BOARD OF PERSONNEL APPEALS
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 5-2003:
(Formerly titled Unit Clarification No. 9-2002):

CASCADE COUNTY,	)	
Petitioner,	)	
- vs -	)	FINAL ORDER
MONTANA PUBLIC EMPLOYEES ASSOCIATION,	)	
Respondent.	)	

* *

The above-captioned matter came before the Board of Personnel Appeals (Board) on August 28, 2003. The matter was before the Board for consideration of the PETITIONER'S EXCEPTIONS TO HEARINGS EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER filed by Gregory L. Bonilla, Cascade County Deputy County Attorney, to the FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER issued by Anne L. MacIntyre, Chief, Hearings Bureau, dated May 13, 2003.

Gregory L. Bonilla, Cascade County Deputy County Attorney, participated in oral argument by telephone. Carter Picotte, Staff Attorney, Montana Public Employees Association, presented oral argument in person.

After review of the record and consideration of the arguments, the Board concludes and orders as follows:

1. IT IS HEREBY ORDERED the Petitioner's Exceptions to Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order are dismissed.

2. IT IS FURTHER ORDERED that the Findings of Fact; Conclusions of Law; and Recommended Order is affirmed.

DATED this 10th day of September, 2003.

BOARD OF PERSONNEL APPEALS

By: ______________________
Jack Holstrom
Presiding Officer

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Board Members Holstrom, Reardon and Johnson concur.
Alternate Board Members Dwyer concurs.
Board Member O'Neill dissents.

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NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

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CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify that a true and correct copy of this document was mailed to the following on the 15th day of September, 2003:

GREGORY L. BONILLA
DEPUTY COUNTY ATTORNEY
CASCADE COUNTY ATTORNEY'S OFFICE
121 FOURTH ST N, SUITE #1A
GREAT FALLS MT 59401

CARTER PICOTTE
STAFF ATTORNEY
MONTANA PUBLIC EMPLOYEES ASSOCIATION
PO BOX 5600
HELENA MT 59604-5600

* *

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 9-2002:

CASCADE COUNTY,	)	Case No. 951-2003
	)	
Petitioner,	)	
	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER**
vs.	)	
	)	
MONTANA PUBLIC EMPLOYEES' ASSOCIATION,	)	
	)	
	)	
Respondent.	)	

* * * * * * * * * *

I. INTRODUCTION

On February 20, 2002, the Montana Public Employees' Association (MPEA) filed a petition for a new unit determination (UD 9-2002) seeking the certification of a unit composed of certain Cascade County employees in the City-County Health Department, including sanitarians. On or about March 6, 2002, the sanitarians in the proposed unit submitted a petition to intervene objecting to inclusion in the proposed unit. Because the County did not file a counter-petition and because the petition to intervene was not filed by a labor organization, the Board proceeded to a consent election on the creation of the unit pursuant to Admin. R. Mont. 24.26.620(1)(b).

On or about May 20, 2002, the Board notified the County of the results of the election. On May 23, 2002, the County filed an objection to the conduct of the election, based on the failure of the Board to consider the petition to intervene. Following a hearing on the objection before the Board, the MPEA, the County, and the sanitarians filed a stipulation under which the County withdrew its objection to the election and the sanitarians withdrew the petition to intervene. The parties further stipulated that the County could file a petition for unit clarification concerning the sanitarian positions, and that the MPEA would waive any objections it might have to the filing of the unit clarification petition. Based on this stipulation, the Board issued its final unit determination order on August 30, 2002, recognizing the unit proposed by the MPEA, including the sanitarians.

On November 18, 2002, the County filed a petition for unit clarification, contending that the sanitarians were not properly included in the unit. The MPEA filed a response in which it denied that the sanitarians were improperly included in the unit. On December 13, 2002, Joe Maronick, agent for the Board, issued an order that a hearing should be held in UC 9-2002.[1] Staff for the Board transferred the case to the Department's Hearings Bureau on December 17, 2002.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on March 18, 2003. Gregory L. Bonilla represented Cascade County. Carter N. Picotte represented MPEA. Pat Carroll, Steven White, Dean Pomeroy, Darrell Furan, Sandy Johnson, Cherry Loney, and Richard Letang testified as witnesses in the case. Exhibits J-1 through J-8 were admitted into evidence, pursuant to the stipulation of the parties.

II. ISSUE

The issue in this case is whether a unit established for collective bargaining purposes is appropriate pursuant to Mont. Code Ann. § 39-31-202. Specifically, the issue is whether the positions of the non-supervisory sanitarians are properly included in the unit.

III. FINDINGS OF FACT

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

2. Cascade County is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10). The City-County Health Department (CCHD) is a department of Cascade County government.

3. The Cascade County personnel policy manual applies generally to all County employees, although collective bargaining agreements may affect its application in particular cases.

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[1]The investigative report and determination is dated December 13, 2001 and the certificate of service is dated December 16, 2001. Since both of these dates precede the filing of any petition in this case, the hearing officer assumes that the dates were typographical errors.

4. The Board's order in UD 9-2002 established a unit for collective bargaining purposes comprised of:

> All employees working in the Cascade County City-County Health Department and Public Health Clinic under the following classifications: health educator, licensed practical nurse, nutrition educator, social worker, W.I.C. technician, case manager, sanitarian and indigent housing technician, excluding confidential, supervisory or management officials. . . .

Final Order, UD 9-2002 (August 30, 2002). A unit comprised of these employees would have 25 members, 4 of whom are registered sanitarians.

5. The registered nurses employed by the CCHD are members of a collective bargaining unit represented by the Montana Nurses Association. The administrative support employees of the CCHD are members of a collective bargaining unit represented by the Teamsters. The unit established by the Board's order includes all remaining non-exempt employees of the CCHD.

6. The mission of the CCHD is to protect the public health of Cascade County. Its vision and values statement is healthy people in a healthy community, with an emphasis on keeping people healthy through prevention. Responsibilities within CCHD include disease prevention, communicable and sexually transmitted disease control, family and community health services, health education, a community health clinic, environmental health programs, solid waste management, and health planning.

7. The environmental health programs address air and water pollution issues, septic systems, subdivisions, sanitation in places of public accommodation, junk vehicles, and community decay. The work of the environmental health programs is regulatory in nature.

8. The other CCHD programs provide direct individual health services and education, including primary clinical care for acute and episodic illness, preventive care, immunization, and nutrition education and assistance.

9. The sanitarians report to two supervising sanitarians in the environmental health unit. The supervising sanitarians report to Cherry Loney, who is the health officer and director of the CCHD.

10. The other members of the collective bargaining unit report to supervisors in their respective areas. These supervisors also report to Loney.

11. Loney has occasional meetings with all of the supervisors in the CCHD to discuss matters that are germane to the entire organization. The purpose of these meetings is to ensure that all employees in the CCHD receive the same information.

12. All employees of the unit established by the Board's order work in a single building. The sanitarians have a separate work area within the building.

13. The CCHD has a single pay plan for employees within the bargaining unit established by the Board's order. The plan has three levels of compensation, based on required education levels, nature of responsibilities, and nature of duties. Level I applies to service assistants, including W.I.C. technicians, home visitors, outreach workers, and phlebotomists. According to the plan, Level I positions require high school education. Their duties include public contact. Level II applies to service technicians, including licensed practical nurses and dental assistants. According to the plan, Level II positions require associate degrees, certifications, or specialized education or training. Their duties are paraprofessional in nature. Level III applies to specialists, including registered sanitarians, social workers, home economists, and health educators. According to the plan, Level III positions require undergraduate college degrees and may include professional accreditation. Their duties are professional in nature.

14. The County's personnel policies include a number of employee benefits such as health insurance, retirement, holidays, sick leave, and annual leave. These benefits apply to all county employees.

15. Sanitarians are required to be licensed by the State of Montana as registered sanitarians. Educational requirements for the sanitarian position include a bachelor of science degree with emphasis in biology, microbiology, environmental science or a related field, and 30 quarter hours in biological sciences and at least one course in microbiology.

16. Because of the differences in the nature of their duties, the sanitarians have little integration of work functions and little interchange with the other members of the collective bargaining unit.

17. All four sanitarians wish to be excluded from the collective bargaining unit.

IV. DISCUSSION

The County seeks to exclude the sanitarian positions from the unit established by the Board for collective bargaining purposes. The MPEA contends that the positions are properly included in the unit on community of interest grounds.

Montana law governing collective bargaining for public employees provides:

> In order to ensure employees the fullest freedom in exercising the rights guaranteed by this chapter, the [Board of Personnel Appeals] or an agent of the board shall decide the unit appropriate for collective bargaining and shall consider such factors as community of interest, wages, hours, fringe benefits, and other working conditions of the employees involved, the history of collective bargaining, common supervision, common personnel policies, extent of integration of work functions and interchange among employees affected, and the desires of the employees.

Mont. Code Ann. § 39-31-202(1). The rights guaranteed by the act include the right of 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 of Personnel Appeals follow federal court and NLRB precedent to interpret the Montana Act. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals* (1981), 195 Mont. 272, 635 P.2d 1310; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

Like 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. Those factors, such as wages, hours, benefits, working conditions, and so on, are not enumerated in the federal law but are by case law the factors evaluated to determine whether a community of interest exists. Thus, in this decision, the phrase "community of interest" is used to refer to all of the statutory factors. All of the factors have to be weighed together and no one factor has controlling weight. UC 1-2000, *Montana Public Employees' Association v. Cascade County* (2000).

Considering the community of interest factors in the context of this case, the factors of wages, hours, fringe benefits, working conditions of the employees involved, the history of collective bargaining, common supervision, and common personnel policies all favor a finding that the sanitarians are properly included in the unit. All of the employees in the unit are employees of a single department of Cascade County government, the CCHD. All CCHD employees in the unit established by the Board are subject to common personnel policies, are paid pursuant to a common pay plan, are subject to common supervision by the CCHD director[2], and work in the same building.

The County contends that two factors, the extent of integration of work functions and interchange among employees affected, and the desires of the employees, support a finding that the sanitarians should not be included in the unit.

The evidence clearly established that the sanitarians had extremely limited contact with the other employees in the CCHD. However, the factor of integration and interchange must be considered in light of the overall structure and mission of the employing entity. In this case, the employing entity is a single department, the CCHD. Its purpose is to protect public health in the county. All of the employees of the CCHD are employed to carry out this important mission. Not surprisingly, they have different roles in carrying out their work. As a result, they have limited

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[2]The County maintained at hearing that the sanitarians were not subject to common supervision because they had different supervisors in the environmental health unit than the employees in other parts of CCHD had. However, all employees in the CCHD ultimately report to the director of CCHD. That each unit of the department had its own intermediate supervisory personnel does not demonstrate an absence of common supervision as contemplated by the statute.

integration and interchange. The absence of integration and interchange is not compelling under the facts of this case.

The County also points to the desires of the affected employees as demonstrating a lack of community of interest. In their testimony, the sanitarians all stated that they did not want to belong to the unit. Their desires were based on their beliefs that a union cannot "do anything" for them and that the work of the environmental health unit is distinct and autonomous from the rest of the CCHD. These beliefs, although sincerely held, do not establish an absence of community of interest in this case. The factor of desires of the employees as used in the statute is intended to address the desires of the employees regarding their collective interests, as, for example, when a group of employees believe a different labor organization would better represent their interests. The belief held by the sanitarians that the unit is distinct and autonomous is another way of stating that the sanitarians lack integration and interchange with the other employees, and that contention has already been addressed, *supra*. Ultimately, however, the desires of the employees are only one factor, and insufficient to overcome the weight of the other factors in determining that a community of interest exists.

Weighing all of the factors together, the evidence supports a conclusion that the sanitarians have a community of interest with the other employees who are included in the unit established by the Board's order and are therefore properly included in the unit.

V. CONCLUSIONS OF LAW

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

2. The registered sanitarian positions in Cascade County's City-County Health Department have a community of interest with the other positions in the bargaining unit. The positions are therefore properly included in the unit. A unit including those positions is appropriate pursuant to Mont. Code Ann. § 39-31-202.

VI. RECOMMENDED ORDER

The positions of registered sanitarian shall be included in the MPEA collective bargaining unit for employees working in the Cascade County City-County Health Department.

DATED this 13th day of May, 2003.

BOARD OF PERSONNEL APPEALS

By: Anne L. MacIntyre

Anne L. MacIntyre, Chief
Hearings Bureau
Department of Labor and Industry

NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than June 6, 2003. 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 a true and correct copy of the foregoing documents was, this day served upon the following parties or their attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Gregory L. Bonilla
Deputy County Attorney
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Carter N. Picotte
Attorney at Law
P.O. Box 5600
Helena, MT 59604

DATED this 14th day of May, 2003.

Sandy Duncan

CASCADE COUNTY.FOF.AMD