on other duties only secondarily to
her prime duty. She should not be excluded as a confidential

1 labor relations employee. Nor should any of the other positions
2 for which Respondent sought confidential exclusions. None of
3 those positions' incumbents acts in a confidential capacity to a
4 person who is significantly involved in formulating, determining
5 and effectuating labor relations policies; first line supervision
6 personnel seldom are. That they are involved in labor relations
7 cannot be denied; however, such involvement does not suffice.
8 They must be significantly involved in the formulation . . . of
9 labor relations policy. Making an occasional recommendation for a
10 contract proposal will not fill the bill. The involvement again,
11 must be significant. If the superior cannot pass the test neither
12 can an assistant, i.e., there can be no confidential labor relations
13 employee unless the boss passes muster. None of the others does.

14 E. Supervisory Employees

15 During the hearing counsel for Respondent urged that certain
16 of the positions which he had contended were confidential were
17 also supervisory and should be excluded from any bargaining unit
18 for that additional reason. The facts simply do not support such
19 contention. The incumbents of the positions for which the super-
20 visory exclusion is sought (Secretaries to the High School, Junior
21 High, and Elementary Principals and the Director of Special Services)
22 do not exercise independent judgment in making or recommending
23 those personnel actions listed in 39-31-202 MCA. This Board must
24 look behind the appearances of certain said-to-exist authority in
25 order to determine whether alleged supervisory personnel actually
26 exercise substantial discretion with respect to those statutory
27 criteria or whether they merely make routine, broadly reviewable
28 decisions. Central Buying Service, 223 NLRB 77 (1976), 92 LRRM
29 1145; Mountain Manor Nursing Home, 204 NLRB 425 (1973), 83 LRRM
30 1337; Harlem Rivers Consumer Cooperative, Inc., 191 NLRB 314
31 (1971), 77 LRRM 1883; Commercial Fleet Wash., Inc., 190 NLRB 326
32 (1971), 77 LRRM 1156. When an employee's exercise of authority is
routine in nature, i.e., it follows established procedures, the

1 position should not be excluded from the bargaining unit. Emco
2 Steel, Inc., 227 NLRB 148 (1977), 94 LRRM 1747; Pinecrest
3 Convalescent Home, Inc., 222 NLRB 10 (1976), 91 LRRM 1082; Mountain
4 Manor Nursing, supra; Harlem Rivers Consumers, supra; Precision
5 Fabricator, 101 NLRB 1537 (1952), 32 LRRM 2268. The only real super-
6 visory decisions are made by the Principals and the Director. Those
7 made by the subject employees are routine and are made without the
8 exercise of discretion.

9 V. CONCLUSIONS OF LAW

10 The appropriate unit for the purpose of collective bargaining
11 under 39-31-202 MCA is all secretarial/clerical personnel, including
12 aides, bookkeepers and monitors, of the employer Kalispell School
13 District No. 5 excluding food service employees, tutors, positions
14 in other bargaining units, management officials, supervisory
15 personnel, and confidential labor relations employees.

16 VII. RECOMMENDED ORDER

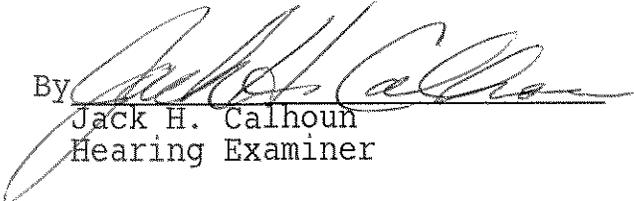
17 An election by secret ballot shall be conducted under authority
18 of 39-31-208 MCA and in accordance with 24.26.555 et seq. ARM.

19 VII. NOTICE

20 Exceptions to these Findings of Fact, Conclusions of Law and
21 Recommended Order may be filed within twenty days of service
22 thereof. If no exceptions are filed with the Board of Personnel
23 Appeals within that time, this Recommended Order shall become the
24 Order of the Board. Exceptions shall be addressed to the Board of
25 Personnel Appeals, Capitol Station, Helena, Montana 59601.

26 Dated this 12th day of May, 1980.

27
28 BOARD OF PERSONNEL APPEALS

29
30 By 
31 Jack H. Calhoun
32 Hearing Examiner

CERTIFICATE OF MAILING

I, Ruby S. Foster, do hereby certify
and state that I did on the 12th day of May,
1980 mail a true copy of the above Findings of Fact, Conclusion
of Law and Recommended Order to the following:

Daniel D. Johns
MURPHY, ROBINSON, HECKATHORN & PHILLIPS
1 Main Street
Kalispell, MT 59901

Jim Adams
Montana Public Employees Association
P.O. Box 5600
Helena, MT 59601

Cordell Brown
Montana Federation of Teachers
P.O. Box 1246
Helena, MT 59601

Ken Siderius
Kalispell School District No. 5
P.O. Box 788
Kalispell, MT 59901

Ruby S. Foster

702:G14