

BEFORE THE BOARD OF PERSONNEL
APPEALS

1
2
3 IN THE MATTER OF:)
4 INTERNATIONAL BROTHERHOOD OF PAINTERS)
AND ALLIED TRADES, LOCAL NO. 1023,)
5 Complainant,)
6 -VS-)
7 MONTANA STATE UNIVERSITY AND BARRY HJORT,)
Respondent.)

ULP-1-1975

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND RECOMMENDED ORDER

8
9 STATEMENT OF CASE

10 As a result of two separate unfair labor practice charges filed by
11 the Brotherhood of Painters and Allied Crafts, Local 1023, on November 25, 1974
12 and January 6, 1975, the Executive Secretary of the Montana State Board of Personnel
13 Appeals served Notice of Hearing to be held on both charges on January 30, 1975.
14 Copies of both charges and Notice of Hearing were duly served upon Montana State
15 University, hereinafter referred to as the Employer. A pre-hearing conference
16 was held on January 2, 1975.

17 In an order dated January 21, 1975, the Board of Personnel Appeals,
18 hereinafter referred to as the Board, granted the motion of the Employer to
19 consider both charges, hereinafter referred to as UFLP NO. 13, 1974 and UFLP NO. 1,
20 1974 respectfully, at the same hearing.

21 The Complainant, hereinafter referred to as the Union, basically
22 alleges in UFLP NO. 13, 1974, that the Employer refused to negotiate a supplemental
23 agreement to the already existing supplement contract between the two parties and
24 further that this refusal was in violation of Section 59-1605(1)(E), Revised Codes
25 of Montana, 1947. This citing of the Revised Codes deals specifically with the
26 employers duty to bargain in good faith with an exclusive representative.

27 The second charge, UFLP NO. 1, 1975, in substance alleged that the
28 Employer refused to acknowledge a grievance and further did not attempt to resolve
29 said grievance in accordance with contractual provisions then and now in existence
30 between the two parties. This refusal, the Union alleges, also violates Section
31 59-1605(1)(E) of the Revised Codes of Montana, 1947.

32 Employer's answer to UFLP NO. 13, 1974, in substance denied that their

1 actions in refusing to bargain a supplement to the contractual agreements be-
2 tween the two parties constituted a refusal to bargain in good faith.

3 Employer's answer to UFLP No. 1, 1975, basically denies this charge
4 on the argument that their actions in refusing to recognize and submit an al-
5 leged grievance to the contractual grievance procedure do not contravene any
6 provision of Section 59-1605. Moreover, in the opinion of the Employer, no
7 standing contract provision is being disputed. Fundamentally, the employer
8 holds that the wording of the Master Contract; "all claims for overtime or
9 interpretations of this agreement, which are disputed and cannot be resolved...,"
10 precludes any grievance from the grievance procedure which does not dispute a
11 definite provision of the contract.

12 The hearing was held on January 30, 1975 by Cordell R. Brown, ap-
13 pointed agent of the Board. Said hearing was conducted in accordance with the
14 provisions of the Montana Administrative Procedures Act (Section 82-4201 to 82-
15 4225, Revised Oodes of Montana 1947).

16 At the outset of the hearing on January 30, 1975, the Union motioned
17 to dismiss UFLP No. 13, 1974. Said motion was granted with the result that all
18 further proceedings of the hearing dealt only with UFLP No. 1, 1975.

19 After thorough review of the entire record of the case, including
20 sworn testimony, evidence, and briefs, I make the following:

21 FINDINGS OF FACT

22 1. The Employer entered into contractual agreement with the Montana
23 State University Employee's Craft Council, July 1, 1974. The Craft Council
24 consists of individual craft unions. The Master Contract (complainant's exhibit
25 E) is in force continuously until June 30, 1975. The Union in question is a
26 member of the Craft Council and is therefore contracted under the Master Con-
27 tract. The Union also negotiated a Supplemental Contract (complainant's exhibit
28 F) to the Master Contract with the Employer, and this contract is in force for
29 the same duration of time as the Master Contract.

30 2. In a letter dated December 11, 1974 (complainant's exhibit B),
31 Mr. Frank Harcourt, then Business Manager of the Union, formally notified Mr.
32 C. C. Dye, Director of Personnel for the University, that the Union disagreed
with the Employer's interpretation of the contract between the two parties.

1 3. The basis for Mr. Harcourt's formal notice was an "experi-
2 mental painting policy" (complainant's exhibit C) which in substance would
3 permit dormitory students to paint their individual rooms following certain
4 prescribed guidelines. The Union contested that even though the Employer was
5 not paying the students, that this policy still violated the existing contract.
6 It was through cross examination of Mr. Harcourt that the Union stated which
7 clause of the contract was in dispute. (tr. p. 9)

8 4. In Mr. Harcourt's letter of December 11, 1974, three names
9 were submitted as being suitable to the Union for participation in the grievance
10 procedure as prescribed in Article VIII, Section A, of the Master Contract.
11 Article VIII, Section A, reads:

12 Section A. All claims for overtime or interpretations of
13 this agreement, which are disputed and cannot be resolved
14 between employer and employee, must be submitted in written
15 form to the secretary-treasurer or the business agent of the
16 union, and by him to Montana State University to the end that
17 the matter in dispute may be adjusted without injustice to
18 the employer or the employee. These claims must be submit-
19 ted in written form within a period of ten (10) days, for the
20 purpose of grievances which may arise in connection with
21 any cause or complaint, concerning the interpretation of any
22 of the clauses of this agreement or the duration of this a
23 agreement.

24 A grievance committee shall be constituted as follows: Not
25 more than three (3) representatives of the employer and not
26 more than three (3) representatives of the union. All grie-
27 vances which cannot be settled to the satisfaction of the
28 employer and the union shall then be submitted to a committee
29 in writing, made up (3) members of M.S.U. Personnel Board
30 and three (3) members not associated with the grievance of
31 M.S.U. Craft Council, and it shall meet and arrive at a decision
32 within ten (10) days following the date the grievance is sub-
mitted. In the event that the committee is unable to arrive
at an agreement, it shall select an impartial arbiter (who
shall again consider the grievance and shall render a decision
within ten (10) days of the date they received the grievance.)
It is agreed that there shall be no unfair reports, work
stoppage, or work slowdowns during the time a grievance is
being processed or because of the decision rendered by their
committee. The decision of this committee shall be binding
upon all parties concerned.

33 5. In a certified letter dated December 19, 1974 (complainant's
34 exhibit D), President Carl McIntosh of the University stated the Employer's
35 position. In this six point reply, point (a) reads; "there is no dispute
36 over interpretation of this (the master contract or the supplement with Painters
37 agreement)." Five other points, B through F, further explain the

1 the basis for the Employer's refusal to recognize and act on the alleged grievance.

2 6. Employer's reply was based on the counsel of Mr. Barry Hjort,
3 staff attorney for the University System. In a letter dated November 25,
4 1974 (complainant's exhibit A), Mr. Hjort advised Mr. William Johnston, Vice
5 President of administration, "that there is no contract provision or other le-
6 gal impediment to prevent the University from proceeding with its plan to allow
7 students to do their own painting appears to be clearly established." He
8 adds, "Painters employed by the Montana State University will not thereby be
9 thrown out of work, nor indeed, will their work load be diminished." In closing,
10 Mr. Hjort recommends that because "there does not appear to be a problem with
11 regard to the administration of the existing collective bargaining agreement
12 with the Painters,...," "I would recommend that the collective bargaining agree-
13 ment not be opened for purposes of discussing the student's painting policy."

14 DISCUSSION

15 Critical and central to this case are the words of the Supreme Court,
16 "collective bargaining is a continuing process."¹ Clarifying this statement the
17 Court adds; "this process may involve among other things, day to day adjustments
18 in the contract and working rules, resolution of problems not covered by exist-
19 ing agreements, and protection of rights already secured by contract."²

20 It is this dynamic quality of collective bargaining which allows the
21 process to keep pace with the changing world of labor-management relations.
22 This dynamism however, is tempered by static qualities of the process which
23 act to structure and stabilize the relationship that exists between management
24 and labor. These static qualities are the negotiated contracts. They should
25 be regarded as the "framework"³ within which the process of collective bargaining
26 may be carried on. Yet these contracts, with their basically static nature that
27 provides the stability needed for the establishment of a coherent working agree-
28 ment, are themselves susceptible to change.

29 ^{1,2}*Conley v. Gibson* 355 US 41, 46, 41 LRRM 2089, (1957) *Accord NLRB v. Acme*
30 *Industrial Co.*, 385 US 432, 64 LRRM 2069 (1967).

31 ³ *Timken Roller Bearing v. NLRB*, 161 F 2d 949, 20 LRRM 2204 (Ca 6, 1947)
32 *Accord: NLRB v. Knight Morley Corp.*, 251 F 2d 753, 41 LRRM 2242 (Ca 6, 1957).

1 There are at least two major avenues available to either party of a
2 negotiated contract to render the contract more meaningful and responsive
3 to the work situation at hand. If a matter has not been addressed in a stand-
4 ing contract, and no exact stipulation or waiver of rights to bargain on the
5 matter is included in the contract, then the matter is a subject susceptible
6 for further collective bargaining. (*Jacobs Mfg. v. NLRB* 196 F 2d 680, 30
7 *LRRM* 2098 (Ca 2, 1952).

8 If a provision of a standing contract is disputed by either the
9 employer or the Union, the "contractual mechanism"⁴ for the continuing process
10 of collective bargaining, is the all important, agreed to, grievance procedure.
11 This avenue, in my opinion, is the route the Union has taken in this case.

12 Mr. Harcourt, former business manager of the Union, testified under
13 cross examination by counsel for the Employer, that he based "the unfair labor
14 practice on the fact that I attempted to enter into the grievance procedure
15 in clarifying this Section 1, Article 2 (complainant's exhibit F), and the
16 University refused to enter into the grievance to determine whether, in fact,
17 there was a violation of the agreement." (tr. p. 8,9) Under further cross
18 examination, Mr Harcourt was asked the question: "The normal procedure, then,
19 is not to sit down around a table and bargain collectively about a grievance?
20 My question is this: When you sit down to negotiate collectively in good
21 faith, you're negotiating about the contents of a contract, is that not accu-
22 rate?" (tr. P. 12) Mr. Harcourt replied, "that's accurate."

23 I mention this testimony by the former business agent for the Union
24 because it could be construed as being contradictory to the Union's position
25 that a grievance is a proper subject for collective bargaining. However, even
26 though Mr. Harcourt is an "experienced union man" (tr. p. 12), counsel pursued
27 a line of questioning which required expert testimony on the process of collective
28 bargaining and the complicated concept of what constitutes a failure to bargain
29 in good faith. Mr. Harcourt in my opinion, is not an expert witness on labor
30 law and I do not feel his testimony detracts from the Union's contention

31 ⁴*Emken Roller Bearing Co. v. NLRB*, 161 F 2d 949, 20 *LRRM* 2204 (Ca 6, 1947)
32 Accord: *NLRB v. Knight Morley Corp.*, 251 F 2d 753, 41 *LRRM* 2242 CA 6, 1957)

1 that a grievance is a proper subject for collective bargaining.

2 The Union has taken steps to dispute the Supplemental Contract.
3 They have chosen the second avenue aforementioned to clarify the contract
4 through collective bargaining. This is not an attempt at clarification of a
5 minor provision in the contract. The "definition of bargaining unit work"⁵
6 is now clearly recognized by the NLRB as a mandatory subject for collective
7 bargaining. The "definition of bargaining unit work" clause in the Supplement
8 Contract is at best obscure if not nonexistent, depending on interpretation.
9 This obvious shortcoming only emphasizes and illustrates the need for the
10 grievance procedure and its utilization.

11 There can be no doubt that neither party really knows what work
12 is to be done by the painters. It is only logical that in collectively bar-
13 gaining a work agreement, the bargaining on wages and the employees which
14 are to do contracted work, should be accompanied by a description of what work
15 is to be done!

16 The contract provision in question, if it can be called that, was
17 uncovered through cross examination of Mr. Harcourt by counsel for the Employer.
18 It reads as follows:

19 Work Covered by Agreement

20 Article II. Section I.- all decorators, paperhangers, hardwood
21 finishers, grainers, varnishers, guilders, and enamelers.

22 Like all incomplete and inconcise contract language, it sooner or
23 later had to create problems. The unilateral action of the Employer in im-
24 plementing the "experimental painting policy" was all that was needed to trig-
25 ger the dispute. The Union has not pressed to reopen the contract to negotia-
26 tion, a possibility not precluded by the reopening clause of the Supplemental
27 Contract if the Union had considered the "definition of bargaining unit work"
28 a subject not addressed in the contract. In fact, this is the interpretation
29 of the Employer in the words of its counsel in his summary. He states, "the
30 only work covered by this agreement, as I apprehend it, and it is written in
31 this particular contract, is not work at all. It is really just individuals."

32 (tr. p. 29)

⁵*Almeida Bus Lines, Inc. v NLRB* 445, 53 LRRM 1055, 1963)

1 The Employer's argument against utilization of the grievance pro-
2 cedure revolves around the curious logic, that if one party to an alleged dis-
3 pute does not recognize the dispute because it feels no provision of the con-
4 tract is being addressed, then in fact the dispute does not exist! Who then
5 determines whether or not a grievance is suitable for submittal to the pre-
6 scribed grievance procedure of Article VIII of the Master Contract? Counsel
7 for the Employer has stated, "now the question, as I understand it, is for resolu-
8 tion for the Board, as whether or not a grievance existed." (tr. p. 8)

9 It is not within the jurisdiction of the Board, to decide whether
10 grievances are suitable for submission to contractual grievance procedures. Nor
11 is it the right of management or labor to resolve disputes of the contract by
12 ignoring them. The only party which can initiate or withdraw a grievance is the
13 aggrieved party, if the grievance procedure is to be utilized at all. From Mr.
14 Harcourt's testimony under recross examination by counsel for the Employer, it
15 is obvious that the grievance procedure is seldom utilized. It has not been
16 abused by either party and it is not being abused now.

17 Reiterating, it is not within the jurisdiction of the Board to rule
18 on the merits of the grievance in question. Whether or not the the unilateral
19 action of permitting students to paint their own rooms is justified or not under
20 the existing contract is not the question here. What is in question however,
21 is did the Employer by refusing to take part in the "contractual mechanism" for
22 the ongoing process of collective bargaining, refuse to bargain in good faith? ✓
23 The answer to this question is in the affirmative.

24 It is possible that this refusal may have been the result of un-
25 familiarity with the modern concepts of collective bargaining, and counsel for
26 the Employer has indicated his anxiety concerning a too liberal construction of the
27 precedent set by the Federal Courts and the NLRB. No doubt, there are very basic
28 differences between the Montana Public Employees Collective Bargaining Act and
29 the NLRA, and that one has to be wary of overstepping enabling legislation.
30 Nevertheless, collective bargaining is a new concept in the public sector in
31 this State and we can only benefit from the great experience and developed ex-
32 pertise of the NLRB in this matter. We cannot close our eyes to the overwhelming
 interpretation of the process of collective bargaining throughout the country.

1 Collective bargaining does not cease with the completion of negotiations
2 on a working agreement between labor and management.

3 CONCLUSIONS OF LAW

4 By refusing, and continuing to refuse, to bargain collectively with
5 the Union through the use of the standing contractual grievance procedure,
6 the Employer did engage and is engaging in an unfair labor practice within the
7 meaning of Section 59-1605 (E) of the Revised Codes of Montana, 1947.

8 RECOMMENDED ORDER

9 It is ordered that the Employer, Montana State University, its
10 officers, agents, and representatives, shall:

11 1. Cease and desist from;

12 a. Refusing to bargain collectively through the contractual
13 grievance procedure on the matter of the "students experimental
14 painting policy;"

15 2. Take the following affirmative action which will effectuate
16 the provisions of Title 59, Chapter 16, Revised Codes of Montana 1947.

17 a. Immediately submit three names acceptable to the Employer
18 for participation in the contractual grievance procedure, in order
19 to resolve the grievance in question.

20 b. Notify the Board of compliance with this order within five
21 (5) days from the date of this order.

22 c. Notify the Board as to the outcome of processing the grievance
23 in question through the contractual grievance procedure.

24
25 DATED this 12th day of March 1975.

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31 Cordell R. Brown, Hearing Examiner
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1 CERTIFICATE OF MAILING

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3 I, CORDELL R. BROWN, hereby certify that I mailed a true copy of the above
4 Findings of Fact, Conclusions of Law, and Order as Recommended to the Board
5 of Personnel Appeals to:

6
7 Barry Hjort, Attorney
8 Montana University System
9 1231 Eleventh Avenue
10 Helena, MT 59601

11 Robert Yunck, Attorney
12 2210 North Roberts
13 Helena, MT 59601

14 Mr. Carl McIntosh, President
15 Montana State University
16 Bozeman, MT 59715

17 Mr. Bud Lippett, Business Manager
18 Int'l Brotherhood of Painters &
19 Allied Trades, Local #1023
20 1300 Cedar Street
21 Helena, MT 59601

22 on this 27th day of March 1975.
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Cordell R. Brown
Hearing Examiner