

1 BEFORE THE BOARD OF PERSONNEL APPEALS

2 * * * * *

3 IN THE MATTER OF:)
4 TEAMSTERS LOCAL #2)
5 Complainant,)
6 -vs-)
7 BOARD OF COUNTY COMMISSIONERS,)
8 SILVER BOW COUNTY, MONTANA)
9 Respondent.)

ULP-4-1976

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER.

10 * * * * *

11 I. STATEMENT OF CASE

12 As a result of an unfair labor practice charge filed on
13 27 February, 1976, by the Teamsters Local Union #2 (herein
14 referred to as the Union), the Montana Board of Personnel Appeals
15 duly served copies of the charge and Notice of Hearing on the
16 Silver Bow County Commissioners.

17 The Union's charges, (herein referred to as ULP #4, 1976)
18 basically allege that the Silver Bow County Commissioners,
19 (herein referred to as the Employer), violated the employees'
20 rights guaranteed in Section three of the Montana Public
21 Employees Collective Bargaining Act by refusing to bargain
22 collectively with the employees through representatives of their
23 own choosing (59-1605(1)(a)).

24 The Union further charges that the Employer violated Section
25 59-1605(1)(b) by interfering in the administration of the Union
26 by refusing to bargain with Mr. Jim Roberts, Secretary-Treasurer
27 of said Union, therefore attempting to determine the completion
28 of the Union negotiating committee.

29 The third Union charge is that the Employer also refused to
30 bargain in good faith with an exclusive representative by
31 1) demanding the physical therapist take a pay cut as a condition
32 of agreeing to a collective bargaining contract, 2) threatening
to sub-contract the work performed by members of the unit to a
private concern.

1 Commission Chairman Ed DeGeorge denied the charges in an
2 answer filed with the Board of Personnel Appeals (herein referred
3 to as the Board) on March 12, 1976. The charges were filed
4 against the employer and Mr. DeGeorge's response is considered
5 as the employer's response.

6 A hearing on the above-captioned matter was held on 14 April
7 1976, at the Silver Bow County Courthouse, Butte, Montana.

8 Mr. Joseph W. Duffy of the law firm of McKittrick and Duffy,
9 Great Falls, Montana represented the Union. Mr. John T. Mullany,
10 Silver Bow Deputy County Attorney, represented the Employer.

11 As the duly appointed hearing examiner of the Board, I
12 conducted the hearing in accordance with the provisions of the
13 Montana Administrative Procedures Act (Sections 82-4201 to 82-
14 4225, R.C.M. 1947).

15 FINDINGS OF FACT

16 After a thorough review of the record of this case, including
17 briefs, sworn testimony, and evidence, I make the following
18 findings:

19 PHYSICAL THERAPY AIDES UNIT

20 1. The Board of County Commissioners of Silver Bow County
21 is the public employer of the physical therapy aides at the
22 Silver Bow General Hospital.

23 2. On September 8, 1975, the Union filed a petition with
24 the Board for a New Unit Determination and Election. The pro-
25 posed unit of approximately five employees was to include
26 "physical therapy aides - Silver Bow General Hospital." An

27
28 2. *The Board's summons issued on 1 March 1976 was to Silver*
29 *Bow County and its Board of County Commissioners. This*
30 *Board is not interested in a personal response to an unfair*
31 *labor practice charge summons. Mr. DeGeorge participates*
32 *in collective bargaining as an employer, therefore, all*
discussions and actions, which may have precipitated the
charges, were made as an employer.

1 election was subsequently held on November 24, 1975, and the
2 majority of eligible employees voted for representation by the
3 Union. The Board then certified the Union as the exclusive repre-
4 sentative for collective bargaining purposes for the members of
5 the new unit.²

6 3. After certification, the Union served a demand to bar-
7 gain on the employer. After some informal discussions between
8 the two parties a negotiation meeting was set for 12 January 1976.

9 4. In addition to the physical therapy aides, the Teamsters
10 are the exclusive representative for some other county employees,
11 namely the nurses aides³ and the surveyors. Several collective
12 bargaining contracts have been negotiated and agreed upon in the
13 past between this employer and this Union.

14 BUDGETARY PROCESS

15 5. A preliminary budget for the hospital is submitted by
16 the administrator to the County Commissioners in June. The labor
17 budget is based on estimated patient load. In accordance with
18 state law, a county-wide final budget is adopted by the Commis-
19 sioners in August. The Commissioners claim that the hospital is
20 losing about \$50,000 a month. They also claim that the physical
21 therapy department is operating at a deficit.

22 6. At the time of the adoption of the final budget, the
23 physical therapy aides were not represented by a union. Mr.
24 DeGeorge testified that he was under the impression, and it was
25

26 2. *Between the time of the filing of the unit determination*
27 *petition and the subsequent election, the Commissioners*
28 *directed that the employees in the physical therapy depart-*
29 *ment who were hired for/whom did clerical work would not per-*
30 *form physical therapy aide work. The directive raised the*
31 *issue of whether Ms. Julie Walsh should be part of this*
32 *bargaining unit or, as the Commissioners contend, be part of*
the clerical bargaining unit represented by the Montana Public
Employees Association. Mr. Tom Schneider, Executive Director
of MPEA wrote a letter to the Teamsters stating that the
Association did not represent any employees from the physical
therapy department.

3. *See Teamsters Exhibit A: Teamsters Union - NURSES' AIDES*
DIVISION - agreement.

1 the Commissioners' intent, that all the hospital employees (union
2 and non-union) received a salary increase similar to the increase
3 negotiated with the Montana Public Employees Association (MPEA).⁴

4 7. Mr. Roberts and Mr. Leo Lynch (Business Agent, Teamsters
5 Local #2) testified that the physical therapy aides did not
6 receive a salary increase, and this was one of the main reasons
7 they signed authorization cards for Teamster representation.

8 MEETINGS

9 January 12, 1976:

10 8. Mr. DeGeorge testified that his notes indicate the
11 Commissioners met with the Union, though the main purpose of the
12 meeting was to discuss problems involving the union's other bar-
13 gaining unit, the surveyors. He testified:

14 "On January 12, 1976 at 10:55 a.m.
15 it was physical therapy and I made
16 a note here that Ms. Walsh was in attend-
17 ence and they wanted the same agreement
18 as nurses aides. They presented us that
19 they wanted a rate of \$4.00 per hour, same
20 tenure at 7¢ an hour, and they proposed
21 uniforms. We talked about a few items
22 like this. Nothing was formulated." (tr. pgs. 22-23)

23 Mr. DeGeorge added that the parties went through the nurses aide con-
24 tract, talked about starting salary, including the employer's position
25 against tenure.

26 The Commissioners agreed that they would give the physical therapy
27 aides the same insurance coverage as provided to the other hospital em-
28 ployees.

29 9. Mr. Roberts, testifying from his notes, stated the 12 January
30 meeting, after several postponements, was the first formal meeting invol-
31 ving the physical therapy aide unit. The Union presented its original
32 proposals to include the physical therapy aides under much of the "boiler-
plate" language of the Nurses aides contract, with an addendum covering
wages and a few other items. The employer rejected this proposal, there-
fore it became necessary to negotiate an entirely separate contract using

4. *Some clerical and other hospital employees are represented by MPEA.*

1 the Nurses aides contract only as a guide.

2 According to Mr. Roberts, there was some discussion as to whether
3 Ms. Walsh should be included in this unit. Also, the union informed
4 the employer that it was opposed to subcontracting in principle and,
5 in any event, the least they were going to settle for was protection
6 for the members of this unit.

7 Mr. Lynch's testimony, from his notes, basically concurs with Mr.
8 Roberts.

9 January 23, 1976:

10 10. Mr. DeGeorge testified that:

11 "We reviewed the contract, we had mentioned
12 that we felt that we could not pay the \$4.00
13 per hour. We were still discussing the
14 position of the clerical person and we talk-
15 ed about a sub-contract." (tr. pg. 32)

16 Under cross examination by Mr. Duffy, Mr.
17 DeGeorge elaborated on salary and sub-
18 contracting: "My offer, which was never
19 finally settled, was that we accept their
20 portion of the contract for any new people
21 coming to work to be \$2.407. It has nothing
22 to do with the people working." (tr. pg. 37)

23 Duffy: "Was there any discussion at the January 23rd
24 meeting with respect to cost-of-living al-
25 lowances?"

26 DeGeorge: "We had said that we were not going to ne-
27 gotiate COLA." (tr. pg. 43)

28 "The PT Department was losing money. We
29 didn't know the financial position of PT
30 Department until union program came up and
31 we started checking the figures."

32 February 13, 1976

11. Mr. DeGeorge stated the meeting mostly pertained to surveyors.
Testifying from his notes, he stated the physical therapy aides unit
discussions includes a starting salary of \$2.487 for forty hours a week
(8:00 A.M. to 5:00 P.M.), and insurance.

12. Mr. Lynch testified that Mr. DeGeorge suggested a starting salary
of \$2.487, but no cost-of-living allowance, no tenure increase, and no
shift differential. He added that as the parties again went through the
nurses aides contract other issues were discussed including Ms. Walsh's

1 position and letter of reprimand, probationary time for new employees,
2 separate contract, and subcontracting. (See Teamster Exhibit B)

3 In reference to Mr. DeGeorge's participation at the meeting Mr.
4 Lynch said, "He also stated that we have been stalling to give Mr. West
5 a chance to take this over."

6 Mr. Lynch also testified that based on the employer's position against
7 tenure and cost-of-living allowance, it was his understanding that the
8 \$2.487 was a final offer for the duration of the contract.

9 February 24, 1976

10 13. Mr. DeGeorge testified that the parties agreed that all physical
11 therapy aides who perform physical therapy work, including Ms. Walsh,
12 would be in this unit. He added that there was some discussion about
13 salaries and a few other items before negotiations broke off.

14 14. Mr. Roberts testified that he suggested that they take the
15 existing Nurses Aide contract and go through it article by article on
16 the "boilerplate" language and reach an agreement on those articles which
17 could be under a new physical therapy aide contract.

18 According to Mr. Roberts the negotiations proceeded in that fashion.
19 Tentative agreements were reached on several sub-sections of Article II,
20 which are general policy recognition sections. There was also an agree-
21 ment on time and one-half for a forty hour week (state law).

22 The parties discussed wages and again mentioned a starting of \$2.487
23 an hour and total rejection of the concept of tenure and cost-of-living
24 allowances.

25 15. Mr. Roberts pointed out that this was less than the physical
26 therapy aides were currently earning. The \$2.487 is 13¢ less than two
27 employees' hourly salaries, 50¢ less than Ms. Walsh's hourly salary,
28 and 8¢ more than two other employees' hourly salaries. He also pointed
29 out that there was no wage increase for these employees in 1975. (tr. pg.104)

30 Mr. Duffy questioned Mr. DeGeorge on this point:

31 Duffy: "Is it your testimony that Mr. Roberts
32 never represented to you, at any time, at any
of these meetings, that \$2.40 or \$2.48 an hour
was less than these employees were being paid

at the present time?"

1 DeGeorge: "We knew that."

2 Duffy: "You knew that already?"

3 DeGeorge: "Yeah."

4 Duffy: "I just want to know that if it was clear in
5 your mind that you were offering less than
6 these employees were in fact making?"

DeGeorge: "Just a little."

(tr. pg. 46-47)

7 Section 59-1605 (1) (a) (b)

8 16. Negotiations broke off after a short exchange of words between
9 Mr. Roberts and Mr. DeGeorge.

10 17. Commissioner Holman, who was present at the February 24th meeting,
11 testified as follows:

12 Holman: "Well, Mr. Roberts said something and Mr. De-
13 George took exception to it."

14 Duffy: "Do you remember what he said?"

15 Holman: "Well, it all jumped up so fast there. He said,
16 I won't negotiate with you."

Duffy: "He refused to negotiate with Mr. Roberts?"

17 Holman: "Yes he did. He said, I am not going to ne-
18 gotiate with you, with your bulldozing tactics!
19 He didn't say 'bulldozing', but it meant bull-
dozing tactics." (tr. pg. 61)

20 Referring to the March 8th letter, Mr. Duffy asked Mr. Holman if it is
21 safe to say that Mr. DeGeorge absolutely refused to negotiate with Mr.
22 Roberts.

23 Holman: "Yeah, he said that if he continues on this
24 belligerent attitude I'm not going to negotiate
with him. And that is all there is to it."⁵
25 (tr. pg. 66)

26 18. The Union filed the charges as stated in the foregoing Statement
27 of Case.

28 In the answer to this charge on 8 March, Mr. DeGeorge wrote:

29 "I have stated to the Local Teamsters Negotiating
30 Committee that I would be available to negotiate
with Mr. Leo Lynch and/or any other member of
their Union, at any time."

31 19. Mr. DeGeorge, under examination as an adverse witness, testified

32 5. *There were further questions regarding what is a "belligerent attitude,"
but it would be improper for me to attempt to address a definition.*

1 as follows:

2 Duffy: "As I understand it then, you said you would
3 not negotiate with the Teamsters Union as
4 long as Roberts is on the committee?"

4 DeGeorge: "I would not negotiate with Mr. Roberts. I
5 would negotiate with any of the other members,
6 they have a lot of people in the union."
7 (tr. pg. 87)

6 Duffy: "The point is that you would not negotiate
7 with the Teamsters Union if their spokesman
8 was Jim Roberts?"

8 DeGeorge: "I would not negotiate with Mr. Roberts, that
9 is right." (tr. pg. 88)

10 Mr. DeGeorge claims that in his long experience as a negotiator on
11 both sides of the table "I never had any incident where one person spoke
12 directly at another person, we always stated the issue."

13 Mr. DeGeorge further takes the position that as long as Mr. Roberts
14 has what he views as a belligerent attitude, he will not negotiate with
15 him.

16 "Mr. Roberts made comments about my abilities, about
17 my Union connection, and what I do, and I don't think
18 he has any rights to do that in negotiations."
19 (tr. pg. 84)

20 20. Mr. Roberts testified that Mr. DeGeorge

21 "Refused to negotiate any further so long as I was
22 part of the union bargaining team."

23 21. Mr. Lynch testified that

24 "He (Mr. DeGeorge) had done an about face and walked
25 away. Then he turned around and said that he would
26 not talk to Jim Roberts but would talk to Mr. Lynch.
27 Jim told him that he was Secretary-Treasurer of Local
28 #2 and that he did the negotiating or that the union
29 picked a negotiating committee. Ed said that he
30 would not negotiate and told Jim that he would nego-
31 tiate with me or anybody that the union sent up."
32 (tr. pg. 113)

27 22. Mr. Kennedy testified that after the "offensive" remarks by Mr.
28 Roberts, Mr. DeGeorge went to his private office. Mr. Kennedy and Mr.
29 Holman asked him to return to the bargaining meeting. According to Mr.
30 Kennedy, "He said he would no longer negotiate with Mr. Roberts because of
31 the statements that were made!" (tr. pg. 73)

32 Mr. Kennedy added,

1 "Mr. Holman and myself went back out and proceeded
2 to negotiate. What we did was go step by step
3 through the contract, to see what parts we wanted
4 left in the total contract - agreement on some items,
5 when we got to the end of the contract, the subject
6 of wages came up and at that time I informed Mr.
7 Roberts that I thought it was - it would be a waste
8 of time for us to go any further because Mr. Holman
9 had taken a position at that time that he was not
10 going to give an increase in salaries above what
11 his offer had been, his own personal offer and I
12 felt if the contract of negotiations would go any
13 further, would have to be between me and Mr. DeGeorge,
14 because, as I expressed to Mr. Roberts then, which
15 has been brought out here, Mr. Holman would no way
16 sign the contract if we did reach an agreement. So
17 it would have to be myself and Mr. DeGeorge. So I
18 felt at the time that it would be fruitless for me
19 to try and negotiate a wage settlement with him be-
20 cause anything that I negotiated would be in a
21 minority of one, which would not work unless I
22 could get the seconds from someone else."

(tr. pg. 73)

13 Duffy: "Without Mr. DeGeorge's presence there was no way
14 that you could negotiate."

15 Kennedy: "That is true." (tr. pg. 74)

16 During the negotiations Mr. Holman suggested a salary similar to the
17 salary schedule at St. James Community Hospital.

18 23. Mr. Mullany asked Mr. Kennedy if he felt that after negotiations
19 broke off, he could have patched things up and got back together again
20 and continued the discussion at a later date. Mr. Kennedy responded that
21 he attempted to get Mr. DeGeorge back to the table, but he refused be-
22 cause of what he, Mr. DeGeorge, felt was the verbal abuse he had taken
23 from Mr. Roberts.

24 24. Mr. DeGeorge claims that the negotiations were moving along prior
25 to the "personality conflict." The record indicates that there were no
26 agreements on the mandatory subjects of bargaining; in fact, the negotiations
27 were stalled over a permissive subject (scope of Unit). Only the Nurses
28 aides contract had been reviewed. The only agreement just prior to the
29 negotiations breaking off was the scope of the bargaining unit.

30 The Hearing Examiner, in a series of questions, attempted to develop
31 just what issues had been agreed to and what issues were still on the
32 table. Mr. DeGeorge's response, in part, was there were discussions on a
number of issues. In summary, "I don't think we got right down to the

1 basic negotiations, as we were waiting for some input from Mr. West."

2 Nothing was signed off and as Mr. DeGeorge stated: "The whole con-
3 tract was still up and pending. We were reviewing the contract that day."

4 25. In a conciliatory effort, near the close of the hearing, Mr.
5 DeGeorge stated,

6 "We had bargained and will continue to bargain,
7 it is just the situation that came up with
8 Jim Roberts and I, it has created a problem.
9 We are willing to bargain and my letter so
10 states and we are willing to continue to bar-
11 gain. We have bargained and we have many
12 contracts to bargain yet before the year is
13 out." (tr. pg. 135-136)

14 3 March, 1976

15 26. An attempt was made on this date to continue negotiations de-
16 spite the filing of the unfair labor practice charges.

17 Mr. Lynch testified that "Mr. DeGeorge said there was no sense in
18 negotiating because the ULP has been filed."

19 Mr. Roberts testified "On 3 March, Ed again refused to negotiate as
20 the meeting had been scheduled, so long as I was present." (tr. pg. 119)

21 DISCUSSION

22 I have attempted to list the Findings of Fact in some chronological
23 order. However, for discussion purposes the three unfair labor practice
24 charges are discussed separately. The first two charges are closely
25 related, as illustrated in the Union's petition and the Statement of Case.
26 Therefore the discussion will overlap.

27 The third charge presents several issues and is outlined as the
28 totality of conduct as it pertains to good faith bargaining.

29 I have relied upon a number of cases before the National Labor Re-
30 lations Board. The Board of Personnel Appeals is not bound by NLRB pre-
31 cedent, but it would be wise to consider the experience of the NLRB,
32 especially where the sections of the NLRA are similar or identical to the
33 Montana Act. I have also relied on some state cases which have been adjudi-
34 cated in the courts or before a state labor relations board, similar to the
35 Montana Board.

36 In 1935 when the National Labor Relations Act was adopted to regulate
37 employer-employee relations in the private employment sector, Section

1 7, 29 U.S.C.A. 157, provided:

2 "Employees shall have the right to self-organ-
3 ization, to form, join, or assist labor organ-
4 izations, to bargain collectively through repre-
5 sentatives of their own choosing..."

(Emphasis added)

6 During the forty year history of the Act, "representatives of their
7 own choosing" has become a phrase of art, designed to convey the intention
8 that the employees' selection of a bargaining representative should be
9 uncoerced.

10 Section 8 (a) (5) of the National Labor Relations Act provides that
11 it shall be an unfair labor practice for an employer "to refuse to bar-
12 gain collectively with the representative of his employees."

13 In the private sector, it is a well established doctrine that an em-
14 ployer may not dictate to a union its selection of agents or representatives.^{6, 7}

15 6. Deeco, Inc. 46 LRRM 1075

16 *That the employer refusal to deal with the Union's authorized bargaining*
17 *representative because union representative called the employer "a liar"*
violated the Act, even though the employer expressed a willingness to deal
with any other union representative.

18 Prudential Insurance Company 45 LRRM 1024; 46 LRRM 2026

19 Concord Docu-Prep, Inc. 85 LRRM 1416

20 *The employer violated the Act when it terminated collective bargaining*
with the union over the issue of the size and composition of the Union's
negotiating committee.

21 Harley Davidson Motor Co. 87 LRRM 1571

22 *The employer violated the Act by refusing to negotiate with the local*
union unless the union's negotiating team was confined to unit employees
plus one representative of the Union's international.

23 *In this case the NLRB re-affirmed several basic principles in this*
24 *area including: (1) Each party to the collective bargaining process gen-*
erally has the right to choose whomever it wants to represent it in formal
25 *labor negotiations; (2) In collective bargaining a negotiating committee*
may include members not in the unit so long as the committee seeks to bar-
26 *gain solely on behalf of the bargaining unit which it represents.*

27 AMF, Inc.- Union Machinery Division 90 LRRM 1171

28 *The NLRB cited the same principle as number one of the above Harley*
Davidson case. The employer violated Section 8 (a) (5) of the Act by re-
fusing to negotiate a new collective bargaining contract with a local union
29 *unless the union excluded from its negotiating team representatives of*
the international, who were to give contract negotiation assistance to its
30 *affiliate union.*

31 General Electric Company 412 F.2d 512 (1969)

32 *Cert. denied 397 U.S. 965 (1970)*

A union may include representatives from other unions on its bargaining

1 The Montana Public Employees Collective Bargaining Act, (Section 5 (1)(a)),
2 states it is an unfair labor practice for a public employer to "interfere
3 with, restrain, or coerce employees in the exercise of the rights guaranteed
4 in section three of this Act.

5 Section 3 (1) Public employees shall have, and shall be protected in
6 the exercise of, the right of self-organization, to form, join or
7 assist any labor organization, to bargain collectively through re-
8 presentatives of their own choosing on questions of wages, hours,
9 fringe benefits, and other conditions of employment and to engage in
10 other concerted activities for the purpose of collective bargaining
11 or other mutual aid or protection, free from interference, restraint
12 or coercion. (Emphasis added)

13 I find that the intent of section 3 (1) of the Montana Act is very
14 clear. The employer can not interfere with the employees right to bar-
15 gain collectively through representatives of their own choosing!

16 Though it was offensive to Mr. DeGeorge to have his motives and abil-
17 ities attacked by Mr. Roberts, it does ^{not (Roy Saeman)} detract from the fact that he re-
18 fused to bargain with a representative of the employees own choosing (Find-
19 ings of Fact #17 and #19).

20 The discussion which precipitated Mr. DeGeorge's action is a secondary
21 consideration. The important point is that by stating he would not nego-
22 tiate with a particular member of the Union's negotiating team, he was
23 determining the membership of that team. A clear violation of Section
24 5 (1) (a) of the Montana Act.

25 As pure speculation, if the principle of the union choosing its own
26 representative is not adhered to, what would prevent the employer from
27 refusing to negotiate with Mr. Roberts this week, Mr. Lynch the following
28 week, Ms. Walsh the third week, etc? It can be quickly understood that
29 if the employer determines the union spokesperson by refusing to bargain
30 with the employees' choice, the union could become ineffective since the
31 *team on behalf of the employees represented by the union. Neither an em-
32 ployer nor a union may select or veto the persons employed to negotiate
for the other side.*

7. After a review of other cases cited by the union in its response to the
employers verified answer to the complaint (Examiner's Exhibit C) I find
the following cases to be relevant to my considerations of this case:
NLRB v. Signal Manufacturing Co. 351 F.2d. 471
Fetzer Television, Inc. 48 LRRM 1165
Wisconsin Employment Relations Board v. Kresovic, 50 LRRM 2255

1 employer might tend to eliminate spokespersons until it found an inexper-
2 ienced negotiator across the table. To look at it from the other point
3 of view, the union can not refuse to negotiate with a particular commis-
4 sioner with the idea or hope that eventually it will have a commissioner
5 sympathetic to its views across the bargaining table.

6 Mr. DeGeorge's subsequent action, (Findings of Fact #19, #20 and #21),
7 deprived the union membership of its right to collectively bargain.

8 The principle of authority to participate in effective bargaining at
9 the table, on both sides, is a fundamental principle of good faith bar-
10 gaining. It is not required that the county commissioners bargain directly
11 with the representatives of their employees. In fact, in some Montana
12 counties the commissioners do not negotiate collective bargaining contracts,
13 but they have given the authority to bargain effectively to a personnel
14 director, an attorney, or a professional negotiator.

15 After Mr. DeGeorge refused to return to the table, Mr. Kennedy did
16 continue "negotiations" on behalf of the employer; however, there is no
17 testimony or evidence that he had the authority to agree to provisions of
18 a contract. In fact, the contrary seems to be true. During questioning
19 by the Hearing Examiner, Mr. Kennedy elaborated on this point. In refer-
20 ence to the 24 February meeting he testified,

21 "I thought it was fruitless for us to sit
22 and negotiate any wage increase. I felt...
23 that Mr. Holman would not sign the contract
24 if I did reach an agreement with (the union);
25 and if Mr. DeGeorge, in his present feeling,
26 were not to negotiate with Mr. Roberts, it
27 would be a waste of time for me to sit there
28 and try to reach an agreement that wouldn't
29 be valid."

30 In summary, Mr. Kennedy's testimony is that he did not believe he
31 could effectively negotiate an agreement as one member of a three member
32 board because the other two members would not, in his opinion, approve
any contract he might negotiate.

30 Mr. DeGeorge previously testified that one member could not negotiate,
31 two of them had to be present. (tr. pg. 6-7)

32 In essence the union was deprived of its collective bargaining rights

1 because one commissioner was willing to negotiate, but didn't have the
2 authority to bind at the table; the second commissioner refused to ne-
3 gotiate with the choosen representative of the union; and a third
4 commissioner was known to very rarely sign a collective bargaining agree-
5 ment (he could not recall ever signing an agreement with the Teamsters
6 during the past eleven years).

7
8 TOTALITY OF CONDUCT

9 The facts as they pertain to the Union's first and second charge
10 support the conclusion that the employer failed to meet the minimum
11 obligation imposed by law (59-1605 (1) (a) and 59-1605 (1) (b)).

12 In reference to the Union's third charge, all the various facts, in-
13 cluding the facts pertaining to the first two charges, must be considered
14 and examined in determining whether the employer was bargaining in good
15 or bad faith.

16 The duty to bargain in good faith is an "obligation to participate
17 actively in the deliberations so as to indicate a present intention to
18 find a basis for agreement." This implies both "an open mind and a sin-
19 cere desire to reach an agreement as well as a sincere effort to reach a
20 common ground."⁸

21 In an examination of the conduct of an employer or a union, certain
22 factors are relied upon to ascertain whether the parties have bargained
23 in good or bad faith. The record indicates that any of the factors
24 (scope of unit, wages, subcontracting, separate contract, counter-pro-
25 posals, meetings, unfair labor practice charge) may not, considered alone,
26 be sufficient to substantiate an individual charge; but their total
27 persuasiveness increases.

28 The totality of conduct is the standard through which the quality
29 of negotiations is tested. In order to properly analyze the totality of
30 conduct concept, it is necessary to discuss the various aspects of the
31 negotiations on an individual basis.

32 8. NLRB v. Reed and Prince Mfg. Co. 118 F.2d. 874, 885.

1 (a) Scope of unit: After the Union filed a New Unit Determination
2 and Election Petition with the Board, (the proposed unit to include all
3 physical therapy aides) Ms. Walsh was directed not to perform any physical
4 therapy aide work, only clerical. She was also directed to write a job
5 description of her duties and subsequently received a letter of reprimand.

6 Ms. Walsh testified that she was not a secretary but performed the
7 same physical therapy (patient care) work as the other physical therapy
8 aides. She testified that her clerical duties were the normal record-
9 keeping (charting, attendance, patient progress reports, etc.) duties
10 also performed by the other physical therapy aides.

11 The employer claims that because Ms. Walsh is required to only perform
12 clerical duties she should be included in the unit represented by MPEA.
13 In fact, they gave her a raise in salary in accordance with the MPEA con-
14 tract, effective on the date of the employer directive, not retroactive
15 to the effective date of the MPEA contract.

16 Mr. Tom Schneider of MPEA wrote a letter to the Teamsters stating
17 that the Association does not represent anyone, clerical or aides, em-
18 ployed in the Physical Therapy Department.

19 It should also be noted that Ms. Walsh is a member of the Teamster's
20 negotiating committee.

21 The record indicates that several informal discussions and three or
22 more negotiation meetings included discussions involving a question of
23 whether or not one person should be included in this bargaining unit.

24 It would have been a simple task for the employer or its designee
25 to have visited the Physical Therapy Department to investigate her work-
26 time records and patient care work, and to discuss her duties with other
27 employees and the department director. From this investigation the
28 employer should have been able to know exactly what her duties were prior
29 to the directive and after the petition was filed, and to know the needs
30 of the department as they may relate to this position.

31 Though Mr. Kennedy made an effort to clarify Ms. Walsh's position
32 with the hospital administrator, and the parties agreed that Ms. Walsh

1 should be included in this unit on February 24th, I can not help but
2 conclude that this permissive subject of negotiations (scope of unit)
3 consumed an intolerable amount of time at the table. From the record it
4 would be impossible to state that the employer deliberately used this
5 issue as a delaying tactic, but suffice it to say that the employer
6 did not ascertain the facts about the position, therefore, a delay in
7 resolving the matter was inevitable. Furthermore, the discussion about
8 this issue did not help to create an atmosphere of attempting to find
9 common grounds for an agreement, on other issues.

10 (b) Wages:

11 At the 12 January meeting the Union presented its proposals to the
12 employer including a starting salary of \$4.00 per hour and 7¢ per hour
13 tenure. The employer stated that the \$4.00 proposal would be unacceptable.

14 At the 23 January meeting the employer stated it would agree to
15 \$2.40 for starting physical therapy aides and would not accept COLA, tenure
16 or the Union's \$4.00 proposal. Mr. DeGeorge claims that this offer was
17 identical to the wages in the Nurses Aide contract which the union referred
18 to during the initial meeting.

19 To continue the discussion about wages it is necessary to examine
20 the Nurses Aide contract (Teamster's Exhibit A). Article Four states
21 that effective 1 July, 1974, the starting wages were \$2.407 per hour,
22 with the following tenure increases: after 6 months \$2.475; after 1 year
23 \$2.543; after 18 months \$2.611, after two years \$2.679, four additional
24 tenure increases were provided. Also effective 1 July, 1975, a wage
25 increase of .125¢ per hour was provided for in the two year agreement.
26 In addition the wage article included a cost-of-living adjustment (COLA)
27 clause.

28 Not including COLA the 1 July, 1975, starting wage for nurses aides
29 was \$2.532. Quick arithmetic points out that the commissioners' proposed
30 starting wage for physical therapists was not identical to what the nurses
31 aides were receiving when negotiations commenced in January 1976. Mr.
32 Kennedy pointed out to Mr. Holman what the original wage offered (\$2.407)

1 was less than employees were receiving at the time. He felt the nego-
2 tiations on salary should have started at the present salary - not down-
3 ward. Mr. Holman's testimony concurs with the starting salary proposal
4 of \$2.407.

5 At the 13 February meeting, Mr. DeGeorge testified that he proposed
6 a starting salary of \$2.487, no COLA, no tenure, and no shift differential.

7 Because of the no tenure and no COLA, Mr. Lynch testified that he
8 understood the \$2.487 as a proposal for the duration of the contract.

9 Again, at the 24 February meeting, Mr. DeGeorge proposed a starting
10 salary of \$2.487 and a rejection, in total, of the concept of tenure
11 increases.

12 Mr. Roberts testified that he pointed out that this was less than some
13 physical therapy aides were receiving (Finding of Fact #15).

14 The fact that a proposal merely embodies existing practices, or ad-
15 vances less desirable working conditions, is not in itself, sufficient
16 to show bad faith, but is a consideration in evaluating the totality of
17 conduct.

18 There is no duty to match proposals with counter-proposals. In
19 this case, Mr. DeGeorge testified that the bargaining history with this
20 Union was that the Commissioners received the demands and negotiated from
21 them. The logical consequence would be for this examiner to scrutinize
22 the reasonableness of an employer's position as a measure of his good
23 faith. To appraise the employer's position with respect to this issue as
24 a means of ascertaining his good faith would involve passing judgment
25 upon the reasonableness of his proposal. In my opinion, this judgment
26 must be reserved for the parties at the table. Nevertheless, I must
27 consider the actions of the parties as those actions relate to a man-
28 datory subject of bargaining. The record indicates the following employer
29 actions: (1) the starting salary proposals were not equal to the salaries
30 of the present employees; (2) no proposal for current employees, just
31 for new hires. (3) no formal salary offer was made. (4) no united
32 employer proposal was made (individual commissioners suggested their own

1 wage ideas).

2 The total conduct of the employer, as mentioned above on this issue
3 indicates a lack of good faith bargaining.

4 Mr. Mullany, in his closing brief, denies that it was the employer's
5 intent that there would be a reduction in wages under terms of a new con-
6 tract.

7 I am inclined to agree with Mr. Mullany, but the record does not
8 support that conclusion in view of the fact that the employer wasn't
9 making a proposal which affected the present members of the bargaining
10 unit. Personal ideas of wages, not offers, were presented for discussion
11 purposes by the individual commissioners.

12 Subcontracting:

13 The totality of conduct concept presents several sub issues, not
14 the least of which is the subcontracting problem. The subcontracting
15 issue, and how it relates to the collective bargaining process, had been
16 considered in a number of cases before the National Labor Relations Board
17 in the last decade.
9

18 Although the issue is still in flux, the NLRB has set some funda-
19 mental trends in this area. The Board of Personnel Appeals is not bound
20 by this precedent, but it would be wise to look at the experience and
21 expertise of the NLRB.

22 In the important Westinghouse case, the NLRB renders the most défin-
23 itive explanation of how it reads the decision of the United States
24 Supreme Court in Fibreboard. A series of tests were laid down by the
25 NLRB to determine whether or not a particular subcontracting decision
26 necessitates bargaining. Subcontracting of unit work does not require
27 bargaining, said the Board, if:

28 (1) the subcontracting is motivated solely by economic reasons;

29 9. *Westinghouse Elect. Corp. v. International Union of Electrical, Radio,*
30 *and Machine Workers, AFL-CIO, 58 LRRM 1257 (1965)*

31 *East Bay Union of Machinists v. NLRB (Fibreboard Paper Products)*
32 *322 F.2d.411, 53 LRRM 2666 (CA, DC, 1963) aff'd 379 U.S. 203, 57 LRRM 2609*
(1964)

1 (2) it has been customary for the employer to subcontract various
2 kinds of work;

3 (3) no substantial variance is shown in kind or degree from the
4 established past practice of the employer;

5 (4) no significant detriment results to employees in the unit;

6 (5) the union has had an opportunity to bargain about changes in
7 existing subcontracting practices at general negotiating meetings.

8 It would be useful to examine these tests or criteria with respect
9 to the case at hand.

10 1. It is entirely plausible that the employer in this case was
11 motivated solely by economic reasons. At least anti-union animus was
12 not apparent though it seems relations between the parties, especially
13 as it pertains to the physical therapy unit, have not been good.

14 Nevertheless, I can understand the Union's concerns about the em-
15 ployer's motives. At every negotiating session the employer, after
16 stating it was attempting to "save the jobs" by subcontracting, would
17 state that it wanted more time to negotiate a subcontracting agreement
18 with Mr. West. An employer may negotiate a subcontract, but those
19 negotiations can not be used as a method to deny, by delay, the col-
20 lective bargaining rights as outlined in the Montana Act.

21 The Union, by election and certification, is the "exclusive repre-
22 sentative bargaining agent with respect to wages, hours of work, and
23 other conditions of employment." (Emphasis added) It is the above
24 underlined phrase which has been interpreted by the NLRB to include the
25 subject of subcontracting.
10

26 Similar language is present in the Montana Public Employees Col-
27 lective Bargaining Act, Section 59-1602 (5) R.C.M., 1947, reads:

28 "labor organization means any organization or
29 association of any kind of which employees par-
30 ticipate and which exists for the primary purpose
31 of dealing with employers concerning grievances,
labor disputes, wages, rates of pay, hours of
employment, fringe benefits, or other conditions
of employment." (Emphasis added)

32 10. *Westinghouse Corp.* 58 LRRM 1257

1 Whether an employee is employed by the public employer or a private
2 concern through subcontracting is a condition of employment. It can
3 affect the employees in a number of areas, and most importantly in the
4 areas of mandatory subjects of bargaining - wages, hours, other con-
5 ditions of employment.

6 Public employers must be cognizant of their responsibility to bar-
7 gain on work to be subcontracted out if it affects any member of a collective
8 bargaining unit. Subcontracting cannot be used as an anti-union weapon
9 or as a delaying tactic if the policies of the Montana Act are to be af-
10 fected.

11 There is sufficient evidence that the employers used the negotiations
12 for subcontracting with the physical therapist as a reason to delay or
13 show reluctance to enter into an agreement with the union. I base the
14 above conclusion on the following evidence:

15 At January 23rd meeting the employer took the position that the
16 Physical Therapy Department lost money, therefore it was considering
17 the possibility of subcontracting the department to the physical therapist.
18 According to Mr. DeGeorge's testimony the motive for subcontracting was
19 to work out something to keep the department operating, thereby con-
20 tinuing employment for the Physical Therapy Aides.

21 At this meeting Mr. Lynch stated that the union wanted to be in-
22 volved with the subcontracting negotiations.

23 Mr. Holman testified that subcontracting the Physical Therapy De-
24 partment was not considered during June, 1975, preliminary budget,
25 August, 1975, final budget; though it came up after they (the physical
26 therapists) first organized in November or December.

27 Mr. Kennedy, who did not attend all the negotiation sessions, (but
28 received reports) testified,

29 "I don't think we ever came back with a firm
30 counter-proposal and the grounds that we were
31 delaying on was that we were negotiating with
32 the therapists to lease the facility out there
and we thought if he (Mr. West) would come across
the decision (to lease), that maybe he should

1 have some input into what we were going to settle
2 on because he would be the first; and be stuck
3 with the conditions afterwards." (tr. pg. 75)

4 To use the possibility of subcontracting as a weapon to delay nego-
5 tiations with an exclusive representative, who has a legal obligation to
6 represent the employees, is not good faith bargaining.

7 From the record, it is clear that the Physical Therapy Department
8 employees have been public employees. The only department under a sub-
9 contract is the Inhalation Therapy Department.

10 There is no evidence that a subcontract will have detrimental re-
11 sults to employees in the unit. Any evidence would be secondary and
12 speculation. The important point is that the union had a legal obligation
13 to represent the membership now and the employer had the legal obligation
14 to negotiate, in good faith, with the exclusive representative of the
15 employees now. To deny the employees their collective bargaining rights
16 now because of the possibility of a subcontract next week, next year, etc.,
17 would, in my opinion, give public employers throughout the state reason
18 for not negotiating with a union, and therefore, seriously weaken the
19 intent of the public employees collective bargaining act.

20 After diligent consideration of the facts, as they pertain to the
21 subcontracting issue, I conclude that the employer did use the issue,
22 as one part of the totality of conduct, in not bargaining in good faith.

23 Unfair Labor Practice Charge:

24 Attaching conditions to entering into negotiations is patently an
25 unfair labor practice.

26 According to Mr. Lynch's testimony from his notes, "Ed said that
27 there was no sense in negotiating because the ULP had been filed." Mr.
28 DeGeorge then left the meeting and Mr. Kennedy stated there was no point
29 in negotiating because they didn't have everyone there.

30 In reference to Mr. Robert's remark about filing an unfair labor
31 practice charge at the 24 February meeting, Mr. Mullany asked Mr. Kennedy,
32 *ll. American Laundry Machine Co. 174 F2nd 124*
Employer refused to negotiate unless union withdrew an unfair labor practice
charge and abandoned strike.

1 "Did you feel that statement foreclosed you in reopening the negotiations
2 then?" The response was, "Not necessarily, I did feel I couldn't nego-
3 tiate unless I had one other member of the board." (tr. pg. 80)

4 My point is that hammering out a labor agreement requires all the
5 negotiator's skill and attention. To be diverted from this main task
6 by putting a value on or deleting an unfair labor practice base diminishes
7 the likelihood that the negotiators will be successful. To refuse to
8 continue negotiations because one or both parties may have filed an
9 unfair labor practice charge is a delaying tactic which is in itself
10 ground for an unfair labor practice charge. At the minimum, it is not
11 an attempt to reach an agreement; therefore, it would not by the wildest
12 stretch of the imagination come within the definition of good faith bar-
13 gaining.

14 FURTHER DISCUSSION

15 There have been too many delays (from certification to hearing) in
16 negotiations, mainly because the employer committed several unfair labor
17 practices.

18 Because of those unfair labor practices the employees have not been
19 able to fully exercise their collective bargaining rights as provided
20 by the Montana Act. This brings up the issue of what is the proper re-
21 commended order. In my opinion, the following recommended order is
22 inadequate because it does not include compensation to the employees for
23 having their rights violated; nor does it include a penalty for the em-
24 ployer, who has violated those rights.

25 To recommend compensation to the employees in this case would be
26 initiating a remedy which the Union did not request at the hearing. In
27 the two NLRB cases I found where the courts have directed compensation,
28 the union had requested such a remedy.

29 This is one possible remedy which I recommend that the charging
30 parties as well as this board consider at future hearings.

31 12. *Tridee Products Co.* 79 LRRM 1175
32 *Ex-Cello* 426 F 2nd 1249

