

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 14-2007:

MEA-MFT, NEA, AFT, AFL-CIO,) Case No. 1738-2007

Petitioner/Counter-Respondent,)

vs.)

DILLON ELEMENTARY SCHOOL)
DISTRICT,)

Respondent/Counter-Petitioner.)

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND PROPOSED ORDER**

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I. INTRODUCTION

This matter involves the question of whether an appropriate collective bargaining unit of persons employed by the district would consist of the classified and paraprofessional personnel holding the positions of Alternative Classroom Aides, Resource Classroom Aides, ESL Tutors, Scheduling Liaison, Migrant Aides and Instructors, Title I Aides and Instructors, Grounds, Building, Maintenance, Janitorial, Custodial and Crosswalk Personnel, Title I Tutors and Special Aides of Dillon Elementary Schools as of April 30, 2007, pursuant to Montana's Public Employees Collective Bargaining Act.

Hearing Officer Terry Spear held a unit determination hearing in this matter on October 24, 2007. Richard Larson, Harlen, Chronister, Parish & Larson, P.C., represented the petitioner, Montana Education Association-Montana Federation of Teachers, NEA, AFT, AFL-CIO. Debra A. Silk, Montana School Boards Association, represented the respondent (and counter-petitioner), Dillon Elementary School District.

The petitioner's Exhibit 2 and the respondent's Exhibits 101 through 111 were admitted into evidence. The petitioner's Exhibit 4 was provisionally admitted and subsequently withdrawn. Melissa Case, Sharon Ricks, Maria Gallegos, Gail Barnhart, Richard Brown, Melinda Berkram, Matthew Lewis, and Randy Shipman all testified under oath.

II. ISSUE

The issue in this matter is what unit is appropriate for the purposes of collective bargaining.

III. FINDINGS OF FACT

1. The respondent (and counter-petitioner), Dillon Elementary School District (Beaverhead County District No. 10), hereinafter “the district,” is a “public employer” as defined in Mont. Code Ann. § 39-31-103(10).

2. The petitioner, Montana Education Association-Montana Federation of Teachers, NEA, AFT, AFL-CIO, hereinafter “the union,” is a “labor organization” as defined in Mont. Code Ann. § 39-31-103(6) MCA, and eligible to be the exclusive representative of the employees specified in its petition for new unit determination and election.

3. The union filed a petition for recognition of a unit for collective bargaining consisting of classified and paraprofessional personnel including Alternative Classroom Aides, Resource Room Aides, ESL Tutors, Scheduling Liaison, Migrant Aides and Instructors, Title I Tutors, Aides and Instructors, Special Aides, Grounds, Building, Maintenance, Janitorial, Custodial and Crosswalk Personnel.

4. The district submitted a counter-petition proposing a bargaining unit limited to classified and paraprofessional personnel working more than 4 hours per day including Resource/Special Education/Classroom Aides and Title I Tutors. The district asserts that a unit which also includes Grounds, Building and Maintenance, Janitorial, Custodial and Crosswalk Personnel (as the union proposes) would not be appropriate.

Wages

5. All positions included in the union’s proposed unit are paid on an hourly basis. The district’s board of trustees establishes the wages for all positions included in the union’s proposed unit. The district first negotiates a percentage increase with the teaching staff, and then decides whether to apply the same percentage increase for the classified staff (which it recently has done) and also looks at the average wages in the Montana Class A public schools when setting salaries for classified staff. Currently the wages paid to paraprofessionals differ from the wages paid to the other positions in the union’s proposed unit, in part because of the higher qualification levels sought in applicants for those positions. There is no evidence that two separate salary schedules would be required within the union’s proposed unit, although different positions would probably require different line descriptions in the salary schedule where the starting salary ranges differed.

Hours

6. Paraprofessional employees in the proposed unit generally work the same hours as the teaching staff, conforming to the instructional day. The teaching staff and these paraprofessionals typically work Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. (or part of that schedule, for paraprofessionals who work part time). Custodians work at specified hours during the day, on weekends, and during evening hours. Custodians typically have some overlapping hours with the instructional day during the school year.

7. The paraprofessionals and the part-time employees within the union's proposed unit work during the school year and not during the summer months. Other classified full-time employees are 12 month employees.

8. Part-time positions include the Crosswalk Guards, ESL Tutor and Scheduling Liaison/Speech Therapist Assistant (two part-time positions that have been held by the same employee). The Crosswalk Guards are employed in positions that are 4 hours or less per day. The ESL Tutors are also primarily part-time positions, the duties of which typically require the employee to work 3-4 hours per week.

Fringe Benefits and Other Working Conditions

9. In accord with the job qualifications for paraprofessionals, the district tries to hire persons with qualifications consistent with the "No Child Left Behind" Act, and hires the best available candidates. As a result, the district prefers certified teachers for paraprofessional positions and also prefers applicants with schooling beyond high school and/or degrees beyond high school. Other classified positions within the union's proposed unit require high school diplomas or the equivalent. Particular qualifications for particular positions differ according to the job duties of those positions.

10. The members of the union's proposed unit are subject to the same personnel policies and have access to the same benefit package. There are differences in the benefits offered by the district depending upon hours worked – health insurance is not available for part-time employees who work less than 20 hours per week. For part-time employees who work more than 20 hours per week, the available coverage is prorated.

11. Some members of the proposed unit (the paraprofessionals) are included in the Montana Teachers Retirement System, while the remaining members of the proposed unit are included in the Montana Public Employees Retirement System. There are different rules, terms, and conditions that apply to each of these two separate retirement programs, which are not subject to collective bargaining between these public employees and their employer, the district.

12. The hiring process for paraprofessionals involves exclusively the building principals and the superintendent who together make recommendations to the district's board of trustees. For other classified employees within the union's proposed unit, any immediate supervisor for the position joins the building principals and superintendent in screening and interviewing applicants.

13. Reductions in force are driven, in large part, by student enrollment and educational need.¹ Obviously, the impact of reduced enrollment could be heavier on some positions within

¹ The district's evidence suggested that these were the only factors involved. The Hearing Officer takes administrative notice that the district has the right and obligation to make educational policy decisions as an autonomous local governmental entity. Decisions about what kind of reductions in force should follow reduced enrollment would be based upon educational policy concerns, as well as bare enrollment numbers and legal educational requirements.

the union's proposed unit as opposed to other such positions. There is no evidence that multiple bargaining provisions for different kinds of positions within the proposed unit would necessarily result.

14. The district's procedures for covering absences of employees within the union's proposed unit vary from position to position, depending upon the job duties of the absent employee.

History of Collective Bargaining

15. The district engages in collective bargaining with its certified staff. Although it has tried to provide comparable improvements in salaries and benefits to its classified employees, it has no history of collective bargaining with any of them.

Common Supervision

16. For the "classroom oriented" members of the union's proposed unit, *i.e.*, the paraprofessionals, the chain of command, after the classroom or resource room teacher(s), if the position is connected to classrooms or resource rooms, is typically the building principal and then the superintendent. For the maintenance and custodial staff, the chain of command, after the member of the proposed unit who is denominated the "maintenance supervisor" and intermittent supervision from teachers regarding custodial work in their teaching areas (see finding 17, following), is typically the building principal and then the superintendent. For the remaining positions that do not have intervening immediate "supervisor(s)," their chain of command is the building principal and then the superintendent. The district is not a large, decentralized enterprise. The superintendent is also building principal at one of the district's three buildings. Tutors and aides migrate from building to building. Beyond the differences, such as they are, between immediate supervision, overall supervision of the members of the union's proposed unit is structured the same way.

17. Exhibit 110, titled "Dillon Elementary Classified Staff," shows five custodians, one of whom, Dennis Patton, is identified as the "Maintenance Supervisor." Richard Brown, one of the custodians, testified that he viewed Patton as his immediate supervisor, that he was also supervised by the building principal and that he received occasional direction from teachers. He has not been formally evaluated by anyone over the several years he has worked as a custodian for the district. There is no credible and substantial evidence that Patton has the authority on a regular, recurring basis, while acting in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline the other custodians, nor that he has the authority on a regular and recurring basis effectively to recommend any of these actions. Even if Patton does sometimes have and exercise such authority, there is no credible and substantial evidence that the exercise is not of a merely routine or clerical nature but instead requires the use of independent judgment.

18. There is no substantial and credible evidence to establish that any of the positions included in the union's proposed unit would be ineligible for inclusion due to supervisory,

managerial, or similar status, notwithstanding Exhibit 110 and Brown's testimony about the "Maintenance Supervisor."

Common Personnel Policies

19. The evaluation process for paraprofessionals is formally distinct from that of custodial, maintenance, and other staff proposed for inclusion by MEA-MFT. The district evaluates its paraprofessionals in accord with its process for evaluation of professional staff. Other classified positions within the union's proposed unit are supposed to be evaluated by their supervisors. There is no evidence that supervisors below the level of building principal, other than professional staff supervising paraprofessionals, actually perform such evaluations. In practice, the evaluation process appears actually rather similar for all members of the union's proposed unit.

Integration of Work Functions and Interchange Among Employees Affected

20. There is very limited integration of work functions or interchange of functions between the paraprofessionals included in the union's proposed unit and the other classified positions included in the union's proposed unit. Although all employees share a common mission of maximizing educational opportunities for the students of the district, the actual work functions of the members of the union's proposed unit whose jobs are primarily learning related are far more directly involved in the education of the students, aligning them closely with the teaching staff because of their common functions and goals in ensuring quality instruction to students. The remainder of the positions included in the union's proposed unit have actual work functions that involve the operation of the facility, which does not align them closely with the teaching staff. Although there is some cooperation among the positions included in the union's proposed unit, it is largely because, as already noted, the district is not a particularly large, decentralized elementary system.

Desires of the Employees

21. All three persons holding or having held positions within the union's proposed unit who testified, Gallegos, Ricks, and Brown, expressed support for a bargaining unit that would include all of the positions in the union's proposed bargaining unit. There was no evidence that any person holding a position in the union's proposed bargaining unit opposed it.

Practice of Recognizing "Mixed" Bargaining Units Containing Paraprofessional and Other Classified Staff

22. Melissa Case, who organized the district's classified and paraprofessional staff for MEA-MFT, has worked with various school district bargaining units around the state that include paraprofessional and classified personnel. The Hearing Officer has found no adjudicative recognition of a similar unit to that currently proposed by the union, so the units with which Case has worked were apparently recognized by agreement between the public employer and the bargaining representative.

Community of Interest

23. Because there are such disparate work functions and disparate position qualifications for the positions in the union's proposed bargaining unit, the union has failed to establish the requisite community of interest for its proposed unit. Instead, the evidence establishes that a unit consisting of the classified and paraprofessional personnel holding the positions of Alternative Classroom Aides, Resource Classroom Aides, ESL Tutors, Scheduling Liaison, Migrant Aides and Instructors, Title I Aides and Instructors, Title I Tutors and Special Aides of Dillon Elementary Schools as of April 30, 2007, are an appropriate unit.

IV. DISCUSSION²

²Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Montana law governing collective bargaining for public employees provides that to ensure employees the fullest freedom in exercising the rights guaranteed by Montana’s public employee collective bargaining laws, the Board of Personnel Appeals, hereinafter, “the Board,” or its agent shall decide the unit appropriate for collective bargaining, considering 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). The rights the law guarantees include self organization, protection in the exercise of self organization, the right to form, join or assist any labor organization, the right to bargain collectively through representatives of the employees’ choosing, and the right to engage in other concerted activities free from interference, restraint, or coercion. Mont. Code Ann. § 39-31-201.

The rules of the Board implementing Mont. Code Ann. § 39-31-202 provide:

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.

In analyzing this case, it is appropriate to consider cases decided under federal law. Section 9(b) of the National Labor Relations Act gives the National Labor Relations Board (NLRB) comparable authority to determine appropriate bargaining units. Thus, the Montana Supreme Court and the Board follow federal court and NLRB precedents in interpreting Montana public employee collective bargaining cases. *State ex rel. Board v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *Teamsters Local 45 v. State ex rel. Board* (1981), 195 Mont. 272, 635 P.2d 1310; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

The role of the Board is not to determine the most appropriate unit, but only an appropriate unit, pursuant to the statutes and regulations.

In determining an appropriate bargaining unit . . . the Board seeks to fulfill the objectives of ensuring employee self-determination, promoting freedom of choice in collective bargaining, and advancing industrial peace and stability. Under the Act, our task is to determine not the most appropriate or comprehensive unit, but simply an appropriate unit.

Dezcon, Inc. (1989), 295 NLRB 109.

Like the federal law, Montana law requires the Board to consider “community of interest” in determining an appropriate unit. Mont. Code Ann. § 39-31-202(1). However, the Montana statute enumerates a number of factors in addition to community of interest to be considered in determining when a unit is appropriate, even though neither the statute nor the rule (see *infra*) defines “community of interest.” The additional Montana factors in both the statute and rule—wages, hours, benefits, working conditions, history of collective bargaining and so on,

are not enumerated in the federal statute but are made part of the definition of “community of interest” by federal case law.³ Since Montana law provides no other definition of “community of interest,” the remaining 8 factors in determining an appropriate unit are the practical definition of “community of interest” (together with any other relevant fact-based factors unique to each particular case) under Montana law as well as federal law. Those remaining 8 factors are repeated in the regulation as well as the statute:

In considering whether a bargaining unit is appropriate, the board shall consider such factors as:

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

Admin. R. Mont. 24.26.611.

“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.

All of the factors have to be weighed together and no one factor has controlling weight. *Montana Public Employees’ Association v. Cascade County* (2000), UC 1-2000. “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.” *MPEA v. Great Falls* (2005), UC 8-2005, “Discussion,” p. 10 [Emphasis added.]

The initial burden is upon the union to establish that the bargaining unit proposed is an appropriate unit. The union has failed to meet its burden. The positions primarily involved in facilities functions—Grounds, Building, Maintenance, Janitorial, Custodial and Crosswalk

³ See, e.g., *Kalamazoo Paper Box Corp.* (1962), 136 NLRB 134, where the NLRB enumerated the factors in determining whether a community of interest sets a group of employees apart from other employees: [A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plat situs...; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.

Although *Kalamazoo* was a unit severance case, the NLRB has applied its principles to unit determinations. The Developing Labor Law (5th Ed., 2006) Ch. 11.II.A., *gen.*

Personnel are not less important than the positions appropriately within the new unit. The facilities functions jobs are simply so appreciably different that including them in the new unit over the objection of the employer is not appropriate.

V. CONCLUSIONS OF LAW

1. The Board has jurisdiction. Mont. Code Ann. § 39-31-207.

2. The classified and paraprofessional personnel holding the positions of Alternative Classroom Aides, Resource Classroom Aides, ESL Tutors, Scheduling Liaison, Migrant Aides and Instructors, Title I Aides and Instructors, Title I Tutors and Special Aides of Dillon Elementary Schools as of April 30, 2007, are an appropriate unit for collective bargaining. Mont. Code Ann. § 39-31-202(1).

3. The classified positions of Grounds, Building, Maintenance, Janitorial, Custodial and Crosswalk Personnel do not share the community of interest of the new collective bargaining unit and are excluded from it. Admin. R. Mont. 24.26.610.

VI. RECOMMENDED ORDER

An election by secret ballot shall be conducted as soon as possible, in accord with the rules and regulations of the Board of Personnel Appeals, among the employees in the bargaining unit. The bargaining unit shall consist of the classified and paraprofessional personnel holding the positions of Alternative Classroom Aides, Resource Classroom Aides, ESL Tutors, Scheduling Liaison, Migrant Aides and Instructors, Title I Aides and Instructors, Title I Tutors and Special Aides of Dillon Elementary Schools as of April 30, 2007, only. The positions of Grounds, Building, Maintenance, Janitorial, Custodial and Crosswalk Personnel are excluded.

DATED this 27th day of February, 2008.

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR
TERRY SPEAR
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than March 21, 2008. This time period includes the 20 days provided for in Admin. R. Mont. 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