

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 4-85:

MONTANA FEDERATION OF TEACHERS	)	
AFT, AFL-CIO,	)	
	)	
Petitioner,	)	FINDINGS OF FACT,
	)	CONCLUSION OF LAW
MONTANA EDUCATION ASSOCIATION,	)	AND
NATIONAL EDUCATION ASSOCIATION	)	RECOMMENDED ORDER
	)	
Petitioner,	)	
	)	
FLATHEAD VALLEY COMMUNITY COLLEGE,	)	
	)	
Respondent.	)	

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INTRODUCTION

On February 26, 1985 both the Montana Federation of Teachers and the Montana Education Association filed petitions for a new unit determination and election pursuant to 24.26.612 ARM. Both petitioners proposed a bargaining unit comprised of all secretarial, clerical, custodial and maintenance employees of Flathead Valley Community College. They proposed to exclude from the unit all supervisors, management officials, confidential employees and members of the faculty.

On March 14, 1985 the President of the College filed an answer to the petitions in which he disagreed with the appropriateness of the proposed bargaining unit. He proposed that the unit exclude part-time employees, temporary employees, two supervisors and all positions which are paid from funds other than the College's general operating budget.

At a pre-hearing conference held on May 28, 1985 eleven positions and the Respondent's proposed reasons for exclusion were identified as being in dispute, they were: (1)

1 Copy Clerk because of its part-time status; (2) Payroll  
2 Technician because of its part-time status; (3) System  
3 Operator, night shift, because of its part-time status; (4)  
4 Bookstore Manager because of its supervisory status and  
5 because it is paid from non-general funds; (5) Bookstore  
6 Assistant because of its part-time status and because it is  
7 paid from non-general funds; (6) Secretary for Community  
8 Education Office, for the Director of FVCC Theatre and for  
9 the Director of Project Transition because it is paid from  
10 non-general funds; (7) Maintenance Supervisor because it is  
11 supervisory; (8) Secretary to the Financial Aid Director  
12 because it is part-time; (9) Secretary to the President, to  
13 the Board of Trustees and to the Director of Personnel  
14 because of its confidential status and because the incumbent  
15 is the Clerk of the School District; (10) Executive Secre-  
16 tary/Office Manager, Office of Community Education because  
17 of its part-time status and because it is paid from non-  
18 general funds; and (11) Accounting Technician because of its  
19 part-time status. At a later time counsel for the Respon-  
20 dent proposed to also exclude temporary positions from the  
21 unit. He noted that all such positions were, at that time,  
22 vacant.

23 A hearing was held in Kalispell on June 10, 1985  
24 pursuant to Section 39-31-207 MCA. The purpose of the  
25 hearing was to receive evidence and hear testimony related  
26 to the issues in dispute. The Montana Federation of Teach-  
27 ers was represented by Mike Dahlem; the Montana Education  
28 Association was represented by Emilie Loring; and Flathead  
29 Valley Community College was represented by Barry Hjort.  
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1 A. SECRETARY TO THE PRESIDENT/BOARD OF TRUSTEES/DIRECTOR  
2 OF PERSONNEL

3 1. The incumbent of the position entitled Secretary  
4 to the President/Board of Trustees/Director of Personnel  
5 performs various secretarial and clerical duties for those  
6 three entities.

7 2. Typical duties of the position include screening  
8 correspondence and calls for the President and Personnel  
9 Director; editing and typing their correspondence; maintain-  
10 ing confidential records and files for the President and the  
11 Board of Trustees; assisting in the research, collection and  
12 dissemination of information; acting as liaison with other  
13 college departments on administrative matters; and typing  
14 minutes, reports, records and related material.

15 3. The Secretary has access to all the President's  
16 files including confidential material.

17 4. The President writes memoranda to the Board of  
18 Trustees to update them on collective bargaining issues. He  
19 provides guidance and direction to the College's chief  
20 negotiator when he is negotiating with the faculty bargain-  
21 ing unit.

22 5. The President engages in both written and oral  
23 consultation with the Board of Trustees and should it become  
24 necessary to engage in confidential written communications  
25 with the Trustees concerning collective bargaining matters,  
26 he would use the Secretary to type the material.

27 6. Almost all communication between the administra-  
28 tive staff and the Board of Trustees goes through the  
29 President. Although the secretary to the chief negotiator  
30 types proposals and counter proposals, she does not handle  
31 all clerical work related to collective bargaining.  
32

1           7. The Secretary has executed an oath of office as  
2 School District Clerk.

3           8. The Secretary attends all Board of Trustee meet-  
4 ings and she prepares minutes of those meetings concerning  
5 actions taken.

6 B. MAINTENANCE SUPERVISOR AND BOOKSTORE MANAGER

7           1. The person who occupies the position called  
8 Maintenance Supervisor works under the immediate supervision  
9 of the Business Manager. He has five people who work for  
10 and with him as custodians or maintenance workers.

11           2. A minimum of eighty percent of the Maintenance  
12 Supervisor's time is spent doing custodial and maintenance  
13 work. He spends no more than twenty percent of his time  
14 doing other kinds of work.

15           3. With respect to hiring the Maintenance Supervisor  
16 has sat on a committee comprised of three or four other  
17 employees which screened applicants for a custodial position  
18 down to three names. Those names were forwarded to the  
19 Business Manager who made the final selection from among the  
20 three.

21           4. If there were to be a termination of a custodian  
22 or maintenance worker the Maintenance Supervisor would have  
23 to check with the Business Manager before making a decision.

24           5. He has written warning letters and he is responsi-  
25 ble for annual evaluations.

26           6. To discipline or lay off an employee the Mainte-  
27 nance Supervisor would have to check with the Business  
28 Manager before taking any action.

29           7. He schedules regular work, however, the Business  
30 Manager has to authorize all overtime.

31           8. Two of the people subordinate to the Maintenance  
32 Supervisor are paid at a higher rate than he. They all have

1 the same fringe benefits and work under the same personnel  
2 policies.

3 9. At one time when the custodian and maintenance  
4 workers were represented by the Teamsters Union, the Mainte-  
5 nance Supervisor was included in the unit along with the  
6 other workers. When the Teamster Union was decertified, he  
7 voted in the election.

8 10. The Maintenance Supervisor can authorize routine  
9 vacations.

10 11. His pay is based on the same salary schedule as is  
11 the pay of the custodian and maintenance workers. They all  
12 receive time and one-half for overtime.

13 12. He does not attend management meetings nor does he  
14 enjoy special privileges different than what the workers  
15 enjoy.

16 13. At the time the custodial and maintenance workers  
17 went in and talked to management as a group about wages the  
18 Maintenance Supervisor was a part of the group.

19 14. The Maintenance Supervisor position as it existed  
20 then, was included in a unit determination decision  
21 (UD29-79) issued by this Board in 1980. Certification was  
22 issued to the Teamsters Union but bargaining never took  
23 place before the decertification election was conducted.

24 15. All the custodian and maintenance workers and the  
25 clerical workers, including the Maintenance Supervisor, have  
26 met with management to talk about salaries and benefits. A  
27 salary schedule was agreed upon which covered all the  
28 positions in dispute.

29 16. The Bookstore Manager works under the immediate  
30 supervision of the Business Manager. She usually has an  
31 assistant with whom she works and she may have the help of  
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1 work study students. In general she is responsible for the  
2 overall operation of the College bookstore.

3 17. With respect to hiring the Bookstore Manager has  
4 sat on a committee comprised of two or three other employees  
5 which screened applicants down to three names which were  
6 sent to the Business Manager who made the final decision on  
7 the selection.

8 18. She does not evaluate any other employee nor has  
9 she ever terminated anyone.

10 19. The Bookstore Manager assigns tasks to bookstore  
11 workers and she works alongside them doing the same work  
12 they do. The Business Manager decides how much time the  
13 Assistant works. She does not change the Assistant's hours.

14 20. Both the Bookstore Manager and the Assistant train  
15 work study students.

16 21. The Bookstore Manager's pay is based on the same  
17 salary schedule as other clerical personnel; she receives  
18 the same fringe benefits as do they; and she gets time and  
19 one-half for overtime work.

20 22. Management does not confer with her regarding its  
21 policies.

## 22 C. PART-TIME POSITIONS

23 1. The Copy Clerk position, although it is not being  
24 paid in accordance with the salary schedule which was agreed  
25 on by certain employees representing the same group as has  
26 been petitioned for here, was not excluded from the schedule  
27 during those discussions with management. The incumbent  
28 works 25 hours per week during the period September to June.  
29 She is paid the minimum wage; however, she receives no  
30 fringe benefits such as group health insurance, vacation pay  
31 or sick leave.  
32

1           2.    The Payroll Technician position is a permanent,  
2 part-time job. The incumbent works 30 hours per week, she  
3 is on the salary schedule and receives prorated fringe  
4 benefits.

5           3.    The Bookstore Assistant position incumbent works  
6 from 80 to 125 hours per month. The pay of the position is  
7 based on the salary schedule. No fringe benefits are  
8 received by the incumbent.

9           4.    The Secretary to the Financial Aid Director works  
10 less than 20 hours per week or about 750 hours per year.  
11 Her pay is not based on the salary schedule and she receives  
12 no fringe benefits.

13           5.    The Executive Secretary/Office Manager for the  
14 Office of Community Education works 30 hours per week, 12  
15 months each year. Her pay is based on the salary schedule  
16 and she gets fringe benefits.

17           6.    The Accounting Technician is a permanent, part-  
18 time position. The incumbent works 16 hours per week; she  
19 gets no fringe benefits. Her pay is based on the salary  
20 schedule.

21           7.    The System Operator, night shift, is a permanent,  
22 part-time position. The incumbent works 18 hours per week.  
23 Her pay is based on the salary schedule. She receives no  
24 fringe benefits.

25           8.    The Copy Clerk's pay was not based on the salary  
26 schedule because the minimum qualifications for the position  
27 fell below the minimum for the least salary on the schedule.  
28 It had nothing to do with the number of hours worked.

29           9.    There was no explanation of why the salary of the  
30 Secretary to the Financial Aid Director was not based on the  
31 salary schedule. It could have been so based because she  
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1 makes \$5.00 per hour which is more than the \$4.75 per hour  
2 minimum shown on the salary schedule.

3 10. The personnel manual which sets forth personnel  
4 policies for the College states that non-exempt employees  
5 shall be paid in accordance with the salary schedule and  
6 that they have the right to negotiate salaries. Non-exempt  
7 employees are defined to include all clerical and related  
8 positions and all custodial-maintenance positions which are  
9 not supervisory, administrative or professional. Part-time  
10 positions are not excluded.

11 11. Both the Copy Clerk and the Secretary to the  
12 Financial Aid Director positions were at one time paid in  
13 accordance with the negotiated salary schedule.

14 12. Representatives of a group of employees, which was  
15 the same group as has been petitioned for here, met last  
16 year with the President, the Personnel Director and the  
17 Business Manager to negotiate salaries and benefits. During  
18 those negotiations the President mentioned one salary  
19 schedule for both the clerical, custodial and maintenance  
20 employees.

21 13. Prior to petitioning for the unit now under  
22 consideration the employees in the clerical-custodial-  
23 maintenance group had never sought recognition as one group.  
24 They had no by-laws to govern the group's affairs.

25 D. POSITIONS FUNDED BY OTHER THAN GENERAL FUND REVENUE

26 1. Revenues to fund salaries at Flathead Valley  
27 Community College are categorized into: (1) the general  
28 operations budget which gets its money primarily from the  
29 local mandatory levy and from tuition and fees paid by  
30 students; (2) the community education adult levy budget,  
31 which is a one mill levy; (3) a grant money budget for  
32 special services projects; and (4) an auxiliary budget which

1 indicates that the programs are self-supporting and must  
2 generate their own revenues.

3 2. The positions of Bookstore Manager and Bookstore  
4 Assistant are funded through the auxiliary services program  
5 meaning that income from sales is supposed to pay for  
6 expenditures of the program including salaries. At one time  
7 salaries for the two positions came from the general fund;  
8 it was changed about five years ago. The bookstore does not  
9 always show a profit and as a result money has been borrowed  
10 from the general fund to pay bookstore salaries.

11 3. Funds for the Secretary for the Community Educa-  
12 tion Office/Director of FVCC Theatre/Director of Project  
13 Transition came from three different sources: (1) one-third  
14 from the general fund; (2) one-third from a state grant; and  
15 (3) one-third from a one mill adult levy. The grant money  
16 probably will not be available next year.

17 4. Funds for the Executive Secretary/Office Manager  
18 of the Office of Community Education position come from the  
19 one mill adult levy and from tuition and fees paid by  
20 students who participate in the program. The amount of  
21 money generated by the mill levy can vary.

22 5. There is no difference in the method of payment to  
23 the incumbents of the four positions which are sought to be  
24 excluded from the unit. All receive the same kind of check  
25 that other employees of the College receive. The same  
26 personnel policies apply to them as apply to regularly  
27 funded position incumbents.

28 E. TEMPORARY EMPLOYEES

29 1. None of the positions proposed to be included in  
30 the bargaining unit by the unions meet the definition of  
31 temporary employee as shown in the Flathead Valley Community  
32 College handbook.

1           2.    The Handbook defines temporary full-time as: "An  
2 employee hired for a workweek of forty hours or more for a  
3 limited period of time with a designated ending date.  
4 Normally the limited period of time does not exceed nine  
5 months.."

6           3.    A temporary part-time employee is defined in the  
7 Handbook as: "An employee ... employed for a workweek of  
8 less than forty hours for a limited period of time with a  
9 designated ending date. Normally the limited period does  
10 not exceed nine months..."

11           F.    FINDINGS OF FACT RELEVANT TO THE OVERALL QUESTION OF  
12                THE APPROPRIATE UNIT FOR COLLECTIVE BARGAINING

13           1.    The following list shows the positions which the  
14 unions proposed to include in the bargaining unit:

- 15               1.    Copy Clerk
- 16               2.    Custodian II
- 17               3.    Recruiting/Student Services Secretary
- 18               4.    Payroll Technician
- 19               5.    Secretary to the Business Manager
- 20               6.    Student Development Secretary
- 21               7.    Cashier/Receipt Technician
- 22               8.    Assistant to the Registrar
- 23               9.    Special Services Secretary
- 24               10.   System Operator, Night Shift
- 25               11.   Secretary to the Dean of Educational Services
- 26               12.   Bookstore Manager
- 27               13.   Faculty Secretary
- 28               14.   Accounting Technician
- 29               15.   Bookstore Assistant
- 30               16.   Custodian I
- 31               17.   Receptionist/Switchboard Operator/Secretary
- 32               18.   Custodian II
19.   Admissions Assistant
20.   Maintenance Worker
21.   Secretary for Community Education Office,  
                  Director of Project Transition
22.   Maintenance Supervisor
23.   Office Assistant, Administrative Area
24.   Secretary to Financial Aid Director, Part-time
25.   Custodian II
26.   Secretary to the President/Board of  
                  Trustees/Director of Personnel
27.   Executive Secretary/Office Manager, Office of  
                  Community Education
28.   Accounting Technician, Part-time
29.   Secretary to the Director of Financial Aid
30.   System Operator



1 unit of part-time, temporary and non-general fund positions.  
2 The question raised by the proposed exclusion of the three  
3 other positions is whether the specific statutory provisions  
4 proscribe their inclusion into the unit.

5 A. SECRETARY TO THE PRESIDENT/BOARD OF TRUSTEES/DIRECTOR  
6 OF PERSONNEL

7 In 1979 the Collective Bargaining for Public Employees  
8 Act was amended to exclude confidential employees from its  
9 coverage. Section 39-31-103(12) MCA reads:

10 (12) "Confidential employee" means any person  
11 found by the Board to be a confidential labor  
relations employee..."

12 The Board of Personnel Appeals has relied on the  
13 National Labor Relations Board and federal court precedent  
14 for guidance in arriving at its interpretation of what  
15 constitutes a confidential employee. Although the National  
16 Labor Relations Act does not exclude confidential employees,  
17 the National Labor Relations Board has a long established  
18 policy, as expressed in its decisions, of excluding such  
19 personnel from coverage.

20 Early on the NLRB in Ford Motor Co., 66 NLRB 1317, 17  
21 LRRM 394 (1946), decided that those employees who assist and  
22 act in a confidential capacity to persons who exercise  
23 managerial functions in the field of labor relations should  
24 not be in a bargaining unit of rank and file workers.  
25 Managerial employees the NLRB held were . . ."employees who  
26 are in a position to formulate, determine and effectuate  
27 management policies. These employees we have considered and  
28 still deem to be 'managerial' in that they express and make  
29 operative the decisions of management."

30 In B.F. Goodrich Co., 115 NLRB 722, 37 LRRM 1383 (1956)  
31 the NLRB found that the definition of 'confidential employ-  
32 ee' used in the Ford case should be strictly followed. It

1 went on to exclude as confidential only those employees who  
2 assist and act in a confidential capacity to persons who  
3 formulate, determine and effectuate management policies in  
4 the field of labor relations. Specifically, the NLRB  
5 excluded as confidential the secretaries to a personnel  
6 director and an office manager because they were involved in  
7 labor negotiations.

8 More recently, and directly on point here, the National  
9 Labor Relations Board, in Siemens Corp., 224 NLRB 216, 92  
10 LRRM 1445 (1976), held that the secretary to a district  
11 manager, who was a member of the employer's bargaining team,  
12 was a confidential employee because she acted in such  
13 capacity to a person who was involved in formulating,  
14 determining and effectuating the employer's labor relations  
15 policies. The Board, after addressing another issue, said:

16 The record shows that Clark performs a wide range  
17 of clerical duties, including the typing of  
18 correspondence for the district manager, filing,  
19 opening mail, and answering telephones, among  
20 other duties. The record further reveals that,  
21 during her approximately eight-month tenure, Clark  
22 was called upon to type a disciplinary warning and  
23 during contract negotiations typed a memorandum  
24 containing tentatively agreed-upon bargaining  
25 issues and a counter-proposal for presentation to  
26 the Union. Clark has access to employee grievance  
27 files, and the record also shows that her prede-  
28 cessor, as the district manager's secretary, typed  
29 the Employer's grievance responses. Thus, it  
30 appears her position would also encompass such  
31 duties.

32 In view of the foregoing, we find that Clark acts  
in a confidential capacity to a person involved in  
formulating, determining and effectuating the  
Employer's labor relations policies and she is  
therefore a confidential employee. The fact that  
Clark does not presently spend a greater portion  
of her time in duties related to labor relations  
matters does not warrant a contrary result.  
Rather, the test is whether she is expected to,  
and in fact does, act in a confidential capacity  
in the normal course of her duties.

The U.S. Supreme Court in a 1981 case reviewed the  
National Labor Relations Board's policy regarding the

1 exclusion of confidential employees from bargaining units of  
2 regular employees and held that the long standing practice  
3 of excluding only those confidential employees who satisfy  
4 the Board's labor-nexus test has a reasonable basis in law.  
5 NLRB v. Hendricks County Rural Electric Membership Corp.,  
6 454 U.S. 170, 108 LRRM 3105 (1981) rev'g. 627 F.2d 766, 104  
7 LRRM 3158 (CA 7). The Court cited B.F. Goodrich Co., supra  
8 and stated that the Board had consistently applied the  
9 labor-nexus test by excluding from bargaining units those  
10 employees who assist and act in a confidential capacity to  
11 persons who formulate, determine and effectuate management  
12 policies in the field of labor relations.

13       Having decided that Secretary to the President/Board of  
14 Trustees/Director of Personnel is a confidential employee,  
15 it is unnecessary to decide whether she is a school district  
16 clerk, which would be excluded under Section 39-31-103(1)(b)  
17 (vi) MCA.

18       The evidence on the record plainly shows that the  
19 President of Flathead Valley Community College is the one  
20 individual in the administration who consults regularly with  
21 the Board of Trustees on labor relations matters. He is the  
22 person from whom the chief negotiator gets his directions.  
23 It cannot be denied that he is involved in formulating,  
24 determining and effectuating labor relations policy for the  
25 College.

26       The evidence further shows that the incumbent of the  
27 Secretary to the President/Board of Trustees/Director of  
28 Personnel position performs a wide range of clerical duties  
29 for the President including the typing of memoranda to the  
30 Board of Trustees, maintaining files, collecting and dissem-  
31 inating information and acting as liaison with other depart-  
32 ments. Although she does not type proposals and

1 counterproposals, she is expected to handle the President's  
2 clerical work which entails significant involvement in  
3 confidential labor relations matters. She is expected to  
4 act, and in fact does act, in a confidential capacity to the  
5 President during the normal course of her duties.

6 B. MAINTENANCE SUPERVISOR AND BOOKSTORE MANAGER

7 Section 39-31-103(2)(b) MCA excludes supervisory  
8 employees from the definition of public employee and,  
9 thereby, removes them from the coverage of the Collective  
10 Bargaining for Public Employees Act. Section 39-31-103(3)  
11 MCA defines a supervisory employee as:

12 . . . any individual having authority in the  
13 interest of the employer to hire, transfer,  
14 suspend, lay off, recall, promote, discharge,  
15 assign, reward, discipline other employees, having  
16 responsibility to direct them, to adjust their  
17 grievances, or effectively recommend such action,  
if in connection with the foregoing the exercise  
of such authority is not of a merely routine or  
clerical nature but requires the use of independ-  
ent judgment.

18 The word "supervisor" is defined in Section 2(11) of  
19 the National Labor Relations Act and is essentially identi-  
20 cal to the wording in Section 39-31-103(3) MCA.

21 The National Labor Relations Board has long held that,  
22 because the enumerated personnel actions contained in the  
23 statute are listed in the disjunctive, possession of any one  
24 of them is sufficient to make an employee a supervisor.  
25 NLRB v. Broyhill Co., 514 F.2d 655, 89 LRRM 2203 (8th CA,  
26 1975); NLRB v. Metropolitan Life Insurance Co., 405 F.2d  
27 1169, 70 LRRM 2029 (2nd CA, 1968).

28 The National Labor Relations Board does, however,  
29 distinguish between true supervisors and straw bosses, lead  
30 workers and other minor supervisory employees. NLRB v.  
31 Security Guard Service Inc., 384 F.2d 143, 66 LRRM 2247 (5th  
32 CA, 1967). The status of supervisory employee is not to be

1 construed so broadly that persons are denied employee rights  
2 which the statute was designed to protect. NLRB v. Bell  
3 Aerospace Co., 416 U.S. 267, 85 LRRM 2945 (1974); Westing-  
4 house Elec. Corp v. NLRB, 424 F.2d 1151, 74 LRRM 2070 (7th  
5 CA, 1970), cert. denied 400 U.S. 831, 75 LRRM 2379 (1970).

6 Certain well established principles have been developed  
7 in the federal sector for determining who are supervisory  
8 employees under the National Labor Relations Act. In  
9 Security Guard Service, supra, the court held that to be a  
10 supervisor an employee must have authority to use indepen-  
11 dent judgment in performing supervisory functions in the  
12 interest of management.

13 An employee is not a supervisor when he has the power  
14 to exercise or effectively recommend the exercise of one of  
15 the functions unless such power is accompanied by authority  
16 to use independent judgment in determining how, in the  
17 interest of management, it will be exercised. Authority to  
18 perform one of the functions is not supervisory if the  
19 responsibility is routine or clerical. NLRB v. Wentworth  
20 Institute, 515 F. 2d 550, 89 LRRM 2033 (1st CA, 1975); NLRB  
21 v. Metropolitan Petroleum Co., 506 F.2d 616, 87 LRRM 3139  
22 (1st CA, 1974).

23 For supervisory status to exist, the position must  
24 substantially identify the employee with management. NLRB  
25 v. Doctor's Hospital of Modesto, Inc., 489 F.2d 772, 85 LRRM  
26 2228 (9th CA, 1973).

27 An employee may have potential powers, but theoretical  
28 or paper power will not make him a supervisor. Tables of  
29 organization and job descriptions do not vest powers. Some  
30 kinship to management, some empathic relationship between  
31 employer and employee must exist before the employee becomes  
32

1 a supervisor for the employer. NLRB v. Griggs Equipment,  
2 Inc., 307 F.2d 275, 51 LRRM 2020 (5th CA, 1962).

3 The degrees of authority to direct the work of others  
4 vary from that of a general manager or other top executive  
5 to lead workers. The gradations are so infinite and subtle  
6 that the federal courts have given the National Labor  
7 Relations Board a large measure of informed discretion in  
8 exercising its responsibility to determine who is a supervi-  
9 sor. NLRB v. Swift and Co., 292 F.2d 561, 48 LRRM 2695 (1st  
10 CA, 1961).

11 When an employee merely acts as a conduit for orders  
12 which emanate from superiors he is performing routine tasks.  
13 Screwmatic, Inc., 218 NLRB No. 210, 89 LRRM 1508 (1975).  
14 The title carried by a position has little bearing on  
15 whether it is supervisory. It is the function rather than  
16 the label that is significant. Bell Aerospace, supra;  
17 Phillips v. Kennedy, 542 F.2d 52, 93 LRRM 2353 (8th CA,  
18 1976).

19 Directing and assigning work by a skilled employee to  
20 less skilled employees does not involve the use of indepen-  
21 dent judgment when it is incidental to the application of  
22 the skilled employee's technical or professional knowledge.  
23 In such a situation the skilled employee does not exercise  
24 independent judgment as a representative of management  
25 within the meaning of the statutory requirement. Westing-  
26 house Elec. supra; Arizona Public Service Co. v. NLRB, 453  
27 F.2d 228, 79 LRRM 2099 (9th CA, 1971).

28 The Iowa Public Employee Relations Board defines an  
29 effective recommendation as one which, under normal circum-  
30 stances and policy, is made at the chief executive level or  
31 below and is adopted by higher authority without independent  
32 review or de novo consideration as a matter of course. In

1 City of Davenport v. PERB, 264 N.W. 2d 307, 98 LRRM 2582  
2 (1978) the Iowa Supreme Court endorsed the Board's defini-  
3 tion and noted that a mere showing that recommendations are  
4 followed does not make them "effective" within the meaning  
5 of the Iowa statute. The City of Davenport case was cited  
6 and its principles were adopted by this Board in Department  
7 of Administration v. MPEA, UC 6-80.

8 Assigning employees to work on a routine basis is  
9 insufficient reason to create supervisory status because it  
10 does not require the use of independent judgment. NLRB v.  
11 McQuaide, Inc., 552 F.2d 519, 94 LRRM 2950 (3rd CA, 1977);  
12 Harmon Industries, supra.

13 One must look behind the appearances of certain said-  
14 to-exist authority in order to determine whether alleged  
15 supervisory personnel actually exercise substantial dis-  
16 cretion with respect to those statutory criteria or whether  
17 they merely make routine, broadly reviewable decisions.  
18 Central Buying Service, 223 NLRB 77 (1976), 92 LRRM 1145;  
19 Mountain Manor Nursing Home, 204 NLRB 425 (1973), 83 LRRM  
20 1337; Harlem Rivers Consumer Cooperative, Inc., 191 NLRB 314  
21 (1971), 77 LRRM 1883; Commercial Fleet Wash., Inc., 190 NLRB  
22 326 (1971), 77 LRRM 1156. When an employee's exercise of  
23 authority is routine in nature, i.e., it follows established  
24 procedures, the position should not be excluded from the  
25 bargaining unit. Emco Steel, Inc., 227 NLRB 148 (1977), 94  
26 LRRM 1747; Pinecrest Convalescent Home, Inc., 222 NLRB 10  
27 (1976).

28 The following considerations for determining supervis-  
29 ory status were recommended by a hearing examiner and later  
30 adopted by this Board in Billings Firefighters Local 521 v.  
31 City of Billings, UC 1-77:  
32

- 1           ° Whether the employee has independent authority  
2           to perform the functions enumerated in the Act.
- 3           ° Whether the exercise of authority in the area  
4           of assignment and direction is routine.
- 5           ° Whether the employee uses independent judgment  
6           in directing the activities of others.
- 7           ° Whether the recommendations made by the employ-  
8           ee are subject to independent review or inves-  
9           tigation.
- 10          ° Whether a substantial amount of the employee's  
11          time is spent doing work which is similar to  
12          the work of the subordinates.
- 13          ° Whether an unrealistic and excessively high  
14          ratio of supervisors to employees would be  
15          created. (citations omitted)

16           An application of the principles ascertained from the  
17           above-cited cases to the facts derived from the record in  
18           the instant case compels the conclusion that neither the  
19           Maintenance Supervisor nor the Bookstore Manager is a  
20           supervisor. At most they are lead workers or straw bosses.  
21           True supervisory authority over the Bookstore and custodial  
22           maintenance employees rests solely with the Business Manag-  
23           er.

24           Neither of the incumbents of the two positions in  
25           question, either directly or by effectively recommending,  
26           performs any of the functions enumerated in Section  
27           39-31-103(3) MCA. Moreover, neither uses independent  
28           judgment in assigning and directing the work of others  
29           because the work is routine in nature. Neither is iden-  
30           tified with management; they are identified with their  
31           fellow-workers because most of their time is spent doing the  
32           same work as the other workers.

          It would be difficult to imagine, under normal circum-  
stances, that either the Maintenance Supervisor or the  
Bookstore Manager would make recommendations that are

1 adopted at higher levels as a matter of course without  
2 independent review or de novo consideration.

3 C. PART-TIME POSITIONS

4 The general rule regarding part-time employees is they  
5 will be included in the bargaining unit if the regularity  
6 and frequency of their employment, along with other factors,  
7 show they gave a substantial community of interest with the  
8 unit's full-time employees in wages, hours and conditions of  
9 employment. In Leaders - Nameski, Inc., 237 NLRB 1268, 99  
10 LRRM 1132 (1978) the National Labor Relations Board held  
11 that a part-time employee who averaged four hours per week,  
12 for six months, received vacation and holiday pay, but did  
13 not get sick leave or pension benefits should be included in  
14 the bargaining unit as a regular part-time employee.

15 Similarly, the Board held, in Muncie Newspaper, 246  
16 NLRB No. 272, 203 LRRM 1089 (1979), that a reporter who  
17 averaged from five to ten hours per week, was paid on an  
18 hourly basis, worked on a flexible schedule and had a  
19 reasonable expectation of continued employment should be  
20 included in the unit.

21 Part-time employees who worked 19½ hours per week and  
22 some of whom were students, were paid similar wages to other  
23 employees, had the same working conditions as others, but  
24 received limited fringe benefits were included in the  
25 bargaining unit by the National Labor Relations Board in  
26 Hearst Corp., 221 NLRB No. 67, 90 LRRM 1468 (1975) despite  
27 the fact that the employer had a policy of not giving  
28 holiday, insurance and pension benefits to employees who  
29 worked less than 20 hours per week.

30 Part-time employee-students working 20 hours per week  
31 plus the summer and part-time laborer-students have been  
32 included in bargaining units by the Board where they shared

1 a community of interest with the other bargaining unit  
2 employees. W&W Tool & Die Mfg. Co., 225 NLRB No. 138, 93  
3 LRRM 1006 (1976); Dick Kelchner Excavating Co., 236 NLRB No.  
4 189, 98 LRRM 1442 (1978).

5 Temporary or casual employees are distinguished from  
6 regular part-time employees and are not included in the  
7 bargaining unit. In Mariposa Press, 272 NLRB No. 83, 118  
8 LRRM 1266 (1984) the Board held that employees who worked on  
9 a sporadic, irregular basis, at their own convenience, who  
10 received special on-call pay different from regular  
11 part-time employees and who had no reasonable expectation of  
12 continued employment did not have a community of interest  
13 with regular employees and were, therefore, excluded from  
14 the unit. Also, in Westinghouse Air Brake Co., 119 NLRB No.  
15 169, 41 LRRM 1307 (1958), the Board concluded that temporary  
16 employees working only during summer months should not be  
17 included in the unit because they did not share in the same  
18 benefits as other employees, they had no recall rights nor  
19 did they have any possibility of returning as employees.  
20 Students are usually excluded from the unit because they  
21 normally occupy positions which do not share a community of  
22 interest with regular employees. Evergreen Legal Services,  
23 246 NLRB No. 146, 103 LRRM 1028 (1979); Georgia Pacific  
24 Corp., 195 NLRB 258, 79 LRRM 1263 (1972); Barnard College,  
25 204, NLRB No. 134, 83 LRRM 1483 (1973). However, students  
26 are not excluded because they are students, but rather  
27 because, in many cases, they lack a community of interest  
28 with other workers.

29 Even where most of a company's probationary employees  
30 did not remain as employees beyond the initial 90 days, the  
31 Board held they could not be excluded from the unit.  
32

1 National Torch Tip Co., 107 NLRB No. 269, 33 LRRM 1369  
2 (1954).

3 Although the number of hours which an employee puts in  
4 on the job will not of itself be decisive of inclusion or  
5 exclusion, it is an important factor in the total assessment  
6 of whether he has the requisite community of interest with  
7 other employees. The Board, using that reasoning, went on  
8 to hold, in NLRB v. Greenfield Components Corp., 317 F.2d  
9 85, 53 LRRM 2145 (CA 1, 1963), that an employee who worked  
10 from six to less than two hours per week should be excluded  
11 from the unit. The Board came to the same conclusion in  
12 Mission Pak Co., 127 NLRB No. 147, 46 LRRM 1161 (1960) where  
13 it excluded employees who worked from two to four weeks as  
14 seasonal workers and did not, therefore, have a community of  
15 interest with permanent employees, although the seasonal  
16 workers did the same type of work as the permanent.

17 Of the seven part-time employees whom the College wants  
18 to exclude, five are paid on the same salary schedule as are  
19 full-time employees. Both of the remaining two employees'  
20 positions used to be paid off the same schedule as regular  
21 full-time employees. The other two could easily be placed  
22 on the schedule. In any case, the fact that they are not so  
23 placed does not affect their common interest with the other  
24 five.

25 All of the part-time employees are subject to the same  
26 general personnel policies and they work in the same phys-  
27 ical facilities. All work from 16 to 30 hours per week  
28 which plainly is more than sufficient to indicate a commun-  
29 ity of interest with full-time employees. Some share in  
30 fringe benefits, others do not. There is nothing on the  
31 record to indicate the seven part-time employees  
32

1 expectations of permanency of employment is less than that  
2 of their full-time counterparts.

3 There can be little doubt that the seven part-time  
4 employees in dispute here have a substantial community of  
5 interest with the regular full-time employees in wages,  
6 hours and other conditions of employment.

7 D. POSITIONS FUNDED BY OTHER THAN GENERAL FUND REVENUE

8 The College claims that four of the positions in  
9 question should be excluded from the proposed bargaining  
10 unit because they are funded from sources other than the  
11 general fund. They reason that the uncertainty of the  
12 continuation of funding for the four positions causes the  
13 incumbents of those positions to fall short of sharing a  
14 community of interest with incumbents of positions funded in  
15 the traditional manner. They point out that the faculty  
16 bargaining unit representatives stipulated to the exclusion  
17 from their bargaining unit of positions not paid from  
18 general funding sources.

19 To the argument that since the faculty unit representa-  
20 tives agreed to the exclusion of certain positions, suffice  
21 it to say the Board of Personnel Appeals' consideration in  
22 this matter is whether the proposed inclusions have a  
23 community of interest with other employees in the proposed  
24 unit. Reasons for which a labor organization may agree to  
25 exclude certain positions from a unit could well be differ-  
26 ent than reasons related to community of interest.

27 The National Labor Relations Board has included in  
28 bargaining units employees of positions funded by federal  
29 training programs. In spite of the fact that funding was  
30 uncertain at best, the Board included employees whose jobs  
31 were funded through the Federal Manpower Training Program  
32

1 where their wages, fringe benefits and working conditions  
2 were identical to those of the employer's regular employees.  
3 The Board found that, although their length of employment  
4 was indefinite due to the financial constraints facing the  
5 program, it was not sufficient to exclude them from the  
6 bargaining unit. Mon Valley United Health Services, 238  
7 NLRB No. 129, 99 LRRM 1332 (1978).

8 In Evergreen Legal Services, 246 NLRB No. 146, 103 LRRM  
9 1028 (1979) the Board found that employees who were paid  
10 pursuant to grants under the Comprehensive Employment and  
11 Training Act (CETA) should be included in a unit with a  
12 corporation's regular employees since there was a substan-  
13 tial similarity in wages, fringe benefits and working  
14 conditions of CETA employees and non-CETA employees.

15 The Board arrived at the same conclusion regarding CETA  
16 employees in Montgomery County Opportunity Board, Inc., 249  
17 NLRB No. 103, 104 LRRM 1238 (1980). In that case, the CETA  
18 workers were placed in an organization-wide unit even though  
19 their salary was limited by the program to \$10,000 annually  
20 and the duration of their employment was restricted to 78  
21 weeks. The Board concluded that since they went through the  
22 same hiring process, were paid by the same kind of checks,  
23 received benefits of comparably placed employees, had the  
24 same supervisors, and were subject to the same working  
25 conditions they shared a community of interest with regular  
26 employees. See also Rosemont Center, 248 NLRB No. 163, 104  
27 LRRM 1046 (1980); The Workshop, Inc., 246 NLRB No. 145, 103  
28 LRRM 1072 (1979); Catholic Community Services, 254 NLRB No.  
29 9, 106 LRRM 1255 (1981).

30 Of the four proposed exclusions two are part-time and  
31 two are full-time. The pay of all four is based on the same  
32 salary schedule as other clerical employees in the unit,

1 they receive the same kind of payroll check as other employ-  
2 ees, they receive the same benefits as others depending upon  
3 whether they are part-time or full-time and they have job  
4 descriptions comparable to other employees. They enjoy as  
5 great or a greater degree of continued employment expectancy  
6 as did the CETA employees involved in the National Labor  
7 Relations Board cases cited earlier herein.

8 The source of funds in this case does not affect the  
9 community of interest the four employees in question have  
10 with other employees whose pay is funded from a different  
11 source.

12 E. TEMPORARY EMPLOYEES

13 At the time of the hearing Flathead Valley Community  
14 College employed no temporary employees as defined in its  
15 personnel policies handbook. The handbook defined a tempo-  
16 rary full-time employee as one who works 40 hours per week  
17 for nine months or less. A temporary part-time employee was  
18 defined as one who works less than 40 hours per week for  
19 nine months or less.

20 As is clear from a reading of the cases cited under C.  
21 PART-TIME POSITIONS, each position and its regularity and  
22 frequency of utilization in the work force by the employer  
23 must be considered separately. The principles governing the  
24 inclusion or exclusion of positions into or from bargaining  
25 units must be applied to specific fact situations. One  
26 could surmise that, given the temporary definitions listed  
27 in the personnel handbook, there would be inclusions at one  
28 end of the definitions' spectrum and exclusions at the other  
29 end. As was stated earlier under the discussion of part-  
30 time employees, those employees who regularly work approxi-  
31 mately 16 to 30 hours per week, who have the same expectancy  
32 of continued employment as do other employees, who share in

1 benefits as do comparable employees, who are subject to the  
2 same policies as others share a community of interest with  
3 those other employees and should, therefore, be included  
4 with them in a collective bargaining unit.

5 One can easily postulate an employment arrangement of  
6 temporary employees which would clearly warrant the exclu-  
7 sion of those employees. For example, see Mariposa,  
8 Westinghouse and related cases, supra. However, without  
9 actual facts before it, the Board of Personnel Appeals would  
10 be unwise to fashion a general conclusion and order on  
11 temporary employees. Without knowing the circumstances of  
12 employment that affect the several factors related to  
13 community of interest, the most the Board could engage in  
14 would be speculation. For that reason, this recommended  
15 order will address only those issues on which specific facts  
16 related to specific positions were placed in evidence. If  
17 in the future the College employs a temporary position and  
18 it cannot reach agreement with the exclusive representative  
19 on the position's inclusion or exclusion from the unit, a  
20 unit clarification petition can be filed to invoke the  
21 Board's published administrative procedures for handling  
22 such matters.

#### 23 CONCLUSION OF LAW

24 Pursuant to Section 39-31-202 MCA the unit appropriate  
25 for the purpose of collective bargaining for certain employ-  
26 ees of Flathead Valley Community College is one comprised of  
27 all full-time and regular part-time employees who perform  
28 secretarial, clerical, custodial or maintenance duties for  
29 the College excluding all supervisors, management officials  
30 and confidential employees as those terms are defined in  
31 Section 39-31-103 MCA and excluding all faculty. Specif-  
32 ically to be included in the appropriate unit are all the

1 positions for which the unions petitioned, as listed earlier  
2 herein, except the position of Secretary to the Presi-  
3 dent/Board of Trustees/Director of Personnel.

4 RECOMMENDED ORDER

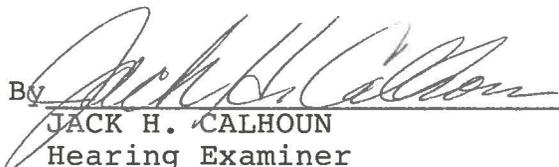
5 A secret ballot election, pursuant to Section 39-31-208  
6 MCA, among those employees in the appropriate unit is hereby  
7 directed.

8 NOTICE

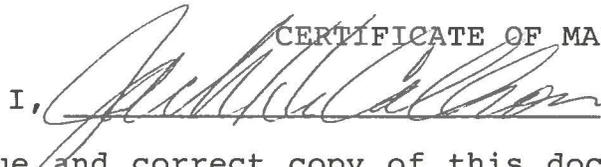
9 Exceptions to these findings of fact, conclusion of law  
10 and recommended order may be filed within twenty days of  
11 service thereof or within such time as the Board of Person-  
12 nel Appeals may allow. If no exceptions are filed within  
13 such time, the recommended order and conclusion of law will  
14 become the order of the Board.

15 Dated this 22nd day of August, 1985.

16  
17 BOARD OF PERSONNEL APPEALS

18  
19 By   
20 JACK H. CALHOUN  
21 Hearing Examiner

22 CERTIFICATE OF MAILING

23 I, , do hereby certify that  
24 a true and correct copy of this document was mailed to the  
25 following on the 22nd day of August, 1985.

26 Mike Dahlem  
27 Montana Federation of  
28 Teachers, AFT, AFL-CIO  
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