STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 4-97:

LEWIS AND CLARK COUNTY, Petitioner, vs. MONTANA PUBLIC EMPLOYEES' ASSOCIATION, Respondent.	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**

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I. INTRODUCTION

The hearing in this matter took place on June 24, 1997. Sheila D. Cozzie, Personnel Officer, and K. Paul Stahl, Esquire, represented the Petitioner, Lewis and Clark County (County). Carter N. Picotte, Esquire, represented the Respondent, Montana Public Employees' Association (MPEA). Sheila Cozzie, Cathy O'Brien, Tom Davis, and Ed R. Tinker, Jr. gave sworn testimony.

The County's proposed Exhibits A - F were admitted into the record without objection. The Respondent's proposed Exhibits 1 and 2 were also admitted without objection. After the hearing the County submitted an organizational chart as agreed (Exhibit G).

The Board's Agent, Kathy van Hook, found that a question of fact exists concerning appropriate bargaining unit pursuant to ARM 24.26.630 (5). Ms. van Hook's preliminary investigation and ORDER dated December 30, 1996, forwarded this case for a contested hearing in keeping with the administrative rule.

The record was deemed submitted upon receipt of the parties' proposed findings of fact and conclusions of law on September 9,

1997. The Hearing Officer listened to the four hearing tapes in their entirety shortly before writing this decision.

II. ISSUES

The County's October 1, 1996, Unit Clarification Petition seeks to remove landfill heavy equipment operators from their historical inclusion in the MPEA Health Department contract, which the County signed July 1, 1996, and which runs until June 30, 2000. The County seeks to place the four landfill employees under the Public Works Department contract due to the County's reorganization of public works.

The larger of the two MPEA units, the Lewis and Clark County Road/Bridge/Shop Department operates under a separate MPEA contract with the County, which runs from July 1, 1996 until June 30, 1999. Both bargaining units are recognized by the Board of Personnel Appeals (Board). In the Respondent's December 12, 1996, answer to the petition, and at the pre-hearing conference, the parties' representatives addressed whether unit clarification or a unit determination was the appropriate procedural means for the County's desired action. As the Board hears both types of petitions, the parties decided to proceed with the hearing framed as a unit clarification.

III. RULINGS ON PROPOSED FINDINGS OF FACT

Respondent's Proposed Findings

1. "The parties hereto are also parties to two collective bargaining agreements which have relevance in this matter. (Joint Exhibits #1 and #2)." The Respondent's proposed finding no. 1 is accepted as accurate based upon Exhibit Nos. 1 & 2, A & B, and the

consistent testimony of Cathy O'Brien, Sheila Cozzie, Ed Tinker, and Tom Davis.

2. "At the trial of this matter, the employer had the burden of proof to show that its petition to remove landfill equipment operators from the present bargaining unit under the Health Department Contract and place them in the Road and Bridge Bargaining Unit was justified on the evidence." The Respondent's proposed finding no. 2 is a conclusion of law and its substance is addressed later in this decision.

3. "There was no proof that there has been any substantial change in the duties of the landfill employees at any material time." The Respondent's proposed finding no. 3 is accepted based upon the consistent testimony of Ed Tinker, Cathy O'Brien, Sheila Cozzie and Tom Davis. Duties reflected in undated County position descriptions (PDs) for Landfill operators (Exh. C), and Road and Bridge operating engineers (Exh. D), were not alleged to have changed at any material time.

4. "There was no proof, nor allegation that any of these employees have become, or are, in any way, supervisory employees." The Respondent's proposed finding no. 4 is accepted based upon the consistent testimony of all witnesses.

5. "Exhibits were introduced by the petitioner in the form of position descriptions (Exhibits C and D) which demonstrate that there are large dissimilarities between the position requirements and duties of road and bridge crew members and landfill equipment operators. The positions involved vary substantially [sic] different skills and knowledge and duties and involved a wholly separate work place. The positions are not fungable [sic]." The

Respondent's proposed finding no. 5 is accepted for the following reasons: the PDs, and the testimony of Ed Tinker, Tom Davis, Cathy O'Brien and Sheila Cozzie establish that more diverse and complex skills are required for road and bridge operating engineers than for the landfill equipment operators. Because both groups of County employees operate equipment which weighs more than 25,000 pounds, a commercial driver's license is required of both groups. The County now classifies both as heavy equipment operators on the same pay matrix. Workplaces are different, but both involve public works.

6. "There are small but significant differences in the wage and benefit packages between the two bargaining units, as set forth in the two collective bargaining agreements. Moreover, the evidence showed that weather [sic] the benefit packages contain large or small differences, the landfill employees affected by the petition, prefer the package they have under the present contract." The Respondent's proposed finding no. 6 is accepted based upon the uncontradicted testimony of Ed Tinker, Tom Davis and Cathy O'Brien. That testimony established a unanimous preference by the landfill employees for negotiated differences in bonus pay; a personal day-off ("well-day"); work schedules bid by seniority, posted 10 days in advance with a possible week day off; fewer emergency occasions to be called into work during bad weather; and most important, separate seniority lists.

7. "There was no evidence offered that any benefit in efficiency or economy would accrue to the employer as a result of granting the present petition." The Respondent's proposed finding no. 7 is largely accepted. The petitioner argued administrative

efficiency, and ease of processing grievances. However, there was no evidence of any problems processing grievances at any time according to Cathy O'Brien's uncontradicted testimony. The County's designated representative has always been Sheila Cozzie for both bargaining units. Cathy O'Brien services the Health Department contract and Mel Wojcik services the Road and Bridge Contract for MPEA.

8. "The only basis for justifying the petition offered at trial was proof that a paper reorganization had taken place at an earlier time [June 26, 1996], and that the only result, other than the decrement to the employees proposed in the petition would be the paper squaring of the employers [sic] organizational charts, which in no way changed the duties, or even the immediate supervision of the affected employees." The factual assertions contained in the Respondent's proposed finding no. 8 are accepted. Organizational efficiency is the apparent benefit to the County. Although some similar job duties exist, the two groups perceive a different community of interests and do not wish joinder. There was no showing of any organizational problems or conflicts caused by either bargaining unit prior to the County's change in public works on or around June 26, 1996. (Testimony of C. O'Brien, S. Cozzie, T. Davis and E. Tinker)

9. "In the context of this case, it is significant that the landfill equipment operators do not wish to be moved under the new contract, and they are not wanted in the road and bridge crew bargaining unit." The Respondent's proposed finding no. 9 is accepted based upon the testimony of Ed Tinker, a 13 year employee of the landfill. The landfill employees are unanimous in their

strong desire not to be moved. Tom Davis, shop steward of the road and bridge crew, testified to unanimous resistance by his unit to having the four landfill employees moved into his unit as proposed. Cathy O'Brien also testified to concerns expressed by landfill employees.

10. "Finally, there are significant seniority issues which are not resolved by moving the employees from one bargaining unit to another, and, those seniority issues [sic] significant considerations, in the absence of any proof of benefit to the employer in any substantial manner, or any other justification for the proposed action of the employer." The Respondent's proposed finding no. 10 is accepted based upon the credible testimony of Cathy O'Brien, Tom Davis and Ed Tinker and on the specific controlling contract language and provisions detailed in the DISCUSSION section of this decision (Exhs. A & B, 1 & 2).

11. "Each of the collective bargaining agreements is binding on each of the parties." The Respondent's proposed finding no. 11 is accepted based upon the testimony of Cathy O'Brien and Sheila Cozzie, and on the contracts themselves, Exhs. A & B, 1 & 2.

Petitioner's Proposed Findings

12. "Lewis and Clark County went through an organizational restructuring. This restructuring began when the County opened a new regional landfill. The operation and oversight of this landfill was assigned to the Public Works Director. These Landfill employees were placed under the supervision of the Public Works Director. In the past, oversight of the landfill had been under the Health Officer. This restructuring prompted Lewis and Clark County to request these employees be moved to the Public Works

collective bargaining unit." The County's proposed finding no. 1 is accepted to the extent it details action the County took on or around June 26, 1996, shortly before the controlling contracts at issue became effective July 1, 1996. Although the health officer had held organizational-chart authority over the landfill employees, there were no allegations or evidence of any active supervision or any organizational difficulties associated with that previous structure. Will Selser continues to have responsibility for day-to-day supervision of the landfill employees.

13. "Lewis and Clark County did implement a change in the administrative structure of this department. The entire landfill operation was moved from the Health Department to the Public Works Department.

"Leaving the Landfill Operators in their current bargaining unit (Health Department) makes it difficult to following [sic] grievance procedures as outlined. Under the current contract they are to appeal a grievance to the department head. This would mean a grievance would be appealed to the Health Officer.

"However, the Health Officer has no affiliation with these individuals. This person is not the landfill employees' supervisor, would not have any insight into a grievance or the events leading to a grievance, or, any knowledge of the landfill operations.

"In addition, the Public Health Officer is supervised by the Board of Health, as outlined in state statue, [sic] and the Public Works Director is supervised by the Board of County Commissioners."

Proposed finding no. 1 contained in the County's reply brief, is rejected, with the exception of paragraph one, which reflects

action taken by the County. Paragraphs two through four are rejected as arguments largely disproved at the hearing. There were no allegations nor any evidence of difficulties processing grievances through the existing mechanisms and chain of command, in place for approximately nine years. When problems or grievances go beyond Will Selser, the immediate supervisor of the landfill workers, Sheila Cozzie, becomes the County's designee as a matter of longstanding practice. Sheila Cozzie continues to represent both the Health Department and the Public Works Department in working with either Cathy O'Brien, MPEA's Health Contract servicer, or Mel Wojcik, MPEA's Public Works Contract servicer. There is overlap in the membership of the Boards of Health and County Commissioners, and all employees ultimately work for the County. (Testimony of C. O'Brien, T. Davis, E. Tinker, and S. Cozzie)

14. "Prior to 1988 the Landfill employees were non-union. During a restructuring in 1988, these employees were automatically placed in the Health Department unit, and became members of that union." The County's proposed finding no. 2 is rejected based on lack of evidence. No person who testified knew the actual date the landfill workers became part of the MPEA Health Department unit. The representation of 1988 came from the County's attorney. Although this may be an accurate date, there is no support in the record. According to Cathy O'Brien's credible testimony, contract provisions stem from long bargaining efforts, and, therefore, cannot properly be considered "automatic."

15. "The Landfill employees, by definition, are not members of the Health Department bargaining unit. Article II, Recognition of Exclusive Representative, Section 2. Appropriate Unit states

that '...exclusive representative shall represent all part-time and full-time employees of the Employer, employed by the Department whose headquarters are located at 316 North Park, and 1930 9th Avenue, Helena, Montana, and, as certified by the Board of Personnel Appeals dated July 12, 1977...' Employer is futher defined on page 1 of the contract as 'Lewis and Clark City-County Health Department.' The County's proposed finding no. 3 is rejected. The law will not permit the County to deny the validity of the contract it signed and that has long controlled the work relationship between itself and the landfill employees. The County's primary offices remain at 316 North Park. This proposed finding appears to be an artificial semantic distinction. (Exhs. A & B, 1 & 2).

16. "Currently, the operators at the Landfill work under the Health Department contract. This requires that grievances be first filed with the Department Head, the Health Officer. However, the Health Officer has not [sic] supervisory or regulatory authority over these individuals. Their supervisor is the Public Works Director. In addition, the Health Officer and the Public Works director are not supervised by the individuals. The Board of Health hires, supervises and terminates the Health Officer and the Board of County Commissioners hire, supervise and terminate the Public Works Director." The County's proposed finding no. 4, much as its amended proposed finding no. 1 above, is rejected for reasons cited in FINDING No. 12. No grievance processing problems were even alleged. However, the weight of the evidence, and even some begrudging admission by the Respondent's counsel show that the

proposed move would foster administrative convenience for the County.

17. "Lewis and Clark County attempted to work with Montana Employee's Association to move these employees to the Public Works unit. Initially, representatives from both units (Mel Wocjik, Public Works, and Cathy O'Brien, Health Department) agreed to the move. However, later [sic] decided they did not want to move these employees. The County attempted to address all of the concerns of the representatives, but we were unable to satisfy the union. At that point, Lewis and Clark County contacted the Board of Personnel Appeals for advice. The County was advised by Paul Melvin, that unit clarification was the appropriate avenue." The County's proposed finding no. 5 goes to the heart of the dispute. Sheila Cozzie testified that she never asked the landfill employees about their concerns or wishes. Cathy O'Brien admitted that unsuccessful discussions had taken place between the parties' representatives. Testimony established that from the perspective of the affected County employees, serious seniority concerns exist. Other employee concerns involve provisions achieved through negotiated bargaining. Because this finding goes to the ultimate issue, and because the County was unsuccessful at the bargaining table, its chosen means of achieving this goal will be addressed in the DISCUSSION section of this decision below. Because Paul Melvin did not testify or submit anything in writing, his precise advice is unknown. Although he may have recommended unit clarification as the appropriate mechanism for pursuing this matter, Melvin's statement is neither relevant or binding.

18. "The Landfill employees, by definition, are not members of the Health Department bargaining unit. Article II, Recognition of Exclusive Representative, Section 2. Appropriate Unit states that '...exclusive representative shall represent all part-time and full-time employees of the Employer, employed by the Department whose headquarters are located at 316 North Park and 1930 9th Avenue, Helena, Montana, and, as certified by the Board of Personnel appeals (sic) dated July 12, 1977...' Employer is further defined on page 1 of the contract as 'Lewis and Clark City-County Health Department.' The County's proposed finding no. 6 repeats their proposed finding no. 3, and was rejected in FINDING No. 15 above.

19. "All of the employees involved in this matter are members of the Montana Public Employee's Association. They are, however, represented by two separate union contracts." The County's proposed finding no. 7 is accurate but incomplete. This proposed finding downplays the differences testified to by members of the two separate MPEA groups affected here. Both Ed Tinker, a landfill worker, and Tom Davis, a road and bridge worker, testified that their respective members unanimously oppose the proposed move. Moreover, Tom Davis, testified that the road and bridge crew would take active measures to protect their present positions at the expense of the newly proposed minority members, that is, the landfill employees. Cathy O'Brien credibly testified that in her opinion, as a matter of well-settled contract law, by simple majority vote on their contract, the existing 23 or so road and bridge crew employees can effectively deny seniority rights to the four landfill workers contemplated in this move.

20. "All individuals are classified on the County pay schedule as Heavy Equipment Operators. This position is a grade 14, with a salary range of $12.56 per hour to $14.78 per hour. Both contracts have been settled for at least two years. The Public Works contract's pay plan is slightly more accelerated than the Health Department. Operators in public works will be at the market rate of $14.78 by January 1998, while the health department employees won't be at the market rate until July 1998." The County's proposed finding no. 8 is accepted as an accurate representation of the County's pay plan based upon Sheila Cozzie's testimony. Details of the County's implementation of its pay plans to achieve market rate for both groups of employees (Health Department and Public Works) are appended to Exhibits A&B, 1 & 2.

21. "Duties performed by these individuals are similar. They are not identical. However, there are more similarities in duties of these two positions (operator at public works and operator at landfill) than there are between the positions at the health department. The Health department unit consists of professional medical staff and the administrative staff needed to operate the health clinic. This is the unit that the landfill operators are currently under." The County's proposed finding no. 9 is accurate but incomplete. Because landfill equipment operators and road and bridge crew operating engineers operate quite different equipment weighing more than 25,000 pounds, both sets of employees are required to posssess commercial drivers' licenses. Testimony of Ed Tinker and Tom Davis documented significant differences in their respective duties and skills (more in DISCUSSION section). The County's undated position descriptions set out many differences.

The road and bridge crew operating engineers require more skills and the ability to execute engineers' directions (Exhs. C and D). Not all Health Department workers share close similarities, such as nurses, secretaries and the County sanitarian. "Community of interest," ARM 24.26.611 (1) (a), encompasses more than job duties and is addressed further in the DISCUSSION section of this decision.

22. "Lewis and Clark County's fringe benefit package is the same for all employees of the County, whether inside a bargaining unit or not." The County's proposed finding no. 10 is accepted to the extent it refers to insurance and certain county-wide benefits. It is rejected to the extent it fails to address several benefit distinctions achieved through collective bargaining and reflected in the two different contracts and based on the testimony of Sheila Cozzie, Cathy O'Brien, Ed Tinker and Tom Davis. The affected workers testified to their strong desire to retain such benefit distinctions. Certain advantages exist in the public works unit.

23. "There are some differences in the two union contracts. One specific difference is the issue of a well day. Under the current contract, the operators receive a well day (day off with pay), if for a period of six months they do not use any sick leave. This benefit would be lost under the public works contract. However, payroll records show that these particular employees have not qualified for the well day during the last four years.

Other differences include:
Pay when working a holiday: Currently they receive double time (2), and under the proposed unit they would receive double time and one-half (2 1/2)

> Weekend work: Landfill employees are required to work on the weekends on certain shifts and public works employees are not.
>
> Comp time accrual: Landfill employees can accrue up to 24 hours of comp time. Under the new contract that is increased to 40.
>
> Overtime: Under their current contract landfill employees do not receive overtime pay until reaching 40 hours in a work week. Under the new contract they would receive overtime pay after eight hours in a work day.

The County's proposed finding no. 11 is accepted to the extent it highlights certain differences in the two binding contracts. It is rejected as to whether any current landfill operators have recently qualified for a "well day." Although possibly accurate, no testimony or documentary evidence was offered to support this portion of the proposed finding.

24. "Seniority is an issue for the landfill employees. Lewis and Clark County would agree to separate seniority lists for the road employees and the landfill employees. It would work much the same as in the current contract, as these individuals are already separated by seniority lists. These employees would not be required to start over with no seniority. We would consider them transfers as they are transferring from one department to another. When transferring any employee at the County, all seniority and benefits are retained with that employee to their new department. This has been past practice county-wide and has occurred between these two units in the past, when one landfill employee transferred to the road department." The County's proposed finding no. 12 is an accurate statement of its intentions. It is rejected to the extent it purports to interpret contract law, because the signatories to the two contracts running until July 1999, and July

2000, are the only persons with voting rights. In essence, the County cannot by fiat and good intention transfer seniority rights (the pertinent Articles VIII and XXII of the Road/Bridge/Shop contract are explained in the DISCUSSION section below). No testimony or documentary evidence supports any landfill employees achieving such a transfer of seniority. Protection of seniority constitutes the most serious and meritorious issue at stake for the landfill workers. Hearsay testimony concerning seniority transfer which may have taken place for a now retired supervisor (Bill "TJ" Blagent [sp]) is not applicable or controlling.

IV. FINDINGS OF FACT

25. The Road and Bridge crew are not required to work weekends, except for emergencies, including snow removal. The landfill equipment operators must work weekends, and pick up trash along the perimeter of the site. The road and bridge crew employees do not want to be assigned to the landfill duties. Both groups work outside in all types of weather. (Testimony of S. Cozzie, T. Davis and C. O'Brien)

26. Before and after the County's June 1996 reorganization of public works, no problems have occurred between the County and either bargaining unit in the processing of grievances. The mechanics of processing grievances have not changed. Sheila Cozzie usually serves as the County's designee. Cathy O'Brien had processed three grievances in calendar 1997 for her Health Department unit. (Testimony of C. O'Brien)

27. In the event of County layoffs, the landfill employees have serious concerns that the voting block of the road and bridge crew employees would imperil their jobs, despite their current

seniority under the separate Health Department contract. The 23 to 4 voting edge, and explicit testimony of Tom Davis, Shop Steward, confirmed that the road and bridge crew employees would exercise their voting rights in a manner which could jeopardize the jobs of the landfill employees. The road and bridge crew employees possess greater skill levels as evidenced by the job requirements (compare position descriptions, Exhs. C and D). The members of each unit object to being moved against their will. Cathy O'Brien recounted employee-expressed causes for friction regarding possible merger, including how overtime is dispensed. (Testimony of C. O'Brien, T. Davis, and E. Tinker)

28. According to the terms of the contracts, seniority starts with the day of hire under the contract, not with the date of hire with the County. The two County-MPEA contracts at issue do not have reciprocity clauses for transfer of seniority to different County departments (explicated in the DISCUSSION section). The members of each unit have voting rights to refuse to re-open or even consider an "addendum" to the existing contracts, prior to the expiration of the contracts. (Exhs. A & B, 1 & 2; testimony of C. O'Brien)

29. The County does not consider landfill employees and road and bridge crew employees fungible. At the time of hearing the County had no plans to have workers in the different units assigned to the other's work. The County ratified the respective position descriptions detailing different skills. (Testimony of S. Cozzie; Exhs. C and D)

30. The parties in this case are also parties to two collective bargaining agreements which are relevant in this matter.

(Exhs. 1 & 2, A & B; testimony of C. O'Brien, S. Cozzie, E. Tinker and T. Davis)

31. The parties did not allege nor offer proof of any substantial change in the duties of the landfill employees at any material time. The duties of the road and bridge operating engineers were not alleged to have been changed at any material time. (Testimony of E. Tinker, C. O'Brien, S. Cozzie and T. Davis; Exhs. C & D)

32. The parties did not allege nor offer proof that any of these employees have become, or are, in any way, supervisory employees. (Testimony of the witnesses was consistent on this point)

33. The position descriptions of these two groups of employees (Exhs. C & D) demonstrate significant differences in the duties, skills and work places of the two groups. The County and the Respondent do not consider the positions fungible. Because both groups of employees operate heavy equipment, the workers are required to have a commercial driver's license. The County now classifies both groups of employees as heavy equipment operators on the same pay matrix. Workplaces are different, but both involve public works. (Testimony of E. Tinker, T. Davis, C. O'Brien and S. Cozzie)

34. The benefit packages set forth in the two collective bargaining agreements demonstrate small but significant differences. Members of the two bargaining units prefer the separate benefits they have under their respective contracts. (Testimony of E. Tinker, T. Davis and C. O'Brien)

35. The Petitioner offered no substantial evidence that the County would gain any significant benefit or economy if this petition were granted. Granting the petition would afford the County some administrative efficiency. The County offered no evidence that processing grievances through existing mechanisms has been a problem or would be improved by granting the petition. Cathy O'Brien services the Health Department contract, and Mel Wojcik services the Road and Bridge contract for the MPEA. (Testimony of C. O'Brien)

36. The Petitioner offered no evidence of any change of duties for the two groups of employees, or of change in the immediate supervisors. The County would gain some organizational efficiency. The two groups do not wish joinder. The County's basis for the unit change is to reconcile the reorganization action it took June 26, 1996. (Testimony of C. O'Brien, S. Cozzie, T. Davis and E. Tinker)

37. Landfill operators are unanimous in not wanting to be moved. Road and bridge crew employees are unanimous in not wanting to be moved. Cathy O'Brien detailed concerns which had been expressed to her. (Testimony of E. Tinker, T. Davis and C. O'Brien)

38. The Respondent's witnesses presented bona fide concerns by the landfill operators for job seniority and job security. The County's proposed offers and request to move the workers failed to overcome controlling contract language and contract provisions detailed in the DISCUSSION section of this decision. (Testimony of C. O'Brien, T. Davis and E. Tinker)

39. The two separate collective bargaining agreements are binding on each of the parties. (Testimony of C. O'Brien and S. Cozzie; Exhs. A & B, 1 & 2)

40. Lewis and Clark County initiated an organizational restructuring. This restructuring began when the County opened a new regional landfill. The operation and oversight of this landfill has been assigned to the Public Works Director. The County's reorganization now places the landfill employees under Public Works; formerly they were under the Health Department. Although the Health Officer held organizational authority over the landfill employees, the parties offered no evidence of any active supervision or organizational difficulties associated with the County's previous structure. The County's formal reorganization of public works occurred June 26, 1996, shortly before the two controlling contracts became effective, July 1, 1996. Will Selser continues to have responsibility for the landfill employees.

41. Lewis and Clark County implemented the organizational realignment described earlier. The County offered no evidence of any difficulties processing grievances through existing mechanisms and the chain of command in effect for approximately nine years. When problems or grievances go beyond Will Selser, the immediate supervisor of the landfill employees, Sheila Cozzie becomes the County's designee as a matter of longstanding practice. Sheila Cozzie continues to represent both the Health Department and the Public Works Department in negotiating with either Cathy O'Brien, MPEA's Health Contract servicer, or with Mel Wojcik, MPEA's Public Works Department Contract servicer. There is overlap in the membership of the Board of Health and the County Commissioners.

All the employees at issue ultimately work for the County. (Testimony of C. O'Brien, T. Davis, E. Tinker and S. Cozzie)

42. All of the employees involved in this matter are members of the MPEA. However, the landfill employees and public works' operating engineers are covered and represented by two separate contracts. The County and the MPEA negotiated these two contracts. Both Ed Tinker, a landfill employee, and Tom Davis, a road and bridge crew employee, testified to their respective members' unanimous opposition to this proposed move. The two groups perceive different interests. In fact, Davis credibly testified that the road and bridge crew employees would take active measures to protect their perceived interests at the expense of the newly proposed minority members, the landfill employees. Cathy O'Brien credibly testified that in her opinion, as a matter of well-settled contract law, by simple majority vote on their contract, the existing 23 or so road and bridge crew employees can effectively deny seniority rights to the four landfill employees contemplated in this move. (Testimony of C. O'Brien, T. Davis and E. Tinker)

43. The County classifies all employees at issue as heavy equipment operators on its pay schedule. The landfill position is grade 14, with a salary range of $12.56 per hour to $14.78 per hour. The existing contracts are marked as Exhibits 1 & 2 and A & B. The County's pay plan to achieve market rate for all employees is slightly more accelerated for Public Works than for the Health Department. The County expects the later department to be at market rate by July 1998. Details of the County's implementation of its pay plans for both groups are appended to Exhibits A & B, 1 & 2. (Testimony of S. Cozzie)

44. Certain fringe benefits are the same for all County employees, such as insurance. The road and bridge crew employees and the landfill employees achieved certain different benefits through negotiated bargaining which are reflected in their contracts. The respective groups have strong preferences for their benefit distinctions. (Testimony of E. Tinker, T. Davis and S. Cozzie)

45. The two groups have different contracts. One specific difference is a well-day under the Health Department contract. This rewards landfill employees with one day off if no sick leave is used in a six month's period. Public works does not have this benefit.

> Other differences include:
> Pay when working a holiday: Currently they receive double time (2), and under the proposed unit they would receive double time and one-half (2 1/2)
>
> Weekend work: Landfill employees are required to work on the weekends on certain shifts and public works employees are not.
>
> Comp time accrual: Landfill employees can accrue up to 24 hours of comp time. Under the new contract that is increased to 40.
>
> Overtime: Under their current contract landfill employees do not receive overtime pay until reaching 40 hours in a work week. Under the new contract they would receive overtime pay after eight hours in a work day.

V. DISCUSSION

The parties have met the threshhold petition requirements for unit clarification. The Board's agent, Kathy van Hook, conducted a preliminary investigation of this Petition and issued her ORDER dated December 30, 1996. Having found that a question of fact exists, her ORDER forwarded this case to the hearings bureau for a contested hearing pursuant to ARM 24.26.630. At the pre-hearing

telephone conference in this matter, the Respondent's representatives did not dispute that the County's petition contains the individual elements named in ARM 24.26.630. The County's petition in this matter sets out those requisite items. (Hearing file)

The Board has authority to determine an appropriate bargaining unit. The statutory criteria and administrative rules to be used in unit clarification petitions are identical (§39-31-202, MCA and ARM 24.26.611). The Board's statutory grant of authority also enunciates the policy behind these nine factors:

> **39-31-202.** Board to determine appropriate bargaining unit -- factors to be considered. In order to assure employees the fullest freedom in exercising the rights guaranteed by this chapter, the board or an agent of the board shall decide the unit appropriate for the purpose of 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.

The County contends that its proposed move will promote administrative convenience, ease the processing of grievances, and that its reorganization of public works will be better reflected if its petition is granted. The County argued that it has classified both groups of employees as heavy equipment operators, and that their duties are similar. The County said it offered to maintain separate seniority lists. The County argued that the wishes of the affected employees should not be the deciding factor in whether unit clarification is granted.

The MPEA argued that the two groups of employees strongly wish to maintain their negotiated differences. The Respondent further

argued that the separate contracts, signed by the County, are controlling. The MPEA argued that seniority and job security of the landfill employees is at stake and not addressed by the County's offers.

The County failed its burden of proof to disturb the existing contracts. The County did not show any difficulties with the existing grievance process, in place for approximately nine years. The MPEA demonstrated substantial differences in skills and duties between the two groups of employees. The County did not demonstrate any applicable reciprocity clauses for seniority between the two contracts. The concern of the landfill employees for job security if they become minority members in a majority contract has been proven a valid concern. The MPEA demonstrated negotiated differences in benefits strongly preferred by the two groups of employees. The County failed to show why the contracts are not binding, or why the two contracts should be set aside for mere administrative convenience.

This discussion covers, in turn, (1) the nine factors the Board must consider in evaluating petitions for unit clarification, (2) the County's offer to maintain separate seniority lists and how that offers comports with the contracts in place, and (3) case law and precedent cited by the County.

1. **The nine factors for the Board to consider (§ 39-31-202, MCA)**

<u>Community of interest</u>

Community of interest is a general rubric fundamental to a bargaining group's composition. This term is not expressly defined but incorporates all the succeeding eight elements (ARM 24.26.611 (b) - (i)). The Board uses factors adopted from the National Labor

Relations Board (NLRB) in evaluating an appropriate unit. The NLRB enumerated these factors in Kalamazoo Paper Box Corp., 136 NLRB 134, 48 LRRM 1715 (1962). The Board need not determine the "most" appropriate unit, only that the unit shares a community of interests (See The Developing Labor Law, 448 - 452 (3rd ed., P. Hardin, ed. 1992)).

Wages

The County has classified both the landfill workers and the road and bridge crew employees as grade 14 heavy equipment operators. The wages of the road and bridge crew employees are slightly more advanced than those of the landfill workers toward the County's goal of market-based pay (FINDING No. 20). Overtime wages are greater under the road and bridge crew's contract (FINDING No. 23). Therefore, a close comparison exists between the two groups. No evidence was offered as to how the landfill equipment operators compare to other members of the Health Department contract.

Hours

Both groups work a 40-hour week, but considerable differences exist. In the summer, the road and bridge crew employees work four 10 hour days, with some working Monday to Thursday, and some Tuesday to Friday. This group is subject to emergency call-ins for street repairs and snow-plowing in the winter. They have weekends off. The landfill is staffed on weekends. The landfill equipment operators bid by seniority for favored shifts, often with a weekday off (FINDING No. 25 and testimony of C. O'Brien). Comp time accrual is different (FINDING Nos. 3, 5 and 23).

Fringe benefits and other working conditions

The contracts provide for differences in the negotiated fringe benefits the two groups receive (FINDING Nos. 6, 22 & 23). Pursuant to 42 A.G. Op. 37 (1987) Montana counties must offer the same insurance benefits to their recognized bargaining units. Testimony of Ed Tinker, Tom Davis and Cathy O'Brien confirmed the preferences the two groups have in maintaining their current differences (bonus pay, well-day, and work schedule bidding, among others).

The history of collective bargaining

The landfill equipment operators and the road and bridge crews have no common history of collective bargaining. Sometime around 1988, the Landfill workers became affiliated with the MPEA Health Department/County contract. The testimony of Ed Tinker, Tom Davis and Cathy O'Brien highlighted differences in duties and skills, and concerns to the extent that formal grievances would be filed if the petition advanced. Road and bridge crew employees do not want landfill duties; both groups perceive different interests. Cathy O'Brien's uncontradicted testimony established that the County's proposal would make the four landfill workers minority members in a majority contract.

Common personnel policies

The parties presented little if any evidence concerning personnel policies. Although some differences may exist between Public Works and Health, County-wide policies cover most issues. In terms of processing grievances, or day-to-day operations, no problems have been demonstrated with the status quo. Joinder would give the County some efficiencies.

Extent of integration of work functions and interchange among employees affected

Both groups operate heavy equipment. The landfill operators generally exercise less technical skill and fewer types of equipment. They need not read stakes, follow engineering plans, or perform blasting or other diverse requirements imposed on the road and bridge crew employees. The workers are not fungible and no change is duties is proposed (FINDING Nos. 3 & 29). No "exchange" of workers between the units is proposed. Both perform work outside at different locations in the arena of public works.

Desires of the employees

The desire of both groups is to remain separate (FINDING Nos. 22, 24 & 27). Seniority, possible job loss by the landfill workers who could be "bumped," overtime and scheduling remain legitimate concerns. Cathy O'Brien, Ed Tinker and Tom Davis credibly testified on this factor.

The County has raised legitimate organizational reasons for considering joinder. However, the County has ignored the binding nature of the two contracts (explained below). Offers of separate seniority lists fail to address contract provisions the County bargained.

2. **The County's separate seniority list offer and contract law**

The current contracts (Exhs. A & B, 1 & 2) are controlling and dispositive of the County's unit clarification petition. The County signed separate contracts with effective dates running from July 1, 1996 to June 30, 1999 (Road/Bridge/Shop) and from July 1, 1996 until June 30, 2000 (Health Department). Yet, on or about June 26, 1996, the County instituted organizatonal changes in

public works. Having been unsuccessful at informal negotiations with the two recognized MPEA groups, the County thereafter filed this petition for unit clarification October 1, 1996.

The Road and Bridge contract (Exh. A, p. 12) contains the following provisions:

ARTICLE VIII
SENIORITY

1. Seniority is based on the length of continuous service worked by a permanent full-time employee for the County in the Road, Bridge, and Shop Departments. For purposes of seniority only, the Road, Bridge, and Shop Departments shall be considered a single combined department. The concept of the combined Road, Bridge, and Shop Departments shall be applied in the seniority provisions specified below:

b. Employees or former employees, subject to the time limitation conditions of Article VIII, Section 4, [employees who are promoted to supervisory status and are removed from the bargaining unit] who have successfully bid to another department, and who have successfully completed the thirty (30) day promotion probationary period conditions of Article XIX, Section 1 herein, shall have their departmental seniority bridged in all respects, i.e., vacation benefits, sick leave benefits, seniority merged into the new departmental seniority lists, etc., providing however, that the new department is also subject to this same Agreement.

As indicated in FINDING No. 28, no such "reciprocity" clause exists in the Health Department contract. Pertinent seniority provisions of the Health Department contract (Exh. B, p.6) are:

ARTICLE XII
SENIORITY/LAYOFFS

Section 1. Seniority means an employee's length of continuous service with the Employer, [Health Department] since the last date of hire.

The other controlling contract provisions of these two separate contracts involves any changes in the contracts. The Road and Bridge contract (Exh. A, p.25) reads:

ARTICLE XXII
TERM OF AGREEMENT

Section 2. Changes in Agreement:

During its terms this Agreement may be altered, changed, added to, deleted from or modified only through the voluntary, mutual consent of the parties in written and signed amendment of this Agreement.

The Health Department's contract provisions covering changes reads (Exh. B, p. 15) as follows:

ARTICLE XXVII
SCOPE OF AGREEMENT

This Agreement constitutes the entire Agreement between the parties. The parties further acknowledge that during the course of collective bargaining, each party has had the unlimited rights to offer, discuss, accept or reject proposals. Therefore, for the term of this Agreement, no further collective bargaining shall be had upon any provision of this Agreement, nor upon any subject of collective bargaining, unless by mutual consent of the parties thereto.

These respective seniority and change of agreement provisions support the Respondent's position that the County's proposed "seniority merger" cannot be accomplished by County fiat. Voting to re-open the contract and then to agree to modification are required by the above terms (FINDING No. 28). Because the road and bridge crew employees now possess exclusive status within their own contract, and because their 23 members would continue to enjoy "majority status" if the four landfill workers were to join the road and bridge contract as new hires, seniority concerns of the landfill workers are bonafide.

3. **Case precedent cited by the County**

Montana recognizes that interpretations of the National Labor Relations Act are "instructive" in evaluating collective bargaining issues under state law Small v. McRae, 200 Mont. 497, 651 P.2d 982 (1982), Great Falls v. Young, 211 Mont. 13,

686 P.2d 185 (1984), and Brinkman v. State, 224 Mont. 238, 729 P.2d 1301 (1986).

The County cites the following three cases which are not controlling in this case: NLRB v. Ideal Laundry & Dry Cleaning Co., 56 LRRM 2036 (10th Cir. 1964), In re Baltimore Transit Co., 92 NLRB 120, 27 LRRM 1148 (1950), and State Labor Relations Bureau on Behalf of the Montana Historical Society v. Montana Federation of State Employees, MFT, AFT, AFL-CIO, Unit Clarification #5-85, September 9, 1986. In re Baltimore Transit, id., involved employees alleged to have supervisory status, which would be grounds to remove the workers from the bargaining unit; the NLRB found the workers to be clerical. None of the landfill employees at issue have had any change of duties and none are alleged to be supervisors. Ideal Laundry, id., holds that the wishes of the workers with respect to inclusion in a bargaining unit is a factor, but not the only factor to be considered. In the Montana Historical Society, id., the archivist position at stake was properly excluded from a bargaining unit due to the bona fide supervisory duties, facts not at issue here.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals and the Hearing Examiner have jurisdiction of this matter. § 39-31-202, MCA. In addition, § 39-31-105, MCA, directs that these administrative hearings be conducted according to the appropriate provisions of the Montana Administrative Procedures Act (MAPA), §§ 2-4-601 to 2-4-623 , MCA.

2. The Petitioner has failed to establish that justification exists to disturb the status quo and remove certain landfill employees from the Board-recognized MPEA Health Department

bargaining unit. The existing collective bargaining agreements cannot be set aside for mere administrative convenience; the Petitioner did not show any change in duties or supervisory status of any affected employees.

VI. RECOMMENDED ORDER

The County's October 1, 1996, petition to remove four full-time landfill equipment operators from the Lewis and County Health Department/MPEA contract is denied.

DATED this 19th day of February, 1998.

BOARD OF PERSONNEL APPEALS

By: Stephen L. Wallace

Stephen L. Wallace
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 March 16, 1998. 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 59604

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Thomas Schneider, Pres & Carter Picotte, Esq
Montana Public Employees' Association
P.O. Box 5600
Helena MT 59604-5600

Sheila Cozzie, Personnel Officer & Paul Stahl, Esq
Lewis and Clark County
P.O. Box 1724
Helena MT 59624-1724

DATED this 19th day of February, 1998.

landfill.sw