

1 BEFORE THE BOARD OF PERSONNEL APPEALS

2 IN THE MATTER OF NEW UNIT DETERMINATION AND ELECTION, UD#11-77:

3 MONTANA ALCOHOLISM AND DRUG ABUSE)
4 COUNSELORS, FEDERATION OF TEACHERS,)
5 MFT, AFT, AFL-CIO,)
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Petitioner,

-and-

GALEN STATE HOSPITAL, DEPARTMENT)
OF INSTITUTIONS, STATE OF MONTANA,)
Employer.)

FINDINGS OF FACT
CONCLUSION OF LAW,
AND RECOMMENDED ORDER

11 On July 7, 1977, the Montana Alcoholism and Drug Abuse Counselors,
12 Federation of Teachers, MFT, AFT, AFL-CIO filed a Petition for New
13 Unit Determination and Election for Montana Alcoholism and Drug Abuse
14 Counselors employed by Galen State Hospital.

15 By Counter Petition filed on July 11, 1977, the Employer disagreed
16 with the appropriateness of the proposed election, contending that an
17 election had been held in the bargaining unit within twelve months and
18 that another election in this bargaining unit at this time would be
19 contrary to Section 59-1606(3), R.C.M. 1947, which states:

An election shall not be directed in any bargaining
unit or in any subdivision thereof within which, in
the preceding twelve (12) month period, a valid
election has been held.

23 On September 15, 1977, the Board of Personnel Appeals conducted a
24 pre-hearing conference in this matter to clarify issues and to discuss
25 procedures. At this pre-hearing conference the parties to this matter
26 agreed to waive the hearing and to submit their arguments in Briefs
27 and Reply Briefs.

28 The hearing examiner, having reviewed the information submitted
29 by both parties, makes the following findings of fact:

30 FINDINGS OF FACT

31 1. On February 2, 1977, the American Federation of State, County
32 and Municipal Employees, AFL-CIO filed a Petition for Unit Clar-

1 ification or Modification with the Board of Personnel Appeals. The
2 Petitioner described the appropriate unit to be clarified or modified
3 as "inclusion of the Alcoholic Counselors [approximately ten] into an
4 already existing unit of employees [approximately 173] represented by
5 Local 1620 of the American Federation of State, County and Municipal
6 Employees, AFL-CIO" employed at Galen State Hospital, State Department
7 of Institutions. The Petition was accompanied by the required 30%
8 proof-of-interest.

9 2. On February 10, 1977, the Board of Personnel Appeals received
10 certification that the Notice of Unit Modification or Clarification
11 Proceedings had been posted on February 8, 1977. The Notice stated,
12 in part, that "Intervenor's petitions must be submitted to our [the
13 Board of Personnel Appeals'] office by February 23, 1977, to be
14 recognized."

15 No intervenors' petitions were received by the Board of Personnel
16 Appeals.

17 3. On March 22, 1977, an election by secret ballot was held to
18 determine whether or not the Alcoholic Counselors employed by Galen
19 State Hospital desired to be represented by the American Federation of
20 State, County and Municipal Employees, AFL-CIO. Nine employees were
21 eligible to vote; nine valid ballots were cast; three ballots were
22 cast in favor of representation by the American Federation of State,
23 County and Municipal Employees, AFL-CIO; six ballots were cast in
24 favor of No Representation.

25 4. No objections to the conduct of the election or conduct
26 affecting the results of the election having been made, and there
27 being a clear majority, the Board of Personnel Appeals, on March 29,
28 1977, certified that there be No Representation for collective
29 bargaining purposes for the Alcoholic Counselors employed by Galen
30 State Hospital.

31 5. On July 7, 1977, the Montana Alcoholism and Drug Abuse
32 Counselors, Federation of Teachers, MFT, AFT, AFL-CIO filed a Petition

1 for New Unit Determination and Election with the Board of Personnel
2 Appeals. The Petitioner described the new unit to be determined as
3 "Montana Alcoholism and Drug Abuse Counselors [approximately fifteen
4 employees]" employed by the State of Montana at Galen State Hospital.
5 The Petition was accompanied by the required 30% proof-of-interest.

6 6. On July 13, 1977, the Board of Personnel Appeals received the
7 Employer's Counter Petition. The Counter Petition disagreed with the
8 appropriateness of the proposed election, stating, in pertinent part,
9 that ". . . an election has been held in this bargaining unit within
10 the 12 months and that another election in that bargaining unit, at
11 this time, would be contrary to law." In support of this contention,
12 the Employer cited the March 22, 1977, election described in finding
13 of fact 3 and Section 59-1606(3), R.C.M. 1947, which states:

14 An election shall not be directed in any bargaining
15 unit or in any subdivision thereof within which,
16 in the preceding twelve (12) month period, a valid
election has been held.

17 7. On September 15, 1977, the Board of Personnel Appeals
18 conducted a pre-hearing conference to clarify issues and discuss
19 procedures relative to the determination of the appropriateness of the
20 proposed election. At that time the parties agreed to waive the
21 hearing in this matter and to submit their arguments to the hearing
22 examiner in Briefs and Reply Briefs.

23 8. The hearing examiner finds no merit in the Petitioner's
24 contention that Section 59-1606(3), R.C.M. 1947, "applies to new units
25 or units to be decertified (that are certified by the Board of
26 Personnel Appeals)" (Petitioner's Reply Brief) and, apparently, does
27 not apply to unit modifications or clarifications.

28 Section 59-1606(3), while requiring that an election be "valid"
29 for it to be applicable, in no other way qualifies the type of
30 election it affects.

31 Section 59-1606(3) is very similar to Section 9(c)(3) of the
32

1 National Labor Relations Act.¹ While the Board of Personnel Appeals
2 is not bound by the National Labor Relations Board's decisions, it may
3 be helpful to consider that that Board, because of statutory
4 construction, has interpreted Section 9(c)(3) to apply only to
5 representation elections.²

6 Even if that distinction were to be made in the instant case,
7 however, the Petitioner's contention remains invalid. The March 22,
8 1977, election, by affording the employees an opportunity to decide
9 whether or not they wished to be represented by a particular
10 collective bargaining agent, was a representation election. That the
11 choice involved a union other than the Petitioner and involved
12 incorporation into an already existing bargaining unit rather than
13 establishment of a separate unit does not alter this fact.

14 9. The hearing examiner finds no merit in the Petitioner's
15 contention that:

16 . . . an election bar does not apply in that it has
17 never been determined by the Board of Personnel
18 Appeals that these employees are a subdivision of
19 a bargaining unit that currently exists at Galen
20 State Hospital. The law points to community of
21 interest and desire of employees. It is obvious
22 that these employees share a definite community
23 of interest of their own, separate and distinct
24 from other employees at Galen State Hospital. It
25 is the desire of the employees to address their
26 condition of employment through the collective
27 bargaining process through a new unit determination.
28 This is demonstrated by the fact that these employees
29 turned back an earlier unit modification. It
30 is extremely significant that these employees were
31 not choosing between one union and no representation,
32 but were refusing to be part of a larger bargaining
unit. (Petitioner's Brief)

There was never a hearing conducted and it was
never determined that these employees are part of
a political subdivision of the larger bargaining
unit at Galen. (Petitioner's Reply Brief)

¹Section 9(c)(3) of the NLRA states:

No election shall be directed in any bargaining unit or any subdivision
within which, in the preceeding twelve-month period, a valid election
shall have been held.

²*Gilchrist Timber Co.*, 76 NLRB No. 177, 21 LRRM 1302 (1948).

1 The March 22, 1977, election involved nine "Alcoholic Counselors"
2 at Galen State Hospital. The instant Petition seeks an election
3 for sixteen "Montana Alcoholism and Drug Abuse Counselors" at
4 Galen State Hospital. All of the employees who were eligible to vote
5 and who voted in the March 22, 1977, election are included in the
6 group sought by the Petitioner. At the time of the March 22, 1977,
7 election and at this time all of the employees are classified as
8 Addictive Disease Counselors. Clearly the group of employees involved
9 in the March 22, 1977, election and the group of employees involved in
10 the instant petition comprise the same bargaining unit. That the unit
11 has increased from nine to sixteen employees does not affect this
12 fact.³

13 While it is true that there was never a hearing conducted in the
14 matter of the unit modification proceeding which culminated in the
15 March 22, 1977, election, it is important to note that all parties
16 were in agreement that the incorporation of the Alcoholic Counselors
17 into the already existing bargaining unit at Galen was a proper
18 accretion. The Notice of Unit Modification or Clarification
19 Proceedings indicates that all affected parties were fully aware that
20 the proceeding involved such incorporation, an Employer Counter
21 Petition was not submitted, no Intervenors' Petitions were submitted,
22 and the parties signed the Stipulation for Certification Upon Consent
23 Election. No contention whatsoever having been made that the
24 accretion was improper, the Board of Personnel Appeals tacitly
25 acknowledged that the Alcoholic Counselors were indeed a subdivision
26 of the already existing bargaining unit.

27 10. The hearing examiner does not find that the following
28 contentions of the Petitioner constitute the type of unusual
29 circumstance which would warrant suspension of the election bar
30 imposed by Section 59-1606(3), R.C.M. 1947:

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32 ³ U. S. Steel Corp., 156 NLRB No. 108, 61 LRRM 1237 (1966).

1 It is obvious that these employees share a def-
2 inite community of interest of their own,
3 separate and distinct from other employees at
4 Galen State Hospital. It is the desire of the
5 employees to address their condition of employ-
6 ment through the collective bargaining process
7 through a new unit determination. This is dem-
8 onstrated by the fact that these employees
9 turned back an earlier unit modification. It
10 is extremely significant that these employees
11 were not choosing between one union and no
12 representation, but were refusing to be part
13 of a larger bargaining unit. (Petitioner's Brief)

8 Their [the employees] wishes to have a separate
9 bargaining unit were certainly conveyed in their
10 rejection of a unit modification. . . .
11 Certainly the provision of 59-1603(1) would
12 command that an election be held in order to
13 guarantee these workers their right to col-
14 lective bargaining. [Section 59-1603(1)
15 provides that: "Public employees shall have,
16 and shall be protected in the exercise of,
17 the right of self-organization, to bargain
18 collectively through representatives of
19 their own choosing on questions of wages,
20 hours, fringe benefits, and other conditions
21 of employment and to engage in other con-
22 certed activities for the purpose of col-
23 lective bargaining or other mutual aid or
24 protection, free from interference, restraint
25 or coercion."] (Petitioner's Reply Brief)

18 It is recognized that the employees affected by this matter are
19 currently without representation for collective bargaining purposes.
20 It is further recognized that the election bar imposed by Section 59-
21 1606(3) will, if implemented, proscribe the election of a collective
22 bargaining agent for these employees until March 22, 1978. However,
23 to place this matter in perspective it must be realized that:

- 23 a. The employees involved in this matter had, within a few
24 months of the filing of the instant petition, an opportunity to
25 express their desires as to a collective bargaining representative.
- 26 b. The March 22, 1977, election was precipitated by a
27 Petition which was, when it was filed with the Board of
28 Personnel Appeals, accompanied by the required 30% proof-
29 of-interest. Therefore, the March 22, 1977, election
30 was not, in any sense of the word, "inflicted" upon the
31 employees; it was the natural culmination of a process
32 which had begun when certain employees had signed that

1 union's authorization cards.

2 c. It has not been contended that the employees were
3 unaware of the Petitioner's intentions when
4 they signed the authorization cards which
5 eventually resulted in the March 22, 1977, election.
6 Therefore, the hearing examiner must assume that the
7 employees knew that the union whose authorization cards
8 they were signing intended to petition for a unit
9 modification which would incorporate them into the
10 already existing bargaining unit. The fact that the
11 employees later decided that they did not want to be
12 incorporated into the already existing bargaining
13 unit, but rather wished to have their own bargaining
14 unit, must be interpreted as a change of mind, not
15 a change of circumstance.

16 National Labor Relations Board decisions which were persuasive in
17 the hearing examiner's determination that such change of mind on the
18 employees part does not constitute an unusual circumstance which would
19 warrant suspension of the election bar rule were Bluefield Produce
20 & Provision Co., 117 NLRB No. 215, 40 LRRM 1065; and WE Transport,
21 Inc.; 198 NLRB No. 114, 81 LRRM 1010. Examples of cases wherein unusual
22 circumstances did warrant suspension of the election bar rule, cases
23 whose fact situations bore little resemblance to the instant case,
24 were WTOP, Inc., 114 NLRB No. 194, 37 LRRM 1143 (1955); and Remington
25 Rand, Inc., 112 NLRB No. 165, 36 LRRM 1231 (1955).

26 DISCUSSION

27 The preceding findings of fact have established that:

- 28 1. On March 22, 1977, the Board of Personnel Appeals
29 conducted an election for certain employees at Galen State Hospital.
30 2. This election was a representation election for
31 collective bargaining purposes.
32 3. The instant petition seeks an election in the

1 same unit of employees that was involved in the March 22, 1977,
2 election.

3 4. There are no "unusual circumstances" in this matter
4 which would warrant suspension of the election bar imposed by
5 Section 59-1606(3), R.C.M. 1947.

6 CONCLUSION OF LAW

7 The Petition filed July 7, 1977, by the Montana Alcoholism and
8 Drug Abuse Counselors, Federation of Teachers, MFT, AFT, AFL-CIO was
9 not filed in a timely manner in accordance with Section 59-1606(3),
10 R.C.M. 1947.

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12 RECOMMENDED ORDER

13 The Petition filed on July 7, 1977, by the Montana Alcoholism and
14 Drug Abuse Counselors, Federation of Teachers, MFT, AFT, AFL-CIO, not
15 having been filed in a timely manner, is hereby dismissed.

16 NOTICE

17 Exceptions may be filed to these Findings of Fact, Conclusion
18 of Law, and Recommended Order within twenty working days service
19 thereof. If no exceptions are filed with the Board of Personnel
20 Appeals within that period of time the Recommended Order shall become
21 the Final Order. Exceptions shall be addressed to the Board of
22 Personnel Appeals, Box 202, Capitol Station, Helena, Montana 59601.

23 Dated this 26th of October, 1977.

24 BOARD OF PERSONNEL APPEALS

25
26 BY Kathryn Walker
27 Kathryn Walker
28 Hearing Examiner
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CERTIFICATE OF MAILING

I, Kay Harrison, hereby certify that on the 26th day of October, 1977, I mailed a true and correct copy of the attached FINDINGS OF FACT, CONCLUSION OF LAW AND RECOMMENDED ORDER to the following:

Mr. William Gosnell, Administrator
Personnel Division
Department of Administration
Mitchell Building
Helena, MT 59601

Mr. Larry Zanto, Director
Department of Institutions
1539 11th Avenue
Helena, MT 59601

Mr. James McGarvey, Executive Director
Montana Federation of Teachers, AFT, AFL-CIO
P.O. Box 1246
Helena, MT 59601

Mr. Joe Balkovatz, Administrator
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Deer Lodge, MT 59722



Kay Harrison

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