

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 1-2017:

MISSOULA EDUCATION	)	Case No. 398-2017
ASSOCIATION, MEA-MFT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	FINDINGS OF FACT;
	)	CONCLUSIONS OF LAW; AND
MISSOULA COUNTY PUBLIC	)	RECOMMENDED ORDER
SCHOOLS, ELEMENTARY AND	)	
HIGH SCHOOL DISTRICT NO. 1,	)	
MISSOULA, MONTANA,	)	
	)	
Respondent.	)	

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I. INTRODUCTION

On September 6, 2016, the Missoula Education Association (Association) brought a Unit Clarification Petition (Petition) asking for inclusion of registered nurses employed by the Missoula County Public Schools, Elementary and High School District No. 1 (District) into the Association’s existing bargaining unit.

The Association made this request based upon its allegations that the registered nurses wanted to be included in the Association’s bargaining unit; the bargaining unit would include only professionals, and the current members of the bargaining unit included full-time teachers and specialists such as speech language pathologists, physical therapists, occupational therapists, school counselors, and school psychologists; and the registered nurses shared a community of interest with the current members of the Association’s bargaining unit.

The District opposed the Petition primarily on the basis that the registered nurses could not support their claim of a shared community of interest with the existing bargaining unit membership. More specifically, the District asserted the registered nurses could not establish a similarity of job functions with existing membership, nor could they establish that, to the extent they share similar job

functions, those functions were not merely incidental to their primary work or otherwise incidental.

Hearing Officer David Scrimm held the contested case hearing in the matter on May 30, 2017, in a conference room at the Missoula County Public Schools Business Building, Missoula, Montana. The law offices of Karl J. Englund, P.C. represented the Association. Kaleva Law Office represented the District. Association Exhibits 1 through 4 and District Exhibits 5 through 7 were admitted into evidence by stipulation.

Melanie Charlson, Aloni George, Linda Simon, and David Rott testified under oath.

The Office of Administrative Hearings received the last brief from the parties on July 14, 2017. The case was deemed submitted. Based on the evidence, arguments, and authorities, the hearing officer makes the following findings of fact, conclusions of law, and recommended order.

## II. ISSUE

The issue in this case is whether registered nurses employed by the District should be included in the existing bargaining unit represented by the Association, pursuant to Mont. Code Ann. § 39-31-202.

## III. FINDINGS OF FACT

1. Petitioner Missoula Education Association (Association) is a labor organization as that term is utilized under Title 39, Chapter 31 of the Montana Code Annotated.
2. Respondent Missoula County Public Schools (District) is a public employer as that term is utilized under Title 39, Chapter 31 of the Montana Code Annotated.
3. The District currently employs at least five registered nurses.
4. Until December 15, 2016, the registered nurses were in a bargaining unit represented by the Professional Specialists, a small unaffiliated bargaining unit certified in September 2012, Unit Determination No. 1-2013, and consisting of approximately six other employees whose primary work functions are administrative.

5. The registered nurses desire to be part of the bargaining unit represented by the Association.

6. The Professional Specialists have disclaimed interest in representing the registered nurses during the course of the proceedings on this Petition. Accordingly, the registered nurses employed by the District are not presently represented for collective bargaining purposes.

7. The parties are not engaged in negotiations.

8. The District and the Association have been parties to a series of collective bargaining agreements, the latest of which is effective from July 1, 2016 to June 30, 2019 (the “current CBA”).

9. The parties are neither engaged in negotiations nor within 120 days of the expiration date of the current CBA.

10. A unit clarification petition has not been filed with the Board of Personnel Appeals (BOPA) concerning substantially the same unit within 12 months prior to the filing of the Petition at issue.

11. No election has been held in this bargaining unit within the past 12 months.

12. The existing bargaining unit, in which the registered nurses wish to become a part, is described in the current CBA under the heading of “Appropriate Unit.” It is described as follows:

. . . all teachers of the District certified in Class I, II, IV, V, VI, or VII as provided in Montana Code Annotated hereafter noted as M.C.A. and whose positions call for or require such certification and/or license, or those positions that have heretofore been included in the appropriate unit. . . .

13. The following employees are excluded from the unit under contract: substitute teachers who teach in the same positions less than thirty-five (35) consecutive days; the superintendent and assistant superintendent(s); principals and assistant principals; supervisors; and all other employees.

14. As used in the current CBA, the term “teacher” refers to “all employees in the appropriate unit. . . .”

15. In addition to teachers, the positions that have traditionally been included in the unit include speech language pathologists, physical therapists, occupational therapists, school counselors, and school psychologists.

16. There are approximately 700 employees in the bargaining unit.

17. Registered nurses employed by the District have a job description that, in general terms, accurately describes some of their duties and responsibilities.

18. Registered nurses and the employees in the bargaining unit are all professionals.

19. Registered nurses work in the same buildings as the members of the bargaining unit. Each registered nurse is assigned to three buildings. Most of the members of the bargaining unit are assigned to a single building, with the exception of some positions such as instructional coaches and elementary school music teachers, who also work at multiple buildings.

20. Registered nurses receive the same insurance, are covered by the same retirement system, and are subject to the same personnel policies as the members of the bargaining unit.

21. Registered nurses work similar hours per day and the same days of the week as the members of the bargaining unit. The registered nurses' regular work hours are from 8:00 a.m. to 3:00 p.m. Bargaining unit employees working at elementary schools (i.e., kindergarten through fifth grade) work from 8:00 a.m. to 4:00 p.m. Bargaining unit employees working in the middle and high schools work from 7:30 a.m. to 3:30 p.m.

22. Registered nurses and members of the bargaining unit work during the school year and have summers off. At the beginning of each school year, teachers in the bargaining unit work two work-days prior to the start of classes, while the registered nurses report to work five work-days before the first day of classes. During the school year, registered nurses, like the members of the bargaining unit, do not work during student holidays (e.g., Christmas and spring break). Registered nurses, like the other members of the bargaining unit, end the work year on the last day of classes.

23. Teachers are covered by the statutes on teacher tenure, which provide that after a teacher has been offered and has accepted a fourth consecutive contract, the

teacher has permanent employment status and cannot be terminated without good cause, pursuant to section 20-4-203, MCA.

24. The speech language pathologists, physical therapists, and occupational therapists in the bargaining unit are not covered by the teacher tenure statutes (as they are excluded from the definition of teachers pursuant to section 20-1-101(29), MCA).

25. Registered nurses are not employed on a year-to-year basis pursuant to annual contracts. As such, after completing a probationary period, they have permanent employment status and cannot be terminated without good cause pursuant to section 39-2-904(b), MCA, and are not presently excluded from coverage under the Wrongful Discharge from Employment Act pursuant to section 39-2-912(2), MCA, because they are not members of a bargaining unit.

26. Registered nurses, like the speech language pathologists, physical therapists, and occupational therapists in the bargaining unit, but unlike the teachers, are not excluded from the sick and vacation leave statutes contained in Title 2, Chapter 18, Part 6 of the MCA (which excludes "schoolteachers" from the statutes governing sick and vacation leaves for public employees pursuant to section 2-18-601(6), MCA).

27. Under Section 2-18-618, MCA, a full-time registered nurse is entitled to 12 days of sick leave per year (part-time employees are entitled to pro-rata benefits). Under the current collective bargaining agreement, members of the bargaining unit employed full time receive a similar benefit of 12 days of sick leave per year.

28. Under sections 2-18-611 & -612, MCA, registered nurses are entitled to vacation leave, the amount of which is based on years of service. Teachers do not receive "vacation" leave, but under the current contract, are entitled to two days of "personal leave" per year, up to a maximum accumulation of six days in any year.

29. Registered nurses, like the members of the bargaining unit, receive days off for professional education, provide professional services to students, and are licensed by the State of Montana.

30. In the 2016-17 school year, the registered nurses, who work in .875 full-time-equivalent positions, were paid between \$35,000.00 and \$36,000.00 per year. If the registered nurses worked full time, they would be paid between \$41,176.00 and \$42,352.00 per year. Full-time employees in the bargaining unit were paid between \$35,367.00 and \$73,779.00 per year.

31. Registered nurses employed by the District provide skilled nursing care and health-related services to students, some of which involves collaborative work with teachers and specialists.

32. Unlike teachers, registered nurses generally do not work in the classroom. On occasion, they do teach classes (in conjunction with members of the existing bargaining unit) in various classrooms related to health matters such as dental health, sexual development, and disease prevention.

33. Registered nurses are separately supervised by a nursing supervisor. Most of the teachers in the bargaining unit are supervised by building principals, although approximately 30 teachers who teach music and art are supervised and evaluated by the District's director of fine arts. The specialists employed by the District—such as the speech language pathologists, physical therapists, occupational therapists, and learning coaches—are also not supervised by building principals.

#### IV. DISCUSSION

The core principle of Montana's Collective Bargaining for Public Employees Act: to "encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees." Mont. Code Ann. § 39-31-101. In furtherance of this principle, Montana law gives public employees the right of self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. Mont. Code Ann. § 39-31-201. BOPA has the authority to decide what units of public employees are appropriate for collective bargaining purposes. Mont. Code Ann. § 39-31-202.

Cases decided under federal law may provide guidance. Section 9(b) of the National Labor Relations Act gives the National Labor Relations Board (NLRB) comparable authority to determine appropriate bargaining units. The Montana Supreme Court and BOPA follow federal court and NLRB precedent to interpret the Montana Act. *City of Great Falls v. Young*, 211 Mont. 13, 686 P.2d 185 (1984); *Teamsters Local 45 v. State ex rel. BOPA*, 195 Mont. 272, 635 P.2d 1310 (1981); *State ex rel. Bd. of Pers. Appeals v. Dist. Court*, 183 Mont. 223, 598 P.2d 1117 (1979).

The Board of Personnel Appeals has the authority to decide what units of public employees are appropriate for collective bargaining purposes. Mont. Code Ann. § 39-31-202. Factors involved in such a decision may include community of interest, wage, hours, fringe benefits, 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 the employees involved, and their preferences regarding being in the unit. Mont. Code Ann. § 39-31-202(1); Admin. R. Mont. 24.26.611.

Several factors can be involved in deciding what constitutes an appropriate bargaining unit. Factors considered include the following:

- (a) community of interest;
- (b) wages;
- (c) hours;
- (d) fringe benefits and other working conditions;
- (e) the history of collective bargaining;
- (f) common supervision;
- (g) common personnel policies;
- (h) extent of integration of work functions and interchange among employees affected; and,
- (i) desires of the employees.

Admin. R. Mont. 24.26.611. In this case, the District does not strictly oppose the registered nurses' involvement in a bargaining unit of some kind, and acknowledges that the registered nurses have expressed a desire to become part of the existing unit. Rather, the primary dispute concerns whether there is a sufficient community of interest between the Association's existing bargaining unit members and the registered nurses, which is a critical consideration in unit determinations.

The community of interest standard is applied to ensure that the terms and conditions of employment of the employees in a proposed bargaining unit are not "too varied for them to be grouped together in the same unit." *Speciality Healthcare*, 357 NLRB 934, 937 (2011). In determining whether a community of interest exists, the focus is on factors such as mutuality of interests in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; functional integration; extent of union organization; bargaining history; and employee choice. See *Ore-Ida Foods, Inc.*, 313 NLRB 1016, 1019 (1994), *enfd. mem.* 66 F.3d 328 (7th Cir. 1995). While several factors are considered, there are no *per se* rules, and no one factor has controlling weight when examining the community of interest of the particular employees involved. *Airco, Inc.*, 273 NLRB 348 (1984). "There is no hard and fast definition or an inclusive or exclusive listing of the factors to consider [under the community-of-interest standard]." *Country Ford Trucks v. NLRB*, 229 F.3d 1184, 1190-91 (D.C. Cir. 2000).

## A. Community of Interest Factors

### 1. Common Personnel Policies, Work Hours, Leave Time, and Benefits

With regard to specific factors, the District concedes the existing unit and the registered nurses are subject to common personnel policies, enjoy the benefits of the same retirement program, and work similar hours given the nature of the District's operations. These factors, therefore, need not be further discussed except insofar as to note that, without disagreement, they all weigh in favor of inclusion of the registered nurses with the existing bargaining unit.

Although teachers are excluded from the sick and vacation leave statutes, registered nurses accrue vacation as public employees, as do the speech language pathologists, physical therapists, and occupational therapists in the existing bargaining unit. Given the mixed nature of the existing unit's membership, this factor leans toward neutral, but does not weigh against inclusion of the registered nurses.

### 2. Similarity of Wages

Although the District asserts that the registered nurses do not share similar wages, it does not explain its assertion, nor does it put forth evidence contradicting the facial similarity of wages between the registered nurses and the members of the existing bargaining unit. In the 2016-17 school year, the registered nurses, who work in .875 full-time-equivalent positions, were paid between \$35,000.00 and \$36,000.00 per year. If the registered nurses worked full time, they would be paid between \$41,176.00 and \$42,352.00 per year. Full-time employees in the bargaining unit were paid between \$35,367.00 and \$73,779.00 per year. Nothing in the record would suggest the registered nurses do not share a mutuality of interest in wages with the existing unit members.

Based upon the facial similarity of wages between the registered nurses and the members of the existing bargaining unit, this factor weighs in favor of the registered nurses' inclusion in the existing bargaining unit.

### 3. Common Working Conditions

Unlike teachers, registered nurses generally do not work in the classroom. This difference in working conditions already exists within the bargaining unit as speech language pathologists, physical therapists and occupational therapists are not based

out of a classroom. This factor neither weighs in favor of or against inclusion of the registered nurses in the existing bargaining unit.

#### 4. Common Supervision

Supervision among members of the existing bargaining unit is split. The majority of teachers in the bargaining unit are supervised by separate building principals. Art and music teachers, however, are supervised and evaluated by the District's director of fine arts. The specialists employed by the District—such as the speech language pathologists, physical therapists, occupational therapists, and learning coaches—are also not supervised by building principals. The registered nurses are separately supervised by a nursing supervisor, and are evaluated based upon different criteria from the existing unit members.

Overall, given the lack of common supervision among the members of the existing unit, the separate supervision of the registered nurses is a neutral factor in determining the appropriate bargaining unit.

#### 5. Bargaining History

The existing unit consists of approximately 700 District employees. Until December of 2016, the registered nurses were members of a bargaining unit represented by the Professional Specialists, an unaffiliated unit consisting of approximately six other employees. There is no indication in the record that the registered nurses were intentionally excluded from the Association's existing bargaining unit by the Association except by their own choice.<sup>1</sup> The Association's existing bargaining unit has historically included District employees who, like the registered nurses, were professionals but not teachers. Positions that have traditionally been part of the unit include speech language pathologists, physical therapists, occupational therapists, school counselors, and school psychologists.

A history of inclusion of related employees in a unit warrants a finding of accretion. See *Manitowoc Shipbuilding*, 191 NLRB 786, 787 (1971). The history of the existing bargaining unit's varied, professional membership therefore favors the registered nurses' inclusion.

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<sup>1</sup> This is not the case of an inappropriate accretion where the workers involved could have been included in the bargaining unit when it was initially established, but were omitted, and are not presently consenting. See *Kaiser Found. Hosp.*, 343 NLRB 57, 57 (2004).

## 6. Common Work Functions

The registered nurses and the members of the existing bargaining unit are all professionals. The work done by both the registered nurses and the members of the unit is primarily intellectual and not manual or physical work, and involves the consistent exercise of discretion and judgment in its performance. Registered nurses and members of the bargaining unit work together to provide health and educational services to students.

There are also differences in the primary job duties of registered nurses versus the primary job duties of teachers. While these duties can be complementary, there is very little overlap of primary duties. When compared with actual teachers, the registered nurses' teaching duties are limited, and the registered nurses tend to work with a limited group of students with medical concerns and employ significantly diverse clinical and professional experience to their duties. The same could be said, however, of teachers and other members of the existing bargaining unit, such as speech pathologists and physical therapists. When compared with other non-teacher members of the bargaining unit, the distinction in duties becomes less meaningful.

Regardless of the similarities and differences, the overlap of job functions between teachers and registered nurses is not determinative of community of interest in this case. Although job functions are a factor in determining whether a community of interest exists, the unit here is not described functionally. As a result, the District's focus on functionally described units is inappropriate. See *Archer Daniels Midland Co.*, 333 NLRB 673, 673 fn. 2, 675-676 (2001).

Here, the existing bargaining unit, or "appropriate unit" as it is referred to in the current CBA, is described as ". . . all teachers of the District certified in Class I, II, IV, V, VI, or VII as provided in Montana Code Annotated . . . and whose positions call for or require such certification and/or license, or those positions that have heretofore been included in the appropriate unit. . . ." The unit is not described or defined by the functions performed by teachers within the District. Rather, the primary delineation between existing bargaining unit members and non-members is via the certifications and/or licenses held by its members. See Mont. Code Ann. § 20-4-106 (Class I, II, IV, and V teachers (Class III administrative and supervisory licensees are excluded from the unit)); Admin. R. Mont. 10.57.435 (Class VI school counselors), 10.57.436 (Class VII American Indian language and culture specialists). Notwithstanding the licensing delineation, the parties have both stipulated that, in addition to school counselors (who would typically hold Class VI licenses), the existing unit has traditionally included speech language pathologists, physical therapists, occupational therapists, and school psychologists. It is apparent, then,

that while the licensing requirements assist in identifying the existing unit's members, they are not meant to imply exclusivity of membership to those particular license-holders, as several members of the bargaining unit are not licensed by the Office of Public Instruction.

Furthermore, although the term "teachers" is used in the current CBA, it is not used as an exclusive descriptor. To reiterate, the existing unit also includes several members who are not covered by the tenure statutes, and who are not "schoolteachers" as that term is used in Title 2 of the Montana codes.

Because the instant case does not involve a functionally-described unit, the fact that some employees in the existing bargaining unit share more work functions with the registered nurses while teachers share less neither raises a presumption that the registered nurses should be included in the existing unit nor shifts the burden to the District to establish that it is inappropriate to include the employees in an overall bargaining unit. See *Archer Daniels Midland Co.*, 333 NLRB at 675-676; see also *Kaiser Found. Hosp.*, 343 NLRB 57, 57 fn. 1 (2004). Overall, and in spite of the parties' focus on the similarities and differences between the job duties of the registered nurses and those of teachers, this factor is neutral.

## 7. Self-Determination

It is undisputed the nurses want to be a part of the existing bargaining unit comprised of all the other professional employees who work with students in the District. It is further undisputed that the existing bargaining unit wants the registered nurses to be included in the bargaining unit. Perhaps more than any other, this factor weighs heavily in favor of the Association. In making a determination regarding the appropriate bargaining unit, the primary guiding principle is that "[e]mployee self-determination in the collective bargaining process is perhaps the most fundamental promise." *Balt.Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001).

### B. Balancing the Factors

The registered nurses and members of the existing bargaining unit share common personnel policies, work hours, leave time, and benefits, and wages. Although supervision of the registered nurses is separate, supervision among the members is also split. Although the existing bargaining unit consists largely of teachers, it has also historically included non-teaching members, such as speech language pathologists, physical therapists, occupational therapists, school counselors, and school psychologists. Thus, although work functions between teachers and

registered nurses may be limited, this is not so true of the registered nurses and other members of the existing unit. Furthermore, because the existing unit is not functionally described, placing undo emphasis on common work functions is inappropriate. Finally, and most importantly, it is undisputed the registered nurses wish to join the existing bargaining unit and the Association is in agreement.

After balancing the foregoing non-exclusive factors, the factors favor the addition of the registered nurses into the Association's existing bargaining unit.

### C. Necessity for Registered Nurses to Vote on Their Inclusion

Pursuant to the Montana Code, “. . . the board or an agent of the board shall decide the unit appropriate for the purpose of collective bargaining. . . .” Mont. Code Ann. § 39-31-202(1). There is no requirement for an election. The Association nevertheless raises the question, though, as to whether the unit clarification process is the proper mechanism to accommodate the registered nurses' desire to be a part of the existing unit and the unit's desire to represent them. As the Association states, the NLRB has been cautious in its approach to placing employees in an existing unit where the employees have not consented to being a part of the existing unit. See, e.g., *Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969) (holding in an accretion case that the Board generally will not “compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference”). The Board has characterized this restrictive policy as requiring a showing of an “overwhelming” community of interest. See *E. I. Dupont de Nemours, Inc.*, 341 NLRB 607, 608 (2004) (finding against accretion in a case with no evidence of consent and lacking overwhelming community interest).

An election is not appropriate in this case, as the issues giving rise to the NLRB's caution are not present here where both sides have stipulated that the registered nurses unanimously want to be included in the existing bargaining unit. See *Balt. Sun Co.*, 257 F.3d at 428-29; Exhibit 5; Exhibit 7.

## V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this matter pursuant to Montana Code Annotated § 39-31-207.

2. The Missoula Education Association, MEA-MFT, has proved that the accretion of registered nurses employed by the District into the existing bargaining unit is appropriate.

VI. RECOMMENDED ORDER

Based on the foregoing, the hearing officer recommends that the Board of Personnel Appeals enter its order granting the request of the Missoula Education Association, MEA-MFT, for unit clarification and granting the Petition.

DATED this 25th day of October, 2017.

BOARD OF PERSONNEL APPEALS

By: /s/ DAVID SCRIMM  
DAVID SCRIMM  
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.222, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than November 17, 2017. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.222, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

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

Board of Personnel Appeals  
Department of Labor and Industry  
P.O. Box 201503  
Helena, MT 59620-1503