

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

IN THE MATTER OF UNIT DETERMINATION NO. 5-98:

MALTA CLASSIFIED EDUCATION	)	
ASSOCIATION, MEA/NEA,	)	
	)	
Petitioner,	)	<b>FINDINGS OF FACT;</b>
	)	<b>CONCLUSIONS OF LAW;</b>
MALTA PUBLIC SCHOOL DISTRICTS	)	<b>AND RECOMMENDED ORDER</b>
NO. 14 AND A,	)	
	)	
Respondent.	)	

\* \* \* \* \*

**I. INTRODUCTION**

Malta Classified Education Association, MEA/NEA, Petitioner, filed a petition for unit determination and election with this Board on September 9, 1997 for certain employees of the Malta Public School Districts No. 14 and A, Respondent. The Respondent filed a counter petition with this Board which disagreed with the proposed bargaining unit and proposed a different unit as appropriate.

Joseph V. Maronick, Hearing Officer, conducted a hearing in Malta, Montana, on February 19, 1998. Superintendent William Parker, Business Manager Greg Boos, Elementary Principal Richard Stuhlmacher, High School Principal Kelly Taylor, Chairman of the Board of Trustees Orvin Solberg, Ed Dusek, Becky Green, Gisela Miller, Lois Waters, Jean Grensten, Sheila Askins, Kelly Sjostrom, John Low, Marion Piegneaux, Brian Green, George Knutsen, and Karen Tollefson were present, duly sworn and offered testimony. The Hearing Officer admitted Respondent Exhibits A through G, Petitioner Exhibits 1 and 2 and 4 through 13. Exhibit 3 was withdrawn. The Hearing Officer took administrative notice

1 of the unit determination petition, Respondent's counter  
2 petition, the order transferring the matter to hearing, the  
3 Notice of Hearing Officer Assignment, and subsequent process and  
4 notice documents. Post-hearing memorandum of argument were  
5 concurrently submitted March 16, 1998. The Petitioners were  
6 represented by Counsel Richard Larson. The Respondent was  
7 represented by Arlyn Plowman.

8 **II. ISSUE**

9 Should the following positions be included in the bargaining  
10 unit: (1) the part-time Zortman Custodian working 50 miles away  
11 and less than ten hours per week; (2) the Head Cook; (3) the Head  
12 Custodians at the elementary and high schools; (4) the Title I  
13 Coordinator; and (5) the Deaf Education Sign Language  
14 Interpreter?

15 **III. FINDINGS OF FACT**

16 1. The Custodian at Zortman, Montana, which is 50 miles  
17 from Malta, works six hours per week. She does not receive the  
18 same insurance benefits as the bargaining unit members who work  
19 more than ten hours per week. She performs the same work duties  
20 as other Respondent custodians. Her job description is the same  
21 as other Respondent Custodians (Exhibit 2). Her chain of command  
22 ends with the Respondent Superintendent as her highest level  
23 supervisor.

24 2. The Head Cook works in food preparation with other  
25 kitchen staff. She is paid slightly more than other kitchen  
26 staff. She assists in evaluating applicants for kitchen staff  
27 positions. She recommends hiring additional staff, if needed.  
28 The ultimate hiring decision for any position rests with the

1 school board. She has authority to independently purchase food  
2 menu items needed. She was evaluated as "very good independent  
3 work" for the independence factor on her performance appraisal  
4 (Exhibit 4, #6). The Head Custodians supervise "all other  
5 maintenance people" (Head Custodian Exhibit 13). The Head  
6 Custodians help in selection, assignment, scheduling, and  
7 training of custodial staff. Head Custodian, John Low is not  
8 paid more than all the staff members he supervises (Low  
9 Testimony, Hearing Tape 1, Foot 6710). One staff member who has  
10 been employed nine years longer than he has is paid more (Low  
11 Testimony, Hearing Tape 2, Foot 793). He does not regularly  
12 evaluate subordinates as indicated in his job description  
13 (Exhibit 13, #5).

14 3. The Head Custodians generally perform the same work  
15 duties as subordinate staff. His work duties are not routine,  
16 however, like subordinate staff. He is responsible to direct  
17 other custodians. Because of the nature of the work and the  
18 experience of other staff, the Head Custodians rarely need to  
19 direct subordinate staff (Low Testimony, Hearing Tape 1, Foot  
20 6720). When the Head Custodian is on vacation or absent, he asks  
21 a substitute or subordinate to perform some of his work  
22 responsibilities. These include activities such as unlocking the  
23 building in the morning (Low Testimony, Hearing Tape 2, Foot  
24 250).

25 4. When additional staff is needed, the Head Custodian at  
26 the high school consults with the school principal, Kelly Taylor,  
27 regarding that need. Taylor makes the hiring decision (Low  
28 Testimony, Hearing Tape 2, Foot 560). In one instance, when the

1 Head Custodian did not approve a subordinate's work performance,  
2 he discussed the problem with Taylor, who authorized dismissal of  
3 that staff member. Subordinate staff has to request permission  
4 to test products with the Head Custodians, who have authority to  
5 authorize that type of test use (Piegneaux Testimony, Hearing  
6 Tape 2, Foot 2400). In the present case, both the Custodian in  
7 Zortman and the Deaf Education Instructor wish to be included in  
8 the bargaining unit.

9 5. The superintendent, William Parker, has delegated  
10 hiring authority in emergency situations to the Head Custodians  
11 (Parker Testimony, Hearing Tape 2, Foot 6045). This authority  
12 was shared with the building principal when exercised (Parker  
13 Testimony, Hearing Tape 2, Foot 6160). Parker has asked  
14 supervisory staff for input regarding recall of subordinate staff  
15 and hiring decisions. This input is, in those instances, shared  
16 with the respective building principal (Parker Testimony, Hearing  
17 Tape 2, Foot 6218). A Head Custodian can effectively recommend  
18 that a candidate be hired, assigned, transferred, laid off, or  
19 recalled (Parker Testimony, Hearing Tape 2, Foot 6329-6550).

20 6. The Title I Coordinator at the elementary school works  
21 with at-risk students who need help because of low grades or  
22 learning disabilities. She works in very close proximity with  
23 other tutors and unit members (Tollefson Testimony, Hearing Tape  
24 2, Foot 4380). She supervises and works with up to 10  
25 subordinate staff. Her supervisor is Richard Stuhlmacher, the  
26 elementary school principal. She is responsible to provide a  
27 well organized Title I program and environment in which teachers  
28 and students can use available resources. Her work activities

1 include involving parents and teachers in planning, implementing  
2 and evaluating the Title I program (Exhibit 1).

3 7. The Deaf Education Sign Instructor is the only person  
4 in the school district capable of the specific work duties  
5 assigned to that position. She is paid a higher wage than other  
6 staff members because of the uniqueness of her work duties,  
7 required education, and special qualifications needed (Parker  
8 Testimony, Hearing Tape 3, Foot 1320). She is supervised by her  
9 building principal and the school superintendent. She works with  
10 many members of the school district as she accompanies and  
11 interprets for a deaf student she assists. She is a  
12 participating member of the interpretative educational program  
13 team with other teachers and staff. She receives medical  
14 insurance benefits from the school district.

#### 15 IV. DISCUSSION

16 1. The two determinative questions raised in this case  
17 are: (1) Are the Head Cook, Head Custodians, and Title I  
18 Coordinator supervisory employees and therefore statutorily  
19 excluded from the bargaining unit, and (2) Does the Custodian  
20 working in Zortman, the Title I Coordinator, and the Deaf  
21 Education Instructor have a community of interest with other unit  
22 members?

23 2. Under § 39-31-103(11), MCA, "supervisory employee" is  
24 defined as follows:

25 Supervisory employee" means any individual  
26 having authority in the interest of the  
27 employer to hire, transfer, suspend, lay off,  
28 recall, promote, 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

1           foregoing the exercise of such authority is  
2           not of a merely routine or clerical nature  
3           but requires the use of independent judgment.

3           3.     In addition to the areas of authority exercised as  
4 identified in § 39-31-103(11), MCA, the Board of Personnel  
5 Appeals has identified some secondary tests for use in  
6 determining whether a position is supervisory. The secondary  
7 tests as identified in UD 6-88 are as follows:

8           the employee being designated a supervisor;  
9           the fact that he is regarded by himself and  
10          others as a supervisor; the exercise of  
11          privileges accorded only to supervisors;  
12          attendance at instructional sessions or  
13          meetings held for supervisory personnel;  
14          responsibility for a shift or phases or  
15          operation; authority to interpret or transmit  
16          employer's instructions to other employees;  
17          responsibility for inspecting the work of  
18          others; instruction of other employees;  
19          authority to grant or deny leave of absence  
20          to others; responsibility for reporting rule  
21          infractions; keeping of time records on other  
22          employees; receipt of substantially greater  
23          pay than other employees, not based solely on  
24          skill; and failure to receive overtime. . . .

17          4.     The Head Cook, Head Custodian, and Title I Coordinator,  
18 in the interest of the Respondent, effectively recommend hiring,  
19 transfer, layoff, discipline, and grievance adjustment, which is  
20 not merely routine in nature. They also have the responsibility  
21 to direct subordinate staff and do so on a regular basis. They  
22 have a supervisory title and regularly exercise independent  
23 judgment in directing subordinate staff. They receive a higher  
24 wage than do subordinate staff with less time in grade. They  
25 appraise subordinate staff and their recommended appraisals in  
26 most cases simply transferred by the school principal or the  
27 superintendent to the appraisal form of the subordinate staff  
28 member.

1           5.     The Zortman Custodian and the Deaf Education Instructor  
2 are paid based upon the same wage time and scale step as are  
3 other staff members. The Deaf Education Instructor has a higher  
4 wage scale but wage scale administration is no different from  
5 other unit members. The supervisory chain of command is the same  
6 for these two positions as other unit members. Their unit  
7 functions are integrated with the work functions of other unit  
8 members. The work functions of the entire school work support  
9 staff is by the nature of school classroom teaching and  
10 scheduling regulated and integrated with the various work  
11 activities of other unit members. These include support and  
12 coordination with both classified and unclassified staff.

13           6.     ARM 24.26.611 requires the Board to consider community  
14 of interest, wages, hours, fringe benefits and other working  
15 conditions, history of collective bargaining, common supervision,  
16 common personnel policies, integration of work functions, and the  
17 desires of employees in determining the composition of a  
18 bargaining unit.

19           7.     The information presented shows a community of  
20 interest, fringe benefits, common supervision, common personnel  
21 policies, integration of work functions, and interchange among  
22 employees affected or a commonality of other working conditions  
23 with the Zortman Custodian and the Deaf Education Instructor.  
24 Community of interest has been and continues to be a fundamental  
25 factor in determining the appropriateness of a bargaining unit.  
26 The Zortman Custodian and the Deaf Education Instructor positions  
27 have common supervision and common personnel policies with other  
28 unit members. They also have the same or integrated unit member

1 work functions. Such commonality leads to the natural conclusion  
2 that these two positions are properly included in the bargaining  
3 unit.

4 **V. CONCLUSIONS OF LAW**

5 1. The Board of Personnel Appeals has jurisdiction in this  
6 matter pursuant to § 39-31-202, MCA. Billings, Montana v. Fire  
7 Fighters Local No. 521, 113 LRRM 3324, 651 P.2d 627, 39 St. Rep.  
8 1844 (1982).

9 2. The totality of all of the factors as identified in the  
10 law and by the Board lead to the conclusion that the Head  
11 Custodians, the Head Cook, and the Title I Coordinator are  
12 supervisors and properly excluded from the unit. They use  
13 independent judgment in the interest of the employer and direct  
14 subordinate staff. This direction is not routine or clerical in  
15 nature.

16 3. The Zortman Custodian and the Deaf Education Instructor  
17 have a community of interest with other unit members and must be  
18 included in the bargaining unit.

19 **VI. RECOMMENDED ORDER**

20 It is ordered that an election by secret ballot shall be  
21 conducted as early as possible, in accordance with the rules and  
22 regulations of the Board of Personnel Appeals, among the  
23 employees in the bargaining unit in which the Head Cook, Head  
24 Custodians, and Title I Coordinator are supervisory staff and  
25 excluded and the Zortman Custodian and the Deaf Education  
26 Instructor are included in the bargaining unit.

1 DATED this 20<sup>th</sup> day of April, 1998.

2 BOARD OF PERSONNEL APPEALS

3  
4 By: Joseph V. Maronick  
5 JOSEPH V. MARONICK  
6 Hearing Officer

7 NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER  
8 shall become the Final Order of this Board unless written  
9 exceptions are postmarked no later than May 13, 1998.  
10 This time period includes the 20 days provided for in ARM  
11 24.26.215, and the additional 3 days mandated by Rule 6(e),  
12 M.R.Civ.P., as service of this Order is by mail.

13 The notice of appeal shall consist of a written appeal of the  
14 decision of the hearing officer which sets forth the specific  
15 errors of the hearing officer and the issues to be raised on  
16 appeal. Notice of appeal must be mailed to:

17 Board of Personnel Appeals  
18 Department of Labor and Industry  
19 P.O. Box 6518  
20 Helena, MT 59604

21 \* \* \* \* \*

22 CERTIFICATE OF MAILING

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

28 Richard Larson  
Attorney at Law  
P.O. Box 1152  
Helena, MT 59624-1152

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

DATED this 20<sup>th</sup> day of April, 1998.

Jandra K. Page