

A

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 8-2005:

MONTANA PUBLIC EMPLOYEES')
ASSOCIATION,)

Case No. 810-2005

Petitioner,)

**Findings of Fact, Conclusions of
Law and Proposed Order**

vs.)

CITY OF GREAT FALLS,)

Respondent.)

I. INTRODUCTION

On October 14, 2004, the Montana Public Employees Association (MPEA) filed a petition for unit clarification, asserting that two employee positions¹ with the City of Great Falls should be included within the bargaining unit MPEA represented. The positions were those of Sandy Ranieri, Legal Secretary, and Cheryl Lucas, Staff Accountant. MPEA contended that the positions were assigned bargaining unit work, had a community of interest with the unit and met no legal exclusions. The City contended that Ranieri did confidential collective bargaining work for the City Attorney and that Lucas was a professional exempt non-union employee.

On November 26, 2004, Vicki Knudsen, agent for the Board, transferred the case to the Hearings Bureau for a hearing, because there were questions of fact.

Hearing Officer Terry Spear held a contested case hearing on April 5, 2005. Carter N. Picotte represented MPEA. David V. Gliko, Great Falls City Attorney, represented the City. Richard Letang, Linda Williams, David Gliko², Wendy Zaremski, Sandra (Sandy) Ranieri, Coleen Balzarini and Cheryl Lucas testified. Exhibits 1 through 4 and A through F were admitted into evidence. The parties submitted the case, with oral argument, at the close of the evidence.

¹ The petition involved a third position that the parties agreed remained out of the unit.

² The parties stipulated that Gliko could testify as a witness and represent the City as its attorney, based upon the limited nature and scope of his testimony.

II. ISSUE

The issue here is whether a unit established for collective bargaining purposes is appropriate if the two positions are included. Mont. Code Ann. § 39-31-202.

III. FINDINGS OF FACT

1. The Montana Public Employees Association is a “labor organization” within the meaning of Mont. Code Ann. § 39-31-103(6).

2. The City of Great Falls is a “public employer” within the meaning of Mont. Code Ann. § 39-31-103(10).

3. MPEA became the representative for the bargaining unit in 1983. On February 7, 1984, the Board of Personnel Appeals issued its unit decision in the matter of Unit Determination No. 8-83.³ The decision provided that the appropriate bargaining unit was “all Great Falls city office employees, including library employees, all housing technicians, clerks, cashiers, secretaries, lab technicians, library clerks, dispatchers, clerical aids and clerk typists [with certain exceptions].”

4. The recognition clause of the current collective bargaining agreement between the parties (July 1, 2004 to June 30, 2006) defines the unit as consisting of a number of clerical, technical, and paraprofessional positions. The unit does not currently include professional positions requiring degrees. The agreement identifies the following positions within the unit (*see*, Exhibit 1, Article 1):

Account Clerk	Code Enforce. Tech.	Housing Inspector	Police Ev. Tech.
Account Clerk Sr.	Comm. Dev. Prog. Spec.	Housing Spec.	Police Inf. Tech.
Accounting Tech.	Comm. Dev. Tech.	I.T. Database Tech.	Police Inf. Tech., Sr.
Accounting Tech., Sr. ⁴	Comm. Serv. Officer	I.T. Ops. Tech.	Process Server
Adm. Secretary	Emerg. Serv. Dispatcher	I.T. Website Spec.	Process Server, Sr.
Adm. Secretary, Sr.	Emerg. Serv. Dispatcher, Sr.	Library Clerk	Utility Dispatcher
Adm. Sec./Lab Assist.	Events Spec.	Library Spec.	
Building Inspector I	Grant Assist.	Off. and Admin. Spec.	

5. The wages, hours and fringe benefits of the two positions at issue are consistent with those of some of the highest paid members of the bargaining unit.

³ The Board’s decisions are a matter of public record, not subject to any reasonable dispute.

⁴ The Board’s Final Order in Unit Clarification No. 17-2002, February 17, 2003, included the Accounting Technician, Senior, positions in the bargaining unit.

A. Classification Code 182, Legal Secretary, Sandy Ranieri

6. In 1983, at the inception of MPEA's representation of the unit, executive and administrative secretaries working for the City Manager provided legal secretarial work for the City Attorney. During Unit Determination No. 8-83, MPEA and the City agreed that Donna Heim, the administrative assistant to the City Manager who provided legal secretarial services to the City Attorney, would not be in the unit.

7. After the resolution of Unit Determination No. 8-83, the City Attorney became Heim's supervisor. Heim was the sole source of legal secretarial work in the City Attorney's office. She remained out of the bargaining unit.

8. Wendy Zaremski subsequently replaced Heim, as the "legal secretary" or "administrative assistant" of the City Attorney. In 1996, Zaremski's hours were reduced to 32 per week. She still held the only such position in the City Attorney's office in 1997, when MPEA and the City agreed to modify the bargaining unit to include an administrative assistant (not Zaremski), a computer programmer-operator, and an account clerk.⁵ MPEA and the City also agreed that Classification Code 181, Administrative Assistant, Zaremski's position, remained out of the bargaining unit.

9. In 1998, the City created a part-time position in the City Attorney's office and hired Sandy Ranieri for that job. Ranieri's primary duties were legal secretarial work to address the growing case load of the City Attorney's office. She also covered some of Zaremski's duties during her absences. There were and still are no members of the bargaining unit working in the office with Ranieri and Zaremski.

10. From 1984 to the present, the workload of the City Attorney's office has continuously increased. The workloads of Zaremski and (after her hire) Ranieri have likewise grown.

11. In 2000, Ranieri's position was changed from part-time to full-time "Legal Secretary." Zaremski's position was renamed "Administrative Assistant." Zaremski performed and still performs financial and personnel work, including confidential collective bargaining matters, which MPEA and the City had agreed (*see supra*, Finding No. 8) exempted her job from the unit. Ranieri performed and still performs legal secretarial work. The City assigns her Zaremski's work in Zaremski's absence.

⁵ The Board adopted the agreement. Stip. and Order of Dismissal, U.C. No. 8-97 (1/31/00).

12. Legal secretarial work involves observance of attorney-client privilege and attorney work-product confidentiality, as well as recognition of the requirements to protect confidential criminal justice information from improper disclosure. Ranieri's normal duties involve these kinds of confidentiality, as opposed to nondisclosure of confidential employer information pertaining to collective bargaining and collective bargaining issues.

13. Ranieri's performance of some but not all of Zaremski's duties requires nondisclosure of employer information pertaining to collective bargaining and collective bargaining issues.

14. As the volume of work in the City Attorney's office has continued to grow, both Zaremski and Ranieri have shared legal secretarial and administrative duties. Currently, Zaremski is absent between 8 and 12 normal business hours each week. Ranieri performs work involving confidential collective bargaining matters as assigned during those absences. There is no credible evidence that confidential collective bargaining work is so urgent that Ranieri must perform it before Zaremski's next scheduled workday. Although Ranieri has access to some confidential collective bargaining information regarding other employees, she need not use that information except when performing Zaremski's work.

15. Ranieri's legal secretarial duties do not differ in any substantive fashion from the clerical, technical, and paraprofessional duties of members of the bargaining unit. Therefore, she performs bargaining unit work. She does not work in the same office as other members of the bargaining unit and her supervisor, Gliko, does not supervise other members of the unit. Ranieri considers herself more of a professional than members of the bargaining unit. Despite her personal desire to remain out of the unit, there is a community of interest which her job shares with the members of the bargaining unit, due to the commonality of the work performed.

B. Classification Code 144, Staff Accountant, Cheryl Lucas

16. The City created the Staff Accountant position in 1989, as a professional position requiring an accounting degree. The first two employees to hold the position were, in turn, promoted to management positions, and are currently the Fiscal Services Director and Assistant Director.

17. In December 2003, the City reorganized its Fiscal Services Department, reclassifying Cheryl Lucas (hired in April 2002 as the Accounting Supervisor) as the Staff Accountant, with no supervisory responsibilities. Lucas provides professional

accounting services, as needed, to the City's collective bargaining team, but is not a member of that team.

18. Lucas shares a supervisor with a significant number of members of the bargaining unit in the Accounting Division, and operates under the same personnel policies as those members. Her work includes some integration of work functions and interchange with bargaining unit members. She is a professional, doing work which for the most part is not bargaining unit work. She desires to remain out of the bargaining unit. Although her work environment has several common features with members of the bargaining unit, a unit consisting entirely of clerical, technical and paraprofessional positions does not have a sufficient community of interest with a professional accounting position requiring a degree.

IV. DISCUSSION

A. Inclusion in the Bargaining Unit

Montana law governing collective bargaining for public employees provides:

In order to ensure employees the fullest freedom in exercising the rights guaranteed by this chapter, the [Board] shall decide the unit appropriate for collective bargaining and shall consider such factors as community of interest, wages, hours, fringe benefits, and 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 employees affected, and the desires of the employees.

Mont. Code Ann. § 39-31-202(1).

“Community of interest” subsumes the other factors—wages, hours, fringe benefits, and 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 employees affected, and the desires of the employees.

The Board's rule implementing Mont. Code Ann. § 39-31-202, provides:

A unit may consist of all of the employees of the employer or any department, division, bureau, section, or combination thereof if found to be appropriate by the board.

Admin. R. Mont. 24.26.610.

B. Ranieri's Position

MPEA is seeking inclusion of Ranieri's position within the bargaining unit and therefore has the burden of producing evidence that it should be included. MPEA proved that Ranieri's job duties consisted of legal secretarial duties comparable to the clerical, technical and paraprofessional duties of members of the bargaining unit. When a unit is defined by the type of work performed, as this unit is, and the union proves, as MPEA did, that the position is performing work included in the unit definition, a presumption of inclusion arises. Since MPEA met its initial burden with regard to Ranieri's legal secretary position, the City then had the burden of presenting evidence either that its "confidential employee" affirmative defense applied, or that Ranieri's job was otherwise sufficiently dissimilar from the unit employees so that inclusion is not appropriate.

Community of interest factors are relevant to efforts to rebut the presumption of inclusion in the unit. *Glendive Federation of Teachers v. Dawson Community College*, Unit Clarification No. 1-99 (2000). Ranieri's wages, hours and fringe benefits were consistent with some unit employees. Although she worked in a different office than other unit employees and had a different supervisor, this alone did not establish sufficient dissimilarity. Adding her personal desire to remain out of the unit, unrelated to any collective interests regarding representation, did not establish sufficient dissimilarity. There was a sufficient community of interest to place her within the unit.

Exclusionary defenses to defeat a *prima facie* case are affirmative defenses. The City's "confidential employee" defense is an affirmative defense, which it has the burden of proving.

Confidential employees are excluded from the definition of "public employee." Mont. Code Ann. § 39-31-103(9). Therefore, confidential employees are not appropriately included in a unit for collective bargaining purposes. A confidential employee is "any person found by the [Board of Personnel Appeals] to be a confidential labor relations employee" Mont. Code Ann. § 39-31-103(3) (emphasis added). The Board of Personnel Appeals has adopted this definition, but without any explication in its other rules. Admin. R. Mont. 24.26.601(1). The City maintains that Ranieri is a confidential labor relations employee.

"Public employee" is construed broadly. *Local 2390 v. Billings* (1976), 171 Mont. 20, 555 P.2d 507. Any exceptions from bargaining units are construed

narrowly. *NLRB v. Hendricks County Rural Elect. Memb. Corp.* (1981), 454 U.S. 170, 180-81, **citing with approval** *Ford Motor Co.* (1946), 66 NLRB 1317, 1322. Thus, the City's burden is a heavy one.

Section 9(b) of the National Labor Relations Act gives the National Labor Relations Board (NLRB) authority comparable within Montana to that of the Board of Personnel Appeals to determine appropriate bargaining units. The Montana Supreme Court and the Board of Personnel Appeals utilize federal labor law which can be instructive and often persuasive regarding the meaning of Montana's labor relations law, following appropriate federal court and NLRB precedent to interpret the Montana Act. *E.g.*, *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185; *Teamsters Loc. No. 45 v. State ex rel. Board of Pers. Appeals* (1981), 195 Mont. 272, 635 P.2d 1310; *State ex rel. Board of Pers. Appeals v. Dist. Crt.* (1979), 183 Mont. 223, 598 P.2d 1117.

Unlike the Montana statute, the National Labor Relations Act contains no statutory provision for excluding confidential employees from bargaining units. However, the NLRB has historically excluded confidential employees when a labor relations nexus is present, thereby providing useful case authority to interpret the Montana "confidential employee" statute.

Confidential labor relations employees include those "who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the area of labor relations." *B. F. Goodrich Co.* (1956), 115 NLRB 722, 724 (footnote omitted, emphasis deleted). "[T]he test is whether [the employee] is expected to, and in fact does, act in a confidential capacity in the normal course of her duties." *Siemens Corp.* (1976), 224 NLRB 1579. Such employees are excluded from units established for collective bargaining purposes. Confidential labor relations employees also include those who regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations. *Pullman Standard Division of Pullman, Inc.* (1974), 214 NLRB 762, 762-763. For fairly obvious reasons, these employees are likewise excluded from collective bargaining units.

In *Hendricks County, op. cit.*, the U. S. Supreme Court upheld the NLRB's practice of requiring that a "labor nexus" be present in order to exclude employees from collective bargaining units. This "labor nexus" exception must be construed narrowly in order not to deprive employees of their rights to bargain collectively. *Id.* This is consistent with Montana's statutory requirement that the exclusion applies to a confidential labor relations employee. Mont. Code Ann. § 39-31-103(3).

In UC 2-87, *Livingston Sch. Dists. No. 4 and 1 v. MEA/LCEA*, the Board adopted a hearing officer's decision which held that for an employee to be excluded, both tests must be met. In other words, to be a confidential labor relations employee, the employee must assist an official who formulates, determines, and effectuates labor relations policies and must have access to confidential labor relations information in the normal course of employment.

The City contends Ranieri is a confidential employee because she performs some of Zaremski's work during the 20% to 30% of the work week that Zaremski is absent. The parties agreed, in prior proceedings (*see* Findings 6 and 8, *supra*), that some of Zaremski's normal duties involve confidential labor relations information.

Ranieri, like Zaremski, works for Gliko, the City Attorney. Gliko sometimes advises the City's collective bargaining team, although he is not a member of that team. There is no substantial evidence in this case that Gliko formulates, determines, and effectuates management policies in the area of labor relations. Even if he does, Ranieri's normal job duties, by job description and practice, do not include acting in a confidential labor relations capacity.

The parties essentially agree that Zaremski's normal job duties include, in part, acting in a confidential labor relations capacity. There is no evidence that Ranieri must act in that same capacity when assigned Zaremski's work, because there is no evidence that any actual confidential labor relations work cannot wait for Zaremski's return. Thus, although the City Attorney occasionally elects to assign confidential labor relations work to Ranieri, that is outside her job description and not part of her normal job duties.

The amount of any confidential labor relations work assigned to Ranieri necessarily involves considerably less than 20% to 30% of her work, the amount of time Zaremski is absent. The effect of assigning to her this work and thereby keeping her out of the bargaining unit is to remove bargaining unit work that comprises 34 to 36 hours of work each week, if Ranieri actually spends 4 to 6 hours each week (half of 20% to 30% of her work week) doing work that the parties agreed previously justified Zaremski's exclusion from the unit. She may not spend that much time on Zaremski's "confidential labor relations" work and need not spend any time on it.

In addition, Ranieri may not actually have access to confidential labor relations information in the course of her work for Zaremski, even if that work includes access to anticipated changes which may result from collective bargaining negotiations. In Montana, the proposition that employer collective bargaining proposals constitute confidential labor relations information for public sector collective bargaining is

dubious at best. Clearly, the public has a constitutional right to know about the strategy sessions of public bodies regarding collective bargaining. *Great Falls Tribune Co., Inc. v. Great Falls Public Schools* (1992), 255 Mont. 125, 841 P.2d 502.

Even if Ranieri does have such access and the labor relations information is confidential, mere access to or handling of confidential labor relations material does not by itself confer confidential status upon the employee handling or having access to the material. *See, e.g., Greyhound Lines, Inc.* (1981), 257 NLRB 477, 480; *and 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); *see also, Livingston Sch. Districts, op. cit.* In this case, Ranieri's access to possibly confidential labor relations information for purposes that are neither articulated in her job description nor necessary for her to perform does not justify excluding her position from the unit.

C. Lucas' Position

For Lucas' position as well as Ranieri's, MPEA had the burden of showing that Lucas' job belonged within the unit. The City in turn presented evidence to rebut MPEA's evidence that there is a sufficient community of interest to include Lucas' position in the unit.

The City argued that Lucas' position does not belong in the unit because it is a professional "exempt" non-union position, lacking the requisite community of interest with the clerical, technical and paraprofessional positions in the bargaining unit. This was not an affirmative defense.

The fact that an employee is exempt from the minimum wage and overtime laws does not, by itself, mandate a finding that the position should not be part of a bargaining unit. The Collective Bargaining Act controls whether employees are properly part of a unit established for collective bargaining purposes. Unlike federal labor law, Montana law contains no restriction on including professional employees in units with other employees. Professional employees can be included in a unit with other employees if there is a sufficient community of interest. *Unit Clarification 4-79*.

While exemption from minimum wage and overtime law can be a factor to be considered as part of the overall community of interest, it is not alone an affirmative basis for exclusion. The sole question remains whether the professional employee has a sufficient community of interest with the other unit members for inclusion.

Lucas' wages, hours and fringe benefits do not place her outside of the unit's range of wages, hours and benefits. She shares supervision with and interacts with unit members. On the other hand, her degree, and the related analytical and administrative duties of her position are distinct from those of the unit members. From the evidence in the record, the unit is comprised of employees in clerical, technical, and para-professional positions. The staff accountant position is involved in higher level work of a professional character. Lucas has a high level of expertise and works at her own initiative, without day to day direction from her supervisor.

Lucas views her position, background, experience, and other qualities as significantly different from those of the employees in the unit. This is not by itself determinative, but her views are indicative of the absence of community of interest with the bargaining unit. The City successfully rebutted MPEA's evidence of a community of interest.

The MPEA failed to meet its burden of proof to establish that Lucas' position had a community of interest with the members of the unit. Lucas performs professional accounting tasks for the City, which are not bargaining unit work. The MPEA has failed to provide evidence of bargaining unit members who perform comparable work under comparable working conditions. Lucas' position should not be included in the bargaining unit.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction to decide this dispute. Mont. Code Ann. § 39-31-207.

2. The position of Legal Secretary (Classification Code 182), Sandy Ranieri, in the Legal Department of the City of Great Falls is not that of a confidential labor relations employee. Ranieri's position has a community of interest with the positions included in the bargaining unit and is properly included in the unit.

3. The position of Staff Accountant (Classification Code 144), Cheryl Lucas, in the City's Fiscal Services Department, Accounting Division, has no community of interest with the positions in the unit and is not properly included in the unit.

VI. RECOMMENDED ORDER

The position of Legal Secretary (Classification Code 182), Legal Department, City of Great Falls, is included in the MPEA collective bargaining unit for office employees of the City of Great Falls.

DATED this 25th day of May, 2005

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR
Terry Spear, Hearing Officer
Hearings Bureau
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 June 17, 2005. 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