

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNIT DETERMINATION NO. 23-90:

MONTANA EDUCATION ASSOCIATION,)

NATIONAL EDUCATION ASSOCIATION,)

Petitioner,)

- vs -)

FRENCHTOWN SCHOOL DISTRICT NO. 40,)

Employer.)

FINAL ORDER

* * * * *

The Findings of Fact; Conclusions of Law; and Recommended Order was issued by Hearing Examiner Stan Gerke on December 26, 1991.

Exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order were filed by Arlyn L. Plowman of the Montana School Boards Association on behalf of the Employer on January 8, 1992.

Oral argument was scheduled before the Board of Personnel Appeals on Wednesday, April 1, 1992.

After reviewing the record, considering the briefs and oral arguments, the Board finds as follows:

1. IT IS FOUND that the Hearing Examiner's Findings of Fact are not clearly erroneous.

2. IT IS FOUND that the Hearing Examiner abused his discretion as a matter of law in concluding that the position at issue was not a confidential employee properly excluded from the bargaining unit.

Based on the foregoing findings, the Board concludes as follows:

1. IT IS CONCLUDED that the position at issue was that of a confidential employee.

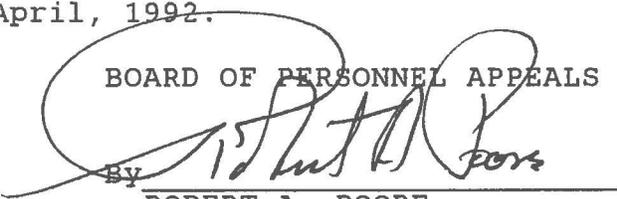
Based on the foregoing findings and conclusions, the Board orders as follows:

1. IT IS ORDERED that this Board adopts the Hearing Examiner's Findings of Fact and from such findings concludes that the position in question was a confidential employee.

2. IT IS ORDERED that the position at issue be excluded from the bargaining unit.

DATED this 17th day of April, 1992.

BOARD OF PERSONNEL APPEALS

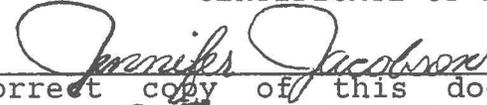
BY 
ROBERT A. POORE
CHAIRMAN

* * * * *

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

* * * * *

CERTIFICATE OF MAILING

I, , do certify that a true and correct copy of this document was mailed to the following on the 21st day of April, 1992:

Arlyn Plowman
Montana School Boards Association
One South Montana Avenue
Helena, MT 59601

Emilie Loring
HILLEY & LORING, P.C.
500 Daly Avenue
Helena, MT 59601

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 23-90:

MONTANA EDUCATION ASSOCIATION,)		
NATIONAL EDUCATION ASSOCIATION,)		
)	
Petitioner,)	FINDINGS OF FACT;	
)	CONCLUSIONS OF LAW;
-vs-)		AND
)	RECOMMENDED ORDER
FRENCHTOWN SCHOOL DISTRICT #40,)		
)	
Employer.)		

* * * * *

I. INTRODUCTION

A formal hearing in this matter was conducted on August 20, 1991, at the Frenchtown Junior High School, Frenchtown, Montana. The formal hearing was conducted under authority of Section 39-31-207 MCA and in accordance with the Montana Administrative Procedures Act, Title 2, Chapter 4, MCA. The Petitioner was represented by Emilie Loring, Attorney at Law, Missoula, Montana. The Employer was represented by Rick D'Hooge, Montana School Boards Association, Helena, Montana. Witnesses included Debbie Tholstrom, Administrative Secretary; Susan M. Shankle, School Clerk/Director of Business Services; and, Michael W. Nicosia, Superintendent. Subsequent to the hearing, the Parties submitted post-hearing briefs.

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II. BACKGROUND

On November 7, 1990 the Petitioner filed a petition for New Unit Determination and Election with this Board seeking to represent certain classified employees of the Frenchtown School District. On November 29, 1990 the Employer filed a counter petition seeking to exclude the position of Administrative Secretary and other positions from the bargaining unit as proposed by the Petitioner. The Parties agreed to an appropriate bargaining unit, with the exception of the position of Administrative Secretary, and further agreed to request this Board to decide the placement of the Administrative Secretary position should the Petitioner win the representation election. An election was conducted and on January 25, 1991 the Petitioner was certified as the exclusive bargaining representative for employees classified as custodians, teacher aides, and secretaries employed by the Employer excluding those employees exempted by the Public Employees Collective Bargaining Act, Section 39-31-103 MCA.

III. ISSUE

Whether the position of Administrative Secretary should be included in the appropriate bargaining unit.

IV. FINDINGS OF FACT

1. The position of Administrative Secretary shares a broad community of interest with other positions in the established collective bargaining unit. Similarities include twelve-month per

1 year employment; eight hour day; five day week; hourly wage;
2 personnel policies and rules; and fringe benefits.

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4 2. The primary duties of the Administrative Secretary
5 position include the preparation of checks to pay invoices;
6 answering the telephone; ordering supplies; clerical handling of
7 job applications; and compiles the monthly news bulletin of the
8 Employer. On occasion, the incumbent has typed miscellaneous
9 documents originated by the Superintendent from rough draft or
10 altered documents.

11 3. The incumbent of the Administrative Secretary position
12 does not attend School Board meetings. On one occasion (May 14,
13 1991) the incumbent did attend a School Board meeting to take
14 minutes because the School Clerk was unavailable. During this
15 particular School Board meeting, the incumbent was instructed to
16 leave the meeting when the Trustees went into executive session.

17 4. The incumbent of the Administrative Secretary position
18 has never been involved in personnel matters, grievances of other
19 employees, or confidential collective bargaining matters. On
20 occasion, the incumbent has typed salary schedules from supplied
21 rough draft. When typing the salary schedules, the incumbent was
22 completely unaware of the purpose or intent of such schedules. The
23 incumbent has also, on occasion, typed cover letters for unseen
24 communications from the Superintendent to School Board members.
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V. DISCUSSION

The incumbent of the Administrative Secretary position is not involved in the collective bargaining process in behalf of the Employer. The incumbent does not participate in any meetings, discussions, or any other preparations of the Employer for purposes of collective bargaining process. The incumbent's role as a "rank and file" employee is amplified by the facts she was directed to leave the School Board meeting during executive session and she is not privileged to see certain communications from the Superintendent to School Board members. Certain documents the incumbent may type into final form may later be used for budget preparation and even for informational purposes for the collective bargaining process. However, at time of typing, the incumbent was completely unaware of the intended purposes.

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using federal court and NLRB precedents as guidelines in interpreting the Public Employees Collective Bargaining Act (the Act) as the state act is so similar to the federal Labor Management Relations Act (LMRA). State Department of Highways v. Public Employees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974), 87 LRRM 2101; AFSCME Local 2390 v. City of Billings, 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753 (1976); State ex rel. Board of Personnel Appeals v. District Court, 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297 (1979); Teamsters Local 45 v.

1 State ex rel. Board of Personnel Appeals, 195 Mont. 272, 635 P.2d
2 1310, 110 LRRM 2012 (1981), City of Great Falls v. Young (Young
3 III), 221 Mont. 13, 686 P.2d 185, 119 LRRM 2682 (1984).

4 A "Confidential Employee", as defined in the Public Employees
5 Collective Bargaining Act, is not a statutory employee entitled to
6 the protections of the Act, Section 39-31-103(2)(b)(v), MCA.

7 "Confidential employee" means any person found
8 by the board to be a confidential labor
9 relations employee and any person employed in
10 the personnel division, department of
11 administration, who acts with discretionary
12 authority in the creation or revision of state
13 classifications specifications. Section 39-
14 31-103(12), MCA.

15 In 1981 the United States Supreme Court affirmed the NLRB's
16 long-standing policy of narrowly defining "confidential employees"
17 as those who "assist and act in a confidential capacity to persons
18 who exercise 'managerial' functions in the field of labor
19 relations", NLRB v. Hendricks County Rural Electric Membership
20 Corp., 454 U.S. 170 (1981).

21 The Court found the Board had limited the
22 "confidential employee" category to those
23 employees who assist and act in a confidential
24 capacity to persons who formulate, determine
25 and effectuate management policies in the
field of labor relations or who have regular
access to confidential information concerning
anticipated changes which may result from
collective bargaining, (citations omitted).
The Court concluded the Board's policy was
"rooted firmly in the Board's understanding of
the nature of the collective bargaining
practice and Congress' acceptance of that
practice", 454 U.S. at 190. Mukamal and

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2 Grenig, "Collective Bargaining: The Exclusion
3 of "Confidential" and "Managerial" Employees,
4 22 Duquesne Law Review 1, (1983).

5 In a separate opinion concurring in part and dissenting in
6 part, four justices agreed that an employee's possession of
7 "proprietary or nonpublic business information" did not mandate
8 exclusion from a bargaining unit as "confidential".

9 The NLRB has repeatedly held that the mere handling of or
10 access to confidential business or even labor relations information
11 is insufficient to render a person an excluded "confidential"
12 employee, Ernst & Ernst Nat'l Warehouse, 228 NLRB 162, 100 LRRM
13 1297 (1979).

14 The Board of Personnel Appeals has consistently followed the
15 NLRB's narrow exclusion of "confidential employees".

16 (T)he criteria used by the Board of Personnel
17 Appeals to determine whether one is a
18 confidential labor relations employee should
19 be those set forth in Siemens Corp., 224 NLRB
20 1579, 92 LRRM 1455 (1976). There the National
21 Labor Relations Board held that if the
22 employee acts in a confidential capacity,
23 during the normal course of duties, to a
24 person who is involved in formulating,
25 determining and effectuating the employer's
labor relations policy, he or she should be
excluded from any appropriate unit. Lewis &
Clark County v. MPEA, UC 4-79 (1980).

Access to information that may be used during
labor negotiations or responsibility for
compiling information that might be related to
labor relations is not sufficient to exclude
an employee as confidential. AFSCME & Havre
School District #16-A, UD 24-79 (1980).

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2 On one hand the employee or position occupied
3 by the employee must act, or have the
4 responsibility of acting, in a confidential
5 capacity...(On the) other hand the superior
6 must be involved in labor relations to the
7 degree suggested previously...Confidential
8 exclusions...should be construed
9 narrowly...(They) should not apply unless the
10 superior has significant involvement in
11 formulating...and then only if the employee's
12 primary duty is to assist such superior. MPEA
13 & Yellowstone County School District No. 2, UD
14 7-80 (1981).

15 In this matter, the record is clear the incumbent of the
16 Administrative Secretary position seldom, if ever, has access to
17 confidential business or labor relations information. Information
18 handled by the incumbent is sterile as it relates to confidential
19 labor relations and the incumbent has no active role in the
20 collective bargaining process in behalf of the Employer.

21 VI. CONCLUSIONS OF LAW

22 1. The Board of Personnel Appeals has jurisdiction in this
23 matter pursuant to Section 39-31-202 MCA. Billings Montana vs.
24 Fire Fighters Local 529, 113 LRRM 3324, 651 P.2d 627, Montana
25 Supreme Court 1982.

2. The position of Administrative Secretary is not a
confidential employee as defined in Section 39-31-103(2)(b)(v) MCA.

VII. RECOMMENDED ORDER

The position of Administrative Secretary shall be included in
the bargaining unit consisting of certain classified employees.

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DATED this 26th day of December, 1991.

BOARD OF PERSONNEL APPEALS

By: 

STAN GERKE
Hearing Examiner

SPECIAL NOTICE

In accordance with Board's Rule ARM 24.25.107(2), the above RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless written exceptions are filed within 20 days after service of these FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER upon the Parties.

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

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Attorney at Law
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Montana Education Association, NEA
218 East Front Street #209
Missoula, MT 59802

DATED this 26th day of December, 1991.



SD279.1