

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 1-2001:

FLATHEAD VALLEY COMMUNITY COLLEGE)	Case No. 205-2001
CLASSIFIED EMPLOYEES' UNION,)	
LOCAL 4446, MFT, AFT, AFL-CIO,)	
)	
Petitioner,)	
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
)	AND RECOMMENDED ORDER
FLATHEAD VALLEY COMMUNITY COLLEGE)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

This unit clarification petition was filed by the Petitioner, Flathead Valley Community College Classified Employees' Union, in July 2000, seeking a determination that certain employees were properly included in a unit established for collective bargaining purposes. The Respondent, Flathead Valley Community College, responded with a motion to dismiss for lack of jurisdiction. Two pre-hearing conferences were held in November 2000 during which the parties agreed to attempt to resolve this matter through collective bargaining. Accordingly, the parties entered into a stipulation whereby the hearing was delayed until March 2001, the Respondent withdrew its motion to dismiss, and the parties agreed that if a hearing was held, it would involve the substantive issues of whether the positions at issue were to be included in the bargaining unit in accordance with the community of interest standard contained in § 39-31-202, MCA, or excluded from the unit pursuant to the statutory exclusions from the definition of "public employee" contained in § 39-31-103, MCA.

Initially, the Petitioner claimed that 15 positions should be included in the unit. At the hearing, the parties agreed that the Secretary, Tech Prep Program was to be included in the unit. That leaves 14 positions in dispute. The Respondent claims four of the positions are supervisors, two are confidential employees, and eight do not share a community of interest with the unit because they are professional or technical. The following chart lists the 14 positions in contention in this matter and the basis the employer claims for excluding each position:

<u>Job Title</u>	<u>Incumbent</u>	<u>Employer's Classification</u>
Bookstore Manager	Denise Shuman	Supervisor
Coordinator Admissions and Records	Marlene Stolz	Supervisor
Supervisor Custodial Services	Tom Dyer	Supervisor
Systems Analyst - Data Communications	Ron Sheets	Supervisor
Assistant I, Human Resources	Deb Barrett	Confidential
Assistant II, Human Resources	Sheila Applekamp	Confidential
Student Recruiter Admissions Representative	Vicky Lorenz	Professional
Coordinator Business Services	Colleen Baars	Professional
Coordinator Business and Purchasing Services	Lenore McGarry	Professional
Executive Assistant to Director of College Relations	Sue Dennis	Professional
Executive Assistant to Vice President and Dean of Instruction and Student Services	(Vacant)	Professional
Coordinator Lincoln County Campus Student Services	Diana Miller	Professional
Systems Analyst - Systems Operations	Rick Owens	Professional/Technical
Instructional Tutorial Assistant, Computer Lab	Renee Lynch	Technical

Hearing Officer Gordon D. Bruce held a hearing in Kalispell on April 19 and 20, 2001. At the conclusion of the hearing, the parties agreed to file post-hearing briefs on May 23, 2001. All joint exhibits marked and identified for the hearing were admitted without objections, as were all of Petitioner's and Respondent's exhibits.

II. BACKGROUND

On February 16, 1985, the Montana Federation of Teachers and the Montana Education Association filed petitions for a new unit determination and election pursuant to 24.26.612 ARM.

Both petitions proposed a bargaining unit comprised of 30 secretarial, clerical, custodial and maintenance employees of Flathead Valley Community College. Both petitions proposed to exclude supervisors, management officials, confidential employees, and members of the faculty.

Following a hearing and determination issued on Unit Determination No. 4-85 on August 22, 1985, the Montana Board of Personnel Appeals adopted the hearing examiner's decision. In the Order, the Board defined the appropriate unit as one "comprised of all full-time and regular part-time employees who perform secretarial, clerical, custodial or maintenance duties for the College excluding all supervisors, management officials and confidential employees as those terms are defined in § 39-31-103, MCA, and excluding all faculty. Specifically to be included in the appropriate unit are all the positions for which the unions petitioned, as listed earlier herein, except the position of Secretary to the President/Board of Trustees/Director of Personnel."

Since 1985, the parties have negotiated a number of positions in and out of the appropriate unit in accordance with the following language in Article 4 of the parties' collective bargaining agreement:

The Employer recognizes the Union as the sole and exclusive representative of all Employees within the bargaining unit as defined and certified by the Board of Personnel Appeals or as mutually agreed to by the parties, excluding all supervisory employees, management officials, and confidential employees as those terms are defined in Section 39-31-103, MCA, and further excluding all temporary employees hired for a definite period of time not to exceed three (3) months. A list of current bargaining unit positions is hereby attached as Addendum A and by reference made a part of this Agreement.

III. ISSUE

Whether the positions in the above chart should be excluded from the unit because they are supervisors, confidential employees, or professional/technical employees.

IV. FINDINGS OF FACT

1. Flathead Valley Community College Classified Employees' Union Local 4446, MFT, AFT, AFL-CIO is a "labor organization" within the meaning of § 39-31-103(6), MCA.
2. Flathead Valley Community College is a "public employer" within the meaning of § 39-31-103(10), MCA.
3. Over a period of years, positions have been added to and removed from the bargaining unit through the collective bargaining process. Each change is reflected in an addendum to the agreement that has been approved by both the College and the Union. (Testimony of Rismon-Beckley)
4. Many of the changes that have occurred in the composition of the bargaining unit have been the result of College reorganizations in which employees have assumed new duties and added

responsibilities. The number of bargaining unit positions has not changed significantly since 1985. (Testimony of Rismon-Beckley)

Supervisory

5. Denise Shuman has held the position of Bookstore Manager for the last six years. Her position was removed from the bargaining unit in January 1999. She manages the entire bookstore operation and supervises two bargaining unit positions a bookstore assistant and a bookstore accounts technician in addition to seven temporary employees and several work-study students. She develops, alters and is fully responsible for generating the revenue necessary to fund a \$500,000.00 budget at the Kalispell campus and a \$40,000.00 budget at the Libby campus. She reports to Chief Financial Officer Phyllis Jenkins. (Exhibit No. 10; Testimony of Shuman and Jenkins)

6. Shuman has chaired hiring committees for bargaining unit positions; however, decisions such as hiring and firing must finally be approved by the president of the College. She has full authority to hire and fire temporary employees and work-study students. She has exercised independent judgment in the preparation of performance evaluations, the assignment of work, the establishment of work schedules, and the approval of overtime and leave requests for two bargaining unit members. Shuman has the authority to discipline those employees, has successfully promoted one employee, and has initiated an effort to promote another. She has also fired a temporary employee. She sets policy for the bookstore and is considered to be the supervisor by her employees. All of the recommendations she has made to the chief financial officer and the president have been adopted. She is paid a salary on a pay matrix with other administrative, professional and exempt employees. (Exhibit No. 10; Testimony of Shuman and Jenkins)

7. By comparison, in 1985, the Bookstore Manager served on a hiring committee that forwarded to the business manager the names of three applicants for a bookstore position from which the business manager made the hiring decision. At that time, the Bookstore Manager did not evaluate any employee, did the same type of work performed by her assistant, and did not determine the number of hours the assistant worked. The Bookstore Manager's pay was based on the same salary schedule as other clerical personnel, she was paid time and a half for overtime, and she was not consulted by management regarding its policies. (Unit Determination 4-85).

8. Marlene Stoltz has held the position of Coordinator, Admissions and Records since 1998. This position has never been included in the bargaining unit, although Stoltz performed some of the position duties when she was employed in a bargaining unit position. Stoltz is responsible for the management and supervision of student admissions and records. Her duties include the planning, development and scheduling of student registration, the development and coordination of admissions and records policies and procedures, the interpretation of residency requirements, the evaluation of transfer and other credit requirements, and the enforcement of academic rules and regulations related to student probation and suspension. She also develops the budget for her department. Her position requires the possession of a bachelor's degree. Stoltz reports to Jane Karas, Vice President/Dean of Instruction and Student Services. (Exhibit No. 13; Testimony of Stoltz and Karas)

9. Stoltz regularly attends board of trustees meetings and senior level management meetings with College President David Beyer. She is a member of the College's bargaining team in negotiations with the classified employees' union and has been appointed by the president to serve as a College representative on a union grievance committee. Stoltz also exercises independent judgment in the supervision of three bargaining unit positions. In carrying out these duties, she has selected and chaired employee hiring committees (the committee's final decision requires approval of the president of the College). She has prepared evaluations, assigned work, and approved and denied requests for overtime and time off for employees. She has the authority to discipline the employees she supervises, and she has recommended that one of those employees be promoted. Stoltz works independently, and her predominant duties do not involve the performance of secretarial, clerical, custodial or maintenance duties and no one from the bargaining unit performs similar duties. She is paid a salary of between \$31,000.00 and \$32,000.00 on a pay matrix with other administrative, professional and exempt employees. (Exhibit No. 13; Testimony of Stoltz and Karas)

10. Tom Dyer has held the position of Supervisor, Custodial Services since December 1998. He was previously employed in a bargaining unit position as lead custodian. He works from 2:00 p.m. until 11:00 p.m. on Monday through Thursday and from 12:00 p.m. to 8:00 p.m. on Friday. He is the highest ranking employee on duty after 5:00 p.m. and, for that reason, may make decisions about room assignments for night classes. Less than 40% of his time is spent performing custodial duties. He supervises three bargaining unit members and reports to Director of Maintenance Services Jack Roark. Roark works from 8:00 a.m. to 5:00 p.m. on Monday through Friday. (Exhibit No. 5; Testimony of Dyer and Roark)

11. Dyer has hired temporary employees and has chaired hiring committees for bargaining unit positions (here too, the committee's final decision requires approval from the president of the College). Dyer assigns, inspects and evaluates work, prepares performance evaluations, approves overtime and leave requests, establishes and alters work schedules, and reports rule infractions to the director of human resources. Dyer has disciplined an employee under his supervision. He also tracks inventory and orders supplies, prepares bids, and develops the budget for his department. His performance of the above duties requires the use of independent judgment. He has attended meetings with College officials to discuss an employee grievance. He receives communications from the College not provided to bargaining unit members. He is paid \$13.50 an hour on a pay matrix with other administrative, professional and exempt employees. His rate of pay is higher than that of any of the people he supervises. (Exhibit No. 5; Testimony of Dyer and Roark)

12. Dyer's duties were different when he was previously in the bargaining unit, when 80% of his time was spent doing custodial and maintenance work. The maintenance supervisor served on a hiring committee that forwarded to the business manager the names of three applicants for a custodial position from which the business manager made the hiring decision. The maintenance supervisor could not authorize overtime. Dyer's pay was based on the same salary schedule as was the pay of the custodian and maintenance workers and he received time and a half for overtime. The maintenance supervisor did not attend management meetings or receive any special privileges. (Unit Determination 4-85).

13. Ron Sheets has held the position of Systems Analyst - Data Communications since January 2000. While this position has not been included in the bargaining unit, some of the duties performed by Sheets were previously performed by a member of the bargaining unit. Sheets is responsible for the design, operation and maintenance of the primary data communications backbone and associated subnetworks and attached client systems at the Kalispell campus. His job duties involve the network operation of all primary data conduits and associated switches, hubs and routers, the maintenance of an inventory of all MIS based client software licenses, the development of Help Desk policies, procedures and performance, the design and development of data base systems, technology research and planning; the development of the MIS Operations Manual, the instruction of faculty, staff and students, and the supervision of the instructional/tutorial assistant and several work-study students. Sheets has been involved in the development of College policy and attends administrative meetings on technology planning. He reports to Director of Management Information Systems Bill Bond. (Exhibit No. 18; Testimony of Sheets and Bond)

14. As a supervisor, Sheets assigns work and prepares a performance evaluation for the instructional/tutorial assistant. He has the authority to discipline and to adjust the grievances of this employee. He heads the committee for hiring computer technicians, whose recommendation is forwarded to the director of management information services whose recommendation is forwarded to the president of the College. Sheets has hired and fired work-study students. His predominant duties do not involve the performance of secretarial, clerical, custodial or maintenance duties and no one from the bargaining unit performs similar duties. Sheets is not closely supervised. His position requires extensive technical training. He is paid a salary of approximately \$32,000.00 on a pay matrix with other administrative, professional and exempt employees. (Exhibit No. 18; Testimony of Sheets and Bond)

Confidential Employees

15. J. Rismon-Beckley is employed as Director of Human Resources. In that position, she is directly involved in the formulation and implementation of management policies in the field of labor relations. Her duties include participation in collective bargaining negotiations with three employee unions, consultation in the hiring and firing of College employees, the development of the College's response to employee grievances, the preparation of employee payroll and wage and benefit records, and the development of the College's personnel policies. Rismon-Beckley reports directly to the president and is a member the president's management team. (Testimony of Rismon-Beckley)

16. Assisting Rismon-Beckley in the performance of her job duties are Sheila Applekamp, Human Resources Assistant II, and Deb Barrett, Human Resources Assistant I. Applekamp has been employed in her position since December 1995, and functions as lead worker to Barrett, who has been employed in her position since September 2000. There is cross training between the two positions and the three employees function as a team. (Exhibits 11 and 12; Testimony of Rismon-Beckley, Applekamp, and Barrett)

17. Both employees perform certain payroll duties, but spend more of their time on labor relations duties. Sheila Applekamp performs research, reviews the files, and looks at board

policy and statutes. The duties of both positions involve the gathering and reviewing of information on grievances and collective bargaining proposals, and they may brainstorm how a proposal might be implemented. They also review and analyze employee grievances, and are involved in the review and development of personnel policies. Both employees have access to confidential employee files and labor relations information used in negotiations. (Exhibits 11 and 12; Testimony of Rismon-Beckley, Applekamp, and Barrett)

18. When one of these positions was previously filled by a bargaining unit member, that employee exclusively performed payroll and other non-confidential duties. (Testimony of Rismon-Beckley, Applekamp, and Barrett)

Professional

19. Vicky Lorenz has held the position of Student Recruiter/Admissions Representative since October 1999. She is responsible for all facets of student recruitment including strategic planning, the development of a quarterly newsletter detailing course offerings and admissions information, the preparation of recruitment analyses and special reports, and the organization of summer orientation and an annual College fair. Lorenz represents the College in working with high school counselors, teachers, community agencies, Job Service counselors, College faculty, and the media. She determines her own hours and her travel schedule and regularly attends board meetings as a part of her job duties. Her position now requires a bachelor's degree but the previous requisite was "two years of post-secondary education or equivalent work experience" (Exhibit 3). Neither the education or experience requirement specified a particular field. She exercises independent judgment and receives minimal supervision from Public Information Officer Kari Gabriel. (Exhibit No. 17; Testimony of Lorenz and Gabriel)

20. While this position was previously included in the bargaining unit, Lorenz's predominant work duties do not involve the performance of secretarial, clerical, custodial or maintenance duties. No one from the bargaining unit performs similar duties. Her interchange with bargaining unit members is limited. Her position differs from that of the former recruiter in that she works more hours, determines her own schedule, exercises more authority, and receives less supervision. She is paid a salary of \$25,300.00 on a pay matrix with other administrative, professional and exempt employees. She wishes to be excluded from the bargaining unit. (Exhibit No. 17; Testimony of Lorenz and Kari Gabriel)

21. Colleen Baars has held the position of Coordinator, Business Services on an interim basis since January 2001. The position has never been included in the bargaining unit, although some of the position duties have been performed in the past by bargaining unit members. The incumbent in this position is required to have an associate degree in "accounting or related field or an equivalent number of credits in these disciplines" (Exhibit 14). Baars is responsible for the preparation and processing of data for budgeting and accounting, the maintenance of financial records in conformity with generally accepted accounting principles, the preparation of financial and administrative reports, and the resolution of accounting problems and questions. She performs a number of accounting duties previously performed by the chief financial officer, including the year-end reconciliation of 28 funds and 8870 accounts. She also assists in the

development of College policy and its general fund budget. She reports to Chief Financial Officer Phyllis Jenkins. (Exhibit No. 14; Testimony of Baars, Jenkins, and Rismon-Beckley)

22. Baars' level of responsibility is far greater and her predominant work duties are more complex than the duties she performed while employed in a bargaining unit position. In her current position, she reviews the work of bargaining unit members in preparing for an annual audit. Her predominant duties do not involve the performance of secretarial, clerical, custodial or maintenance duties and no one from the bargaining unit performs similar duties. Baars receives minimal supervision and exercises considerable independent judgment. Some of the more routine duties of the position have been reassigned to bargaining unit members. She is paid \$14.84 an hour on a pay matrix with other administrative, professional and exempt employees. She wishes to be excluded from the bargaining unit. (Exhibit No. 14; Testimony of Baars and Jenkins)

23. Lenore McGarry has held the position of Coordinator, Business and Purchasing Services since January 2001. The incumbent in this position is required to have an associate degree in "accounting or related field or an equivalent number of credits in these disciplines" (Exhibit 15). McGarry was employed as Coordinator, Business Services from 1998 to January 2001; as Coordinator, Business Affairs from 1997 to 1998, and as an Accounting Technician from 1994 to 1997. The latter position was included in the bargaining unit. Presently, McGarry is responsible for motor pool scheduling and organization, centralized supplies services, inventory, telephone services, liability and property insurance claims, contract organization and maintenance records, and the formal bidding process. She reports to Chief Financial Officer Phyllis Jenkins. (Exhibit No. 15; Testimony of McGarry and Jenkins)

24. McGarry's level of responsibility is non-routine and her predominant work duties are more complex than the duties she performed while employed in a bargaining unit position. She oversees the formal bidding process. She has the authority to enter into contracts with vendors and to purchase items up to \$1,000.00 without the approval of her supervisor. She has decided what phone system to purchase. In the performance of her duties, McGarry must also interpret state law and a complex set of policies and procedures which she has helped to develop. Her predominant duties do not involve the performance of secretarial, clerical, custodial or maintenance duties and no one from the bargaining unit performs similar duties. McGarry receives minimal supervision and must exercise considerable independent judgment. She is paid \$13.50 an hour on a pay matrix with other administrative, professional and exempt employees. (Exhibit No. 15; Testimony of McGarry and Jenkins)

25. Sue Dennis has held the position of Executive Assistant to the Director of College Relations since 1994. This position was removed from the bargaining unit in 1995. Dennis coordinates the organization and management of development and donor activities including special events, grant preparation, and financial reporting. She serves as Executive Secretary to the FVCC Foundation, performs accounting and budget management functions for the Development Office, manages and coordinates scholarship contributions and all aspects of gift accounting, prepares reports and analyzes financial data for the Foundation Board, acts as Treasurer for campus organizations, and collects, analyzes, edits and prepares grant proposals. She attends all Foundation board meetings. She reports to Director of College Relations Ruth Ackroyd. (Exhibit No. 2; Testimony of Dennis and Ackroyd)

26. Dennis' predominant duties do not involve the performance of secretarial, clerical, custodial or maintenance duties and no one from the bargaining unit performs similar duties. Dennis exercises considerable independent judgment in the performance of her duties. A bachelor's degree in business or related field is required to perform her job. She is paid \$14.65 an hour on a pay matrix with other administrative, professional and exempt employees. She wishes to be excluded from the bargaining unit. (Exhibit No. 2; Testimony of Dennis and Ackroyd)

27. The position of Executive Assistant to the Vice President/Dean of Instruction and Student Services is a new position that is vacant, and has never been included in the bargaining unit. The employee hired to fill this position will assist the vice president in the planning, development and management of the part-time faculty handbook, contracts and scheduling, educational programs, and student services. The employee will also supervise two bargaining unit positions. These duties were previously performed by the Associate Dean for Instruction and the Associate Dean of Students. The position requires the possession of a bachelor's degree specifying no particular field (Exhibit 16). The predominant duties do not involve the performance of secretarial, clerical, custodial or maintenance duties and no one from the bargaining unit performs similar duties. This position will receive a salary of between \$25,000.00 and \$30,000.00 on a pay matrix with other administrative, professional and exempt employees. (Exhibit No. 13; Testimony of Karas)

28. Diana Miller has held the position of Coordinator, LCC Student Services since June 1999. The position has never been included in the bargaining unit. Miller is responsible for coordinating students services and activities for the Lincoln County Campus of Flathead Valley Community College. She is engaged in student recruitment, academic advising, and financial aid and career counseling. She coordinates the admissions and registration process. She manages Running Start, a dual credit program for high school students. She disperses student financial aid, advises student government, and assists faculty and staff with student outcomes assessment. Some of her current duties were previously performed by the associate director at the Lincoln County Campus. She reports to Lincoln County Campus Director Stefani Hicswa. (Exhibit No. 8; Testimony of Miller and Hicswa)

29. Miller's predominant duties do not involve the performance of secretarial, clerical, custodial or maintenance duties and no one from the bargaining unit performs similar duties. She has little interchange with members of the bargaining unit. Miller exercises a considerable amount of independent judgment in the performance of her job. Her position requires a bachelor's degree, but in no particular field (Exhibit 8). She is completing work on a master's degree in school counseling. She is paid a salary of \$35,961.00 on a pay matrix with other administrative, professional and exempt employees. She wishes to be excluded from the bargaining unit. (Exhibit No. 8; Testimony of Miller and Hicswa)

Professional/Technical

30. Rick Owens has held the position of Systems Analyst - Systems Operations since January 2000. While this position has not been included in the bargaining unit, Owens did perform some of his current duties while employed in a bargaining unit position as a Computer Operations Technician III. In his current position, Owens is responsible for the design, operation and maintenance of the primary application, file and system servers at the Kalispell campus. His job

duties involve the operation of all primary server systems and support for standard network protocols, the maintenance of an inventory of all system hardware and software and all software licenses, the design and development of system software, the implementation of security measures, and technology research and planning. He teaches Management Information Systems (MIS) at the College to faculty, staff and students, and is instrumental in development of the MIS Operations Manual. He has been involved in the development of College policy and attends administrative meetings on technology planning. Owens' duties have become much more complex as computer technology has advanced from the days of the mainframe system in place when he began work in 1993. He reports to Director of Management Information Systems Bill Bond. (Exhibit No. 7; Testimony of Owens and Bond)

31. Owens' predominant duties do not involve the performance of secretarial, clerical, custodial or maintenance duties and no one from the bargaining unit performs similar duties. Owens is not closely supervised. His position requires extensive technical training. He is paid a salary of approximately \$30,000.00 on a pay matrix with other administrative, professional and exempt employees. He wishes to be excluded from the bargaining unit. (Exhibit No. 7; Testimony of Owens and Bond)

Technical

32. Renee Lynch has held the position of Instructional/Tutorial Assistant, Computer Lab for the past 2½ years. This position has never been included in the bargaining unit. Lynch manages six computer labs with 150 computers, provides technical assistance to lab users, maintains and evaluates computer software, inventories data bases, operates the Help Desk, teaches computer classes for faculty, staff and students, and assigns duties to four work-study students. She has been involved in the development of College policy and attends administrative meetings on technology planning. She reports to Systems Analyst - Data Communications Ron Sheets. (Exhibit No. 6; Testimony of Lynch, Sheets, and Bond)

33. Lynch's predominant duties do not involve the performance of secretarial, clerical, custodial or maintenance duties and no one from the bargaining unit performs similar duties. She has little interchange with members of the bargaining unit. Lynch is not closely supervised. Her position requires extensive technical training. She is paid \$12.09 an hour on a pay matrix with other administrative, professional and exempt employees. She wishes to be excluded from the bargaining unit. (Exhibit No. 18; Testimony of Lynch, Sheets, and Bond)

V. DISCUSSION

The College seeks a determination that certain employees should be excluded from the collective bargaining unit represented by the Union because of their status as supervisors, confidential labor relations employees, or professional/technical employees.

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. § 39-31-201, MCA. The law further authorizes the Board of Personnel Appeals to decide what units of public employees are appropriate for collective

bargaining purposes. § 39-31-202, MCA. However, because the statute excludes "supervisory employee" and "confidential employee" from the definition of "public employee" (§ 39-31-103(9), MCA), supervisors and confidential employees do not have the rights guaranteed by § 39-31-201, MCA, and are not appropriately included in a unit for collective bargaining purposes.

The Montana Supreme Court has approved the use of federal court and National Labor Relations Board (NLRB) decisions as precedent when interpreting the Montana Collective Bargaining for Public Employees Act. *State ex rel Board of Personnel Appeals v. District Court*, 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297 (1979); *Teamsters Local No. 45 v. State ex rel Board of Personnel Appeals*, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981); *City of Great Falls v. Young (Young III)*, 211 Mont. 13, 686 P.2d 185, 119 LRRM 2682 (1984).

Supervisors

Section 39-31-103 (9)(b), MCA, excludes supervisors from the definition of public employee. § 39-31-103 (11), MCA, defines a supervisory employee as "any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, 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 foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment."

Whether an employee is a supervisor depends on the duties performed by that employee for the organization. If the employees in question have the authority to perform even one of the above-listed activities with the use of independent judgment, or effectively recommend, then they should not be members of the bargaining unit. *NLRB v. Konig*, 79 F.3d 354, 357 (3rd Cir. 1996), citing *Health Care and Retirement Corp.*, *supra*, 114 S.Ct. 1780; *Manor West, Inc. v. NLRB*, 60 F.3d 1195, 1197 (6th Cir. 1995).

The Union argues that the incumbents in these positions spend very little time in any supervisory capacity. However, when an employee possesses at least one of the authorities under the supervisory statute, he or she is indeed a supervisor regardless of the frequency within which these responsibilities are exercised. It is well settled that if an individual is shown to exercise supervisory authority, the frequency with which she exercises that authority does not negate the conclusion that she is a supervisor. *E and L Transport Co. v. NLRB*, 85 F.3d 1258, 1270 (7th Cir. 1996). See also *Northeast Utility Service Corp v. NLRB*, 35 F.3d 621, 624 (1st Cir. 1994).

It is the function of the employee that is critical rather than the label or title. Therefore, it is a question of fact in each individual case as to whether the individuals involved are supervisors. The exercise of any one of these statutory supervisory criteria must be accomplished with at least some independent judgment and cannot be routine, clerical, or perfunctory. *George C. Foss Company v. NLRB*, 75 F.2d 1407, 118 LRRM 2746 (9th Cir. 1985).

The Board of Personnel Appeals outlined the following considerations for determining supervisory status in *Billings Firefighters Local 521 v. City of Billings*, UC 1-77:

Whether the employee has independent authority to perform the functions enumerated in the Act.

Whether the exercise of authority in the area of assignment and direction is routine.

Whether the employee uses independent judgment in directing the activities of others.

Whether the recommendations made by the employee are subject to independent review or investigation.

Whether a substantial amount of the employee's time is spent doing work which is similar to the work of the subordinates.

Whether an unrealistic and excessively high ratio of supervisors to employees would be created.

Supervisors in the public sector are subject to greater review than private sector counterparts. They have subjectively less freedom to exercise their authority by the nature of their employment; however, this does not lessen the ultimate authority delegated to them in their status as a supervisor. The record reflects that these incumbents effectively recommend key criteria analyzed in the record evidence. See, e.g., *Montana Public Employees Association v. Department of Institutions*, UC 9-88 (1989). Finally, employees have been found to be supervisors, even though restricted by federal guidelines and company policies, where they were performing at least one of the 12 statutory criteria. *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 360 (1st Cir. 1980).

The Montana Board, like the NLRB, also considers certain secondary tests in determining supervisory status. The tests that have been considered are the following:

(1) the employee being designated a supervisor; (2) the fact that he is regarded by himself or others as a supervisor; (3) the exercise of privileges accorded only to supervisors; (4) attendance at instructional sessions or meetings held for supervisory personnel; (5) responsibility for a shift or phases of operations; (6) authority to interpret or transmit employer's instructions to other employees; (7) the responsibility for inspecting the work of others; (8) instruction of other employee; (9) authority to grant or deny leave of absence to others; (10) responsibility for reporting the rule infractions and keeping of time records on other employees, not based solely on skill; (12) failure to receive overtime.

A review of the record establishes that the positions of Bookstore Manager, Coordinator of Admissions and Records, Supervisor of Custodial Services, and Systems Analyst - Data Communications meet a sufficient number of the criteria to be designated as supervisors. The positions meet several of the primary tests, and, in addition, meet many of the secondary tests. Here, the incumbents in these positions are not merely "straw bosses," "lead men," and "set-up men" with minor supervisory duties. It is clear that they have the authority to effectively recommend appropriate action in hiring decisions. Some chair boards making such recommendations to upper management. Although they do not have final authority in these situations, neither precedent nor case law require that they have such authority. Nor does the

record show that the incumbents tasks are "merely routine, clerical, perfunctory or sporadic" as in Frederick's Foodland, Inc., 247 NLRB 284, 291 (1980).

Further, both the Montana Board of Personnel Appeals and the NLRB have also held that individuals who exercise one or more of the supervisory powers enumerated above with the requisite independent judgment are statutory supervisors even if they supervise only a single employee. Montana Historical Society and Montana Federation of State Employees, Unit Clarification No. 5-85 (1986); American Crane Corp., 326 NLRB 153 (1998); Holland & Son, 237 NLRB 263, 265, 99 LRRM 1432 (1978); and Cartright Hardware Co., 229 NLRB 781, 95 LRRM 1262 (1977), mod. on other grounds, 600 F.2d 268, 101 LRRM 2652 (10th Cir. 1979).

The Union also contends that because there is no formal system for rewards or for discipline at the College, that the authority to simply evaluate is insufficient to find supervisory status, and cites Passavant Health Center, 284 NLRB 887, 891 (1987). That argument is not convincing, however, because these positions can effectively recommend such actions. What upper management ultimately decides is the most appropriate action in such matters does not reduce the supervisory status of these positions. It is inconceivable that an egregious violation of policy, rule or law by an employee could not, or would not be appropriately dealt with by the College even without a system of discipline for consistently poor employee evaluations being in place.

Based on the foregoing, it is clear that Denise Shuman, Tom Dyer, Marlene Stoltz, and Ron Sheets exercise supervisory authority in the interest of the College. The record evidence shows that they exercise independent judgment in the performance of their supervisory duties. Each of those positions should be excluded from the appropriate unit.

Confidential Employees

The Montana statutes define a confidential employee as "one found by the board to be a confidential labor relations employee" § 39-31-103(3), MCA. Although there is no federal statute comparable to the Montana statute excluding confidential employees from the coverage of the Act, the NLRB excludes confidential employees from collective bargaining units, NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981). The Board of Personnel Appeals has adopted the NLRB's test for determining confidential employee status. See, e.g., In the Matter of Unit Determination No. 6-88, 7-89, and 23-90.

The NLRB uses the "labor nexus" test under which only those employees who act in a confidential capacity to persons exercising managerial function in labor relations matters are confidential employees. Hendricks County Rural Electric Membership Corp., 454 U.S. at 188-89. There is no evidence that these employees act in a confidential capacity to managers. 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 NLRB and the Board of Personnel Appeals refrain 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. 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").

Accordingly, the NLRB and the Board of Personnel Appeals have held repeatedly that mere access to or handling of confidential material, even confidential labor-related material, does not confer confidential status. See, e.g., *Greyhound Lines, Inc.*, 257 NLRB 477, 480 (1981); 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). Nor does access to materials relating to personnel problems, payroll records, or time cards render an employee confidential. *Ernst & Ernst National Warehouse*, 228 NLRB 590, 591 (1977); *Crest Mark Packing Co.*, 283 NLRB 999, 1000 (1987).

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*, 269 NLRB 178, 181 (1984); *Greyhound Lines*, 257 NLRB 477, 480 (1981); *ITT Grinnell Corp.*, 212 NLRB 734 (1977); *California Inspection Rating Bureau*, 215 NLRB 780, 783 (1974). 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.*, 304 NLRB 939 (1991).

The human resource assistants at the College have access to personnel and other confidential information, but the law is firmly established that access does not make them confidential employees. They have no role in making substantive decisions regarding collective bargaining. The human resource assistants gather information on grievances and union collective bargaining proposals, but gathering information is not sufficient to establish that the employee is a confidential employee. The human resource assistants testified that they will brainstorm how a union proposal might be implemented, but that does not appear to be confidential by definition. Even if they occasionally draft a response to union proposals, nothing in the record shows the draft is the employer's final position nor does it show that the human resource assistants have access to the precise terms to which the employer would agree in a collective bargaining agreement. Based on the foregoing, these positions are not confidential.

Professional/Technical Employees

Section 39-31-202, MCA, and 24.26.611, ARM, provide that in determining the appropriate bargaining unit, the Board of Personnel Appeals must 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.

Unlike federal labor law, Montana law contains no restriction on including professional employees in units with other employees. However, like federal law, Montana law requires the

Board to consider community of interest factors in determining whether a unit is appropriate for collective bargaining purposes. § 39-31-202, MCA. Professional employees may therefore be included in a unit with other employees if they have a sufficient community of interest. Unit Clarification 4-79. Similarly, the standard for technical employees is community of interest.

In *Glendive Federation of Teachers v. Dawson Community College*, Unit Clarification No. 1-99 (2000), the Board of Personnel Appeals referred to a recent NLRB case concerning community of interest, and in its decision stated:

In *The Sun and Communication Workers of America, Local 14671*, 329 NLRB No. 74, 1999 WL 958485 (1999), the NLRB recently developed a new standard in unit clarification proceedings where bargaining units are defined based on the work performed. In *The Sun*, supra, the NLRB held that new employees should be added to a bargaining unit that is defined by work performed if: (1) the new employees perform job functions similar to those performed by unit employees as defined in the unit description and (2) the unit functions performed by the new employees are not merely incidental to their primary work functions or otherwise an insignificant part of their work. Once this standard has been met, the party seeking to exclude the new employees has the burden to show that the new group of employees is sufficiently dissimilar from the unit employees so that the existing unit, including the new group, is no longer appropriate. In determining whether the presumption of inclusion has been rebutted, community-of-interest factors will be considered.

The Board of Personnel Appeals certified, and the parties agreed in their collective bargaining agreement, the unit was one "comprised of all full-time and regular part-time employees who perform secretarial, clerical, custodial or maintenance duties for the College excluding all supervisors, management officials and confidential employees as those terms are defined in § 39-31-103, MCA, and excluding all faculty." Thus, the unit is defined by the work performed.

The Union has failed to carry its burden under the test set forth in *The Sun*. The employees classified by the College as professional or technical do not perform job functions similar to those performed by unit employees as defined in the unit description or if they do, the unit functions are merely incidental or insignificant to their primary functions.

Because of the differences in job function, no presumption of inclusion of these employees in collective bargaining unit arises, and it is unnecessary to address the community of interest factors further.

Note that in *MPEA, MEA and Great Falls Public Schools*, Unit Determination No. 1-86 (1986), the Board of Personnel Appeals concluded that adding employees with substantially higher wages to a bargaining unit would dilute the community of interest of those employees.

Even if consideration of the community of interest factors is required, there is no overwhelming community of interest in this case concerning the other professional/technical positions in question in this matter. Most of those employees perform professional or technical duties that require the exercise of independent judgment. Although several of the positions in question were previously included in the bargaining unit, each of them was removed through the collective

bargaining process. The evidence further shows that the employees in question do not wish to be included in the bargaining unit. In sum, they do not have a community of interest.

VI. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this matter pursuant to § 39-31-207, MCA.

2. The positions of Bookstore Manager (Denise Shuman); Coordinator, Admissions and Records (Marlene Stolz); Coordinator, Business Services (Colleen Baars); Coordinator, Business and Purchasing Services (Lenore McGarry); Coordinator, LCC Student Services (Diana Miller); Executive Assistant to the Director of College Relations (Sue Dennis); Executive Assistant to the Vice-President/Dean of Instruction and Student Services (Vacant); Instructional Tutorial Assistant, Computer Lab (Renee Lynch); Student Recruiter/Admissions Representative (Vicky Lorenz); Supervisor, Custodial Services (Tom Dyer); Systems Analyst - Data Communications (Ron Sheets); Systems Analyst - Systems Operations (Rick Owens) are not appropriately included in the bargaining unit comprised of all full-time and regular part-time employees who perform secretarial, clerical, custodial or maintenance duties for the College excluding all supervisors, management officials and confidential employees as those terms are defined in § 39-31-103, MCA, and excluding all faculty.

3. The positions of Secretary Tech Prep Program (Vacant); Assistant I, Human Resources (Deb Barrett); and Assistant II, Human Resources (Sheila Applekamp) are appropriately included in the bargaining unit comprised of all full-time and regular part-time employees who perform secretarial, clerical, custodial or maintenance duties for the College excluding all supervisors, management officials and confidential employees as those terms are defined in § 39-31-103, MCA, and excluding all faculty.

VII. RECOMMENDED ORDER

The Flathead Valley Community College Classified Employees' Union's request to include the position of Secretary, Tech Prep Program (Vacant); Assistant I, Human Resources (Deb Barrett); and Assistant II, Human Resources (Sheila Applekamp) in the unit is hereby granted. The request to include any of the other positions identified in this matter is denied.

DATED this 19th day of November, 2001.

BOARD OF PERSONNEL APPEALS

By: /s/ GORDON D. BRUCE

GORDON D. BRUCE
Hearing Officer

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 December 12,

2001 . 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