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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 1-82:

MONTANA PUBLIC EMPLOYEES)
ASSOCIATION, INC.,)
)
Petitioner,)
)
- vs -)
)
FLATHEAD COUNTY, COUNTY-WIDE)
ADMINISTRATIVE BOARD,)
KALISPELL, MONTANA,)
)
Employer.)

ORDER

* * * * *

The Board of Personnel Appeals, having considered Montana
Public Employees Association's request to withdraw petition
dated October 25, 1982, and good cause appearing therefor;
ORDERS that the matter of Unit Determination No. 1-82 be
dismissed.

DATED this 29 day of October, 1982.

BOARD OF PERSONNEL APPEALS

By Robert R. Jensen
Robert R. Jensen
Administrator

* * * * *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy
of this document was mailed to the following on the 29 day
of October, 1982:

Jerry Brown, Staff Representative
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Jennifer Jacobson

1 workers and planners be in one combined unit or two separate units? (2)
2 Should Lou Ann Conrad, an administrative secretary, be excluded from the
3 appropriate unit under the exclusion for confidential employees? and (3)
4 Noting that the other clerical employee in the proposed bargaining unit has
5 voluntarily terminated her employment, and if Ms. Conrad is excluded from
6 the unit on the basis of confidentiality, how would a vote of the clerical
7 workers be taken? The parties agreed that issues one and two were factual
8 issues for the hearing and that the third issue was a legal question to be
9 addressed in the parties' briefs.

10 Respondent contends that a unit composed of both clericals and planners
11 is inappropriate because of a lack of community of interest. Respondent also
12 contends that the administrative secretary position held by Lou Ann Conrad
13 is a confidential position excluded from the bargaining unit and that,
14 because the only other clerical employee employed at the time the petition
15 was filed has since voluntarily terminated, no clerks are eligible to vote.

16 Petitioner contends there is sufficient community of interest between
17 the employees in the clerical and planning sections to include them in one
18 bargaining unit, and that Ms. Conrad is not a confidential employee and
19 should be included in the unit.

20 Also at the pre-hearing conference, the Employer moved to amend its
21 counter-petition to state that the number of employees in the office-clerical
22 unit should be zero or one, depending on the inclusion or exclusion of Ms.
23 Conrad, the administrative secretary, and that the number of employees in
24 the professional land planners unit should be three. The authority for this
25 amendment is found in ARM 24.26.205 and the motion was granted by the
26 hearing examiner.

27 Having carefully reviewed the entire record, including sworn testimony,
28 exhibits, and briefs, the hearing examiner makes the following findings of
29 fact:

30 FINDINGS OF FACT

31 1. The employees at the Flathead Regional Development Office are
32 employed by the Countywide Administrative Board (CAB). CAB is an interlocal

1 agency which performs land, economic, and social planning for the Kalispell,
2 Whitefish, and Columbia Falls communities. The CAB is comprised of four
3 members: the mayors of Kalispell, Whitefish, and Columbia Falls, and the
4 chair of the Board of County Commissioners. The CAB directs and administers
5 the Flathead Regional Development Office which is located on the fourth
6 floor of the Courthouse East, 723 Fifth Avenue East, Kalispell, Montana.
7 In addition to conducting the overall administration of the Planning Office,
8 the CAB hires all staff, sets the salary of the staff members, directs the
9 planning director, Nakul S. Verma, and approves the budget submitted by the
10 planning director.

11 The CAB was created in January, 1980. It was preceded by the Areawide
12 Planning Organization (APO). APO was a Flathead County organization and its
13 employees were employees of Flathead County and subject to the pay and clas-
14 sification plan of the County. Since the creation of the CAB, employees of
15 the CAB are not employees of the County, but of the Board itself. The CAB's
16 pay plan, although modeled after the County pay plan, is separate from that
17 of the County. Likewise, the personnel manual of the CAB, though patterned
18 after that of the County, is separate and distinct. Employees are paid
19 according to the CAB's determination and are subject to personnel policies
20 adopted by the CAB.

21 The Flathead Regional Development Office is comprised of four sections:
22 Current Planning, Comprehensive Planning, Policy Planning, and the Admin-
23 istrative/Clerical Section. The positions of planning director, senior
24 planner for current planning, senior planner for comprehensive planning,
25 planner II in charge of policy planning, administrative secretary I, and
26 secretary I constituted the staff of the Flathead Regional Development Office
27 at the time the petition was filed. The secretary I position was vacant at
28 the time of the hearing, the incumbent having voluntarily terminated her
29 employment after the petition was filed. That position was being advertised
30 at the time of the hearing and testimony indicated it was the intent of the
31 CAB to fill the vacancy.

32 2. According to testimony and Employer's Exhibits 2, 3, and 5, the

1 general duties of the positions at the Flathead Regional Development Office
2 are:

3 a. Planning Director. Nakul S. "Nick" Verma is the planning director
4 of the Flathead Regional Development Office. His duties and responsibilities
5 include the initial hiring of staff; assigning duties to the staff; devel-
6 oping, formulating, and implementing personnel policies; supervising both
7 technical and clerical staff; and developing and seeking approval of the
8 budget.

9 b. Senior Planner for Current Planning. Jim Mohn, who performs
10 services for the CAB as a senior planner, is in charge of the Current
11 Planning Section of the Flathead Regional Development Office. His duties
12 include reviewing subdivision, zoning change, annexation and other applica-
13 tions which come from the private sector.

14 c. Senior Planner for Comprehensive Planning. Gary Hill, who also
15 performs services for the CAB as a senior planner, is in charge of the
16 Comprehensive Planning Section of the Flathead Regional Development Office.
17 His duties include developing long-range planning for the three cities
18 (Kalispell, Whitefish, and Columbia Falls) and keeping the plans current.

19 d. Planner II for Policy Planning. Jerry Juredus is the most recent
20 hire of all the planners and performs services for the CAB as a planner II.
21 He is in charge of the Policy Planning Section of the Flathead Regional
22 Development Office. Employer's Exhibit 3 is an advertisement placed in the
23 Spokesman Review on May 5, 1980, by the Employer for the purpose of
24 recruiting for the position which Jerry Juredus now holds. The advertise-
25 ment states that the major responsibilities of this position are "updating
26 zoning codes and subdivision regulations, developing growth management
27 policies and innovative land development controls for rural and urban areas,
28 participating in comprehensive and areawide planning projects, reviewing of
29 subdivision plats, zoning requests and site plans, and preparing and imple-
30 menting proposals for grant assistance."

31 e. Administrative Secretary. Lou Ann Conrad performs services for the
32 CAB as an administrative secretary by performing administrative and

1 secretarial duties for the planning director, Mr. Verma. She works closely
2 with Mr. Verma and is directed by him. Her duties include handling corres-
3 pondence for Mr. Verma; typing letters, reports, and memos; taking minutes
4 of meetings; preparing transcriptions; and performing related work as
5 required.

6 f. Secretary I. The secretary I position was held by Tammy Harrman at
7 the time the petition was filed. Ms. Harrman has subsequently voluntarily
8 terminated her employment with the Board. Employer's Exhibit 5, the job
9 description which was in effect at the time the petition was filed, states
10 that this position consists of performing routine clerical tasks and related
11 work as required. Examples of duties are "performs routine clerical duties,
12 including searching files, filing, shelving materials, receiving supplies,
13 sorting and distributing mail, answering telephone and relaying messages,
14 and doing miscellaneous typing; fills in data on standard office forms; makes
15 simple postings to various records; prepares routine reports; compiles simple
16 tabulation data; receives money and issues receipts; performs receptionist
17 duties and provides public information of a general nature; operates office
18 equipment requiring no special training; performs related work as required;
19 duties may also include tasks that are appropriate to deputies of elected
20 officials."

21 Employer's Exhibit 1 is the job description being used to advertise for
22 this vacant position. The duties are substantially the same as those per-
23 formed by Ms. Harrman. Changes consist of a change in salary, a change in
24 the amount of experience required from zero to one or two years, and a
25 change in the amount of education required. The prior job description
26 stated that the education required was "equivalent to completion of the
27 12th grade." The advertised job description requires high school or equiva-
28 lent, with some training in secretarial work. Knowledge of shorthand is
29 preferred, though not required.

30 3. The size of the staff at the Flathead Regional Development Office
31 is very small -- three planning employees and one to two clerical employees.
32 All staff members, both clerical and professional, are supervised by the

1 planning director, Mr. Verma. Mr. Verma assigns duties to the planning
2 personnel and directs the flow of work to and from the clerical staff. He
3 receives correspondence, reports, etc. prepared by the planning staff,
4 prioritizes these materials, and gives them to the clerical staff, usually
5 to the administrative secretary. The administrative secretary sometimes
6 distributes assignments to others on the clerical staff.

7 4. All employees at the Flathead Regional Development Office, both
8 clerical and professional, have their own offices. The work place is such
9 that all employees' offices are located in one wing of the same floor. Six
10 offices comprise the total work space.

11 5. Although the planners do not perform clerical work and the clerical
12 staff does not perform planning work, the two groups do work together when
13 drafting language in reports and when working on special projects. The
14 clerical staff is familiar with "planning jargon" and works with the planning
15 staff in putting plans, reports, etc. into final drafts for the planning
16 director's review. Although the clerical staff sometimes works with the
17 planners on longer projects, the planners generally work by themselves.

18 Current, comprehensive, and policy planning are interrelated and thus
19 the planning sections are not totally separate. Because of work load,
20 vacations, overlap of work, etc. planners will, on occasion, "trade" among
21 themselves or help out in each others' areas on a temporary basis.

22 6. Mr. Verma, as planning director, actively participates in the for-
23 mation of personnel policies. He prepares personnel policies and submits
24 them to the CAB for its approval or disapproval. Examples of those policies
25 include job descriptions, salaries, the number of positions, etc. While
26 Mr. Verma has initial hiring authority, the CAB must approve the personnel
27 he hires. Another example of Mr. Verma's participation in developing per-
28 sonnel policies is in the area of promotions -- although he has the authority
29 to promote staff members, those promotions, as part of the budget, must be
30 approved by the CAB. Mr. Verma wouldn't have to have the CAB's approval
31 to fire an employee, but the CAB would be the appeal board for such an
32 action and could reinstate the employee.

1 7. There is no history of collective bargaining within the Flathead
2 Regional Development Office. Mr Verma testified that if the employees
3 vote to have a collective bargaining unit in the Planning Office, he
4 expects to participate in the negotiations and that Ms. Conrad, as his
5 administrative secretary, would probably type all documents necessary for
6 the bargaining process. Testimony indicated that even if an outside
7 negotiator were hired by the CAB, Mr. Verma would be involved in making
8 proposals and suggestions that he would have his administrative secretary
9 type. Any grievance procedure which might result from the bargaining
10 process would probably involve Mr. Verma, and thus also his administrative
11 secretary.

12 8. As the secretary who directly assists Mr. Verma, Ms. Conrad has
13 typed a document regarding the discipline of a staff member. Mr. Verma
14 testified that although the personnel files for all staff members are not
15 situated in Ms. Conrad's office, they are under Ms. Conrad's supervision
16 and that she is responsible for maintaining them and has unlimited access
17 to them.

18 Ms. Conrad is sometimes asked to take notes at CAB meetings. When
19 meetings are designated as "executive sessions" Ms. Conrad is asked to
20 leave. Ms. Conrad has been asked to leave three executive sessions. One
21 of those meetings pertained to Mr. Verma's performance evaluation, one
22 was a meeting in which union bargaining was discussed, and the other was
23 the planning meeting in which Mr. Johns discussed this hearing with Mr.
24 Verma and the CAB.

25 9. When the CAB was created, a new personnel manual was adopted
26 which was patterned after the manual used by the APO. Some changes were
27 made in the personnel manual to make it applicable to the CAB, but no
28 major changes were made and the basic provisions regarding hours of work,
29 benefits, etc. remained the same for all CAB staff. Personnel policies
30 are determined by the CAB, upon the planning director's recommendations,
31 and the CAB has the sole authority to change or modify those personnel
32 policies.

1 10. The CAB is not on a pay plan. It establishes the salaries from
2 year to year for all staff members upon the planning director's recommenda-
3 tion. In the past year, Mr. Verma prepared two alternative pay scales and
4 the CAB adopted one of the two proposed. Salaries for the staff at the
5 present time are: senior planners, \$20,133.12; planner II, \$17,398.20;
6 and administrative secretary, \$10,579.20. Approximately \$7,000 will be
7 paid to the person who fills the new vacant clerk-typist position, depending
8 upon the experience, qualifications, etc. of the person hired.

9 11. Planning staff members are considered professionals and receive
10 compensatory time off instead of overtime compensation. Testimony at the
11 hearing indicated that professional staff members are allowed compensatory
12 time off "off the books" -- no official records are kept for the auditor.
13 Planning staff employees are often given compensatory time off on the
14 personal-office level, but they do not get 100% of this time, contrary to
15 personnel policy.

16 Clerical staff members, on the other hand, have the option of taking
17 compensatory time off or receiving overtime pay. Ms. Conrad testified
18 that in the past she has always chosen the overtime option.

19 Testimony indicated that except for the compensatory time off provision,
20 all personnel policies and procedures are the same for both clerical and
21 professional employees.

22 12. The workday for all members of the staff is usually the same --
23 8:00 a.m. to 5:00 p.m. -- although on some occasions both clerical and
24 planning personnel may attend evening meetings or non-8 to 5 meetings.
25 These meetings may consist of Planning Board meetings or Board Adjustment
26 meetings. Although Mr. Verma usually attends Board Adjustment meetings, when
27 he is unavailable other planning personnel may be asked to attend. Ms.
28 Conrad, as administrative secretary, attends and takes notes at the CAB
29 meetings unless they are designated "executive sessions," in which case
30 she is asked to leave.

31 13. All employees who testified, members of both planning and clerical
32 staffs, indicated it was their desire to belong to the same bargaining unit.
No evidence of a contrary desire by any employee was submitted.

1 employees within the Flathead Regional Development Office perform services
2 which are, directly or indirectly, tied to the planning services of the
3 Kalispell, Whitefish, and Columbia Falls communities.

4 This Board has followed the precedent of the National Labor Relations
5 Board (the NLRB) in interpreting the provisions of the Collective Bargaining
6 Act, since the Montana Act is patterned after the federal Act which that
7 body administers.¹ In Morand Brothers the NLRB stated that an "appropriate
8 unit" need not be the only appropriate unit, or the ultimate unit, or the
9 most appropriate unit, but rather only an appropriate unit. The unit as
10 determined must be appropriate to ensure the affected employees "in each
11 case, the fullest freedom in exercising rights guaranteed by this Act."²
12 The standard applied -- an appropriate unit -- is very broad. The purpose
13 is, as stated, to assure employees the fullest freedom in exercising their
14 rights to collectively bargain.

15 This is very persuasive in the special circumstances of this case, for
16 to determine that sufficient community of interest does not exist between
17 the clerical and planning staffs of the Flathead Regional Development Office
18 leaves the possibility of at least one employee being denied the right to
19 bargain collectively. This Board's practice regarding the minimal size of a
20 bargaining unit has been to hold that the intent of the Act was for "collec-
21 tive" bargaining, and that a unit of one was inappropriate because it was
22 not collective. Therefore, if Ms. Conrad, the planning director's admin-
23 istrative secretary, is found to be a confidential employee and is excluded
24 from the bargaining unit, and if a lack of community of interest between the
25 clerical and planning staffs is found, the incumbent to the now-vacant
26 clerical position (the clerical position besides Ms. Conrad's) would be
27 denied the right to bargain collectively because of this Board's inclination
28 to hold that a unit of one is inappropriate.

29
30 ¹Department of Highways v. Public Employees Craft Council, 165 Mt. 349
31 529 P2d 785 (1974).

32 ²Morand Brothers, 26 LRRM 1501, 1506 (1950).

1 Respondent's Exhibits 1 and 5, which describe the duties of the vacant
2 clerical position, and the other evidence regarding similar working condi-
3 tions and personnel policies, as well as the size of the total staff and
4 the physical location of all the employees within one common area, indicate
5 that sufficient community of interest does exist between the clerical and
6 planning employees of the Flathead Regional Development Office to include
7 them in the same bargaining unit. This determination is in accordance with
8 earlier Board decisions which have recognized and determined that "an appro-
9 priate unit" may include both professional and clerical employees.³

10 Another issue is whether the administrative secretary, Ms. Conrad,
11 functions as a confidential employee. Section 39-31-103(12) MCA states that
12 a confidential employee is "any person found by the board to be a confiden-
13 tial labor relations employee . . ." In defining confidential employees,
14 this Board has relied on the standard applied by the NLRB in the B.F. Good-
15 rich decision.⁴ Thus, a two-part test is used to determine whether an
16 employee is confidential.⁵

17 The first part of the test is that the official with whom the excluded
18 employee has the confidential relationship must be involved in formulating,
19 determining, and effectuating labor relations policies. Mr. Verma proposes
20 personnel policies regarding wages, hiring of staff, staff discipline, etc.
21 to the CAB for its approval or disapproval. He then has sole responsibility
22 for implementing the personnel policies adopted by the CAB. Mr. Verma is
23 also responsible for taking corrective action when policies are not being
24 followed by the staff. Given that he is directly involved in formulating,
25 determining, and effectuating personnel policies, there is a reasonable
26 expectation and probability that Mr. Verma will be directly involved in
27 formulating, determining, and effectuating labor relations policies.

28
29 ³Social and Rehabilitative Services, UD #42-74. Also, the Board had
30 earlier recognized the appropriateness of such a unit in, for example, the
Department of Highway where planning and clerical personnel are in one unit.

31 ⁴B.F. Goodrich, 155 NLRB No. 103, 37 LRRM 1383 (1956).

32 ⁵MPEA v. Dept. of Labor, UD #18-79; AFSCME, Council No. 9 v. Havre
School District #16-A, UD #24-79.

1 As his administrative secretary, Ms. Conrad works closely with Mr.
2 Verma. The very nature of her duties and responsibilities, as well as the
3 fact that she has been involved in typing correspondence relating to staff
4 disciplinary action, indicate that a confidential relationship exists between
5 the planning director and his administrative secretary.

6 The second part of this test is that the excluded employee must have
7 access to confidential labor relations information in the normal course of
8 his or her employment. This part of the test is also met. Although Ms.
9 Conrad does not have confidential files located in her office, she has
10 unlimited access to them and her duties include maintaining those files.
11 When disciplinary letters are written by the planning director, Ms. Conrad
12 types those letters. If a bargaining agreement is entered into and that
13 agreement contains a grievance procedure, Mr. Verma, as the employees'
14 supervisor, will probably be directly involved -- and it is reasonable to
15 assume that Ms. Conrad will have access to files and information regarding
16 those grievances. In National Cash Register the NLRB determined that having
17 custody of the employer's grievance files satisfies this part of the test.⁶
18 In its Minneapolis-Honeywell decision, the NLRB held that being asked to
19 take dictation and type status reports relating to personnel actions before
20 they are approved is an activity that indicates such access to confidential
21 labor relations information.⁷

22 The Goodrich decision makes it clear that both parts of the test must
23 be satisfied. Both tests are met and Ms. Conrad, as administrative secretary
24 to the planning director, is a confidential employee within the meaning of
25 section 39-31-103(12) and must be excluded from the bargaining unit.

26 The final issue to be addressed regards which of the clerical staff at
27 the Flathead Regional Development Office are eligible to vote in this unit
28 determination election. Sufficient community of interest has been found
29 for the clerical and planning staffs to be within the same bargaining unit.
30

31 ⁶National Cash Register, 168 NLRB 910, 67 LRRM 1041, 1045 (1967).

32 ⁷Minneapolis-Honeywell, 107 NLRB 1191, 33 LRRM 1357 (1954).

1 Ms. Conrad has been found to be a confidential employee and therefore will be
2 excluded from the unit. Ms. Tammy Harrman, who was a clerical staff member
3 along with Ms. Conrad at the time the petition was filed, has since volun-
4 tarily terminated her employment. Therefore, while any future incumbent to
5 Ms. Harrman's position will be included in the bargaining unit, such person(s)
6 will not be eligible to vote in the unit determination election to be held
7 in this matter. Such determination is in accordance with ARM 24.26.658,
8 which states: "The employees eligible to vote shall be those within the unit
9 on the date of the filing of the petition excluding those employees who
10 have voluntarily terminated their employment between the filing date and
11 the date of the election."

12 CONCLUSIONS OF LAW

- 13 1. The Board of Personnel Appeals' jurisdiction and authority in this
14 matter is derived from sections 39-31-103(12) and 39-31-202 MCA.
- 15 2. An appropriate unit for the purposes of collective bargaining under
16 section 39-31-202 MCA is one comprised of all non-exempt employees of the
17 Flathead Regional Development Office, including both planning and clerical
18 employees, and excluding all supervisory personnel and confidential labor
19 relations employees.
- 20 3. The administrative secretary to the planning director is a confiden-
21 tial labor relations employee within the meaning of section 39-31-103(12)
22 MCA and therefore is not in the appropriate unit.
- 23 4. Any clerical employee hired subsequent to the filing of the Petition
24 for New Unit Determination and Election in this matter is not eligible to
25 vote in a representation election directed under the authority of section
26 39-31-208 MCA and ARM 24.26.658.

27 RECOMMENDED ORDER

28 It is ordered that an election by secret ballot be conducted under the
29 authority of section 39-31-208 MCA and in accordance with ARM 24.26.555 et.
30 seq. among the members of the above-defined bargaining unit.

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