

BEFORE THE BOARD OF PERSONNEL APPEALS

OF THE STATE OF MONTANA

4 RETAIL CLERKS INTERNATIONAL,)
 LOCALS 4, 57, 684, 991, 1573,)
 5)
 Complainant,)
 6)
 -vs-)
 7)
 MONTANA STATE DEPARTMENT OF)
 8 REVENUE,)
 Respondent.)

ULP-2-1973

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

I

STATEMENT OF CASE

13 Upon charges filed on October 2, 1973 by Retail Clerks International
 14 Association, Locals 4, 57, 684, 991 and 1573, the Executive Secretary of the
 15 Board of Personnel Appeals of the State of Montana served the Notice of Hearing
 16 to be held on December 11, 1973. Copies of the charge and Notice of Hearing
 17 were duly served upon Respondent.

18 The Complainant alleges in substance that on or after July 26, 1973, the
 19 Montana Department of Revenue, hereinafter referred to Respondent has refused
 20 to sign an agreement with the Retail Clerks International Association, Locals
 21 4, 57, 684, 991 and 1573, hereinafter referred to as Union, covering liquor
 22 store vendors. Further, the complaint alleges that the Union has represented
 23 the liquor store vendors and that the state had entered into negotiations
 24 which culminated in a collective bargaining agreement.

25 All of the above, as alleged by the Union, purports to be a violation of
 26 Section 59-1605 (E), Revised Codes of Montana, 1947, as amended (Section 5,
 27 Chapter 441, L 1973).

28 Respondent's answer, in substance, denies that it agreed to negotiate a
 29 vendor's contract or that it agreed to a vendor's contract. Further, it states
 30 that, based upon an attorney general's opinion and an administrative directive,
 31 that it was not obliged to bargain collectively with representatives of the
 32 vendors since Section 59-1601 (1) (2) (3) and (4) excludes liquor vendors from

1 the definition of "public employees" and therefore the protection of Section
2 59-1605 (E).

3 Pursuant to proper notices to parties, hearing was held on December 11,
4 1973 at Helena, Montana. The hearing was held before the entire Board. Said
5 hearing was conducted in accordance with the provisions of the Montana Admin-
6 istrative Procedures Act (Section 82-4201 to 82-4225, Revised Codes of Montana,
7 1947, as amended).

8 Upon the basis of the entire record of this case, including stipulations
9 and briefs, the Board makes the following:

10 II

11 FINDING OF FACT

12 1. The Union is a group of locals representing, among others, the em-
13 ployees of the Respondent's retail outlets, having been designated or selected
14 by the majority of the employees in the unit as their joint representative for
15 the purpose of collective bargaining. By virtue of an election held on October
16 23, 1970 and a Certification of Election dated October 27, 1970, the Union was
17 certified as representing a majority of those employees of the Respondent who
18 were classified as "vendors". (Claimant's Exhibits 1 and 2 and Transcript,
19 Volume I, Pages 7 through 9).

20 2. Respondent is an agency of the government of the State of Montana,
21 charged by statute with the administration of the sale of liquor at retail
22 and the employment of personnel to carry out those duties. (Transcript,
23 Volume I, Pages 83 and 84).

24 3. Subsequent to the certification of October 27, 1970, Respondent's
25 predecessor, the Liquor Control Board of the State of Montana and the Union
26 entered into a collective bargaining agreement dated November 16, 1971 which
27 granted recognition to the Union as the sole collective bargaining agent for
28 all vendors. In addition, the agreement provided for a check-off of union dues
29 from the wages of the employees in the bargaining unit. It also set forth all
30 the terms and conditions of employment, including wages, hours and working con-
31 ditions. This contract expired on June 30, 1973. (Claimant's Exhibit 4 and
32 Transcript, Volume I, Pages 18 to 21).

1 with representatives of its vendor employees. It would seem that this re-
2 fusual is based upon a single premise: supervisory and management employees
3 are exempted from the Act¹ by the provisions of Section 59-1602 (3) (4). The
4 opinion of the attorney general dated July 13, 1973 is the initial supporting
5 pillar for this conclusion and it was bolstered by an administrative directive
6 dated July 20, 1973 from Mr. Lee Tickell.

7 On the other hand, the Respondent brushes aside the protective aspects
8 of Section 59-1615 of the same Act.

9 The Respondent's offer of proof all relate to these writings as the basis
10 for its legal conclusion, that it cannot bargain with representatives of super-
11 visory and/or managerial employees. However, upon our review of the entire
12 record in this case, we must conclude that the Respondent did have an obli-
13 gation to bargain with the Union--an obligation which continues and which is
14 enforceable by this Board.

15 The Board could make this a prolix opinion by expressing obiter dictum
16 as to whether or not the employees involved herein are supervisory employees.
17 Suffice it to say that at least 96 such employees are not supervisory nor
18 managerial employees. A one man operation cannot meet the criteria established
19 by the Act for this classification. In that connection, see Section 59-1603,
20 Revised Codes of Montana, 1947, as amended.

21 With regard to the remaining individuals classified as vendors, there is
22 no disability per se occasioned by supervisory employees belonging to a union
23 and being represented by them for collective bargaining. Even the federal law
24 which denies authority to the National Labor Relations Board, either to in-
25 clude supervisors in bargaining units with other employees or to establish
26 units composed entirely of supervisory personnel, allows supervisors to or-
27 ganize even though they are not covered by the Act and employers are not for-
28 bidden to engage in voluntary bargaining with the organizations that represent
29 them. See Master, Mates and Pilots, NLRB 1963.

30 No such restrictions existed in state law at the time of the certification.

31 ¹Public Employees Collective Bargaining Act, Section 59-1601, et seq, Section
32 1, et seq, Chapter 441, L 1973.

1 Quite the contrary, the state formerly recognized and entered into an agree-
2 ment with the Union covering these employees. In addition, the actions of the
3 Respondent in continuing to recognize the Union by dues, check-off, commun-
4 ication of bargaining positions through the Union to the vendors, processing
5 of grievances and the like worked to estop them from disavowing that recog-
6 nition now that the contract is expired. To allow this disavowance would be
7 contrary to theories of equity and fair play as old as this nation.

8 Rather the touchstone for the Respondent's refusal to bargain is the
9 interpretation given Section 59-1605 (3) (4) by the attorney general's letter
10 of July 13, 1973 and the administrative directive of Mr. Lee Tickell dated
11 July 20, 1973. Let us consider the effect of these documents in order:

12 1. In substance, the attorney general's opinion reviews the state of
13 the law and facts and from that concludes as follows:

14 "It is, therefore, my opinion that

- 15 1. The director of the Department of Revenue is not
16 obligated to bargain collectively with liquor
17 vendors pursuant to Chapter 441, Session Laws
18 of 1973; and
- 19 2. The director of the State Department of Revenue
20 has authority to bargain collectively with retail
21 liquor vendors who, as supervisory employees, are
22 an organized labor unit, even though supervisory
23 employees are excepted from Chapter 441, Session
24 Laws of 1973."

25 The clear import of this opinion is to allow the Respondent to bargain.
26 It adopts the position of the Master, Mates and Pilot decision as set forth
27 above.

28 Having this discretion, why then did Respondent choose to exercise it
29 by refraining from bargaining? Apparently, because of the so-called Tickell
30 Memorandum. That document dated July 20, 1973 states that units containing
31 supervisors will not be recognized for the purpose of collective bargaining.
32 It contains: "Petitions received from such groups shall be returned to them
or their representatives without further action".

It is concluded that this directive cannot be allowed to defeat the
status of previously recognized units, including supervisors, nor to relieve
the state of its bargaining duty with these units. A duty, we might add, that
it had already undertaken. As has been pointed out previously, all vendors

1 are not supervisory nor management employees. At best, only 48 of these
2 individuals would qualify. Yet the directive, as interpreted, would include
3 all vendors in its prohibition.

4 We find that the provisions of Section 59-1605, Revised Codes of Montana,
5 1947 (Section 15, Chapter 441, L 1973), anticipated this problem and gave
6 continuing protection to those employees, whether supervisory or not, who
7 were recognized prior to the effective date of the Act. In its totality,
8 the Section provides:

9 "Nothing in this Act shall be construed to remove recognition of
10 established collective bargaining agreements already recognized
or in existence prior to the effective date of this Act". (emphasis added)

11 The Board finds that this grandfather clause applies to the recognition
12 of the bargaining agent as well as the ratification of existing bargaining
13 agreements.

14 Therefore, perhaps the kindest thing to state about the Tickell Memor-
15 andum is that it was misunderstood and should have applied only to prospec-
16 tive units which sought to include supervisory or managerial personnel which
17 would come into existence after July 1, 1973.

18 IV

19 CONCLUSIONS OF LAW

20 1. The Union is a labor organization within the meaning of Section
21 59-1602 (5) of the Revised Codes of Montana, 1947, as amended.

22 2. The Respondent is a public employer within the meanings of Section
23 59-1602 (1) of Revised Codes of Montana, 1947, as amended.

24 3. The Union, prior to July 1, 1973 and at all other times material
25 herein was the collective bargaining agent for the vendor employees.

26 4. By refusing, and by continuing to refuse, to bargain collectively
27 with the Union on behalf of its vendor employees, the Respondent did engage
28 and is engaging in unfair labor practices within the meaning of Section 59-
29 1605 (E) of the Revised Codes of Montana, 1947.

30 V

31 REMEDY

32 Having found that the Respondent has engaged in and is engaging in

1 certain unfair labor practices, we shall order it to cease and desist
2 therefrom and to take certain affirmative action designed to effectuate
3 the policies of the Act.

4 VI

5 ORDER

6 Therefore, the Board of Personnel Appeals of the State of Montana
7 orders that the Respondent, Montana State Department of Revenue, its
8 officers, agents, employees, successors and assigns shall:

9 1. Cease and Desist from:

10 (a) Refusing to bargain collectively in good faith
11 concerning wages, rates of pay, hours, and other
12 terms and conditions of employment with Retail
13 Clerks International Association, Locals 4, 57,
684, 991, 1573, the exclusive bargaining repre-
sentative of vendor employees;

14 2. Take the following affirmative action which the Board
15 finds will effectuate the policies of the Act:

16 (a) Upon request, bargain collectively with the Union
17 as the exclusive representative of the vendor em-
18 ployee, and embody an assigned agreement in the
understanding reached with respect to the employees
in said unit.

19 (b) Notify the Board, in writing, within 10 days
20 from the date of this order, what steps Respondent
has taken to comply herewith.

21
22 DATED on this 5th day of February, 1974.

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26 Patrick F. Hooks, Chairman
Board of Personnel Appeals

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STATE OF MONTANA

BOARD OF PERSONNEL APPEALS

CERTIFICATE OF MAILING

I, Robert R. Jensen, hereby state and certify that I did, on the 5th day of February, 1974, mail a true copy of the Board of Personnel Appeals' Findings of Fact, Conclusions of Law and Order regarding the Unfair Labor Practice charge filed by the Retail Clerks International, Locals 4, 57, 684, 991, 1573 against the Montana State Department of Revenue by depositing a true and correct copy in the United States mail, in an envelope securely sealed, with postage prepaid, addressed to them at their last known address as follows:

Keith Colbo, Director
Department of Revenue
Sam W. Mitchell Building
Helena, MT 59601

Joseph Meyer, President
Montana State Council of Retail Clerks
P. O. Box 1202
Great Falls, MT 59401

Robert R. Jensen

Subscribed and sworn to before me this 5th day of February 1974.

Lupe S. Foster
Notary Public for the State of
Montana. Residing at Helena, Montana.
My commission expires:
June 24, 1974
Date

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BEFORE THE BOARD OF PERSONNEL
APPEALS

STATE OF MONTANA

INTERNATIONAL UNION OF OPERATING)
ENGINEERS, LOCAL #371,)
Complainant,)
-vs-)
SANDERS COUNTY COMMISSIONERS,)
Respondents.)

ULP-3-73

ORDER

The Board of Personnel Appeals, having considered Respondent's EXCEPTIONS TO THE HEARING EXAMINER'S FINDING OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER, hereby order that said Exceptions be dismissed and hold that Walter W. Benton was properly determined to be a non-supervisory employee by Tony Softich, an agent of the Board of Personnel Appeals, prior to a Union election held October 10, 1974 in which employees of the Plains District road maintenance and construction crew participated.

DATED this 5th day of May, 1974.


Patrick F. Hooks, Chairman
Board of Personnel Appeals

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BEFORE THE BOARD OF PERSONNEL APPEALS
Helena, Montana

International Union of Operating)	
Engineers--Local 371,)	
)	FINDINGS OF FACT
-vs-)	AND
)	CONCLUSIONS
Sanders County Commissioners,)	
Respondent.)	

A hearing was held in the Courtroom of the Sanders County Courthouse at Thompson Falls, Montana on January 3, 1974, to hear the witnesses for the Complainant and for the Respondent in the above entitled matter, and after hearing the testimony, I make the following Findings of Fact:

1. That Walter W. Benton was an employee of Sanders County until October 11, 1973 and was working as a foreman for the road crew on a probationary six-month trial period and had been employed in this position for approximately two months.
2. That when Mr. Benton was put in the position as foreman on a probationary basis, he was informed by his employer that he could not act in this supervisory capacity and be an active member of a union at the same time.
3. That Mr. Benton's position as foreman was considered to be in a supervisory capacity.
4. That Mr. Benton's work performance as foreman was unsatisfactory to his employer for a period of time prior to October 11, 1973, but that no effort was made to demote Mr. Benton or to change his work classification prior to October 11, 1973 because the employer did not want to interfere with or even appear to interfere with the election that was held on October 10, 1973,

1 where the employees were voting to be represented by a union.

2 5. That on the morning of October 11, 1973, Commissioner
3 Stearns informed Mr. Benton that he was being reassigned as an
4 Operator from his position as foreman and was directed to take
5 certain equipment and to do certain work and Mr. Benton refused
6 to do the work and stated that he quit his position, and then
7 left the County Shop and has not reported for work nor offered to
8 work since that date.
9

10 As a result of the above Findings of Act and in considera-
11 tion of the pleadings on file in this matter and of the testimony
12 of the witnesses, it is my conclusion that there were no unfair
13 labor practices engaged in by the Respondent in the matter before
14 this Board and that the Petition and Claim of the Complainant
15 should be and the same is hereby denied.
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18 DATED this _____ day of _____, 1974.
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21 _____
22 Peter O. Maltese
23 Hearing Examiner
24 Board of Personnel Appeals
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