

BEFORE THE BOARD OF PERSONNEL AFFAIRS

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BILLINGS EDUCATION ASSOCIATION )  
 )  
 Complainant, )  
 -vs- )  
 SCHOOL DISTRICT NO. 2 )  
 BILLINGS, MONTANA )  
 )  
 Defendant. )

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

ULP#16-1975

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I STATEMENT OF CASE

On September 19, 1975, the Billings Education Association, hereafter referred to as the Association, filed unfair labor practice charges against School District No. 2, Billings, Montana, hereafter referred to as the School District.

The Association in substance alleges the School District violated Section 59-1605(1)(e) of the Revised Codes of Montana 1947, by refusing to bargain in good faith on three specific unilateral changes in working conditions. Further, the Association alleges that the School District violated Section 59-1605(1)(a), R.C.M., 1947, by transferring three teachers within the bargaining unit to other positions because of their collective bargaining activities in behalf of the Association, therefore interfering with and restraining said teachers in the exercise of their rights as guaranteed by Section 1603 R.C.M., 1947.

Board Chairman Raucci and members Cromley, Reber and Heliker conducted a hearing into the matter on November 6, 1976, in accordance with the Administrative Procedures Act (Title 82, Chapter 42).

Emilie Loring of the firm of Hilley and Loring of Great Falls, Montana, represented the Complainant. John Davidson and Gary G. Broeder of the firm of Davidson, Veeder and Broeder appeared as joint counsel for the Defendant.

II EVIDENTIARY OBJECTION

Counsel Loring objected to School District No. 2 Exhibit B as being irrelevant. The document consists of Standard for Accreditation No. 117

1 which calls for the creation of a committee to draw up a staff evaluation  
2 procedure, and the report and final instrument developed by the committee.

3 The objection is overruled as the School District has taken the position  
4 that a staff evaluation procedure is not a proper subject for collective  
5 bargaining. This of course is one of the fundamental issues to be determined  
6 in this case and the accreditation standard is necessary for such a determination.

7 Upon the entire record of this case including the testimony of a number  
8 of witnesses and briefs, this body makes the following:

9 III FINDINGS OF FACT

10 The Alleged Unilateral Act of Withholding Salary From Teachers on Association<sup>1</sup>  
11 Leave

12 1. It was admitted that on September 7, 1975, teachers Bess Franzen, Jerry  
13 Jimison, Eugene Cetrone and Edward J. Waller requested a leave of absence from  
14 their teaching responsibilities to attend a Montana Education Association  
15 Board Meeting.

16 The School District informed these individuals that leave would be  
17 granted but that 1/200 of each individual salary would be deducted for each  
18 day of absence.

19 2. It was admitted that on September 7, 1975, teachers Muriel Solie and  
20 Ed Ward requested a leave of absence from their teaching responsibilities  
21 to attend a Montana Education Association Leadership Conference.

22 The School District informed these individuals that leave would be  
23 granted but that 1/200 of each salary would be deducted for each day of  
24 absence.

25 3. It was admitted that prior to this refusal to grant paid leave for  
26 Association business, leave requested by members of the Association for  
27 attendance of state, regional, and national meetings of the Montana Education  
28 Association has been granted without loss of pay. The School District qualified  
29 this admission by stating:

30  
31 <sup>1</sup>Association leave refers to leaves of absence taken by certain teachers  
32 for participation in the activities of the Billings Education Association or  
its affiliates.

1 "...policy was never implemented by School District No. 2 and  
2 Association Leave is now covered by Article III, Section II  
3 of the Master Agreement, between the Billings Education  
4 Association and School District No. 2 which Agreement was  
5 retroactive to July 1, 1975."

4 4. Mr. Paul O'Hare, Superintendent of School District No. 2, testified that  
5 although the teachers in question were notified that they would not be paid  
6 for leave granted for Association activities, this in fact did not occur and  
7 these teachers were given leave with pay. (tr. p. 62)

8 Mr. O'Hare testified further that he wanted to establish "a second  
9 concept of 1/200th" with respect to leave for Association meetings and that  
10 there was no definite policy governing association leave in the past.<sup>2</sup> (p. 62)

11 He also testified that he decided to rescind the decision to withhold  
12 salary "...because the matter was on the negotiation table and would be  
13 governed by the settlement of the agreement." (tr. p. 63)

14 The School District's Adoption of a Staff Evaluation Procedure

15 5. On August 11, 1975, the School District adopted a staff evaluation  
16 procedure. Mr. O'Hare testified that this action was taken in order that  
17 the School District could comply with the accreditation standard for a staff  
18 evaluation as prescribed by the Montana Board of Public Education.<sup>3</sup> (tr. pp. 63, 64)  
19 Accreditation standard No. 117 reads:

20 117. STAFF EVALUATION

21 The board of trustees shall adopt  
22 specific policies and procedure for  
23 evaluation of certified staff.

24 The policies and procedures shall be  
25 developed in consultation with  
26 administrators, teachers, other staff  
27 members, and students.

27 <sup>2</sup>It is assumed from Defendant's admission and testimony given by Mr. O'Hare  
28 that although no "definite" leave policy for Association Leave was maintained  
29 by the School District, that in fact leave was granted in the past on similar  
30 requests and, that he was trying to establish a concept for negotiations which  
31 were underway between the two parties.

30 <sup>3</sup>Standard for accreditation No. 117 was excerpted from the body of the  
31 STANDARDS FOR ACCREDITATION OF MONTANA SCHOOLS AS AMENDED BY THE BOARD OF  
32 PUBLIC EDUCATION APRIL 10, 1973.

1 A comprehensive individual personnel  
2 file based on specific evaluation of  
3 every, teacher, principal, supervisor  
4 and other certified staff employed in  
5 the district shall be maintained. The  
6 individual being evaluated shall be  
7 provided with a copy of his written  
8 evaluation. (School District #2 Exhibit B)

9 The School District had begun to prepare a staff evaluation procedure in  
10 October of 1973. A committee of administrative personnel, teachers, and  
11 students was appointed by Mr. O'Hare for the purpose of developing the pro-  
12 cedure. During the 1974-75 school year, the procedure developed by the  
13 committee was used on a trial basis. The staff evaluation procedure adopted  
14 on August 11, 1975, was the final product of the committee.

15 6. A proposal on a staff evaluation procedure was included among the initial  
16 proposals made by the Association during collective bargaining in January  
17 of 1975. Mr. David Sexton, Executive Director of the Association's collective  
18 bargaining team, testified that the Association's proposal on staff evaluation  
19 was still "on the table" during mediation in July and August and at the time  
20 the Association went on strike in October of 1975. (tr. p. 5)

21 7. The School District claims that a staff evaluation procedure is non-  
22 negotiable. Counsel Broeder has taken the following position:

23 "It now is, and always has been, the position of the  
24 defendant that evaluation procedure is not a negotiable  
25 item. Previous master agreements have not dealt with  
26 this issue on that basis alone, defendant believes that  
27 the adoption of the evaluation procedure was not a  
28 unilateral change in a negotiated working condition and  
29 therefore, Complainant's charge is without merit." (Brief p.3)

30 The Association claims that a staff evaluation procedure is a negotiable  
31 item and Counsel Loring argues that standard for accreditation No. 117 is  
32 silent as to whether or not such a procedure would be an appropriate item for  
collective bargaining.

33 8. On October 21, 1975, the School District and the Association agreed to  
the following contract provision for staff evaluation:

ARTICLE XVI

TEACHER EVALUATION

Section 1. Procedure: The School District shall maintain an evaluation

1 procedure for all teachers pursuant to Standards for Accreditation of Montana  
2 Schools as adopted by the Board of Public Education.

3 Section 2. Effect: Such evaluation procedure shall be a matter of  
4 School District policy and shall not be a part of this Agreement. The  
5 evaluation of a non-tenure teacher shall not be subject to the grievance  
6 procedure. A tenure teacher's evaluation shall be subject to the grievance  
7 procedure.

8 The School District's Action of Precluding Teachers Robert Nicholson, John Travis,  
9 and Robert Landis From Assignment to the "Resource Center" at Billings Senior High.

10 9. In April of 1975, the mathematics department at Billings Senior High School  
11 met to discuss class schedules for the coming school year. The meeting was  
12 called by Mr. Vern McDermott, chairman of the department because Mr. McDermott  
13 wanted to receive staff input before he prepared the proposed class schedules  
14 that were to be submitted to Mr. Albert Collins, school principal. Such a  
15 meeting is held each year in order that the ten or so members of the department  
16 might indicate their preferences on class assignment.

17 Part of the proposal prepared by Mr. McDermott after the department  
18 meeting included a recommendation to Mr. Collins that Mr. Robert Nicholson,<sup>4</sup>  
19 a mathematics teacher at the high school, be assigned six periods in the  
20 "resource center" for the 1975-76 school year. The resource center is an  
21 experimental facility (the facility has been in operation for more than five  
22 years) which provides mathematics instruction in addition to that which students  
23 may receive in traditional mathematics courses. The center provides computer  
24 hardware, calculators, and other equipment that is used by students during  
25 study periods or after school. Individual students or a whole class may also  
26 utilize the center for special projects.

27 The School District has experimented with various staffing schedules  
28 for the center in recognition of the need for instructional aid to students

29 \_\_\_\_\_  
30 <sup>4</sup>Mr. Nicholson has been assigned to the resource center every year since its  
31 inception but this year. During the 1974-75 school year he was assigned two periods  
32 of approximately one hour duration. Mr. Nicholson is an active member of the  
Association. He was past vice-president of the Association for the 72-73 school  
year and president for the 1974-75 school year. During negotiations for the  
1975-76 school year, he served as an advisor to the Association's contract  
negotiations team.

1 utilizing the center. The resource center is characterized by an unstructured  
2 classroom atmosphere which is different from classroom instruction in general.

3 This proposed schedule which assigned Mr. Nicholson to six full periods  
4 in the resource center was posted on the master board in the assistant  
5 principal's office during the first week of June as is customary.

6 10. On or about the fifteenth of July, Mr McDermott was told by Mr. Collins  
7 that there had been "a change in policy" in that no teacher would be assigned  
8 for more than one period in the resource center. (tr. p. 14) Mr. McDermott  
9 did not take issue with Mr. Collins' decision and set out immediately to  
10 prepare a new schedule.

11 Mr. Collins testified that Mr. Winston E. Weaver, Assistant Superintendent  
12 of Secondary Education, had expressed to him early in July that the "trustees  
13 felt we had to spread the load as directed to drop the schedule which would  
14 have been very similar to the schedule we had last year which we had basically  
15 one person in the lab each of six periods." (tr. p. 75)

16 Mr. Weaver testified that this communication to Mr. Collins was the  
17 direct result of a school board meeting held early in July in which the  
18 school board expressed its concerns to Mr. Weaver that one teacher assigned  
19 to the unstructured classroom situation in the resource center may create  
20 an inequity in the distribution of teacher load. It appears that the school  
21 board felt that an assignment in the resource center did not require class  
22 preparation and plans nor the grading of papers and was not as difficult as  
23 more conventional teaching assignments. Therefore, the school board felt that  
24 the assignment of instructional duties in the resource center should be more  
25 evenly distributed amongst the staff. (tr. p. 67)

26 Mr. McDermott prepared two new schedules for Mr. Collins. Mr. Collins  
27 chose the schedule which called for six teachers to be assigned one period  
28 each in the resource center. About the same time Mr. McDermott informed  
29 Mr. Nicholson that the first schedule had been changed and that he would only  
30 be assigned one period in the resource center.

31 Mr. Nicholson took exception with this schedule change and informed  
32 Mr. McDermott that he would talk with Mr. Collins about it. Mr. Nicholson

1 did meet with Mr. Collins shortly thereafter. and expressed his concerns  
2 that this new schedule was in conflict with the concept which was reflected  
3 in the math department's original recommendation. This recommendation was  
4 based on the concept that one person assigned to the center could provide more  
5 continuity in instruction and would allow for better utilization and maintenance  
6 of the available materials and teaching aids.

7 Mr. Nicholson testified that Mr. Collins agreed that no more than two  
8 people should be assigned to the resource center and asked Mr. Nicholson to  
9 prepare a rationale to this effect.

10 Mr. Collins testified that he told Mr. Nicholson to prepare the rationale  
11 in order that he could "present it to the total administration which means my  
12 immediate superiors, Mr. O'Hare and Mr. Serrette<sup>5</sup> and Mr. Weaver." (tr. p. 76)  
13 11. Mr. Collins presented the rationale to his superiors in early August and  
14 the reaction he received to the concept of having fewer than six teachers in  
15 the resource center was "quite favorable." (tr. p. 77)

16 Mr. Collins then went back to Mr. McDermott and informed him that "we  
17 would have permission to again restructure the center assignment, utilizing  
18 hopefully two and if not just two, possible three people." (tr. p. 78) He  
19 also testified that when he was queried by Mr. McDermott concerning the possi-  
20 bility of assigning Mr. Nicholson and Mr Landis<sup>6</sup> in the resource center, he told  
21 Mr. McDermott that all of these problems are coming over the problem of conflict  
22 of interest between the BEA activities and the freedom of the math center  
23 assignment, that we could avoid the problem if we didn't put such highly  
24 involved people in the math center and we should look to other possibilities."  
25 (tr. p. 79)

26 Mr. McDermott testified that Mr. Collins told him that the decision had  
27 been made to staff the center with fewer than six people. He also stated:  
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29 <sup>5</sup>Mr. William Serrette is assistant superintendent of the district.

30 <sup>6</sup>Mr. Landis has taught mathematics at Billings Senior High for seven years  
31 and has been assigned to the resource center every year with the exception of the  
32 first year it was established and the 75-76 school year. He has been an active  
member of the Association and up to now served on the joint Association, School  
District Extra Pay Committee. He also served as salary committee chairman for  
three years.

1 "He (Mr. Collins) said however that it was felt that  
2 Mr. Landis, or that Mr. Nicholson had been spending  
3 too much time on BEA business while assigned to the  
4 resource center. He asked me that when I made out  
5 the schedule that I do not place Mr. Landis, Mr.  
6 Nicholson, or Mr. Travis as an assignment in the  
7 resource center." (tr. p. 15)

8 Mr. McDermott then told Mr. Collins that if this was the case with  
9 Mr. Nicholson, Mr. Travis and Mr. Landis, then Mrs. Jellison should not be  
10 assigned to the resource center because she was also becoming very active in  
11 the Association. Mr. Collins did not reply to this suggestion. He did  
12 suggest to Mr. McDermott that both he and a Mr. Branae should be assigned to  
13 the schedule.

14 Mr. McDermott then prepared a third schedule as directed by Mr. Collins  
15 and asked Mr. Collins to sit in on the math department meeting at the beginning  
16 of the school year to explain the change in the schedule. Mr. Collins declined  
17 to do so and Mr. McDermott testified that Mr. Collins stated that "this was a  
18 matter that was personal between him and Mr. Nicholson and that he would  
19 rather handle it with Mr. Nicholson individually rather than involve the math  
20 department." (tr. p. 17)

21 Mr. Nicholson did meet with Mr. Collins at the beginning of the school  
22 year and was told that his written rationale had aided in obtaining a change  
23 in the scheduling to fewer than six people in the resource center but that he  
24 Mr. Landis and Mr. Travis would not be assigned to the resource center.  
25 Mr. Nicholson testified that "he (Mr. Collins) said it was felt by people who  
26 made the decision that there was too much time being spent on BEA business."  
27 (tr. p. 39)

28 Although the record is somewhat unclear on this point, it appears that the  
29 final schedule prepared by Mr. McDermott was implemented and that Mr. McDermott  
30 and Mr. Branae now staff the resource center six periods per day.

31 The School District's Charge That Too Much Time Was Being Used for BEA Activities  
32 by Certain Teachers Assigned to the Resource Center

12. In defense of its action to bar certain teachers from assignment in the  
resource center, the school district argued and presented evidence to the effect  
that Mr. Nicholson's assignment to the resource center was being abused in that

Mr. Nicholson was using too much school time to carry out his duties for the  
1 Association.

2 Mr. Weaver testified that during the 1974-75 school year he had personally  
3 visited Mr. Nicholson's class during the second period for six days and did not  
4 find Mr. Nicholson present. He initially visited the class to pay Mr. Nicholson  
5 a compliment and not finding him there he returned each day during second period.  
6 Mr. Weaver reported the fact he could not find Mr. Nicholson in his class at  
7 the resource center for over a week to Mr. Collins.

8 Mr. Weaver testified further that he remained in the center for five or  
9 ten minutes on each occasion and did not inquire of anyone until the fourth or  
10 fifth day where Mr. Nicholson might be found. He then asked Mr. Collins who  
11 also did not know the whereabouts of Mr. Nicholson.

12 Mr. Nicholson testified to a plethora of reasons which might have caused  
13 his absence including checking for attendance (making sure students who were  
14 leaving certain classes to attend the resource center got there), picking up  
15 materials, teaching another teacher's class and as he testified:

16 "It's also possible I could have been sometimes on BEA business,  
17 I don't know, but I don't believe it ever entered into any great  
degree." (tr. p. 85)

18 Mr. Collins testified that during second period of the 1974-75 school year  
19 and during third period of the 1975-76 school year, Mr. Nicholson spent a consider-  
20 able amount of time talking with Mr. Rogers, assistant principal of Billings  
21 Senior High, mostly about BEA affairs. He also testified that "he had some of  
22 the same observations about Mr. Landis as I had about Mr. Nicholson." (tr. p. 83)  
23 It appears from the record that Travis' exclusion from the resource center was  
24 based on the speculation that he too would spend too much time on BEA activities.

25 The School District also offered further justification for its actions by  
26 attempting to show that resource center computer time was being abused by  
27 certain teachers in that BEA salary proposals and the like would be computed  
28 on school time.

29 13. There is no evidence on the record that Mr. Nicholson or Mr. Landis have  
30 ever been warned, reprimanded or even talked to with respect to their alleged  
31 misuse of time on behalf of the BFA. Mr. Nicholson's evaluation for the  
32

1 1974-75 school year did not contain any indication that he was abusing his  
2 assignment in the resource center. Moreover, the record does not show that  
3 any teacher was ever warned about misuse of the resource center before  
4 Mr. Collins confronted Mr. McDermott with this problem.

5 14. It is on rare occasion that the spring schedule developed by the math  
6 department is changed. It is even more infrequent that Mr. Weaver and his  
7 superiors become involved in the specifics of class scheduling.

8 15. Billings West High School has a facility very much similar to the resource  
9 center. The staffing schedule for this facility was not subjected to the same  
10 concerns that had characterized the scheduling of the resource center at  
11 Billings Senior High.

#### 12 DISCUSSION

13 The first aspect of the charge concerning the School District's refusal  
14 to grant Association leave with pay can be dealt with in summary fashion.  
15 The facts are that although the School District had intended to withhold  
16 pay for teachers on leave for Association business, this was not carried  
17 through. It is difficult to ascertain from the record just what the School  
18 District's motivation was in this regard, and it is our hope that the  
19 establishment of a negotiating "concept" will not in the future intentionally  
20 be achieved through a threatened unilateral act or an act itself. Under these  
21 considerations we find that this aspect of the charge should be dismissed.

22 The second aspect of the charge which alleges that the School District's  
23 adoption of a staff evaluation procedure in August of 1975 constituted a  
24 unilateral act indicative of the School District's failure to bargain with  
25 the required good faith, poses for this body a difficult issue. It is the  
26 School District's position that a staff evaluation procedure is a non  
27 negotiable item. Following this argument to its logical conclusion, a staff  
28 evaluation procedure could then be adopted at the will of the School District  
29 regardless of any proposals made in this regard by the Association. The School  
30 District also contends that even if the staff evaluation procedure were a  
31 proper subject for collective bargaining, its adoption of such a procedure in  
32 August of 1975 was not a unilateral act but rather the culmination of a lengthy

1 process<sup>7</sup> which began well before the Association made its first proposal on  
2 this item.

3 This issue necessitates a careful approach. The first of a number of  
4 questions to be answered is whether or not a staff evaluation procedure is  
5 a subject suitable for collective bargaining. Section 59-1605(3) R.C.M.,  
6 1947 states:

7 (3) For the purpose of this act, to bargain collectively is  
8 the performance of the mutual obligation of the public  
9 employer, or his designated representatives, and the  
10 representatives of the exclusive representative to meet  
11 at reasonable times and negotiate in good faith with respect  
12 to wages, hours, fringe benefits, and other conditions of  
13 employment, or the negotiation of an agreement, or any  
14 question arising thereunder, and the execution of a written  
15 contract incorporating any agreement reached. Such obli-  
16 gation does not compel either party to agree to a proposal  
17 or require the making of a concession.

18 This language parallels Section 8(d) of the National Labor Relations Act  
19 and the cases are legion in which the National Labor Relations Board and the  
20 courts have carefully reasoned the scope of subjects which are in fact "other  
21 conditions of employment" and properly addressed in the collective bargaining  
22 process. It is obviously most desirable that labor and management identify  
23 and agree upon those items which require bargaining for stable relations.  
24 However as the NLRB and even state agencies have found, this possibility is  
25 sometimes unachievable and determinations on the bargainability of certain  
26 items must be made on a case by case basis. We approach this responsibility  
27 with some reservation. However, at stake is the very stability of labor-  
28 management relations in this state and we feel that the policies of the Act  
29 must be effectuated.

30 The staff evaluation procedure presents an interesting item. The pro-  
31 fessional evaluation of a teacher is a complex process reflective of the task  
32 for which it is intended. The School District has argued that a staff evaluation  
33 procedure is a "management prerogative" and although reference was not made  
34 to Section 1603(2) R.C.M., 1947, perhaps this section of the Act deserves our  
35 attention. It reads:

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36 <sup>7</sup>We are referring to the evidence dealing with the School District's  
37 efforts to comply with Standard for Accreditation No. 117.

1 (2) Public employees and their representatives shall recognize the  
2 prerogatives of public employers to operate and manage their affairs in  
such areas as but not limited to:

3 (a) direct employees;

4 (b) hire, promote, transfer, assign, and retain employees;

5 (c) relieve employees from duties and because of lack of work or funds  
6 or under conditions where continuation of such work be ineffecient and  
nonproductive;

7 (d) maintain the efficiency of government operations;

8 (e) determine the methods, means, job classifications, and personnel  
9 by which government operations are to be conducted;

10 (f) take whatever actions may be necessary to carry out the missions  
of the agency in situations of emergency;

11 (g) establish the methods and processes by which work is performed.

12 The legislature has not left to presumption that public employers possess  
13 the prerogatives necessary to "manage their affairs." We also note however,  
14 the Act is absent any express language which prohibits management from  
15 bargaining on just how those prerogatives are to be exercised or in fact  
16 how far they extend. We agree that a staff evaluation procedure involves  
17 management prerogative yet even the subject of wages involves management  
18 prerogative.

19 Further analyzing this problem, we note a basic inconsistency in the  
20 School District's position. As aforementioned. the collective bargaining  
21 agreement negotiated for the 1975-76 school year (School District Exhibit A)  
22 provides that the product of the staff evaluation procedure<sup>8</sup> is subject to  
23 the grievance procedure and ultimately binding arbitration. The fact that the  
24 School District has seen fit to collectively bargain both through the negotia-  
25 tions process and the grievance procedure on the product of the evaluation  
26 procedure and yet refuses to bargain on the substance of that procedure defies  
27 reason.

28 Further, an item which involves an employee's reasonable expectation of  
29 employment security such as an evaluation procedure, should not be arbitrarily

30 \_\_\_\_\_  
31 <sup>8</sup>Under the terms of the contract, the staff evaluation procedure itself is  
32 a matter of School District policy and the evaluation of tenured teachers is  
subject to the grievance procedure.

1 excluded from the forum of collective bargaining. We also note that Standard  
2 for Accreditation No. 117 does not preclude the possibility of collective  
3 bargaining and does in fact recognize a need for teacher input.

4 The second question that must be addressed is that since a staff evaluation  
5 procedure is bargainable, did the School District act unilaterally and in bad  
6 faith in its adoption of the procedure on August 11, 1975? The record shows that  
7 the Association had included in its first package of proposals in January of  
8 1975, a specific proposal on staff evaluation. That proposal remained on the  
9 table well after August 11, 1975.

10 The National Labor Relations Board provides useful insight into the problem  
11 at hand. In NLRB Katz, 369 US 736, 50LRRM 2177 (1962), the U.S. Supreme Court  
12 gave express recognition of the NLRB's *per se* doctrine. The court characterized  
13 the employer's unilateral changes in conditions of employment in these terms  
14 on page 743:

15 A refusal to negotiate (*in fact*) as to any subject which is within  
16 Section 8d<sup>9</sup> and about which the union seeks to negotiate, violates  
17 Section 8(a)(5)<sup>10</sup> though the employer has every desire to reach  
18 agreement with the union upon and over all collective agreement  
19 and earnestly and in all good faith bargains to that end.

20 This reasoning has been further expanded and distinguished and in *Katz*  
21 the Court did note however, that certain circumstances might justify unilateral  
22 employer action (i.e. necessity, waiver, etc.). Yet the facts of the case at  
23 hand do not justify the School District's action and therefore do not exempt  
24 the School District from the duty to bargain with the Association on a staff  
25 evaluation procedure.

26 From the foregoing, it must be concluded that the School District has not

27 <sup>9</sup>Section 8d reads in part:

28 For the purposes of this section, to bargain collectively is the  
29 performance of the mutual obligation of the employer and the representa-  
30 tion of the employees to meet at reasonable time and confer in good  
31 faith with respect to wages, hours, and terms and conditions of employ-  
ment, or the negotiation of an agreement, or on question arising there-  
under, and the execution of a written contract incorporating any agreement  
reached if, requested by either party, but such obligation does not compel  
either party to agree to a proposal or require the making of a concession.

32 <sup>10</sup>Section 8(a)(5) reads to refuse to bargain collectively with the representa-  
tives of his employees, subject to the provisions of Section 9(a).

1 bargained with the required good faith. This conclusion immediately poses  
2 another problem in that an agreement containing a provision covering an evaluation  
3 procedure was negotiated by the parties in October of 1975. The School District  
4 argues that this fact has rendered moot this unfair labor practice complaint  
5 and that no appropriate remedies are available to this Board.

6 Section 59-1607(2) R.C.M., 1947, reads in part:

7 If upon the preponderance of testimony taken the board is of the  
8 opinion that any person named in the complaint has engaged in or  
9 is engaging in an unfair labor practice, it shall state its findings  
10 of fact and shall cause to be served on the person an order  
11 requiring him to cease and desist from unfair labor practice,  
12 and to take such affirmative action including reinstatement of  
13 employees with or without back pay, as will effectuate the policies  
14 of this act.

15 In order to "effectuate the policies of the act" this body holds that  
16 orders in unfair labor practice cases are preventive as well as remedial.  
17 This refusal to bargain on a staff evaluation procedure is a matter of prime  
18 import not only to the parties to this case but to management and labor groups  
19 statewide. It is not enough that the School District and the Association have  
20 come to contractual agreement on this subject. The School District must be  
21 barred from declaring in the future that a staff evaluation procedure is non-  
22 bargainable and must be cognizant of the fact that this board's order imposes  
23 a continuing duty to bargain. This reasoning is certainly not original. In  
24 NLRB vs. Mexia Textile Mills 339 US 563, 567, 568 (1950), the U.S. Supreme  
25 Court recognized that an NLRB cease and desist order imposes a continuing  
26 duty to bargain.

27 Looking specifically at the question of mootness, the NLRB and the courts  
28 again are instructive. In Southern Saddlery Co. 90 NLRB No. 176 (1950) 26LRRM  
29 1322,<sup>12</sup> the NLRB found that the execution of a collective bargaining agreement  
30 between the employer and the union after the employer had refused to bargain  
31 does not render moot the refusal to bargain charges or preclude the NLRB from  
32 entering the customary remedial order. It is well established that conciliatory  
action such as the execution of a contract after an unfair labor practice has

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<sup>12</sup>See also *William A. Moscow* 92 NLRB 245, 27 LRRM 1305 1950, *C-B Buick Inc. V. NLRB* 87 LRRM 2878.

1 been committed does not render such charges moot. The U.S. Court of Appeals,  
2 Fifth circuit in NLRB v. Southern Household Products Co. Inc. CA 5(1971)  
3 78 LRRM 2597, found that unfair labor practice violations are not moot even  
4 though the employer has negotiated a contract with the union and offered  
5 reinstatement to unlawfully discharged employees.

6 Based on these considerations, this body finds that in refusing to bargain  
7 over a staff evaluation procedure, the School District has failed to bargain  
8 in good faith with the Association and in order to prevent reoccurrence of such  
9 action, an appropriate cease and desist order will be fashioned.

10 The third aspect of the first charge alleging that the assignments of  
11 three teachers, Robert Landis, Robert Nicholson and John Travis, were changed  
12 unilaterally and therefore in violation of Section 59-1605(1)(e) R.C.M., 1947,  
13 should be dismissed. The facts are that transfer and assignment of teachers in  
14 the School District has been a matter of school district policy and not  
15 contractual agreement and that although it is a rare occurrence in the math  
16 department at Billings Senior High that an assignment is changed after July 1,  
17 it does in fact occur elsewhere within the School District on occasion. We  
18 do not find a *per se* violation here, however, we are concerned with the School  
19 District's motivation in changing the assignments which is the issue in the  
20 second charge of this case.

21 The second charge which alleges that the school district violated Section  
22 59-1605(1)(a) by making the aforementioned changes in teaching assignments is  
23 substantiated by the evidence and although it has not been pleaded,<sup>13</sup> the record  
24 shows that the School District discriminated against these teachers because of  
25 their Association activities. There is overwhelming direct and circumstantial  
26 evidence that in preparing the final staff schedule, assignment to the resource  
27 center was predicated on the degree of Association activity. Principal Collins  
28 and Math Department Chairman McDermott testified directly to this effect.  
29 (tr. p. 79 and p. 15) It is also a fact that staff scheduling of the resource  
30

31 <sup>13</sup>The Association has not charged that Section 59-1605 (1)(c) R.C.M., 1947  
32 has been violated.

1 center at Billings Senior High has never been subject to such scrutiny until  
2 Mr. Nicholson and Mr. Landis became so importantly involved in Association  
3 business. We also note that the resource center at the other high school in  
4 the School District was not subject to the same administrative concerns.

5 This body is aware of the exhaustive study in the private sector of the  
6 question of union activity on company property and company time. However,  
7 the record in this case does not support the School District's charges that  
8 School District property was misused and that actual working time was abused  
9 by any teacher. Moreover, the record does show that none of the teachers in  
10 question had ever been warned about their participation in Association business  
11 during school hours and on school property. Indeed, Mr. Travis was precluded  
12 from assignment to the center because it was assumed that his involvement in  
13 Association activities would interfere with his work. In light of these facts,  
14 the School District's defense for its actions with respect to the scheduling of  
15 the resource center is at best insufficient, and we regard such employer inter-  
16 ference and discrimination seriously. Accordingly, Mr. Nicholson and Mr. Landis  
17 will be given the right to first refusal of assignment in the resource center  
18 for the 1976-77 school year and this shall be ordered in lieu of reinstatement  
19 because of the nature of a teaching assignment and the responsibility it places  
20 on the teachers involved. Further, the School District must be barred from  
21 ever using as a consideration for teacher assignment the fact that a teacher  
22 is an active Association adherent and member.<sup>14</sup> Teachers must not be fearful  
23 that the exercise of rights guaranteed by Section 59-1603 will result in the  
24 loss of the opportunity for desirable teaching assignment.

#### 25 CONCLUSIONS OF LAW

26 School District No. 2 Billings, Montana, violated Section 59-1605(1)(e),  
27 R.C.M., 1947 by refusing to bargain with the required good faith on the subject  
28 of a staff evaluation procedure and by unilaterally adopting such a procedure  
29 on August 11, 1975.

30  
31 <sup>14</sup>We recognize that the parties have negotiated scheduled time for  
32 Association officers to conduct Association business and are not referring  
to this fact.

1 The Defendant also violated Section 59-1605(1)(a), R.C.M., 1947 by unlaw-  
2 fully interfering with teachers Robert Nicholson, Robert Landis, and John  
3 Travis in the exercise of their rights as guaranteed under Section 59-1603,  
4 R.C.M., 1947.

5 Such interference resulted when the Defendant discriminated against the  
6 above-named teachers by excluding them from assignment to the Math Resource Center  
7 at Billings Senior High on the motivation that these teachers were highly  
8 involved in union activities.

9 PREFACE TO THE ORDER

10 The Motion to Dismiss charge I of Unfair Labor Practice Charge No. 16  
11 filed on November 4, 1975 by the School District on the grounds that the  
12 Master Agreement effectuated on October 20, 1975 between the School District  
13 and the Association rendered moot said charge, is hereby dismissed on the basis  
14 of the foregoing Findings and Conclusions.

15 ORDER

16 It is hereby ordered that School District No. 2 Billings, Montana, and  
17 its officers, agents, and representatives shall:

- 18 1. Cease and desist from refusing to bargain with the Billings Education  
19 Association on the subject of a staff evaluation procedure and take notice  
20 of the continuing duty to bargain on said subject.
- 21 2. Cease and desist from interfering with employees in the exercise of  
22 their rights as guaranteed by Section 59-1603 R.C.M., 1947, by dis-  
23 criminating against teachers in their classroom assignment because of  
24 union activity.
- 25 3. Take the following affirmative action:
  - 26 (a) Grant teachers Robert Landis and Robert Nicholson the right of  
27 first refusal to assignment in the math resource center for the  
28 1976-77 school year.
  - 29 (b) Place in the personnel file of Mr Landis and Mr. Nicholson  
30 a letter to the effect that the unlawful exclusion of these  
31 teachers from assignment to the math resource center does not in  
32 any way reflect upon their professional competency.
  - (c) Formally in writing notify Mr. John Travis that his partici-  
pation in Association activities will not in the future have a  
bearing on his teaching assignments.
  - (d) Post in conspicuous places in each school building of School  
District No. 2, Billings, Montana, copies of the attached notice  
marked "Appendix". Copies of this notice after being signed by  
the School District's representative, shall be posted by the

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School District immediately upon the receipt thereof,  
and shall be maintained by the School District and not  
altered, defaced, or covered by any other material for  
sixty consecutive days.

4. Notify the Executive Secretary of the Board of Personnel Appeals  
in writing, within twenty (20) days from receipt of this decision  
what steps have been taken to comply herewith.

DATED this 21<sup>st</sup> day of March, 1976.

  
Francis J. Kauci, Chairman  
Board of Personnel Appeals

1 A P P E N D I X

2 NOTICE TO ALL TEACHERS

3 Pursuant to the Order of the Board of Personnel Appeals and in order to  
4 effectuate the policies of the Montana Public Employees Collective Bargaining  
5 Act, we hereby notify our employees that:

6 We will cease and desist from refusing to bargain with the Billings  
7 Education Association on the subject of a staff evaluation procedure

8 We will not in any way interfere with your right to:

- 9 --Organize yourselves, or form, join or help unions  
10 --Bargain for your working conditions through a representative freely  
11 chosen by a majority of teachers in this District  
12 --Act together for mutual aid or protection of your working conditions  
13 --Refuse to do any or all of these things.

14 We will grant teachers Robert Nicholson and Robert Landis the right of  
15 first refusal to assignment in the resource center at Billings Senior High  
16 School and will formerly notify John Travis in writing that his participation  
17 in the activities of the Billings Education Association will not in the future  
18 have a bearing on his teaching assignments.

19 School District No. 2  
20 Billings, Montana

21 By \_\_\_\_\_  
(Representative) (Title)

22 Dated:

23  
24 This notice must remain posted for sixty consecutive days from the date  
25 of posting and must not be altered, defaced, or covered by any other material.

26 If teachers have any question concerning this notice or compliance with  
27 its provisions, they may communicate directly with the Board of Personnel  
28 Appeals, 1417 Helena Ave., Helena, Montana 59601, telephone 449-2890.  
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