STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 1-2000:

MONTANA PUBLIC EMPLOYEES ASSOCIATION,	)	Case No. 1269-2000
Petitioner,	)	
vs.	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**
CASCADE COUNTY,	)	
Respondent.	)	

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I. INTRODUCTION

Hearing Officer Michael T. Furlong conducted a hearing in this matter on April 6, 2000. Petitioner Montana Public Employees Association (MPEA) was represented by Carter N. Picotte, MPEA Legal Counsel. Respondent, Cascade County, was represented by Dirk M. Sandefur, Deputy County Attorney. The parties filed joint exhibits A/1, C/3, D/4, and W, which were admitted into evidence. Petitioner exhibits G, H, I, N, Q, R, S, and T, were admitted into evidence without objection. The record was held open until May 8, 2000, by request of the parties, in order to submit post-hearing briefs. Post-hearing submissions were filed by the parties and are included in the record.

On October 6, 1999, pursuant to §39-31-202, MCA, the MPEA filed with the Board of Personnel Appeals a unit clarification petition seeking the inclusion of three new positions, county grant writer, county grant financial compliance officer, and county computer support specialist, into the existing MPEA unit. The County

submitted a rebuttal response in opposition to the MPEA petition on November 18, 1999.

On February 16, 2000, parties appeared for a telephone pre-hearing conference before the hearing officer. At the pre-hearing, the County and the MPEA verbally stipulated to expand the unit clarification proceedings to address the County's request to exclude the sheriff's office administrative assistant position from the MPEA unit. However, by written stipulation filed with the hearing officer on April 6, 2000, the County and the MPEA stipulated to include the county computer support specialist and the sheriff's office administrative assistant position into the MPEA unit. As a result, the parties jointly requested that the Board recognize the stipulation in its final decision on this proceeding. Thus, the only remaining question at issue at the hearing on April 6, 2000, is whether the grant writer andgrant financial compliance officer should be included into the unit.

II. ISSUE

The issue in this matter is whether the grant writer and grant financial compliance officer positions should be included in the MPEA collective bargaining unit.

III. FINDINGS OF FACT

1. Cascade County is an incorporated political subdivision of the State of Montana. The County is a large, diverse, and multi-unit public employer subdivided into a number of separate office divisions. Some of the divisions exist by law and some exist at the discretion of the Board of County Commissioners. Several union bargaining units, as well as several non-union work units and positions exist throughout various offices and departments of the county government.

2. Cascade County recognizes the MPEA as the exclusive bargaining agent for the following employees, pursuant to Article I, Section 1 of the collective bargaining agreement:

SECTION 1: All deputies and clerks and assistants and other employees, except those who were elected, in the following offices of the Cascade County Courthouse: Clerk and Recorder, Treasurer, Auditor, County Commissioners, Surveyors, Superintendent of Schools, Clerk of Court, Justice of the Peace, Youth Court, County Attorney except the legal staff, secretarial, clerical, cooks in the Sheriff's Office and Switchboard.
SECTION 2: Other secretarial, bookkeeping, stenographic and clerical employees of Cascade County, authorized by the laws of Montana.
SECTION 3: The ASSOCIATION recognizes that it is not the bargaining agent for the supervisors, management officials and confidential employees as defined by M.C.A. 39-31-103. The EMPLOYER shall notify the ASSOCIATION of any new position within the bargaining unit for determination as to whether the position is covered under the terms of this Agreement. Any disagreement between EMPLOYER and ASSOCIATION over positions excluded from the bargaining unit shall be submitted to the BOARD OF PERSONNEL APPEALS for a final decision.

3. The Board of Commissioners has general supervisory authority over all the divisions of county government. In the non-statutory offices, the Board of Commissioners has customarily delegated its supervisory authority to various appointed positions. The Board of Commissioners has also adopted a comprehensive personnel policy for all county employees. The comprehensive personnel policy applies to all officers and employees in work units, union and non-union, without distinction. The county personnel policy provides common fringe benefits (leave, insurance, and so on) in accordance with Montana law.

4. The finance officer position is a non-union, non-statutory position generally supervised by the Board of Commissioners. The primary function and responsibility of the county finance officer is to prepare, administer, and monitor the overall county budget on behalf of the Board of Commissioners in accordance with Montana's county budget and finance laws. The finance officer also assists county elected officials and department heads in preparation of their individual department

budgets. The Board of Commissioners does not direct the county finance officer as to the method, manner, or details of performance of his tasks.

5. The finance officer is delegated general supervisory status over the county computer center and the grants office. The computer center and grants office have separate and distinct functions and budgets within the overall county budget process. The finance office budget does not include the budgets of the computer center or grants office. The budget for grants office activities is prepared and submitted directly through the finance officer.

6. The computer center consists of a non-union supervisor and three computer programmers who are members of the MPEA. The computer center is responsible for all centralized computer data processing functions, for researching, obtaining, administering, and monitoring supplementary state, federal, and private grant funding for county government offices and related public improvement projects. Individuals assigned to the programmer positions and the computer center supervisor position interact and interchange with bargaining unit employees in only limited ways.

7. The grants office consists of two positions, grant writer and grant financial compliance officer. The finance officer handles all supervisory and disciplinary responsibilities for the grants office. Under county policy, the finance officer is empowered to oversee the grants office positions and to call periodic meetings with the grant writer and grant financial compliance officer to receive briefings on the status of current projects. Typically, the finance officer does not closely inspect or direct the methods by which the grant writer and grant financial compliance officer perform these duties.

8. The scope of the activities of the grant writer position is relatively narrow, but the complexity and the importance of the work are relatively high. The

grant writer has direct contact with members of the Board of Commissioners concerning specific projects already in hand.

9. The grant writer researches and identifies sources of potential state, federal, and private grant money to fund county government services and other public projects. The grant writer evaluates potential grant sources for suitability and compatibility with county government goals, needs, and policies. The grant writer writes professional grant applications to secure funding and coordinates and facilitates the administration of multiple grant funding projects through all stages, beginning with the research and application and following through to project implementation.

10. The grant writer performs these tasks through extensive consultation with elected officials and department heads, private entities, and local, state, and federal government agencies and officials. The grant writer researches and interprets federal and state regulations and guidelines. The position requires knowledge, skills, and abilities typically acquired through a combination of education and experience equivalent to a bachelor's degree with course work specifically in grant writing or successful grant writing experience.

11. The functions and responsibilities of the grant financial compliance officer are to monitor and evaluate all county grant projects for compliance with state and federal grant regulations, grants, accounting and requirements. The grant financial compliance officer advises, directs and assists county elected officials and department heads on all aspects of state and federal grant issues. The grant financial compliance officer prepares and presents grant compliance reports to state and federal agencies regarding the compliance status of all county grants. The grant financial compliance officer directly performs certain administrative functions, such as procurement and expenditure approval for various county grants.

12. The grant financial compliance officer position requires knowledge of grant accounting, federal and state guidelines, and grant compliance issues typically acquired through a combination of education and experience equivalent to a bachelor's degree with course work specifically in governmental and grant accounting. The grant financial compliance officer is required to spend significant time in contact with the full range of county personnel, from department heads to clerical employees who do the record keeping. The compliance officer consults with county elected officials and department heads, private entities, local, state, and federal government officials, researches, and interprets state grant regulations and guidelines, and files applications. The grant financial compliance officer does not initiate policy or projects without authorization.

13. The grant writer and grant financial compliance officer exercise initiative and discretionary decision making in their effort to help the county maintain and expand its revenue base, given the otherwise static nature of county revenue. The grant writer and grant financial compliance officer interact primarily with county elected officials, department heads, and administrative staff, none of whom are in the current MPEA bargaining unit. There is some limited integration of job-related tasks between the grants office positions and the general office positions in various departments of the county, including members of the MPEA and other county bargaining units.

14. Prior to the 1999 creation of the grant writer and grant financial compliance officer positions, various department heads and administrative staff outside the MPEA bargaining unit applied for and administered grant funding. The county created the grant financial compliance officer position to fill a new and increasing need beyond the general grant accounting function previously performed in various county offices.

15. The grant writer and grant financial compliance officer positions are salaried positions. The current starting salary for these positions is $26,000. The county has treated the grant writer and compliance officer positions as "exempt" positions for purposes of payment of wages under the federal Fair Labor Standards Act (FLSA) and supplementary Montana law.

16. In addition to the independent grant-related duties of his position, the grant financial compliance officer performs certain non grant-related general bookkeeping and general accounting functions at the Cascade County Juvenile Detention Center since the job became vacant in early 2000. The position is an MPEA, non-grant position. He performs the bookkeeping and accounting functions on a temporary, emergency basis, until the County can hire a qualified employee to fill the position.

17. Positions of MPEA bargaining unit employees are paid at an hourly rate. There are bargaining unit positions that receive annual wages of more than $26,000. The beginning salaries for the grant writer and grant financial compliance officer positions are higher than the current annual earnings of most current bargaining unit employees.

18. Individuals currently assigned to the grant writer and grant financial compliance officer positions object to inclusion in the MPEA bargaining unit. In their opinion, inclusion in the MPEA bargaining unit would limit their earning potential and their ability to advance based upon individual merit, productivity, and achievement in the work.

19. The same personnel policies and disciplinary measures apply to grants office employees as apply to all bargaining unit members, with the exception of the protections and due process rights that adhere by virtue of membership in the unit.

20. The history of the MPEA bargaining unit began in 1975. In 1975, the MPEA petitioned to recognize appointed employees in certain specified county offices

as a unit appropriate for certain collective bargaining purposes. As a result, the MPEA and the county stipulated in writing that:

> [the] appropriate collective bargaining unit is a unit consisting of all non-exempt clerical and general office employees of Cascade county in the following offices: Clerk and Recorder, Treasurer, Auditor, Surveyor, County Attorney, Justice of the Peace, IBM, Switchboard, Probation Office, Superintendent of Schools, Clerk of Court Public Defenders, Commissioners, and Sheriff.

(Resp. Exhibit R, 1975 Stipulation, UD 10-75)

At that time, the Board recognized and certified the stipulated unit as an appropriate unit for collective bargaining, thereby recognizing the MPEA as the exclusive representative of the stipulated unit. The originally recognized MPEA unit consisted of 72 county employees. As of April 6, 2000, the MPEA bargaining unit currently includes 80 County employees.

21. In 1993, incident to a unit clarification proceeding, the County and the MPEA stipulated, without elaboration, to the inclusion of three county computer specialists in the MPEA unit (Exhibit T) and the computer support unit specialists became members of the bargaining unit. In 2000, the County and MPEA stipulated to include a new computer support specialist position in the MPEA unit.

21. In 1993, the County filed a unit clarification petition seeking to exclude from the MPEA unit seven positions located in certain offices enumerated in the 1975 unit stipulation. (Exhibit T). The Board rejected the County's assertion that the subject employees were not "public employees" because they qualified as "supervisory employees," as defined by §39-31-103(11), MCA. The Board based its decision on its finding that the subject positions were "more routine and clerical in nature and did not require the use or the exercise of substantial independent judgment."

V. DISCUSSION

Montana law gives the Board of Personnel Appeals the responsibility to determine what unit of public employees is appropriate for collective bargaining. §39-31-202, MCA. The essential question to be examined in this case is whether the MPEA bargaining unit sought by petitioner is appropriate for the grant writer and grant financial compliance officer positions. The county does not maintain that the employees are supervisory employees, therefore, excluded from coverage under the collective bargaining laws. Instead, the county maintains that due to the nature of the work they perform, they lack community of interest with the other members of the unit. Section 39-31-202, MCA requires that a number of factors be considered in determining the appropriate unit in which employees should be placed for the purpose of collective bargaining. Section 39-31-202 MCA states:

> 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.

All the pertinent factors set forth in the statute have to be weighed to determine if the proposed bargaining unit is appropriate and no one factor has controlling weight. However, all of the factors together are often referred to as community of interest. While it is true that the two individuals employed in the grants unit positions expressed their desire not to belong to the bargaining unit, this, by itself, is not determinative. The burden is on the employer to demonstrate that the interests of a given classification are so disparate from those of other employees that they cannot be represented in the same unit. To have isolated pockets of employees outside any bargaining unit who share some community of interest with members of

the bargaining unit is disruptive to labor relations and fails to promote the fullest freedom to employees in exercising their collective bargaining rights.

The County argues that except for the computer positions added by stipulation in 1993 and 2000, a majority of all of the current MPEA positions are within the express scope of the originally stipulated definition of the MPEA bargaining unit. Those positions involve closely supervised, routine and repetitive general office and clerical tasks, whereas the grant unit positions are mostly administrative, technical, and advisory in nature. The County further points out that the actual nature, size, and scope of the MPEA bargaining unit has not substantially changed in the 25 years since the original 1975 unit stipulation.

In determining the community of interest of the particular employees involved, it is important to examine the collective bargaining agreement and the groups of employees it includes and excludes from the bargaining unit. (FOF#2).

Article I of the collective bargaining agreement entered into on July 13, 1999, does not expressly exclude the grant writer and grant financial compliance officer positions from the bargaining unit. They are not elected or appointed positions of the County. Those positions do not belong to the legal, secretarial, or clerical staffs in the office of the county attorney, man the switchboard, or serve as cooks within the sheriff's office. They are not classified as supervisors, management, or confidential employees, as defined by §39-31-103, MCA. The County maintains that the grant positions do not fit within the scope of the duties performed by general office and clerical workers and, therefore, do not belong in the bargaining unit. However, the fact that county has recognized MPEA as an appropriate bargaining agent for computer unit staff who do not perform clerical or general office type work is not consistent with their position.

The grant writer and grant financial compliance officer are not responsible for carrying out any supervisory or managerial tasks. They are, therefore, similar to

MPEA members rather than non-bargaining unit county employees who typically would be assigned those tasks. Perhaps the two grants office positions are not given as much direct supervision in daily job tasks as usually given MPEA members due to their expertise in the grant field. Nevertheless, pursuant to the county organizational system, their performance is still subject to immediate supervision, including discipline, under the finance officer. It is the county's position that the grant writer and grant financial compliance positions are not "clerical and general office" employees, but that they are special function, senior advisory, and administrative specialist positions by nature and function. The county alleges that the grants office positions are not part of any enumerated county offices in the stipulated unit definition currently recognized by the Board – they exist in a separate and distinct functional department, the county grants office.

Although the grants office positions serve an important function of the county, they are not directly related to those positions that develop management policies or are in the county's general business operations. Those positions are primarily involved in securing and complying with grants rather than the actual development of policy and general business operations. The positions are administrative and technical in nature, but this does not make them inappropriate for inclusion in the unit. See Unit Clairification 6-85 (1986).

The grant writer and grant financial compliance officer positions are paid on a salary basis while the MPEA members are paid hourly. However, the annualized wages of the grants unit positions fall in the same range as some bargaining unit members with respect to total amount earned. In fact, there are MPEA members who earn equal to or in excess of the wages paid the grant writer and grant financial compliance officer positions. Therefore, the pay the grants office positions receive is not disproportionate in comparison to bargaining unit members. Also, the record shows that the grant writer and grant financial compliance officer have at least

occasional interaction in the performance of their work with MPEA employees.

There is no evidence that there is any benefit package that applies to the positions in issue that does not apply to the bargaining unit members who work in the same office complex. All county employees including the grants office positions and the MPEA member positions are subject to the same personnel policies as set forth in the Cascade County personnel policies. County personnel policies and benefit entitlements are essentially identical for both bargaining unit and non-bargaining unit employees.

The County contends that the grants unit positions fall within the "exempt" provisions found in the federal Fair Labor Standards Act and the supplementary Montana law. Whether these positions are in fact exempt from the minimum wage and overtime laws is outside the scope of this decision. However, the fact that an employee is exempt from the minimum wage and overtime laws does not, by itself, mandate a finding that the position should not be part of a bargaining unit. The Collective Bargaining Act contains specific statutory exemptions for certain types of positions, most significantly management, supervisory, and confidential employees. §39-31-103(9), MCA. The exemptions contained in the Collective Bargaining Act, not those in the wage and hour laws, govern unit composition cases. Although there may be some overlap, especially regarding supervisory and management employees, an exemption under the FLSA is not alone determinative.

There has been no bargaining history, as the grant writer and grant financial compliance officer positions have not been unionized since their inception. Upon weighing all the pertinent factors identified in §39-31-202(1), MCA, the common interests of the two grants office positions outweigh and override any separate and distinct interests of MPEA bargaining unit members.

V. CONCLUSIONS OF LAW

1. The positions of county computer support specialist and administrative assistant in the sheriff's office are appropriate for inclusion in the MPEA, bargaining unit for Cascade County employees, pursuant to the stipulation of the parties.

2. The positions of grant writer and grant financial compliance officer are appropriate for inclusion in the MPEA bargaining unit for Cascade County employees.

VI. RECOMMENDED ORDER

The positions of county computer support specialist, administratvie assistant in the sheriff's office, county grant writer, and grant financial compliance officer shall be included in the MPEA bargaining unit for Cascade County employees.

DATED this 24th day of October, 2000.

BOARD OF PERSONNEL APPEALS

By: Michael T. Furlong

Michael T. Furlong
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 November 16, 2000. 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

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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:

Melvin Wojcik
PO Box 5600
Helena, Montana 59604-5600

Kathleen Jensen
Cascade County Human Resource Department
325 2nd Avenue North, Courthouse Annex Room 108
Great Falls, Montana 59401

DATED this 24th day of October, 2000.

Carol A. Larkin

MPEAvCascdCo.mfl.