

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 6-2002:

City and County of Butte-Silver Bow, Montana,)	Case No. 780-2002
)	
Petitioner,)	ON REMAND;
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
Federation of Butte-Silver Bow Public Employees,)	AND RECOMMENDED ORDER
Public Employees, Local No. 4372, MEA-MFT,)	
AFT, AFL-CIO,)	
Respondent,)	

I. INTRODUCTION

On November 1, 2000, the City and County of Butte-Silver Bow, Montana ("BSB"), filed a petition to exclude the position of Administrative Budget/Control Technician (formerly the Budget/Control Clerk) within the BSB Law Enforcement Agency (LEA) clerical unit from the bargaining unit. BSB based the proposed exclusion on the confidential labor relations duties of the position.

The representative of the bargaining unit, Federation of Butte-Silver Bow Public Employees, Local No. 4372, MEA-MFT, AFT, AFL-CIO (the union), filed an answer to the petition on November 29, 2001, objecting to the exclusion on three bases: (1) the position as BSB now defined it was not confidential; (2) the position did not satisfy any statute or regulation justifying its exclusion from the bargaining unit; and (3) the position as BSB now defined it had duties that could properly be performed by a member of the bargaining unit.

On behalf of the Board of Personnel Appeals, Department of Labor and Industry Hearing Officer Terry Spear held a contested case hearing on May 8, 2002, in the Council of Commissioners' Chambers in Butte, Montana. Michael W. Clague, BSB deputy county attorney, was counsel for BSB. Sheriff John Walsh was BSB's designated representative attending the hearing. J. C. Weingartner, Attorney at Law, was counsel for the union. Deputy Clerk of District Court and union president Teri Fisher was the union's designated representative attending the hearing. The hearing officer excluded witnesses on the union's motion.

BSB Human Resources Division Director Tim Clark, Sheriff Walsh, BSB Administrative Budget/Control Technician Genita Bishop, BSB 911 Coordinator Kathy Lasky and Local No.

4372 President Teri Fisher testified. The hearing officer admitted Joint Exhibits 1-4 into the record.

After completion of post-hearing briefing, the hearing officer issued findings and conclusions and a proposed decision on July 5, 2002. The union filed exceptions. On October 29, 2002, the Board of Personnel Appeals remanded the matter to the hearing officer to reconsider the conclusions and proposed decision, specifically addressing the confidential employee standards established by the Board in *Flathead Valley Community College Classified Employees' Union, Local 4446, MFT, AFT, AFL-CIO v. Flathead Valley Community College*, Unit Clarification 1-2001 (Final Order May 15, 2002). The parties filed their last briefs on remand on December 4, 2002.

II. ISSUE

The issue is whether the position of Administrative Budget/Control Technician (formerly the Budget/Control Clerk) within the LEA's clerical unit should be excluded from the union's bargaining unit because the position is that of a confidential employee.

III. FINDINGS OF FACT

1. The union is an organization in which member employees participate and which exists for the primary purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, fringe benefits, or other conditions of employment. BSB is a political subdivision of the State of Montana.
2. BSB and the union entered into a collective bargaining agreement dated October 17, 2001, that excluded from the bargaining unit clerical employees who are confidential employees pursuant to Mont. Code Ann. § 39-31-103(3).
3. Sheriff John Walsh is the elected head of the LEA. He became sheriff in January 2001. He is the person responsible for formulating and effectuating labor relations policies for the LEA. He attends collective bargaining sessions with the various unions that represent employees under his supervision, including the union in this case. He relies upon Tim Clark, BSB's Human Resources Division Director or Personnel Director, to accomplish his goals in the bargaining sessions. Clark is BSB's chief negotiator with the unions representing its employees, including the union in this case. When a union reaches a contractual agreement with Clark on behalf of BSB, Clark presents the contract to the Council of Commissioners. The Council has final authority in approving or rejecting the negotiated contract. Sheriff Walsh provides input to Clark and to the Council of Commissioners on behalf of the LEA.
4. The union currently represents 64 employees who work in 19 separate units of BSB. Five members of the union work in the LEA clerical unit and are under the supervision and control of Walsh. The Sheriff has no supervisory control over the other 59 members of Local 4372.
5. Genita Bishop currently works in the position of Administrative Budget/Control Clerk in the BSB LEA's clerical unit. She is and has been a member of the union. She has held office within

the union and has been a member of the union's negotiating team for collective bargaining with BSB.

6. The Administrative Budget/Control Clerk is and has been the person most familiar with the Sheriff's Department's budget. Bishop, in that capacity, provided defined task information to the previous sheriff. The sheriff would ask for a specific answer to a specific question and she would provide the answer. She did not otherwise assist the previous sheriff in labor relations matters. She did not undertake any confidential labor relations work for the previous sheriff. She did not discuss with the previous sheriff possible proposals or tactics for future labor negotiations, nor did the previous sheriff share his thoughts about possible proposals or tactics.

7. Sheriff Walsh directed a revision to the job title and job description for Bishop, to reflect his reliance upon her for research and development of issues relative to labor relations matters and the Sheriff Department's budget. He now requires more input on these matters from Bishop than specific answers to his specific questions about budgeting. He asks her to research various means of allocation and use of the LEA budget. He includes her in discussions regarding possible approaches to funding issues and union wages, rates of pay, hours of employment, fringe benefits, or other conditions of employment that impact finances within the LEA. She participates in confidential meetings with the Sheriff and sometimes others where strategy and bargaining positions with the unions are discussed. The discussions at those meetings are to be confidential and not disclosed to the unions. As the Administrative Budget/Control Clerk, Bishop has access to information about possible changes in personal policy and labor relations under consideration by the Sheriff. She is aware of and sometimes involved in developing those possible changes both before and after they are proposed. None of this information is part of the existing budget itself, which is available to the public (including union members).

8. Since the revision of her job duties and title, Bishop has not become involved in any confidential meetings or work directly addressing the employment conditions or collective bargaining agreement of BSB with her union. The current collective bargaining agreement was reached before the revised job duties and title and the filing of the current petition, and that agreement is still operative. Soon, negotiations regarding that agreement will commence and Bishop, under the new job description, will become involved in confidential meetings or work directly addressing the employment conditions or collective bargaining agreement of BSB with her union.

9. Since the revision of her job duties and title, Bishop has provided confidential information to Sheriff Walsh regarding possible options in dealing with the union representing the police officers within LEA. Sheriff Walsh has also made Bishop privy to confidential information regarding strategies for those negotiations. Bishop has received requests to assist and participate in union strategy sessions regarding negotiations with BSB. She has declined to do so, fearing that such an act would be in conflict with her duties to the Sheriff.

10. The LEA clerical unit already has one non-union clerical employee, Carolyn Hooper, who works as the evidence technician. Sheriff Walsh believes she has a classification as a confidential employee, and the union declined BSB's offer to include that position in the bargaining unit on those grounds. Walsh is not sure of what Hooper does or why she has the classification, unless it

is because she handles personnel files for the LEA.⁽¹⁾ Sheriff Walsh has no current need of two confidential employees. Hooper has neither training nor experience in the confidential work Sheriff Walsh obtains from Bishop, nor in the budget and financial work Bishop also performs that is not confidential. There is no evidence that Hooper's current position is properly excluded from the bargaining unit as a confidential employee.

IV. DISCUSSION

BSB argues that Bishop's position should be excluded from the union's bargaining unit because the position is that of a confidential employee. The union argues that BSB failed to establish the requisite confidentiality and that any proof of prospective confidential employee status is insufficient to justify the exclusion.

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. The law authorizes the Board of Personnel Appeals to decide what units of public employees are appropriate for collective bargaining purposes. Mont. Code Ann. § 39-31-202. However, confidential employees of public employers are not public employees, by definition. Mont. Code Ann. § 39-31-103(9)(b)(v). The statutory definition of "confidential employee," includes a confidential labor relations employee, Mont. Code Ann. § 39-31-103(3):

(3) "Confidential employee" means any person found by the board to be a confidential labor relations employee and any person employed in the personnel division, department of administration, who acts with discretionary authority in the creation or revision of state classification specifications.

Because of this statutory exclusion, a confidential employee does not have the rights guaranteed by Mont. Code Ann. § 39-31-201 and is not appropriately included in a unit for collective bargaining purposes. The definition of statutory terms such as "public employer" and "public employee" in Montana's collective bargaining statutes must be construed broadly in doubtful situations. *Local 2390 v. City of Billings* (1976), 171 Mont. 20, 555 P.2d 507, 508 (citing and applying federal labor law⁽²⁾). The exclusions must be construed narrowly in order not to deprive employees of their rights to bargain collectively. *NLRB v. Hendricks County Rural Electric Membership Corp.* (1981), 454 U.S. 170, 180-81, **citing with approval** *Ford Motor Co.* (1946), 66 NLRB 1317, 1322. The burden is upon BSB to establish the requisite confidential status in order to justify the requested exclusion.

The original conclusions and proposed decision relied upon the Board's interpretation of federal labor cases. *Livingston School District Nos. 4 & 1 v. MEA/LCEA*, Unit Clarification 2-87 (September 2, 1988). The Board, on remand, directed that the hearing officer instead apply the confidential employee test it articulated in *Flathead Valley*, *supra*. The Board, on remand, directed the hearing officer only to reconsider conclusions of law and the proposed decision. The Board did not seek additional findings. The present findings, conclusions and proposed order therefore contain the same fact finding and some modifications of the discussion, conclusions and proposed decision.

The Board of Personnel Appeals has adopted the NLRB's test for determining confidential employee status. The Board views the NLRB's "labor nexus" test as only qualifying as confidential employees those employees who act in a confidential capacity to persons exercising managerial function in labor relations matters. *Hendricks County*, *op. cit.* at 188-89. In this case, unlike *Flathead*, Genita Bishop does act in a confidential capacity to Sheriff Walsh. *Cf.*, Findings 7 and 9.

Alternatively, the NLRB holds that employees who have regular access to confidential information concerning anticipated changes that may result from collective bargaining negotiations are deemed confidential employees. *Id.* The Board, like the NLRB, refrains from broader definitions of confidential employees because many employees have arguably confidential relationships with management and because expansive application of the exclusionary rule would deprive many employees of their right to bargain collectively. *See*, *NLRB v. Los Angeles Hospital*, 640 F.2d 1017 (9th Cir. 1981); *In the Matter of Unit Determination 7-80* (holding that the confidential employee exclusion "should be applied narrowly"). Bishop clearly has such access.

Mere access to or handling of confidential material, even when it is confidential labor-related material, does not by itself confer confidential status upon the employee handling or with access to the material. *See, e.g.*, *Greyhound Lines, Inc.* (1981), 257 NLRB 477, 480; *In the Matter of Unit Determination No. 24-79* (holding access to information that may be used during collective bargaining or responsibility for compiling labor relations information is not sufficient to confer confidential employee status). As noted above, Bishop has more than mere access to or handling of confidential material in her current position.

Access to confidential labor relations material such as minutes of management meetings, strike contingency plans, departmental strategic planning, and grievance responses is not sufficient to confer confidential status unless it can be shown that the employee at issue played some role in making the substantive decision being recorded. *Associated Day Care Services of Metropolitan Boston* (1984), 269 NLRB 178, 181; *Greyhound Lines* (1981), 257 NLRB 477, 480; *ITT Grinnell Corporation* (1977), 212 NLRB 734; *California Inspection Rating Bureau* (1974), 215 NLRB 780, 783. Employees who provide critiques of union bargaining proposals and personnel or statistical information upon which the employer's labor relations policy would be based, but who do not have access to the precise terms to which the employer would agree in a collective bargaining agreement, are not confidential employees. *Case Corp.* (1991), 304 NLRB 939. It is unclear whether Sheriff Walsh intends to provide Bishop with access to the precise terms to which BSB would agree in a collective bargaining agreement, however, the role she now plays for him will provide such access, whatever his express intentions.

Bishop has more than access to personnel and other confidential information. Her role does not extend to making substantive decisions regarding collective bargaining. She gathers information, she brainstorms (makes suggestions) to Sheriff Walsh about how a union proposal might be implemented. She may even draft proposals (although that was not proved), but she certainly would not prepare or decide BSB's final position. The evidence does show that she will have access, through Sheriff Walsh, to the precise terms to which BSB would agree in a collective bargaining agreement.

In *Hendricks County*, *op. cit.* (cited and applied in *Flathead Valley*), the Supreme Court upheld an NLRB decision finding that the personal secretary to the chief executive officer of a corporation was not a confidential secretary because she did not act in the requisite confidential capacity with respect to labor relations matters. 454 U.S. *at* 190-191. In a footnote explaining its rationale, the Court stated:

We do not suggest that personal secretaries to the chief executive officers of corporations will ordinarily not constitute confidential employees. *Hendricks* is an unusual case, inasmuch as Weatherman's tasks were "deliberately restricted so as to preclude her from" gaining access to confidential information concerning labor relations. . . . Whether *Hendricks* imposed such constraints on Weatherman out of specific distrust or merely a sense of caution, it is unlikely that Weatherman's position mirrored that of executive secretaries in general.

454 U.S. *at* 191, fn. 23 (citations omitted).

Sheriff Walsh's predecessor "deliberately restricted" her duties to deny her access to confidential information regarding labor relations, to use the words of *Hendricks County*. She was not previously a confidential employee. Sheriff Walsh expanded her duties to include those that, as explicitly stated in *Hendricks County*, ordinarily do make confidential employees. The union's argument that Bishop must have decision-making authority is not an accurate reading of *Flathead Valley*, where the employees at issue did not act in a confidential capacity to persons exercising managerial function in labor relations matters. Bishop does act in such a capacity to Sheriff Walsh, and thereby qualifies under the *Flathead Valley* test.

Walsh is neither the chief negotiator nor the ultimate decision-maker for BSB. He does provide input both to Clark, the chief negotiator, and to the Council of Commissioners, the ultimate decision-maker. In her current job, Bishop assists an official who formulates, determines and effectuates labor relations policies **and** she has access to confidential labor relations information in the normal course of her employment.

The basis for the exclusion must be actual present duties rather than prospective duties that might arise in the future. The test for determining whether a position is that of a confidential employee is whether the employee both is expected to act and does in fact act in a confidential capacity. *Siemans Corp.*, *op. cit.* *at* 1579. The Board and its hearing officers have stated this rule clearly:

Section 39-31-202 MCA requires that the Board of Personnel Appeals consider certain factors when determining an appropriate bargaining unit. In making that determination the Board of Personnel Appeals must apply those factors as they exist at the time of the petition. It would be impossible for the Board to consider and evaluate conditions that do not exist. To do so would require the Board to separate out ghosts or dreams of what may or may not ever exist. The Board has only considered prospective circumstances under very rare exceptions, UD 19-87, *Board of Regents and Montana Federation of Teachers, AFT, AFL-CIO et al*, August 23, 1988. Therefore, no consideration has been given to job duties or conditions that did not exist at the time of the hearing.

Montana Education Ass'n, NEA v. Missoula Cnty High School, Unit Determination 7-89, p. 38 (July 26, 1989).

Bishop's union, the respondent in this case, has not yet begun negotiations on a new or renewed collective bargaining agreement. Nonetheless, Bishop is already actually acting in a confidential capacity, with regard to collective bargaining matters related to the police union. BSB is not seeking the clarification solely on the basis of prospective confidential labor relations responsibilities.

Loss of bargaining unit work due to reassignment of unit members is a mandatory subject of collective bargaining. *Kohler Co.*, 273 NLRB 1580, 1583 (1985); *Fry Foods, Inc.*, 241 NLRB 76, 88, *enforced*, *NLRB v. Fry Foods, Inc.*, 609 F.2d 267 (6th Cir. 1979). Although the union apparently has not filed a claim of unfair labor practice against BSB for failing to bargain prior to the change, there is a more pertinent reason why the union did not prevail on this argument. On the record in this case, the union can maintain its present level of representative by inclusion of the evidence technician in the unit.⁽³⁾ Thus, no loss of bargaining unit work necessarily results from the clarification.

Although this is an exceptionally close case, BSB has established that the unit clarification it seeks is proper under the existing law. Therefore, it is entitled to the relief sought by its petition.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this petition. Mont. Code Ann. § 39-31-207. BSB is a public employer and the union is a labor organization. Mont. Code Ann. §§ 39-31-103(6) and (10).
2. The position of Administrative Budget/Control Technician (formerly the Budget/Control Clerk) within the BSB Law Enforcement Agency clerical unit (currently filled by Genita Bishop) is that of a confidential employee, pursuant to *Flathead Valley Community College Classified Employees' Union, Local 4446, MFT, AFT, AFL-CIO v. Flathead Valley Comm. Coll.*, Unit Clarification 1-2001 (May 15, 2002).
3. The position of Administrative Budget/Control Technician within the BSB Law Enforcement Agency clerical unit is no longer appropriately included in the bargaining unit, since confidential employees are excluded from coverage by the Public Employees Collective Bargaining Act. Mont. Code Ann. § 39-31-103(9)(b)(v).

VI. RECOMMENDED ORDER

The Board grants the request of the City and County of Butte-Silver Bow, Montana, that the bargaining unit represented by Federation of Butte-Silver Bow Public Employees, Local 4372, MEA-MFT, AFT, AFL-CIO, be modified to exclude the position of Administrative Budget/Control Technician (formerly the Budget/Control Clerk) within the BSB Law Enforcement Agency clerical unit.

DATED this 8th day of January, 2003.

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR

Terry Spear, Hearing Officer

Department of Labor and Industry

NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than January 31, 2003. This time period includes the 20 days provided for in ARM 24.26.215, 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 6518
Helena, MT 59624-6518

1. ¹ Hooper previously supervised the LEA clerical unit as a member of management, *see, Hooper v. BSB*, Human Rights Case No. 9809008607 (4/29/02). Circumstances that led to her exclusion from the bargaining unit as a confidential employee (if such an exclusion exists) rather than a member of management are not in the present record.

2. ² Federal law properly applies to this analysis. Section 9(b) of the National Labor Relations Act gives the National Labor Relations Board (NLRB) comparable authority to determine bargaining units to that of the Board. The Board and Montana courts apply federal court and NLRB precedent to interpret the Montana Act. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals* (1981), 195 Mont. 272, 635 P.2d 1310; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

3. ³ The union refusal to include Hooper makes sense only in light of *Hooper v. BSB, op. cit.*, in which the hostility between some of the LEA clerical employees and their then supervisor was clear. No alternative reason appears in this case for that refusal.