

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
LEGAL SERVICES DIVISION
HEARINGS UNIT

IN THE MATTER OF UNIT DETERMINATION NO. 7-91

TEAMSTERS UNION LOCAL NO. 2)
AFFILIATED WITH INTERNATIONAL)
BROTHERHOOD OF TEAMSTERS,)
CHAUFFEURS, WAREHOUSEMAN, AND)
HELPERS OF AMERICA, AFL-CIO,)

Petitioner,)

vs.)

SANDERS COUNTY SHERIFF'S)
DEPARTMENT,)

Employer.)

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER**

* * * * *

I. INTRODUCTION

A hearing was held in the above matter on January 7, 1992, at the Sanders County Courthouse chambers located in Thompson Falls, Montana. The Petitioner was represented by Jack Cutler, Business Agent for the union. The Employer was represented by Robert Slomski, County Attorney. Witnesses included Rod E. Arnold, Diane Franko, William Alexander, and Norm Resler. The hearing was reopened by telephone conference call on February 13, 1992, at the request of the Employer. The continuance was granted in order to take testimony from Mark Denke, head dispatcher, who was unavailable to testify on January 7, 1992, due to circumstances beyond his control.

1 | **II. BACKGROUND**

2 | On May 30, 1991, the Petitioner filed a petition for new unit
3 | determination and election with the board. The Petitioner proposed
4 | an appropriate bargaining unit to consist of an undersheriff,
5 | deputies, administrative secretary, dispatchers, and jailers
6 | including all full-time and part-time employees. On June 19, 1991,
7 | the Employer filed a counter petition with the board which
8 | disagreed with the proposed bargaining unit. The employer proposed
9 | an appropriate unit which would include the deputy sheriffs,
10 | dispatchers other than the head dispatcher, and the cook/matron.
11 | The employer's proposal would exclude temporary employees, non-
12 | permanent employees, and part-time employees working less than 20
13 | hours per week.

14 | On November 12, 1991, a pre-hearing conference was conducted
15 | by telephone conference call. The Petitioner was represented by
16 | Jack Cutler. The Employer was represented by Robert Slomski and
17 | Ray DeLong, County Commissioner. During the pre-hearing, the
18 | Parties stipulated to the following:

- 19 | 1. Deputy sheriffs would be included in the
20 | bargaining unit.
- 21 | 2. Part-time permanent fill-in dispatchers that
22 | work in excess of 20 hours per week would be
23 | included in the bargaining unit.
- 24 | 3. The jailer position would be included in
25 | the bargaining unit.
- 26 | 4. Part-time cook/matron working less than
27 | 20 hours per week would be excluded from
28 | the bargaining unit.

1 The Employer contends that the undersheriff, head dispatcher, and
2 administrative secretary should be excluded from the bargaining
3 unit pursuant to Section 39-31-103 et seq., MCA. They also
4 maintain that the administrative secretary should be excluded on
5 the basis that she is a "confidential employee" within the
6 definition of Section 39-31-103(12).

7 **III. ISSUE**

8 Whether the positions of county sheriff, administrative
9 secretary, and head dispatcher should be included in the
10 appropriate bargaining unit?

11 **IV. FINDINGS OF FACT**

12 1. The Sanders County Sheriff's Department is located in the
13 county seat of Thompson Falls, Montana. The department serves the
14 county which encompasses 2,600 square miles and has an estimated
15 population of 8,700. The department consists of a sheriff, one
16 undersheriff, five deputies, one administrative secretary, one head
17 dispatcher, four other dispatchers, one cook/matron, and one
18 jailer. The department is considered to be a relatively small unit
19 and is characterized as having a good work rapport among employees.

20 2. The undersheriff's salary is set at 95% of the sheriff's
21 annual salary by law. The undersheriff is placed in total charge
22 of the department's operation when the sheriff is gone. In the
23 absence of the sheriff, the undersheriff manages the department
24 using discretionary latitude under the established Employer's
25 policy and has to make independent decisions that would affect the
26 operation of the department. The department policy requires that
27 either the sheriff or the undersheriff are available to manage the
28 operation 24 hours each day, 365 days per year. The sheriff

1 considers the undersheriff to be in a supervisory/managerial
2 capacity. The undersheriff cannot hire, discharge, or invoke major
3 disciplinary measures in his absence.

4 3. The administrative secretary normally works a set shift
5 schedual consisting of eight hours per day, five days per week.
6 The person in the position is called in on occasion during off duty
7 hours to do things such as warrant reports, etc. The position
8 title is identified on the sheriff's wage scale list as a secretary
9 with an hourly wage rate ranging from \$6.25 to \$7.75.

10 4. The primary duties of the administrative secretary are to
11 coordinate and to perform the clerical functions of the sheriff's
12 department office. Such duties include record keeping, preparing
13 monthly reports, billing, ordering supplies, and assists monitoring
14 work schedules which are initially approved by the sheriff. The
15 person in the position can make minor scheduling adjustments in the
16 event an emergency arises (e.g., call someone to cover a shift due
17 a unexpected illness of one of the deputies). The administrative
18 secretary also maintains personnel files, helps prepare and monitor
19 the department budget, and oversees the clerical processing of
20 warrant and civil reports. The incumbent in the position trains
21 new office employees in CPR and selects and trains staff concerning
22 computer software programming. The administrative secretary fills
23 in periodically as a dispatcher in the absence of the head
24 dispatcher. The county has sent the administrative secretary to
25 school to be trained in the computer programming and CPR.

26 5. The administrative secretary is subordinate to the
27 sheriff. Under the terms and conditions of the work agreement, the
28 administrative secretary has no vested authority in her capacity to

1 hire, fire, layoff employees, or alter grievances. Under
2 department policy, the sheriff is the only one who reserves those
3 rights. The administrative secretary is permitted to make
4 recommendations concerning such matters, due to her office
5 experience and abilities. The administrative secretary often
6 accompanies the sheriff to the county commission meetings to assist
7 him with questions concerning office details.

8 6. The administrative secretary has given minor corrective
9 interviews to clerical staff concerning their performance. Prior
10 to the interview, she has to obtain the sheriff's approval and the
11 course of action to use. The sheriff has the exclusive authority
12 to decide on employee discipline and grievance actions within the
13 department. The administrative secretary attends an informal
14 monthly meeting called by the sheriff which also includes the
15 undersheriff and head dispatcher. The meetings allow those
16 individuals to keep the sheriff informed concerning the clerical
17 and dispatch functions.

18 7. The administrative secretary, who has been in the
19 position for the past five years, has never been advised by the
20 county commission that the position is considered to be in a
21 supervisory capacity. The person presently occupying the position
22 was recently given a 25 cent per hour raise to \$7.75 because of
23 some added duties she performs over and above the other clerical
24 workers.

25 8. The head dispatcher is scheduled to work 40 hours per
26 week and is directly subordinate to the sheriff. When needed, the
27 head dispatcher reports to work during off duty hours. The
28

1 position is paid by the hour. The present head dispatcher is
2 receiving \$7.75 per hour.

3 9. The head dispatcher's main duties consist of coordinating
4 dispatch activities. Twenty-five percent of the persons time
5 consists of working as a line dispatcher. Due to prior training
6 and experience, the head dispatcher is responsible for training new
7 dispatchers. The head dispatcher also gives speeches to school
8 students and the public regarding the unit's functions. The
9 incumbent in the position serves as coordinator for computer
10 programs, serves as a liaison with other public service agencies,
11 oversees clerical work in administrative secretary's absence and
12 does some clerical work for the dispatch positions. The head
13 dispatcher prepares employees' time cards for approval from the
14 sheriff, does monthly reports, orders supplies, and handles
15 citizen's complaints. The head dispatcher coordinates prisoner
16 extraditions, and coordinates the jail and juvenile detention
17 operations. The head dispatcher does initial screening of
18 applicants before the sheriff selects the persons to be
19 interviewed. The individual presently occupying the position has
20 been involved in formulating the Criminal Justice System (CJIN) and
21 National Crime Information Center (NCIC), coordinates the 911
22 emergency system and trains other dispatch personnel to use those
23 systems.

24 10. The head dispatcher has no authority to hire, suspend,
25 discharge, transfer, promote or discipline employees. The head
26 dispatcher may recommend such action. However, the sheriff has the
27 final authority to act on the situation and decide whether or not
28 to accept the recommendation. The head dispatcher can perform

1 minor corrective interviews but only with the sheriff's approval on
2 a case by case basis. If the head dispatcher believes disciplinary
3 action should be taken, he relays the problem to the sheriff. The
4 sheriff determines the discipline and authorizes the head
5 dispatcher to notify the individuals of the measures to be taken.

6 **V. CONCLUSIONS OF LAW**

7 The Board of Personnel Appeals has jurisdiction in this matter
8 pursuant to Section 39-3-202, MCA. Billings, Montana vs.
9 Firefighters Local 529, 113 LRRM 3324, 651 P.2d 627, Montana
10 Supreme Court 1982.

11 The Montana Supreme Court has approved the practice of the
12 Board of Personnel Appeals in using federal court and NLRB
13 precedents as guidelines in interpreting the Public Employees
14 Collective Bargaining Act (the Act) as the state act is so similar
15 to the federal Labor Management Relations Act (LMRA). State
16 Department of Highways vs. Public Employees Craft Council, 165
17 Mont. 349, 529 P.2d 785 (1984), 87 LRRM 2101; AFSCME Local 2390 vs.
18 City of Billings, 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753 (1976);
19 State ex rel. Board of Personnel Appeals vs. District Court, 195
20 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981), City of Great Falls
21 vs. Young (Young III), 2111 Mont. 13, 686 P.2d 185, 119 LRRM 2682
22 (1984).

23 Section 39-31-103(3) MCA (Collective Bargaining for Public
24 Employers) defines a "Supervisory employee" as:

25 ...means any individual having authority in
26 the interest of the Employer to hire,
27 transfer, suspend, layoff, recall, promote,
28 discharge, assign, reward, discipline other
employees, having responsibility to direct
them, to adjust their grievances, or
effectively to recommend such action, if in
connection with the foregoing exercise of such

1 authority is not of a merely routine or
2 clerical nature but requires the use of
3 independent judgement. Regarding the issue of
4 whether or not the undersheriff's position
5 should be included in the appropriate
6 bargaining unit:

7 Section 39-31-103(4) MCA "Management official" means a
8 representative of management having authority to act for the agency
9 on any matters relating to the implementation of agency policy.

10 Managerial employees are defined as those employees who,
11 "formulate and effectuate management policies by expressing and
12 making operative the decisions of their Employer." Palace Laundry
13 Dry Cleaning Corp., 75 NLRB 320, 21 LRRM 1039 (1947); NLRB vs. Bell
14 Aerospace Co., 416 U.S. 267, 85 LRRM 2945 (1974). See also Yeshiva
15 University, 444 U.S. 672, 103 LRRM 2526 (1980). The court in
16 Yeshiva, supra, said that "managerial employee must exercise
17 discretion within or even independently of established employee
18 policy and must be aligned with management."

19 Regarding the issue of whether or not the undersheriff's
20 position should be included in the appropriate bargaining unit:

21 The record shows that the duties and responsibilities of the
22 undersheriff's position is aligned with management. This is
23 supported by the fact that in the sheriff's absence, the
24 undersheriff is given authority to "manage" the entire department
25 operation. When the sheriff is unavailable, the undersheriff must
26 be on duty to assure that the department is being managed
27 appropriately pursuant to the county policies. The undersheriff is
28 empowered to exercise independent discretion and implementation of
public policy. The undersheriff has the responsibility to
formulate and effectuate management policies by making operative

1 the decisions of the Employer. Furthermore, due to the
2 responsibilities of the position, the salary for the undersheriff
3 is established by law at 95% of the sheriff's salary. Such is not
4 indicative of "hourly rank and file" employees that are generally
5 members of a bargaining unit. Therefore, it is found that the
6 undersheriff's position should be excluded from the appropriate
7 bargaining unit pursuant to section 39-3-103(4).

8 Regarding the issue of whether the positions of administrative
9 secretary and head dispatcher should be classified as "Supervisory
10 or Managerial employee" pursuant to Section 39-31-103(3)(4), MCA:

11 The positions of administrative secretary, and head dispatcher
12 do not perform as "Supervisory or Managerial employees" as defined
13 pursuant to the above laws. The positions primarily engage in
14 informal reporting functions to the sheriff for their respective
15 sub-departmental units. The individuals in those positions have
16 never been advised during the course of their employment that they
17 were in any designated supervisory role. When the administrative
18 secretary received a small pay increase above the other clerical
19 help, it was awarded for the added work assignments and not because
20 the person in the position is considered to be in a supervisory
21 capacity. The administrative secretary and head dispatcher are not
22 given the authority to hire, transfer, suspend, layoff, recall,
23 promote, discharge, assign, or reward employees. They are given
24 only limited authority to give a minor corrective interview and
25 only upon the sheriff's approval. The positions are not given
26 the authority to exercise the use of independent judgment in
27 carrying out job related matters that would have significant impact
28 concerning the department. The individuals occupying those

1 positions do not have the authority to formulate and effectuate
2 management policies in a bona fide managerial capacity. Rather,
3 they have to rely on the sheriff or undersheriff to remedy any
4 significant supervisory and management decisions. The
5 administrative secretary and head dispatcher exercise of authority
6 and assistance to the sheriff is primarily routine. It is more
7 tantamount to that of a lead worker role rather than authority
8 customarily vested to a "Supervisory or Managerial employee".
9 Under the circumstances, the positions designated as administrative
10 secretary and head dispatcher do not act in the capacity as a
11 "Supervisory or Managerial employee".

12 Regarding whether the position of administrative secretary
13 should be classified as a "confidential employee":

14 A "confidential employee," as defined in the Public Employees
15 Collective Bargaining Act, is not a statutory employee entitled to
16 the protection of the Act, Section 39-31-103(12), MCA.

17 "Confidential employee" means any person found
18 by the board to be a confidential labor
19 relations employee and any person employed in
20 the personnel division, department of
21 administration, who acts with discretionary
22 authority in the creation or revision of state
23 classifications specifications. Section 39-
24 31-103(12), MCA.

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

 The Court found the Board had limited the
"confidential employee" category to those
employees who assist and act in a confidential

1 capacity to persons who formulate, determine
2 and effectuate management policies in the
3 field of labor relations or who have regular
4 access to confidential information concerning
5 anticipated changes which may result from
6 collective bargaining, (citations omitted).
7 The Court concluded the Board's policy was
8 "rooted firmly in the Board's understanding of
9 the nature of the collective bargaining
10 practice and Congress' acceptance of that
11 practice," 454 U.S. at 190. Mukamal and
12 Grenig, "Collective Bargaining": The
13 Exclusion of "Confidential" and "Managerial"
14 Employees, 22 Duquesne Law Review 1, (1983).

15 In a separate opinion concurring in part and dissenting in
16 part, four justices agreed that an employee's possession of
17 proprietary or non-public business information" did not mandate
18 exclusion from a bargaining unit as "confidential."

19 The NLRB has repeatedly held that the mere handling of, or
20 access to, confidential business or even labor relations
21 information is insufficient to render a person an excluded
22 "confidential" employee, Ernst & Ernst Nat'l Warehouse, 228 NLRB
23 162, 100 LRRM (1979).

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

26 (T)he criteria used by the Board of Personnel
27 Appeals to determine whether one is a
28 confidential labor relations employee should
be those set forth in Siemens Corp., 224 NLRB
1579, 92 LRRM 1455 (1976). There the National
Labor Relations Board held that if the
employee acts in a confidential capacity,
during the normal course of duties, to a
person who is involved in formulating,
determining, and effectuating the Employer's
labor relations policy, he or she should be
excluded from any appropriate unit. Lewis &
Clark County vs. 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

1 an employee as confidential. AFSCME & Havre
2 School District #16-A, UD 24-79 (1980).

3 On one hand the employee or position occupied
4 by the employee must act, or have the
5 responsibility of acting, in a confidential
6 capacity...(on the) other hand the superior
7 must be involved in labor relations to the
8 degree suggested previously...Confidential
9 exclusions...should be construed
10 narrowly...(They) should not apply unless the
11 superior has significant involvement in
12 formulating...and then only if the employee's
13 primary duty is to assist such superior. MPEA
14 & Yellowstone County School District No. 2, UD
15 7-80 (1981).

16 The duties and responsibilities of the administrative
17 secretarial position is not involved in the collective bargaining
18 process on behalf of the Employer. The fact the administrative
19 secretary has access to information in the personnel files, due to
20 the nature of the positions office duties, is not sufficient in
21 itself to exclude the position from the appropriate bargaining unit
22 as a "Confidential employee". Information handled by the
23 administrative secretary would be sterile as it relates to
24 confidential business or labor relations. Therefore, she is not
25 classified as a "confidential employee" pursuant to Section 39-3-
26 103(12).
27
28

1 **VI. RECOMMENDED ORDER**

2 The position of undersheriff shall be excluded from the
3 appropriate bargaining unit. The positions of administrative
4 secretary and head dispatcher shall be included in the appropriate
5 bargaining unit.

6 Entered and dated this 12th day of February, 1993.

7 BOARD OF PERSONNEL APPEALS

8
9 Michael T. Furlong
10 Michael T. Furlong
Hearing Examiner

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

16 * * * * *

17 **CERTIFICATE OF MAILING**

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

22 Robert Slomski
23 Sanders County Attorney
24 P. O. Box 519
25 Thompson Falls, MT 59873

26 Jack Culter
27 Business Representative
28 Teamsters Union Local No. 2
P. O. Box 8144
Missoula, MT 59807

DATED this 12th day of February, 1993.

Christine A. Roland

DA199.4