

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 41-76:

3	MONTANA PUBLIC EMPLOYEES)	
	ASSOCIATION,)	
4)	
	Complainant,)	FINDINGS OF FACT
5)	CONCLUSIONS OF LAW
	-VS-)	AND RECOMMENDED ORDER
6)	
	EMPLOYMENT SECURITY DIVISION,)	
7	DEPARTMENT OF LABOR AND INDUSTRY,)	
	STATE OF MONTANA,)	
8)	
	Respondent.)	

* * * * *

STATEMENT OF CASE

On December 23, 1976, the Montana Public Employees Association (hereafter referred to as the Association) filed an unfair labor practice charge with the Montana Board of Personnel Appeals against the Employment Security Division, Department of Labor & Industry, State of Montana (hereafter referred to as the Respondent). At the pre-hearing conference, 23 February 1977, the complainant filed an amended charge. The Association charged violations of employees' rights (59-1603(1) and 59-1605(a) and (c)) in that "the office manager and certain supervisory employees of the Great Falls Employment Security office have engaged in a course of conduct designed to interfere with, restrain, coerce, intimidate and harass employees because of their membership in and participation in activities of the Association". Specific instances cited by the Complainant are:

1. Job reassignment to create employee dissatisfaction;
2. Harassment of the Association's local employee representative;
3. Selective enforcement of sick leave policies set forth in an office manual which is superseded by the terms of the existing collective bargaining agreements;
4. The placement of warning letters in employee personnel files based upon alleged violations of said invalid sick leave policy;

- 1 5. Interrogation of employees concerning associa-
2 tion activities, meetings and membership;
- 3 6. Verbal threats directed towards those associa-
4 tion members actively participating in associa-
5 tion affairs;
- 6 7. Reducing the semiannual job evaluation scores
7 of persons who are active supporters and
8 participants in the association;
- 9 8. Denying a leave of absence to an employee
10 because of association membership;
- 11 9. Surveillance of an off-premises association
12 meeting; and
- 13 10. Physical violence directed against association
14 members."

15 On 3 March 1977, the employer filed a Motion to Dismiss.
16 The motion was denied at the commencement of the hearing; sub-
17 sequently, the employer orally answered the 23 February 1977
18 amended complaint with a general denial.

19 A hearing on the above-captioned matter was held on 9, 10,
20 11 March 1977, at the Employment Security Division offices in
21 Great Falls. The Association was represented by Mr. Barry L.
22 Hjort, Attorney at Law, Helena, Montana. Mr. David W. Stiteler
23 of the Department of Administration, Personnel Division, and Mr.
24 Moody Brickett of the Department of Labor & Industry, Employment
25 Security Division, Attorneys at Law, represented the Respondent.

26 As the duly appointed hearing examiner of the Board of
27 Personnel Appeals, I conducted the hearing in accordance with
28 the provisions of the Montana Administrative Procedures Act
29 (Section 82-4201 to 82-4225, R.C.M., 1947).

30 After a thorough review of the entire record of this case,
31 including briefs of the parties concerned, sworn testimony, and
32 from my observation of the witnesses, and their demeanor on the
witness stand, and upon substantial, reliable evidence, I make
the following:

FINDINGS OF FACT

1
2 1. The Association charges that the Respondent has violated
3 the following sections of the Montana Public Employees Collective
4 Bargaining Act:

5 "59-1603. Employees' right to join or form
6 labor organization and engage in collective
7 bargaining activities. (1) Public employees
8 shall have, and shall be protected in the
9 exercise of, the right of self-organization,
10 to form, join or assist any labor organization,
11 to bargain collectively through representatives
of their own choosing on questions of wages,
hours, fringe benefits, and other conditions
of employment and to engage in other concerted
activities for the purpose of collective bar-
gaining or other mutual aid or protection, free
from interference, restraint or coercion."

12 "59-1605. Unfair labor practices of employer
13 or labor organization. (1) It is an unfair
labor practice for a public employer to:

14 (a) interfere with, restrain, or coerce
15 employees in the exercise of the rights
guaranteed in Section 59-1603 of this act;

16 (c) discriminate in regard to hire or tenure
17 of employment to encourage or discourage mem-
bership in any labor organization;..."

18 2. Respondent admits that some of the specific instances
19 did occur, but that none of the actions taken by local management
20 were taken with the intent or motive to harass, coerce, interfere,
21 intimidate or discriminate against any employees because of their
22 Association membership or activity.

23 Job Reassignments

24 3. The Complainant alleged that the job reassignments of
25 Ms. Sharon L. Anderson and Ms. Glenda Smith were discriminatory
26 and motivated to create employee dissatisfaction.

27 4. Ms. Anderson is classified as an Interviewer II. Prior
28 to her reassignment to the first floor, January, 1977, she was
29 assigned to the Claims Room and later to the Aptitude Testing
30 Program.

31 5. The Complainant alleged that she was reassigned to the
32 less desirable position of interviewing clients looking for

1 industrial jobs as laborers, craftsmen, farm and ranch hands -
2 generally "blue collar" positions because:

3 (a) She dropped her membership in the International
4 Association of Personnel and Employment Security (IAPES)
5 organization, after Mr. Cady encouraged her not to do so for
6 several weeks. (tr. 164)

7 (b) She testified that in relation to her IAPES action
8 Mr. Cady asked her if she wasn't concerned about her professional
9 career (tr. 164) and during a later conversation on this matter
10 she informed him (Mr. Cady) that she was "going to drop the IAPES
11 and join MPEA and at that time he said 'I don't know why, it won't
12 do you any good.'" (tr. 165, 172)

13 Under cross examination, Ms. Anderson testified that
14 she felt that Mr. Cady's efforts to encourage her to maintain
15 membership in IAPES was more harassment. (tr. 171a) She thought
16 it was harassment because:

17 "Everyday and everyday and everyday for three
18 weeks is harassment, not persistence. Not
19 saying it on a nice vein, at the beginning
20 it was nice; after that it wasn't, it was
21 pushy and that is harassment." (tr. 171a)

22 6. Ms. Anderson attended the 16 December MPEA meeting and
23 voiced certain complaints about various matters concerning the
24 Management's operation of the Great Falls office.

25 7. Ms. Anderson accompanied Ms. Terry Langan to Mr. Chuck
26 Dyer's (the Assistant Manager) office on 23 December as an MPEA
27 witness. This meeting concerned the denial of Ms. Langan's
28 request for a leave of absence. Mr. Dyer testified that he
29 "made some comment to the effect that they must not have a very
30 high opinion of me if they felt they had to have a witness at
31 the time they asked me a question". (tr. 237)

32 8. Ms. Anderson and her immediate supervisor, Mr. Farmer,
met with Mr. Cady about the denial of a leave of absence she
requested. (tr. 168) It was during this meeting that she was

1 informed of her reassignment with the explanation that he (Mr.
2 Cady) was not just moving people around.

3 9. Ms. Anderson testified that she did not complain about
4 the reassignment "Because if I had complained, I would be there
5 for the rest of my life, and I knew it, so I decided to try it
6 and see how it worked." She added that she reached that con-
7 clusion "Because in the past that's the way Mr. Cady has done
8 things."

9 10. In response to Counselor Stiteler's question and obser-
10 vation about such transfers not being good for morale and
11 the motivation, Ms. Anderson responded, "I feel that in my
12 particular situation, the motivation was to get rid of me, find
13 a job that she dislikes the most and she'll leave." (tr. 173,
14 174)

15 11. She also testified, "I'm not prejudiced [against laborers
16 and farm hands] but I'm not comfortable with them either."

17 12. Ms. Anderson requested to take the Interviewer III Merit
18 test. She testified, "I talked to my supervisor and asked him if
19 he would talk with Mr. Cady and see if I could take the exam. He
20 went and talked to him and Mr. Cady turned it down twice."
21 (tr. 169) (tr. 176, 177) She later wrote the State Merit System,
22 who allowed her to take the exam on 26 February.

23 13. During December and January there were several other
24 employee reassignments. The Respondent claims these reassignments,
25 including Ms. Anderson's, were made because the office needed to
26 establish a CETA section. According to Mr. Cady about fifteen
27 people were moved, reassigned for the CETA section, in December.
28 He added, "Generally there were a lot of changes."

29 14. Mr. Cady testified that his discussion with Ms. Anderson
30 concerning IAPES pertained to getting her dues back for a month or
31 two. (tr. 29) He did not think she could get two months dues
32 back (annual \$6.00) and she could drop her membership by not
paying dues.

1 15. Mr. Cady denies talking to Ms. Anderson about MPEA.
2 (tr. 30)

3 He further denies he ever made a statement to an employee
4 that it would do them no good to join MPEA because all the non-
5 supervisory employees have to join. (tr. 251)

6 16. In answer to a question by Counselor Stiteler,
7 "We heard yesterday some testimony that Sherry
8 Anderson had been placed, she was originally
9 in Claims, spent sometime in Testing and then
10 she's moved to her present location on the
11 first floor. Is this common that different
12 individuals do testing?"

13 Mr. Cady replied,

14 "Yes....We feel that it's the method of train-
15 ing them so that they can have better knowledge
16 of the overall operations....About twenty-five
17 different individuals have done testing since
18 1974." (tr. 250)

19 17. Ms. Smith was reassigned to the CETA section in January
20 as a Clerk-Typist. She did not request that reassignment nor did
21 she object.

22 18. Ms. Smith testified that Mr. Cady asked her on 21
23 December if she had attended the 16 December MPEA meeting. She
24 informed Mr. Cady that she hadn't and that she had never attended
25 an MPEA meeting before. (tr. 80, 85)

26 19. Mr. Cady testified that Ms. Smith was transferred to the
27 CETA section because of her abilities and proficiencies (good
28 typist), not because of Association activities nor events pertain-
29 ing to a 17 December office party. (tr. 28-29)

30 20. Mr. Cady denied that he asked Ms. Smith whether or not
31 she had attended the MPEA meeting of 16 December. (tr. 27)

32 Local Association Representative

33 21. Mr. Joe Hueth, Counselor II for the past eight years,
34 was elected the Association's local Employment Security Division
35 representative at the 16 or 21 December meeting. (tr. 208)

1 22. Mr. Hueth received a letter of reprimand from his
2 immediate supervisor, Mr. Clare Jensen, on 20 January (Complain-
3 ant's Exhibit 6). The Complainant alleged this letter was an
4 effort to harass its local representative because it was
5 exaggerated and unwarranted.

6 23. The following testimony was elicited pertaining to the
7 content of the letter. (See Complainant's Exhibit 6)

8 (a) Mr. Clare Jensen, Counseling Supervisor, testified
9 he wrote the letter of reprimand to Mr. Joe Hueth on 20 January
10 because of a re-occurring problem of employees congregating on
11 the floor. Prior to that Mr. Jensen had given general warnings
12 or cautions to all the employees, on his floor, about this prob-
13 lem. As Mr. Jensen stated "...this is something that kind of
14 comes. We seem to get it worked out and it maybe comes back up
15 again. On this occasion it just seemed like it didn't settle
16 like it should." (tr. 179)

17 (b) Prior memoranda on this matter were directed gen-
18 erally to everyone.

19 Mr. Hueth testified that Mr. Jensen never admon-
20 ished him individually but that Mr. Jensen had admonished him and
21 other employees collectively about activities alluded to in
22 Complainant's Exhibit 6.

23 (c) Under extensive examination by Counselor Hjort, it
24 was established that the only person who directly complained to
25 Mr. Jensen was Mr. Chigbrow and Interviewer Supervisor, Mr.
26 Sutliff, who did not supply specific names of those who may have
27 complained to him.

28 (d) Mr. Jensen's response to questions pertaining to
29 complaints on numerous occasions totaled two. (tr. 181)

30 (e) Mr. Hueth testified that the only person he talked
31 to about "who's side they're on" was Mr. Chigbrow, (tr. 210, 211)
32 and that was only once. (3rd paragraph)

1 (f) Mr. Jensen stated in his letter "this verbal
2 pressure on several of our ES members as to whose side they are
3 on has brought about complaints also from these co-workers that
4 it has affected their work both from the standpoint of time
5 and from emotional factors."

6 (g) According to Mr. Jensen's testimony these "ES
7 members and co-workers" comes down to Mr. Chigbrow because he
8 didn't definitely know who else specifically lodged complaints.
9 (tr. 181)

10 (h) Mr. Jensen had verbally admonished most of the other
11 employees about this matter, but according to his testimony Mr.
12 Hueth was "the greatest violator of this within the last couple
13 of weeks prior to my writing this letter." Therefore, only Mr.
14 Hueth received a letter of reprimand.

15 Mr. Jensen testified that no one directed him to
16 write the letter, but that he did consult with Mr. Dyer and Mr.
17 Cady on everything he did. (tr. 185)

18 (i) Mr. Jensen further testified that since he became
19 a supervisor in 1969, this is the first letter of reprimand he
20 had written to an individual. Previous notices or memoranda
21 have been addressed to all personnel. (tr. 186)

22 His explanation for writing this first letter of
23 reprimand to an individual was "I guess this just as to be a
24 first time and I felt that it was appropriate." (tr. 188)

25 (j) Mr. Jensen testified that he was not aware that Mr.
26 Hueth had been elected the local MPEA representative at the time
27 he wrote the letter. Nevertheless, from the content of the letter
28 it is obvious that he at least knew that Mr. Hueth was an active
29 Association member.

30 (k) Mr. Jensen was formally notified that Mr. Hueth
31 was the elected MPEA representative on 4 February. (See
32 Respondent's Exhibit D)

Sick Leave Policies

1
2 24. Ms. Terry Langan and Mr. William Zupan received letters
3 pertaining to alleged violations of sick leave policies from
4 their immediate supervisor, Mr. Tom Sutliff (See Complainant's
5 Exhibits 4 and 5).

6 25. Neither the Montana Operations Manual for Employment
7 Security Division nor the MPEA Master Collective Bargaining
8 Contract states that an employee must personally notify the
9 immediate supervisor in case of illness. (See Complainant's
10 Exhibits 1 and 3)

11 26. Referring to paragraph O of Complainant's Exhibit 3
12 (Operation's Manual), Mr. Cady replied to Counselor Hjort's
13 questions as follows:

14 "MR. HJORT: Now is there any requirement there
15 that notification be given by the individuals
who intend to be absent because of illness?

16 MR. CADY: No.

17 MR. HJORT: In other words is there any unwritten
18 policy or some other written policy which we have
19 not dealt with here that requires employees to
personally report that they intend to take a day's
absence because of illness?

20 MR. CADY: There is an office policy that has
21 been followed since my starting with the state
22 and receiving my appointment, that the individual
do his best to notify his immediate super-
visor in case of illness.... (tr. 38)

23 MR. HJORT: Does it make any difference who
24 makes the notification as long as the supervisor
receives that notification or information?

25 MR. CADY: I think the main thing is, yes, as
26 long as we know that person is not going to be
there and the reason.

27 MR. HJORT: It would be acceptable then if
28 another employee notifies the supervisor
29 affected that that particular employee is
going to be absent?

30 MR. CADY: I think it would be...." (tr. 39)

31 27. The letter to Mr. Zupan is a letter of reprimand and is
32 part of his personnel file. The note to Ms. Langan is not. Also

1 because Ms. Langan does not have a phone, she has made arrange-
2 ments with her immediate supervisor to have someone else report
3 her off. This arrangement indicates that an immediate super-
4 visor has some discretion on employees reporting in sick or off.
5 This seems to be more in compliance with the sick leave clause
6 of the contract.

7 28. Both, Mr. Zupan and Ms. Langan had criticized management
8 policies and personnel at MPEA meetings and to fellow employees.

9 Interrogation

10 29. Article VII Supplement to Master Contract for Employment
11 Security Division, Department of Labor states:

12 "The Association shall be able to hold regular
13 and special Association meetings during off
14 duty time in the facilities of the Employer
15 if a request is made and granted for such use."
16 (Complainant's Exhibit 2)

17 Article VII of the Master Contract states:

18 "Association Activities

19 Staff of the Association will be allowed to
20 visit work areas of the employees during
21 work hours and confer on employment relations
22 matters, provided that such visitations shall
23 be coordinated in advance with management,
24 and shall not unduly disrupt work in progress."
25 (Complainant's Exhibit 1)

26 30. Mr. Tom Schneider held a noon MPEA meeting on 23 Novem-
27 ber in the Great Falls Employment Security Division Library.

28 Mr. Cady was concerned about the MPEA meeting because it
29 was not cleared with him first, but then wasn't sure if he (Mr.
30 Schneider) had to clear it with him or the Helena office. He
31 did go to the third floor and saw a group waiting to go into the
32 library. He distinctly remembered Mr. Hueth waiting. (tr. 243)

Whether or not Mr. Schneider had the approval per the
contracts is not at issue in this instant case. But what is at
issue is the interrogation of employees concerning their atten-
dance at the meeting.

1 31. The following testimony was elicited concerning interro-
2 gation of who attended MPEA meetings:

3 (a) Ms. Jan Goulet, the Secretary who worked for Mr.
4 Cady, testified that he did question her about the above meeting.
5 She stated:

6 "Yes, Mr. Schneider came in the office and
7 held a noon MPEA meeting in the library
8 upstairs. Mr. Cady was waiting for me at
9 1:00 P.M. at my desk when I came back and
10 he asked me if I had attended and I said
11 no. He has an MPEA contract in his hand
12 and there was something underlined in
13 red there and he said Schneider had no
14 business being in the office conducting
15 MPEA business." (tr. 114)

16 Mr. Cady did not ask Ms. Goulet for the names of
17 any persons who attended the meeting, but he subsequently asked
18 others.

19 (b) After the 23 November MPEA meeting, Mr. Cady asked
20 three employees (Mr. Clark, Richards, and Hueth) if they attended
21 the previous meeting. (tr. 212, 215)

22 (c) Mr. Samuel Lucero, Interviewer II, testified that
23 Mr. Cady asked him in the hallway on 24 November if he attended
24 the meeting the day before. Mr. Lucero first denied that he had
25 attended the meeting. He was later called into Mr. Cady's
26 office where he denied attending the meeting for the second time.
27 Sometime during the meeting, Mr. Cady called Mr. Clare Jensen,
28 Supervisor on the third floor, to sit in. Mr. Lucero, in fact,
29 did attend the meeting. (tr. 44, 45)

30 Mr. Lucero testified that Mr. Cady stated at the
31 24 November meeting with him that he (Cady) knew Joe Hueth was
32 there. (tr. 45)

"MR. STITELER: And, when Mr. Jensen came
in did Mr. Cady repeat those questions?

MR. LUCERO: He did ask me again if I
had attended the meeting after Jensen
was in there, I felt that Mr. Cady knew
that I had because I am sure that Clare
Jensen told him I had attended the meeting
so I looked at Clare Jensen and I said,
'No, I didn't attend the meeting'.

1 MR. STITELER: How would Mr. Clare
2 Jensen know that you had attended the
meeting?

3 MR. LUCERO: Because he was on the
4 third floor when the meeting was
held.

5 MR. STITELER: Did you consider that
6 this was an interrogation?

7 MR. LUCERO: Well, yes, in a sense, I
8 though it was an infringement on my
rights." (tr. 48-49)

9 During the meeting Mr. Cady and Mr. Lucero also
10 discussed some merit testing and promotional problems that Mr.
11 Lucero had experienced. Mr. Lucero did not view the discussion
12 about the MPEA meeting and promotions as having an effect on
13 promotions. (tr. 51)

14 (d) As the Respondent's witness, Mr. Cady testified that
15 he didn't recall talking to Mr. Lucero about attending a 23
16 November MPEA meeting. "I may or may not have. I don't recall."

17 (e) Mr. James Clark, Counselor I, attended the 23
18 December (Holiday Inn) and the 23 November (Library) MPEA.

19 Mr. Clark testified that after the 23 November
20 meeting he was questioned by Mr. Jensen as to the names of people
21 who attended the meeting. Later Mr. Clark was called down to Mr.
22 Cady's office. As to that conversation Mr. Clark testified:

23 "MR. CLARK: Mr. Cady in effect told me
24 that it was my responsibility to control
25 the third floor at that time because I
26 was to be on the receptionist desk and my
27 loyalty would be to management - something
to that effect.

28 MR. HJORT: Did he question you about the
29 meeting, whether you had attended or what
30 other people had attended?

31 MR. CLARK: Yes, he felt somewhat, I can't
32 remember exactly but it was to the effect
that I should have given Mr. Jensen the
names of the people that had attended the
meeting because I should be loyal to manage-
ment in that particular case..." (tr. 57)

1 32. The Association held a meeting at the Holiday Inn on
2 16 December. Items discussed were promotions, merit system,
3 management problems, personalities, and other matters.

4 (a) Mr. Chigbrow, met voluntarily with Mr. Cady on
5 December 17th to primarily discuss two concerns from the previous
6 night's MPEA meeting. One - promotions; two - safety of Mr.
7 Cady and Mr. Dyer. Mr. Chigbrow testified that he did not report
8 any specific employees' remarks made at the 16 December meeting to
9 Mr. Cady. Nor did he mention names of individuals who attended.

10 (b) Mr. Cady gave the following relevant testimony per-
11 taining to the conversation with Mr. Chigbrow:

12 "MR. HJORT: During the course of the
13 conversation with Mr. Chigbrow, did you
14 ask him who was present at the meeting?

15 MR. CADY: He just kind of ran down who
16 exactly was there." (tr. 17)

17 "MR. HJORT: Did Mr. Chigbrow elaborate
18 on just what exactly the immediate plan
19 was to remove you and whoever else by
20 whatever means?"

21 "MR. CADY: I don't think so, I kind of
22 thought that, well I said it's possible
23 and he said, well can they take our pro-
24 motions away and I said well I would hope
25 not but I really don't know."

26 "MR. HJORT: Has anyone to your knowledge
27 in your nine years of association as a
28 supervisor in this office, had a promo-
29 tion taken away other than by yourself,
30 or as a result of the normal process
31 involving the head office in Helena?"

32 "MR. CADY: No, there was, as I recall,
earlier this past fall, there was a
grievance filed to take a promotion away
from Tom Sutliff. I think it was filed
by Bill Zupan who had applied for the
job and did not get it so, uh, so,
believing in MPEA I'd say they have a
lot of clout. It would be possible."

33 (c) Mr. Chigbrow also related the employee grievances
(tr. 18) (in a general manner) voiced at the 16 December meeting.

34 (d) Mr. Chigbrow remarks concerned Mr. Cady and Mr. Dyer
35 to the point of debating whether or not they should attend that
36 evening's Christmas party. (tr. 18)

1 (e) Mr. Cady denied having asked Mr. Clark about
2 Association meetings between 23 November to 23 December.

3 "MR. STITELER: Do you recall discussing
4 that particular meeting with any other
employees individually?"

5 "MR. CADY: I discussed it with Mr. Jensen.
6 I might have subsequently discussed it with
Richards and Clark and, I'm not just sure."

7 Verbal Threats

8 33. I find that Mr. Cady's remarks to Mr. Hutchinson (tr.
9 p. 74, lines 13-19) and to Mr. Willey (tr. p. 71, l. 6-21) on
10 17 December are verbal threats directed against Association
11 members. It was also a form of interrogation about the extent
12 of their activities in the Association, especially in view of the
13 information Mr. Cady had about the previous evening's Association
14 meeting. A meeting where several employees expressed a number of
15 complaints against management practices.

16 Job Evaluation

17 34. Mr. Tom Sutliff, Interviewer Supervisor since August,
18 completed a job evaluation form on Mr. William Zupan and other
19 employees he supervises in October.

20 35. The evaluation scores given to Mr. Zupan were below any
21 scores he received in job evaluations the past six years.

22 (a) Mr. Zupan had complained, prior to October, about
23 the promotional method used to promote Mr. Sutliff to the
24 Interviewer Supervisor position. Mr. Zupan, an Interviewer III,
25 was also interested in the Interviewer Supervisor position but
26 was denied an opportunity to apply.

27 (b) Mr. Zupan testified that he very strenuously objected
28 to the low scores, at the time of Mr. Sutliff's evaluation. He
29 also felt that Mr. Cady influenced Mr. Sutliff on the evaluation
30 scores (tr. 157-158).

31 36. (a) Mr. Sutliff testified that no one influenced his
32 evaluation of Mr. Zupan or any other employee. He also stated
that he did not have the prior evaluation marks.

1 Mr. Sutliff testified that Mr. Zupan did not ask
2 him to change the evaluation scores, but did complain about the
3 low scores. (tr. 239)

4 (b) In reference to job evaluations Counselor Stiteler
5 asked:

6 "There was some testimony yesterday
7 that Mr. Sutliff had been influenced
8 in his performance evaluation of a
9 particular employee. Do you get in-
10 volved at all in these performance
11 evaluations of the employees who are
12 not under your direct supervision?"
13 (tr. 244)

14 Mr. Cady's reply was:

15 "No, I would become involved if the
16 person had told Supervisor that he
17 wasn't satisfied, he thought he was
18 getting a dirty deal and he wanted
19 to go talk to the manager. I may or
20 may not become involved." (tr. 250)

21 "MR. STITELER: Supervisors don't have
22 to clear these performance evaluation
23 ratings through you?"

24 "MR. CADY: No, we feel that they should
25 be done by the individual that's doing
26 the supervision...."

27 Leave of Absence

28 37. (a) On 17 or 18 December Ms. Langan applied for a leave
29 of absence without pay for 23 December from 3 P.M. to 5 P.M. Ms.
30 Langan testified that her immediate supervisor told her that he
31 didn't see any problem in granting it and as far as he was con-
32 cerned it was okay. (tr. 141) She later asked to have the
leave extended to 1 P.M. At that time she was informed by Mr.
Sutliff that all the leave was denied and that she could ask Mr.
Dyer (Assistant Manager) about the matter.

(b) Ms. Langan, accompanied by Ms. Anderson went to
Mr. Dyer's office. Ms. Langan testified as follows about that
conversation:

1 "I asked Mr. Dyer why my leave was
2 denied and would he please give me a
3 reason if he was going to deny me my
4 leave time from 1:00 to 3:00 off, why
5 I couldn't have my time I had been given
6 from 3:00 to 5:00 off.

7 He hesitated around, he said that he
8 didn't have the power to give me this
9 time off, if he could that he would,
10 and then he also brought up that some
11 phone calls had been made and MPEA was
12 brought up and that he wanted to know
13 what Cordell said to my Supervisor, Tom
14 Sutliff....

15 MR. HJORT: Now in connection with Mr.
16 Dyer's statements about MPEA, did he
17 indicate to you that your leave was
18 going to be denied because of your
19 association with MPEA?

20 MS. LANGAN: He didn't directly say
21 it was going to be denied by this but
22 he just kept mentioning MPEA, so I
23 assumed by his mentioning this, kept
24 mentioning it, that MPEA was this and
25 that, it was denied because of it."
26 (tr. 143)

27 Mr. Brown called Mr. Sutliff about the
28 leave matter. Ms. Langan testified
29 that was part of the reason for the
30 denial.

31 (c) Ms. Langan participated in the 16 December MPEA
32 meeting and stated some of the difficulties she had encountered
33 as a new employee.

34 (d) Prior to the 23 December denial of leave, Mr.
35 Sutliff had granted leave requests for Ms. Langan.

36 "MR. STITELER: ...in the past Mr. Sutliff
37 had the power to give you time off without
38 pay, do you have any idea or weren't you
39 curious as to why Mr. Dyer wouldn't have
40 that power?

41 MS. LANGAN: I asked Mr. Sutliff what this
42 meant and he said that this had been almost
43 the first time that he has not been able to
44 grant leave himself. ...he says this is one
45 of the times that he could not grant it
46 because it was denied by the Assistant Manager
47 or the Manager, whichever. I was told by Mr.
48 Dyer that he didn't have the authority and
49 never went into it further." (tr. 145)

1 38. (a) In reference to the Langan leave mater, Ms.
2 Anderson testified that Mr. Dyer informed Ms. Langan that he did
3 not have the authority to grant the leave. Ms. Anderson also
4 felt that Mr. Dyer was attempting to obtain information about MPEA
5 activities by the nature of his questions and comments during this
6 meeting. (tr. 171)

7 Mr. Dyer testified that Mr. Sutliff had declined to
8 approve the leave...and that he (Mr. Dyer) concurred....(tr. 236)

9 Pertaining to authority to approve or deny the leave
10 Mr. Dyer testified that he "had perfect full authority to approve
11 it or disapprove it". Because at the time (23 December) he was
12 the office manager in the absence of Mr. Cady, who delegates that
13 authority when he's absent. (tr. 237)

14 (b) Pertaining to MPEA activities Mr. Dyer testified as
15 follows:

16 "MR. STITELER: Do you recall asking either
17 Terry Langan or Sherry Anderson any questions
that day about that meeting, about MPEA?

18 MR.DYER: Yes, after I'd finished the dis-
19 cussion with Terry, I turned to Sherry
20 Anderson and asked what she wanted to talk
to me about and she said that she didn't
21 want to talk to me, she was there as the
MPEA witness.

22 MR. STITELER: And did you ask her anything
23 more about that or was that the end of the
conversation?

24 MR. DYER: I believe that I made some comment
25 to the effect that they must not have a very
high opinion of me if they felt they had to
26 have a witness at the time they asked me a
question." (tr. 237)

27 (c) Under cross-examination, Mr. Dyer testified that the
28 section supervisors (Mr. Sutliff) have basic approval authority.
29 "It is recommended by them and they coordinate it with Bill (Cady)
30 or myself to make sure there's no conflicting situations that
31 they're not aware of or whatever at the moment."
32

1 (d) Mr. Cady denied that a leave of absence was denied
2 to anyone because they were association members. (tr. 41)

3 Mr. Cady testified that there is a heavy claims
4 load between 15 of November to 1st of April and he would be
5 hesitant to grant leave to full-time claims people during that
6 time....especially the receptionist.

7 Surveillance

8 39. Ms. Smith (tr. 82-83) and Mr. Jervis (tr. 150) testified
9 that Mr. Chigbrow told them that Mr. Cady was near the Holiday
10 Inn checking on who was in attendance at the Association meeting.
11 I find that this testimony is based on conclusions reached by
12 Mr. Chigbrow and passed on to the two witnesses in conversations.
13 I do not give much creditability to Mr. Chigbrow's testimony nor
14 conclusions he passed on to anyone about any activity, Association
15 or management. Furthermore, Mr. Chigbrow denied having said that
16 to the two employees and Mr. Cady denied he drove by the Holiday
17 Inn for surveillance purposes.

18 Physical Violence

19 40. (a) Mr. Cady and Mr. Al Davis were involved in an
20 altercation at the office Christmas party on 17 December.

21 (b) Mr. Davis has been employed at the Great Falls
22 office for fifteen years and presently is classified as an
23 Interviewer III. He attended and participated in some of the
24 discussions at the 16 December MPEA meeting. (tr. 102, 103).

25 (c) Mr. Devalt testified that prior to going to the
26 party, he and Mr. Davis "just [talked] about playing it cool and
27 staying out of the way and no trouble". They anticipated trouble
28 "because of actions involved with the night of the 16th, we had
29 an MPEA meeting and the actions all day long in the office were
30 not normal". In reference to actions in the office on 17 December
31 Mr. DeValt stated: I am referring to the traffic of Interviewers
32 going into his [Cady's] office and the action of Bill going into
his office and, well, things weren't normal, that's all I can say.
(tr. 106)

1 Mr. DeValt heard no words about the arguments prior
2 to the altercation. (tr. 108)

3 (d) At the 17 December party, 15 minutes prior to the
4 altercation, Mr. Cady asked Mr. Edwin D. Willey, an Interviewer
5 III, if he voted against him. (tr. 71, 72)

6 (e) Mr. William Hutchinson, Employment Counselor I,
7 was questioned by Mr. Cady as to whether he went to the 16
8 December MPEA meeting. (tr. 74, 75) This questioning took place
9 five minutes prior to the altercation.

10 (f) Mr. Davis testified that he attended the 17
11 December Christmas party and he and Mr. Cady were involved in an
12 altercation. Mr. Davis testified that he doesn't remember much
13 about the altercation, except that "he [Mr. Cady] was coming
14 towards me." Mr. Davis did not testify as to the motive nor
15 what may have precipitated the action. Mr. Davis' testimony did
16 not shed much light on the events which led up to specific
17 instance number ten.

18 DISCUSSION

19 I find that the office manager and certain other supervisory
20 officials at the Great Falls Employment Security Division office
21 have engaged in a course of conduct designed to interfere with,
22 restrain, coerce, intimidate and harass employees of said office
23 in violation of Section 59-1603(1) and 59-1605(a) and (c).

24 The Respondents violated the above mentioned sections of the
25 Montana Public Employees Collective Bargaining Act by committing
26 unfair labor practices in the following specific instances:

27 Job Reassignments

28 I find that the job reassignment of Ms. Anderson was designed
29 to harass and intimidate her because of her Association activities.
30 Mr. Cady's alleged reason for the reassignment was wanting and
31 pretextual (Findings 8). I gave weight to the following con-
32 siderations:

1 1. The events leading to the reassignment (Findings 5a, 5b,
2 8). I find it difficult to assume that Mr. Cady's and Ms.
3 Anderson's discussion about IAPES merely involved the difficulty
4 of getting a \$1.00 refund in dues. The IAPES matter was part of
5 a series of conflicts between Mr. Cady and Ms. Anderson, some of
6 which involved Ms. Anderson's Association support.

7 2. The Respondent was aware of Ms. Anderson's Association
8 activities and support. She presented herself as an MPEA witness
9 at a meeting involving Mr. Dyer, the Assistant Manager, and
10 another employee (Finding 7).

11 3. I find credible Ms. Anderson's testimony as to why she
12 was reassigned to a less desirable position, and why she did not
13 complain about it (Findings 9 & 10), especially in view of the
14 events leading to the reassignment and the reason given to her
15 for it.

16 The Complainant alleges that Ms. Smith was reassigned
17 basically because of her affiliation with the Association. I
18 find the Respondent did not violate the Montana Act in this specific
19 instance for the following reasons:

20 (a) the transfer was reasonable in view of the
21 apparent need for a Clerk-Typist in the CETA section;

22 (b) Ms. Smith was logical choice for this position
23 because of her qualifications;

24 (c) Ms. Smith had not attended nor participated in
25 Association meetings or activities;

26 (d) Mr. Cady's reason for the reassignment did not
27 indicate an anti-association motive, nor was there evidence that
28 Ms. Smith perceived such a motive.

29 Local Representative

30 Though local management was not officially notified until
31 the first week in February that Mr. Hueth was elected the local
32 Association representative; it was well aware of his active

1 participation in the Association, and may even have known about
2 his election at a December meeting. In fact, Mr. Cady referred
3 to Mr. Hueth in his testimony several times when alluding to
4 some Association activities.

5 I do not find Mr. Jensen's testimony, as a whole, highly
6 credible. His testimony often seemed evasive and on other
7 occasions he could not remember events, dates or facts. Even
8 if credit had been given to Mr. Jensen's testimony, it would
9 still have been hard to understand. Most importantly, his
10 testimony did not support the content nor the reasons for the
11 letter of reprimand to Mr. Hueth (Complainant's Exhibit 6).

12 In testimony, Mr. Jensen put great weight on the fact that
13 the subject of the reprimand was a re-occurring problem. However,
14 the fact of the matter is that only Mr. Hueth received a letter
15 of reprimand; there were no other employees individually reprimanded.

16 After a very careful review of Mr. Jensen's and Mr. Hueth's
17 testimony and of Complainant's Exhibit 6, I conclude that the
18 letter of reprimand was unwarranted and was an effort to harass
19 an active Association leader for his Association activities. I
20 find the letter, considering the above circumstances and
21 motivation, to have been in violation of Mr. Hueth's rights as
22 guaranteed in the Montana Act.

23 Sick Leave

24 Whether or not there is a definite policy requiring an
25 employee to personally report sick leave to the immediate super-
26 visor is clear in the MPEA Master Contract (Complainant's Exhibit
27 1), it is not stated in the Employment Security Division operation
28 manual (Complainant's Exhibit 3), and was not supported by Mr.
29 Cady's testimony.

30 The warning note to Ms. Langan and the letter of reprimand to
31 Mr. Zupan, referring to an unwritten policy which was enforced
32 by one supervisor, (Mr. Sutliff), was discriminatory under the
Act.

1 Interrogation

2 The testimony and evidence is not clear as to whether or
3 not Mr. Schneider had clearance, nor is it clear who would give
4 clearance, to conduct such an on-premise Association meeting.
5 But the testimony was overwhelming that local management did
6 interrogate several employees as to whether or not they attended
7 the meeting in question. I can understand Mr. Cady's and Mr.
8 Jensen's concerns about activities at the local office, but in
9 this instance if Mr. Schneider did not have clearance per the
10 contract terms then Mr. Cady or his supervisors should have taken
11 the matter up with Mr. Schneider. It should not have been taken
12 as an opportunity to question individual employees as to whether
13 or not they attended the meeting. In fact, one employee, Mr.
14 Lucero, testified that he denied attending the meeting even
15 though he had done so.

16 The testimony from several witnesses that Mr. Cady and other
17 supervisors had inquired about subsequent Association meetings
18 and activities was also overwhelming. These interrogations,
19 questions, inquiries, etc., of Association members about their
20 labor organization activities were clearly in violation of the
21 Montana Act.

22 Verbal Threats

23 I credit the testimony of Mr. Hutchinson, Mr. Willey, and
24 Mr. DeValt as to the atmosphere at the Christmas party on 17
25 December. The language and manner that Mr. Cady used in
26 inquiring as to who "was out to get him" were of such a nature
27 as to convey a verbal threat to the employees involved in the
28 conversations and also to other employees. (Finding 33).

29 Job Evaluation

30 I find that Mr. Zupan's job evaluation scores were discrimin-
31 atory for reasons which included his known Association activities. I
32 have given weight to the following considerations:

(a) Mr. Zupan, in the past, criticized management policies
and promotional procedures.

1 (b) Mr. Zupan filed a complaint because he (for some
2 unknown reason) was not allowed to take the merit test for the
3 position to which Mr. Sutliff was promoted.

4 (c) Mr. Zupan asserted that Mr. Sutliff's promotion
5 was not in accordance with Merit System rules.

6 (d) Mr. Zupan's job evaluation scores for the past six
7 years were higher than this evaluation.

8 (e) Not only had a new immediate supervisor observed
9 Mr. Zupan's performance for only two months, but it was this
10 same immediate supervisor who was promoted to the supervising
11 position Mr. Zupan had expressed a strong interest in.

12 (f) The new supervisor did not have knowledge of prior
13 evaluations.

14 (g) Only Mr. Zupan received lower job evaluation scores
15 than he had received previously.

16 (h) After the job evaluation Mr. Zupan filed a grievance
17 per the contract.

18 (i) Mr. Zupan complained about promotions and other
19 management activities at Association meetings.

20 (j) Mr. Zupan later received a letter of reprimand
21 (Complainant's Exhibit 4).

22 I do credit Mr. Zupan's testimony about his difficulties
23 involving his job evaluation, especially in view of the following
24 circumstances: Without casting any doubts on Mr. Sutliff's
25 efforts to do a honest and proper evaluation, I do find it a
26 problem that local management would allow a new supervisor to
27 evaluate an employee under the circumstances mentioned under
28 (b)(c) and (e). Furthermore, the purpose of a job evaluation
29 is to show the employee his strengths, weakness, and areas of
30 improvement. This was a most difficult task for a supervisor
31 not having access to prior evaluations.

32

1 Leave of Absence

2 Based on Findings 37a, 37b, 37c, 37d, and 38a, I conclude that
3 Ms. Langan was denied a leave of absence because of her Association
4 activities. The reason for the denial is pretextual.

5 Surveillance

6 I do not find that Mr. Cady engaged in surveillance of
7 Association meetings at the Holiday Inn. I do not credit Mr.
8 Chigbrow's statements to Ms. Smith or to Mr. Jervais, nor is
9 there evidence that Mr. Cady was near the Holiday Inn for the
10 specific purpose of determining who was in attendance.

11 Physical Violence

12 The activities prior to the Cady-Davis altercation are not
13 easily dismissed. However, neither Mr. Cady or Mr. Davis nor
14 any other witness testified that there was a direct link between
15 the altercation and association activities. Of course, Mr. Davis
16 is an Association member per the Agency Shop provision of the
17 contract, but again there was no direct evidence that the
18 violence was directed at or from Mr. Davis because of his
19 Association membership.

20 CONCLUSION OF LAW

21 1. That Respondents violated provisions of 59-1603(1),
22 59-1605(1)(a) and (b), R.C.M. 1947 by having engaged in actions
23 which interfered with, restrained, coerced, discriminated,
24 intimidated and harassed employees.

25 RECOMMENDED ORDER

26 It is hereby ordered that the Department of Labor & Industry,
27 Division of Employment Security, its managers and supervisors
28 specifically at the Great Falls office:

29 1. Cease and desist from interrogating employees, individu-
30 ally or collectively, about Association meetings or activities.
31 2. Cease and desist from interfering with, restraining,
32 coercing employees in the exercise of their rights to assist this
or any other labor organization.

1 3. Cease and desist from discriminating in regard to job
2 reassignments, letters of reprimand, job evaluations and leave
3 of absences.

4 It is further ordered that the Department of Labor & Industry,
5 Division of Employment Security, its managers and supervisor,
6 specifically at the Great Falls office take the following
7 affirmative action:

8 A.1. Remove the letter of reprimand written to Mr. Joe Hueth,
9 dated 20 January 1977, and any other correspondence pertaining
10 to that letter, from his personnel file.

11 2. Remove the letter of reprimand to Mr. Zupan (Complain-
12 ant's Exhibit 4) and the warning note to Ms. Langan (Complain-
13 ant's Exhibit 5) from their respective personnel files.

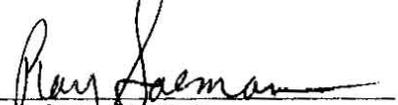
14 3. Perform a non-discriminatory job evaluation for Mr.
15 Zupan.

16 B. Notify the Administrator of the Board of Personnel Appeals,
17 in writing, within thirty (30) days from the receipt of this
18 decision, what steps have been taken to comply herewith.

19 NOTICE: Exceptions may be filed to these Findings of Fact,
20 Conclusions of Law, and Recommended Order within twenty (20) days
21 service thereof. If no exceptions are filed with the Board
22 within the period of time, the Recommended Order shall become
23 a Final Order. Exceptions shall be addressed to the Board of
24 Personnel Appeals, 1417 Helena Avenue, Helena, Montana 59601.

25 DATED this 6th day of June, 1977.

26 BOARD OF PERSONNEL APPEALS

27
28 BY 
29 Ray Saeman
30 Hearing Examiner
31
32

1 CERTIFICATE OF MAILING

2 I, Janice M. Fishburn, hereby certify and state that I mailed
3 or delivered on the 6th day of June, 1977, a true and correct
4 copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED
5 ORDER to the following:

6 Mr. Barry Hjort
7 Attorney at Law
8 1426 Cedar Street
9 Helena, MT 59601

Mr. William Cady
Employment Security Division
1018 7th South
Great Falls, MT 59401

9 Mr. Tom Schneider
10 MPEA
11 1426 Cedar Street
12 Helena, MT 59601

Mr. Joe Hueth
Employment Security Division
1018 7th South
Great Falls, MT 59401

11 Mr. Duane Johnson, Administrator
12 Dept. of Administration
13 Personnel Division
14 Mitchell Building
15 Helena, MT 59601

Mr. Fred Barrett, Administrator
Dept. of Labor & Industry
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14 Mr. Moody Brickett
15 Attorney
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20 Janice M. Fishburn

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