STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 5-89

THE MONTANA FEDERATION OF
TEACHERS, AFT, AFL-CIO,

Petitioner,

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER

THE BOARD OF REGENTS, MONTANA
UNIVERSITY SYSTEM, MONTANA
STATE UNIVERSITY,

Employer/Counter Petitioner.

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I. INTRODUCTION

A hearing on the above-captioned matter was held on May 1 and May 2, 1989 in the Gallatin County Law and Justice Center in Bozeman. J.C. Weingartner represented the Petitioner, Montana Federation of Teachers, AFT, AFL-CIO. The Employer/Counter Petitioner was represented by LeRoy Schramm. Arlyn L. Plowman was the duly appointed Hearing Examiner for the Board of Personnel Appeals. Post-hearing briefs were filed and the matter was deemed submitted on May 12, 1989.

The Petitioner's post-hearing brief contained proposed findings of fact and conclusions of law. All of the proposed findings, conclusions and supportive arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the petitioners, and the
arguments made by the parties, are in accordance with the findings, conclusions and views stated herein they have been accepted, and to the extent they are inconsistent therewith they have been rejected. Certain proposed findings and conclusions may have been omitted as not relevant or not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein it is not credited.

II. BACKGROUND

On March 6, 1989 the Montana Federation of Teachers, AFT, AFL-CIO filed, with the Board of Personnel Appeals, a petition for New Unit Determination and Election for certain employees of the Board of Regents, Montana State University System, Montana State University. In that petition, the Petitioner petitioned for a proposed bargaining unit described as follows:

Included: All full-time and part-time academic instructional faculty of greater than .5 FTE including academic professional staff of the library.

Excluded: 1. All managerial and supervisory employees as defined in MCA Sec. 39-31-104.
2. The College of Engineering.
3. All contract professional employees who do not engaged in academic instructional activities, i.e. athletic staff, non-academic counselors (psychological), campus health care staff, Museum of the Rockies staff, etc. Excluded due to lack of
community of interest and the non-integration of work functions.
4. All Cooperative Extension Service personnel (CES). Excluded due to lack of community of interest and non-integration of work functions.

On March 10, 1989 the Employer requested additional time in which to file a counter petition. On March 16th that request was granted.

On March 24, 1989 the Employer filed a counter petition disagreeing with the bargaining unit as described by the Petitioner and proposing a bargaining unit as described below:

Included: All persons employed on Board of Regents contracts occupying a tenured position at greater than .5 FTE.

Excluded: President, vice presidents, assistant and associate vice presidents, deans, associate and assistant deans, directors, associate and assistant directors, superintendents, associate and assistant superintendents, department heads, Cooperative Extension Service Area supervisors, and all managerial, supervisory and confidential personnel or personnel lacking a community of interest not specified in the foregoing, and all acting or interim personnel in the foregoing positions.

It should be noted that on May 19, 1976 a Petition for a New Unit Determination and Election (UD 11-76) was filed by the American Association of the University of Professors for a bargaining unit employed at Montana State University. That petition resulted in a hearing and a determination which was
modified by the Board of Personnel Appeals. The Board of Personnel Appeals order was the subject of judicial review and resulted in an order and opinion from the District Court of the First Judicial District in and for Lewis and Clark County (Civil no.'s 41317 and 41320) on November 29, 1977.

While the history and conclusions of UD 11-76 are instructive, they are not controlling. There are significant factors which distinguish this matter from UD 11-76.

III. ISSUES

The parties stipulated that the issues to be determined by the Hearing Examiner include the status of the following employee groups vis-a-vis their inclusion/exclusion in/from an appropriate bargaining unit:

1) Certain employees of the Cooperative Extension Service.
2) Certain employees of the College of Engineering.
3) Non-tenure track institutional staff who are employed .5 FTE (Full-Time Equivalent).

Except for the three groups listed above, the parties agreed that their respective proposed bargaining unit descriptions are compatible.

IV. FINDINGS OF FACT

1. Montana State University in Bozeman is the Land Grant University for the State of Montana pursuant to the provisions of the Morrill Act of 1862. See Section 20-25-221
MCA. Montana State University is responsible for the Agricultural Experiment Station provided by the 1887 Hatch Act. See Section 20-25-222 MCA. Montana State University as the state's Land Grant University responsible for the Agricultural Experiment Station is also responsible for the Cooperative Extension Service established by the Smith-Lever Act of 1914. See Section 20-25-226 MCA.

2. Montana State University is made up of seven colleges: the Colleges of Agriculture; Arts and Architecture; Business; Education, Health and Human Development; Engineering; Letters and Science; and Nursing.

3. The Agricultural Experiment Station and the Cooperative Extension Service are part of the College of Agriculture. Since Montana State University is the state's Land Grant University and therefore responsible for the Agricultural Experiment Station and the Cooperative Extension Service, it must be said that the Cooperative Extension Service is elemental to the College of Agriculture and Montana State University. The University is mandated to carry out the functions of the Cooperative Extension Service. Those functions are essential to the University's purpose and mission.

4. The Montana State University 1988-91 Undergraduate Catalog (Exhibit R # 1) describes the Cooperative Extension Service on page 3:
The Extension Service was created by the Smith-Lever Act of 1914, and by subsequent state legislation. These acts provide for financial support from the county, state and federal governments. Consequently the Extension Service is not only an integral part of Montana State University, but also a part of the United States Department of Agriculture; and through agreements with boards of county commissioners, it works cooperatively with the counties in broad agricultural, home economics, youth and community development education programs. The Extension Service channels scientific information provided by the Agricultural Experiment Station and other sources to the people of the state and helps them adapt it to farm, home and community problems. It is also responsible for recognizing problems on which additional research information is needed, and to bring these to the attention of the Experiment Station staff and other faculty of MSU. The aim of the Extension Service is to combine efforts of professional people for the improvement of agriculture and the level of living of Montana citizens. To accomplish this, Extension personnel work with local leaders who assist in carrying on the programs. Most work is conducted by Extension agents, who serve within the counties, and by subject matter specialists, located in academic departments, who support the work of the agents in the field. . . .

5. The Cooperative Extension Service has faculty field staff with tenurable appointments working in county seats and Courthouses throughout Montana. They are referred to as County Agents. According to the roster on pages 236 and 237 of the Montana State University 1988-91 Undergraduate
Catalog (Exhibit R # 1) all of the County Agents have Bachelors degrees, many have Masters degrees, none have terminal degrees. These agents hold the rank of Instructor, Assistant Professor or Associate Professor.

6. The Dean of the College of Agriculture holds a federal appointment as Director of the Agricultural Experiment Station and also as Director of the Cooperative Extension Service. It was his unrefuted testimony that he is the only member of the Cooperative Extension Service faculty with a federal appointment.¹

7. The Cooperative Extension Service faculty are employees of Montana State University. They share common personnel policies and similar evaluation procedures with the on-campus faculty.

8. The Cooperative Extension Service faculty field staff maintain contact with the campus and the University via electronic or written communication and by occasional personal visits to the campus. Their remote location does not make the Cooperative Extension Service faculty unique to

¹ The District Court in reviewing UD 11-76 affirmed a Board of Personnel Appeals decision excluding Cooperative Extension Service faculty from the bargaining unit. Among the findings used to justify that exclusion were: 1) the availability of federal retirement, health and life insurance programs to such faculty members and 2) the federal appointment procedures applicable to the program. There is insufficient evidence on the record to support similar findings in this matter.
the proposed bargaining unit. Other faculty work and live considerable distance from the Bozeman campus. The parties agreed that the Agriculture Experiment Station and College of Nursing faculties, some of whom live and work away from the Bozeman campus should be included in the proposed bargaining unit.

9. Like some other University functions, the Cooperative Extension Service is dependent upon financing from sources other than those appropriated by the Legislature.

10. The primary beneficiaries of the Cooperative Extension Service faculty field staff's teaching, research/creative endeavors, and professional/public service efforts are not typical students. The primary beneficiaries of such efforts are usually farmers, ranchers and other members of the communities to which the field staff is assigned. This feature of the Cooperative Extension Service sets it apart from what is usually perceived and associated with academia and the University. However, not all on-campus activity is geared towards teaching matriculated students involved in a degree program.

11. The Employer introduced Exhibit R # 3, a letter from the Montana Cooperative Extension Association which purports to show that the Cooperative Extension Service field staff desires to be part of the proposed bargaining unit.
This letter hardly reflects the result of a laboratory effort to determine and report the desires of those employees.

12. The faculty in Montana State University is divided into two distinct groups, one group holding tenurable appointments and the other group holding non-tenurable appointments (See Exhibit R # 5). During the course of the hearing faculty holding non-tenurable appointments were sometimes referred to as adjunct or part-time faculty. To refer to non-tenurable faculty as part-time is incorrect since there are non-tenurable faculty who work full-time (Joint Exhibit # 2).^2

13. Non-tenurable appointments are for a specified term (usually one year or less) and expire automatically unless renewed.

14. Tenurable appointments may lead to tenure. Tenurable appointees serve in probationary status for as long as seven years prior to achieving tenure. During this probationary period they serve at the discretion of the employer and have no right to re-appointment for a term in excess of the academic year. However, while on probationary status, tenurable appointees have the right to serve out

^2 This issue was not in dispute in UD 11-76. In that case the parties stipulated to the inclusion/exclusion tenurable/non-tenurable appointments (exhibit R # 9). Adjunct faculty, visiting faculty and emeritus faculty were excluded from the bargaining unit defined in the April 19, 1978 UD 11-76 Notice of Election.
their specified appointment and may not be discharged without cause during that term.

Tenure is the right to re-appointment from appointment term to appointment term until such time as the appointee resigns, retires, is discharged for adequate cause or is terminated for reasons of financial exigency or program reduction, curtailment or discontinuance (Exhibit R # 4).

15. In addition to their more favorable job security, tenurable appointees generally receive better wages and enjoy better working conditions, especially with regard to office space. Non-tenurable appointees are often relegated to carrels.

16. Tenurable appointments usually involve a wider scope of responsibility. Non-tenurable appointments are generally limited either to teaching or research while tenurable appointments are usually expected to engage in teaching, research/creative endeavors, and professional/public service.

17. With some significant exceptions in the School of Agriculture, tenurable appointees are usually expected to have or be about to complete the requirements for a terminal degree. Although many non-tenurable appointees have a terminal degree, possessing a terminal degree is not so crucial in receiving a non-tenurable appointment as in receiving a tenurable appointment.
18. "The Chart" (Exhibit R # 8) used in determining recruitment procedures shows that a more extensive search is required to fill tenure track vacancies.

19. All faculty, tenurable and non-tenurable use the same facilities. Non-tenurable appointees have been used to fill most positions, including Instructor, Assistant and Associate Professor, and even department head. Non-tenurable appointees are used to fill vacancies created by the leave or termination of tenured staff. They are used to "flesh out" the core faculty protected by tenure. While the foregoing points to a certain interchange and integration between tenurable appointees and non-tenurable appointees, it must also be noted that such tenurable/non-tenurable interchange and integration is limited by the following:

   a) Upper and graduate level courses are usually taught by tenurable appointees. Non-tenurable appointees are usually restricted to teaching lower level courses.
   b) While both tenurable and non-tenurable staff may counsel students, only tenurable appointees advise students.
   c) Tenurable appointees are subject to a more vigorous evaluation procedure than their non-tenurable counterparts. Service in non-tenurable appointments does not count towards probationary service for tenure (Exhibit R # 5). Non-tenurable appointees do not participate in the promotion and tenure review process as do tenurable appointees.
20. Both tenurable and non-tenurable appointees receive fringe benefits, teachers retirement, health insurance, etc. as required by statute.

21. Tenurable appointees play a much larger role in faculty governance. The faculty handbook (Joint Exhibit # 1) at page 103.01-4 denies non-tenurable appointees voting privileges.

22. There is insufficient evidence to support a finding that the terms and conditions of employment in the College of Engineering are significantly different from the other six Montana State University Colleges. Of the 67 tenurable appointees in the College of Engineering, 21 are professional engineers or engineers in training.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to the Montana Collective Bargaining for Public Employees Act Section 39-31-101 et seq., MCA.

2. The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using Federal Court and National Labor Relations Board (NLRB) precedents as guidelines in interpreting the Montana Collective Bargaining for Public Employees Act as the state act is similar to the Federal Labor Management Relations Act, State ex rel. Board of Personnel Appeals v. District Court, 183 Mont. 223, 1979, 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 v.

3. Pursuant to Section 39-31-202 MCA in order to assure employees the fullest freedom and exercise in the rights guaranteed by the Montana Collective Bargaining for Public Employees Act, the Board of Personnel Appeals or an agent of the Board shall decide the unit appropriate for the purpose of collective bargaining and shall consider such factors as community of interest, wages, hours, fringe benefits, and other working conditions of the employees involved, the history of collective bargaining, common supervision, common personnel policies, extent of integration of work functions and interchange among employees affected, and the desires of the employees. See Leedom v. Kyne, 358 U.S. 184, 43 LRRM 2222, 1958; NLRB v. The New School for Social Research, Parson School of Design, 122 LRRM 2842, 2 CA 1986, 793 F.2d 503.

4. The National Labor Relations Board executed a major policy change in 1973 when it decided to exclude part-time faculty from a faculty bargaining unit, New York University(I), 205 NLRB No. 16, July 20, 1973, 83 LRRM 1549. In that decision the National Labor Relations Board said:

"...there is no real mutuality of interest between the part-time and full-time faculty...because of the differences with respect to (1) compensation,
(2) participation in University governance, (3) eligibility for tenure and (4) working conditions.

In the case at hand it has been determined that the non-tenurable appointees of the Montana State University faculty receive lower salaries, do not have the right to vote and have less advantageous working conditions. See Kendall College v. NLRB, 570 F.2d 216, 97 LRRM 2878, 7 CA 1978.

In University of San Fransico, 207 NLRB No. 15, November 7, 1973, 84 LRRM 1403, the National Labor Relations Board excluded adjunct professors from a Law School bargaining unit because the adjuncts' salaries were determined differently from tenure staff salaries, adjuncts were not eligible for tenure, did not vote at faculty meetings nor participate in Law School governance. In Boston University v. NLRB, 98 LRRM 2070, 1 CA 1978, 575 F.2d 301, the Court affirmed a tenure-based exclusion/inclusion in/from a bargaining unit.

5. The National Labor Relations Board has included Extension Service faculty in a University bargaining unit. See University of Vermont, 223 NLRB No. 46, March 29, 1976, 91 LRRM 1570. In that case the National Labor Relations Board included Agriculture Extension Specialists in the overall University bargaining unit since like other College of Agriculture faculty they were eligible to participate in faculty government, were hired through the same procedures as other faculty and were evaluated in the same fashion with
regard to promotion and tenure. Those findings at the University of Vermont are very similar to those which affect the Cooperative Extension Service field staff at the Montana State University.

What may distinguish the University of Vermont Agricultural Extension Service from the Montana State University Cooperative Extension Service is the fact that the Vermonters had campus offices. However, the geographical separation of the Montana State University Cooperative Extension Service field staff is only one factor to be considered in determining their community of interest. See Goddard College, 234 NLRB No. 169, March 2, 1978, 97 LRRM 1398. The Cooperative Extension Service faculty field staff's remoteness from the Bozeman campus is not fatal to their community of interest, the common fringe benefits, and the common personnel policies they share with the on-campus faculty.

6. For reasons not completely understood, the Legislature, when adopting the Montana Collective Bargaining for Public Employees Act, decided that professional engineers and engineers in training are not public employees. See Section 39-31-103 MCA. In the matter of Unit Determination

3 Vermont is a much smaller state. An Extension agent could conceivably travel to, visit, and return from almost any point in the state in less than a day.
11-76, Civil No.'s 41317 and 41320, November 29, 1977, the
District Court for the First Judicial District, Lewis and
Clark County, said:

...professional engineers and engineers in
training...are required to be excluded from the
proposed bargaining unit.

While the will of the Legislature is not understood it is
clear. Engineers and engineers in training are not public
employees with the rights and protections of the Montana
Collective Bargaining for Public Employees Act and therefore
are not to be included in bargaining units.

7. Section 39-31-103(11) MCA defines "appropriate
unit" as a group of public employees banded together for
collective bargaining purposes as designated by the Board
(Personnel Appeals).

The National Labor Relations Board has offered this
construction of the meaning of the term "appropriate":

There is nothing in the statute which requires that
the unit for bargaining be the only appropriate
unit, or the ultimate unit, or the most appropriate
unit; the Act requires only that the unit be
"appropriate". It must be appropriate to ensure
the employees in each case 'the fullest freedom in
exercising the rights guaranteed by this Act'.
...[The term] carries with it no overtones of the
exclusive or the ultimate or the superlative." Morand Brothers, 91 NLRB 409, 26 LRRM 1501 (1950).

8. Pursuant to Section 39-31-202 MCA the Board shall
determine the appropriate bargaining unit.
9. Pursuant to Section 39-31-208 MCA if the Board or an agent of the Board finds that there is a question of representation, there shall be an election by secret ballot to determine whether the employees wish to be represented by a labor organization. Further, the Board or an agent of the Board shall determine who is eligible to vote in the election and also establish the rules for the election.

10. Pursuant to the Administrative rules of Montana at 24.26.655 the Board shall direct an election to be conducted by an agent of the Board where an appropriate unit has been determined and a question of representation exists or where a petition for an election has been filed. The election shall be conducted under the direction and supervision of the Board with all determinations made by an agent subject to review by the Board of Personnel Appeals by an aggrieved party.

VI. RECOMMENDED ORDER

1. On or before September 20, 1989 the Employer shall furnish the Board of Personnel Appeals with the names and addresses of all eligible voters.

2. On or about October 1, 1989, after classes have convened on the Montana State University campus for Autumn quarter 1989, there shall be prepared and distributed a Notice of Election pursuant to the Administrative rules of Montana at 24.26.659.
3. On or about October 1, 1989 certain of the eligible voters who live or work remote from the Montana State University campus (Cooperative Extension Service, Agricultural Experiment Station, School of Nursing, etc.) will be mailed a Notice of Election, Mail Ballot and other materials necessary to allow them to vote by mail. Such mailing shall constitute the posting requirements of the election for those employees who will be voting by mail.

4. On or about October 20, 1989 the Board of Personnel Appeals will conduct an on-site election by secret ballot on or near the Montana State University campus to determine whether certain members of the Montana State University faculty desire to be represented by the Montana Federation of Teachers, AFT, AFL-CIO for purposes of collective bargaining. The election shall be held in accordance with the Montana Public Employees Collective Bargaining Act (Section 39-31-101 et seq., MCA) and the applicable procedures and policies of the Board of Personnel Appeals.

5. Eligible voters shall be those employees included within the unit described below who were employed on the date the petition was filed, March 6, 1989.

6. The appropriate bargaining unit is defined as follows:
INCLUDED: All persons with a tenurable appointment employed by Montana State University .5 FTE (full time equivalent) or greater on a Board of Regents Contract.

EXCLUDED: The president, vice-presidents, assistant and associate vice-presidents, deans, associate and assistant deans, directors, associate and assistant directors, superintendents, associate and assistant superintendents, department heads, Cooperative Extension Service area supervisors, engineers, engineers in training, and all managerial, supervisory and confidential personnel and all acting and all interim personnel in the foregoing positions.

VII. SPECIAL NOTICE

Pursuant to the rules of the Board of Personnel Appeals and the Administrative Rules of Montana at 24.26.215(2) and 24.26.655 this recommended order shall become the order of the Board of Personnel Appeals unless written exceptions are filed with the Board of Personnel Appeals at P.O. Box 1728, Helena, Montana 59624-1728 within twenty (20) days after service of this recommended order upon the parties.

ENTERED and DATED this 8th day of June, 1989.

By:

ARLYN L. FLOWMAN
Hearing Examiner
EXHIBIT LIST

Joint Exhibits
Joint Exhibit # 1 Faculty Handbook
Joint Exhibit # 2 List of non-tenurable staff with rank employed at .5 FTE and above

Petitioner's Exhibits
Exhibit P # 1 Collective Bargaining Agreement (1987) University of Montana

Respondent's Exhibits
Exhibit R # 1 1988-91 Montana State University Catalogue
Exhibit R # 2 Employment Contract
Exhibit R # 3 March 10, 1989 letter to Tietz from Muggli
Exhibit R # 4 Policies and Procedures Manual 706.1
Exhibit R # 5 Policies and Procedures Manual 702.1
Exhibit R # 6 Policies and Procedures Manual 253
Exhibit R # 7 Policies and Procedures Manual 251
Exhibit R # 8 Portion of Recruitment Manual
Exhibit R # 9 Portion of Transcript of UD 11-76
CERTIFICATE OF MAILING

I, [Signature], do hereby certify that a true and correct copy of this document was mailed to the following on the [Date] day of June, 1989:

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