

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE #5-77:

FLORENCE-CARLTON UNIT OF THE )  
MONTANA EDUCATION ASSOCIATION, )  
Complainant, )  
- vs - )  
BOARD OF TRUSTEES OF SCHOOL )  
DISTRICT NO. 15-6, FLORENCE- )  
CARLTON, MONTANA, )  
Defendant. )

FINAL ORDER

\* \* \* \* \*

Findings of Fact, Conclusions of Law and Recommended Order were issued on February 24, 1978 by Hearing Examiner Linda Skaar. Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed on March 15, 1978, by Defendant and on April 7, 1978 by the Complainant.

Amended Findings of Fact, Conclusions of Law and Recommended Order were issued on December 13, 1978 by Hearing Examiner. Objections and Exceptions to the Amended Findings of Fact, Conclusions of Law and Recommended Order were filed by the Defendant on January 15, 1979.

Ms. Emilie Loring, representing the Complainant, presented oral argument to the Board of Personnel Appeals at its meeting on March 20, 1979. After reviewing the record and considering the briefs and oral arguments at its meetings on March 20, 1979 and on June 20, 1979, the Board of Personnel Appeals orders that the Exceptions to the Findings of the Hearing Examiner be denied.

IT IS ORDERED, therefore, that the Amended Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Examiner in this matter be sustained and be adopted as the Final Order of this Board.

1 DATED this 11 day of July, 1979.

2 BOARD OF PERSONNEL APPEALS

3  
4 By *Brent Cromley*  
5 Brent Cromley, Chairman

6 \* \* \* \* \*

7 CERTIFICATE OF MAILING

8 I, Jennifer Jacobson, do hereby certify and state that  
9 on the 16 day of July, 1979, I mailed a true and correct  
10 copy of the above FINAL ORDER on ULP #5-77 to the following  
11 persons:

12 Dr. William Willavize  
13 Superintendent  
14 Florence-Carlton School Dist. #15-6  
15 Florence, MT 59833

16 Michael Sehestedt  
17 Office of the County Attorney  
18 Missoula County Courthouse  
19 Missoula, MT 59801

20 Judith Shea  
21 President  
22 Florence-Carlton MEA  
23 3819 Stephens  
24 Missoula, MT 59801

25 Philip Campbell  
26 UniServ Director  
27 3819 Stephens  
28 Missoula, MT 59801

29 Emilie Loring  
30 HILLEY & LORING  
31 1713 Tenth Avenue South  
32 Great Falls, MT 59405

Executive Director  
Montana Education Association  
1232 East Sixth Avenue  
Helena, MT 59601

*Jennifer Jacobson*  
Jennifer Jacobson

BEFORE THE BOARD OF PERSONNEL APPEALS

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3 IN THE MATTER OF UNFAIR LABOR )  
4 PRACTICE CHARGE #5-77: )  
5 FLORENCE-CARLTON UNIT OF THE )  
6 MONTANA EDUCATION ASSOCIATION, )  
7 Complainant, )  
8 vs. )  
9 BOARD OF TRUSTEES OF SCHOOL )  
10 DISTRICT NO. 15-6, FLORENCE- )  
11 CARLTON, MONTANA, )  
12 Defendant. )

AMENDED FINDINGS  
OF FACT  
CONCLUSIONS OF  
LAW AND  
RECOMMENDED ORDER

13 \* \* \* \* \*

14 Teachers in Florence-Carlton School District No. 15-6,  
15 Florence, Montana, are represented for the purpose of collective  
16 bargaining by the Montana Education Association.

17 During negotiations on the 1977-78 contract, the complainant  
18 presented several proposals on which Defendant, Board of Trustees,  
19 refused to bargain. Defendant offered to consider the proposed  
20 articles as amendments to the District Policy Manual.

21 On March 24, 1977, the Association filed charges with the  
22 Board of Personnel Appeals alleging that the School District  
23 refused to bargain on items which are mandatory subjects of  
24 bargaining under the Public Employees Collective Bargaining Act,  
25 R.C.M. 1947, 59-1605(1)(c) and (e).

26 The School District claims that the association's proposals  
27 infringe on management rights reserved for the School District by  
28 the Montana Constitution and the Public Employees Collective  
29 Bargaining Act (Sec. 59-1601 et. seq., R.C.M. 1947).

30 The Parties agreed to submit the matter for decision on the  
31 following agreed statement of facts:

I

32 Complainant, the Florence-Carlton Unit of the  
Montana Education Association, is the exclusive bar-  
gaining agent for nonsupervisory teachers employed by  
Defendant, the Board of Trustees of Florence-Carlton  
School District No. 15-6, Florence, Montana.

1 II

2 The parties have a Professional Negotiations  
3 Agreement for the 1976-77 academic year, Joint Exhibit  
4 #1.

4 III

5 The parties have been negotiating for a contract  
6 for the 1977-78 academic year. During negotiations,  
7 Complainant Association presented proposals in seven  
8 areas, Articles VIII through XVIII, attached to the  
9 charge and by reference incorporated herein.

8 IV

9 Defendant, School District, refused to bargain on  
10 these matters, as a part of the basic contract, but  
11 Defendant offered to consider the proposed articles as  
12 amendments to District Policy Manual.

11 V

12 Defendant believes Articles VIII through XVIII\*  
13 deal with areas included in the management rights  
14 reserved to the district by Section 59-1608(2), R.C.M.  
15 1947 and has stated, if Complainant would produce some  
16 material showing that these were not management rights,  
17 the board would consider including them directly in the  
18 contract rather than considering them as amendments to  
19 the District Policy Manual. Complainant has not offered  
20 any materials showing that these items are not included  
21 in the management rights provision of the statute.

18 VI

19 Complainant and Defendant have settled or aban-  
20 doned Article XI and that is no longer an issue between  
21 them.

21 THE 1972 MONTANA CONSTITUTION

22 Defendant relies upon Section 8 of Article X of the 1972  
23 Montana Constitution to substantiate the claim that being forced  
24 to negotiate on the proposals would be an unconstitutional  
25 infringement on the powers of local school districts. Article X,  
26 Section 8 provides: "The supervision and control of schools in  
27 each school district shall be vested in a board of trustees to be  
28 elected as provided by law."

29 Defendant claims that "the delegate's intent in including  
30 this section was to give school boards a constitutional status  
31 which preserved local autonomy and to vest the school boards the  
32 same measure of control over their schools that the Board of

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\*Only Articles VIII, IX, X, XII, XIII, and XVIII are included in the complaint.

1 Regents exercises over the university system."

2 In support of the contention that the application of the  
3 Public Employees Collective Bargaining Act to local school  
4 districts "is an unconstitutional infringement on the  
5 'supervision and control of schools'....", Defendant cites  
6 School District No. 12 v. Hughes, \_\_\_\_\_, Montana \_\_\_\_\_, 552 P2d 328  
7 (1976).

8 A careful examination of the decision in that case reveals  
9 that the local school board claimed that statutes providing for  
10 hearings by county and state superintendents in cases where  
11 teachers' contracts are allegedly terminated illegally, became  
12 unconstitutional by the adoption of the 1972 Montana  
13 Constitution.

14 The court held that the 1972 State Constitution does not  
15 grant control and supervision of schools of each district solely  
16 to district boards of trustees and that local boards of trustees  
17 are subject to legislative control and do not have control over  
18 local schools to the exclusion of other governmental entities.<sup>1</sup>  
19 In reaffirming the long held principle that legislatures are in  
20 control of local school boards the court said, "The fundamental  
21 purpose of construing a constitutional provision is to give  
22 effect to the intent of its framers and the people who adopted  
23 it." They continued, "The rule is well established that, in  
24 construction of a constitution, recourse may be had to pro-  
25 ceedings of the constitutional convention."<sup>2</sup>

26 This hearing examiner retraced the steps of the court by  
27 reading that section of the transcript which dealt with the  
28 education article. A reading of this transcript leads me to the  
29 exact same conclusion as the one arrived at by the Montana  
30 Supreme Court: the constitutional convention acted to preserve  
31 the existing powers of local boards of trustees, not to expand  
32 them.

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<sup>1</sup>Constitution, 1972, Article 10, Section 9(3)(a)

<sup>2</sup>School District No. 12 vs. Hughes, \_\_\_\_\_, Montana \_\_\_\_\_, 552 P2d 328



1 conditions of employment. That is, those things set forth in  
2 Section 8(d) of the NLRA (as amended).<sup>4</sup> Since most subjects which  
3 arise at the bargaining table are at least tangentially related  
4 to wages, hours, and other conditions of employment, further  
5 definition of the division between mandatory and permissive  
6 subjects of bargaining may be useful, viz, those things which are  
7 ordinarily in the purview of only one party, i.e., internal union  
8 affairs or management's right to hire or fire are those things  
9 which are permissive subjects of bargaining.

10 Since 1958, the courts have continued to define and redefine  
11 mandatory and permissive subjects of bargaining in the private  
12 sector.

13 In what may have been an attempt to avert some of the problems  
14 of case by case adjudication, when collective bargaining rights  
15 were granted public employees, the enabling legislation frequently  
16 contained management rights' provisions. The first of these, the  
17 executive order establishing collective bargaining rights for  
18 federal employees, contains a management rights' clause very  
19 similar to that found in the Montana Act.

20 Including a management rights section in collective bar-  
21 gaining legislation has done very little to clarify the dis-  
22 tinction between mandatory and permissive subjects of bargaining.  
23 One distinguished committee put the problem this way:

24 "Topics proposed for negotiation, like words  
25 in a sentence, take on color and meaning from  
26 their surrounding context. Viewed in the abstract,  
27 the demand to negotiate over 'the level of service  
28 to be provided' for example, would seem to be a  
29 matter . . . not negotiable except at the discre-  
30 tion of the County . . . . In the context of a  
31 specific situation, however, a demand for a lower  
32 maximum case load for social workers, for example,  
although theoretically related to the level of  
service to be provided, might be much more directly  
related to terms and conditions of employment."<sup>5</sup>

4

NLRB vs. Wooster Division of Borg-Warner, 356 U.S. 342, 42 LRRM 2034

5 Aaron Committee Report -July, 1968, formed the basis for public  
employee relations ordinance for Los Angeles County quoted in  
Wollett & Chanin, The Law and Practice of Teacher Negotiations,  
6:56. Bureau of National Affairs, Washington, D.C. 1974.

1           As the question of what is a mandatory subject of bargaining  
2 and what is not has continued to plague negotiators, the question  
3 has frequently been referred to state public employees relations  
4 boards and the courts. In order to deal with the difficulty of  
5 defining the terms, the boards and courts have generally adopted  
6 a balancing approach.

7           The balancing test adopted by the Kansas Supreme Court in  
8 1973 (N.E.A. vs. Shawnee Mission Board of Education, 512  
9 P2d 426, 84 LRRM 2223) and later by the Pennsylvania Supreme  
10 Court (Pennsylvania Labor Relations Board vs. State College Area  
11 School District, 337 A2d 262, 90 LRRM 2081) is one which, if  
12 judiciously applied, should result in the greatest benefit to all  
13 concerned. The Kansas Court said,

14                       It does little good, we think, to speak of  
15 negotiability in terms of "policy" versus something  
16 which is not "policy". Salaries are a matter of  
17 policy, and so are vacation and sick leaves. Yet  
18 we cannot doubt the authority of the Board to  
19 negotiate and bind itself on these questions. The  
20 key, as we see it, is how direct the impact of an  
21 issue is on the well being of the individual  
22 teacher, as opposed to its effect on the operation  
23 of the school system as a whole. [Emphasis added]  
The line may be hard to draw, but in the absence  
of more assistance from the legislature the courts  
must do the best they can. The similar phrase-  
ology of the N.L.R.A. has had a similar history of  
judicial definition. See Fibreboard Corporation  
v. Labor Board., 379 U.S. 203, 13 L.Ed. 2d 233, 85  
S. Ct. 398, 57 LRRM 2609 and especially the con-  
curring opinion of Stewart, J. at pp. 221-222.

24 This test is the one that we shall adopt here.

25           Before this test is applied to the proposals, some comments  
26 on the problem of negotiability versus non-negotiability are in  
27 order. To begin with, we must remember that the purpose of col-  
28 lective bargaining is to achieve labor peace rather than strife.  
29 If negotiators approach the table in the spirit of cooperation  
30 and problem solving, much is to be gained by discussing problems  
31 of mutual interest and much is to be lost by refusing to talk at  
32 all. We must remember that it is always the prerogative of the

1 employer to say "no".

2 The balancing test adopted here is applied in this spirit.  
3 No judgment is made on the merits of the MEA's proposals. The  
4 judgment which is made is whether or not the subject of the  
5 proposal is a mandatory subject of bargaining.

6 MEA PROPOSALS

7 ARTICLE VIII

8 EMPLOYMENT STATUS OF TEACHERS

9  
10 8.1 Considerations Prior to Termination

11 Prerequisite to the consideration of termination  
12 of a teacher's services, the following steps will  
13 have been taken:

14 1. The teacher has been observed and written  
15 evaluation reports have been made in accordance  
16 with Article VII of this Agreement.

17 2. These observation and evaluation reports have  
18 been made by competent evaluators who shared the  
19 reports with the person being evaluated. Every  
20 effort was made by the evaluator to point out  
21 specific weaknesses, if any existed, and to assist  
22 the teacher in overcoming such deficiencies. A  
23 report of such deficiencies will include the  
24 following:

25 (a) A precise definition of the problem in  
26 terms of professional deficiency;

27 (b) A precise set of expectations delineating  
28 what levels of performance would constitute  
29 acceptable performance in the problem areas  
30 defined;

31 (c) A prescription for remediation which  
32 spells out courses of action and time-  
expectations so the teacher involved can  
reach an acceptable level of performance; and

(d) A prescription for assistance by the  
principal or immediate supervisor which  
spells out courses of action whereby the  
teacher will be assisted, counseled, and  
tutored in improving the level of performance  
to an acceptable level.

3. Any incident or situation that arose during  
the current school year, that could possibly be  
cited as a reason for termination of a teacher's  
services, was discussed promptly with the teacher.

4. The principles of progressive discipline have  
been followed.

1           8.2 Notice of Termination (Nontenure)

2           1. The teacher shall be notified in writing  
3           before the fifteenth (15th) day of April.

4           2. Within ten (10) days after receipt of such  
5           notice, the teacher may request in writing, a  
6           written statement declaring clearly and explicitly  
7           the specific reason or reasons for the termination  
8           of his/her services. The Board shall supply such  
9           statement within ten (10) days after the request.

10          3. The teacher may, within ten (10) days after  
11          receipt of the statement of reason, appeal the  
12          termination through the grievance procedure.

13           8.3 Notice of Termination (Tenure)

14          Every teacher being terminated shall be entitled  
15          to all rights under the law and this Agreement.

16           8.4 Dismissal (Tenured and Nontenured)

17          Every teacher being dismissed before the expiration  
18          of the employment contract shall be entitled to  
19          all rights under the law and this Agreement.

20           8.5 Notification of Reelection

21          Notification of Reelection for all teachers shall  
22          be in accordance with the law.

23           8.6 Individual Contract

24          All individual teacher contracts shall be subject  
25          to and consistent with Montana State Law and the  
26          terms and conditions of this Agreement. Any  
27          individual teacher contract hereinafter executed  
28          shall expressly provide that it is subject to the  
29          terms of this and subsequent agreements between  
30          the Board and the Association. If any individual  
31          teacher contract contains any language inconsistent  
32          with this Agreement, this Agreement shall be  
33          controlling. The Board shall not issue any indi-  
34          vidual personal service contracts prior to the  
35          execution of the Collective Bargaining Agreement  
36          and shall within ten (10) days thereafter submit a  
37          complete individual contract to all teachers.

38          The major part of Article VIII involves the procedures to be  
39          followed by the school district before a teacher is terminated.  
40          It sets forth what a teacher is to be told and when he/she is to  
41          be told it.

42          Applying the test of how direct the impact of an issue is on  
43          the well-being of an individual teacher, as opposed to its effect  
44          on the operation of the school system as a whole, the conclusion

1 is inescapable that the effect of these proposals on the individual  
2 teacher will be substantially greater than that on the school  
3 system. What the teacher is told and when he/she is told may  
4 have a direct effect on his future employment.

5 A number of subsections in Article VIII are matters of  
6 statute. Teachers do not have to negotiate the provisions of  
7 Montana Law, these provisions are theirs by right. Most Montana  
8 statutes relating to public employment are concerned with wages,  
9 hours and working conditions. These things are mandatory subjects  
10 of bargaining and because they are, whether or not to include a  
11 statutory provision in the contract can be considered a mandatory  
12 subject of bargaining.

13 Section 8.6, individual contracts, is again a provision  
14 which does not need to be bargained. Individual contracts must  
15 conform to the master agreement signed with the exclusive repre-  
16 sentative. There would be no harm to either party in including  
17 this provision in the agreement. This section also includes a  
18 proposal for the time when individual contracts are to be issued.  
19 Section 75-6102, R.C.M. 1947 which provides for individual con-  
20 tracts does not specify a time when they are to be issued. Since  
21 a collective bargaining agreement rarely names individual teachers,  
22 it is only with the receipt of the individual contract that a  
23 teacher will be able to determine with certainty his placement on  
24 the salary schedule. Should the school administration and teacher  
25 disagree, the problem will need resolution. The time of issuance  
26 of the contract then becomes important to the teacher. For  
27 example, if a school district issued the contracts on the last  
28 day of school, a teacher might have difficulty grieving a mis-  
29 placement on the schedule. The effect of the time contracts are  
30 issued may have great impact on the individual teacher; it will  
31 have little impact on the school district which has to, in any  
32 event, issue individual contracts.

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ARTICLE IX

ASSIGNMENTS, VACANCIES, TRANSFERS

9.1 Assignments

1. All teachers to be employed by the Board shall hold a bachelor's degree from an accredited college or university, and, if employed for a regular classroom teaching assignment, a teaching certificate issued by the Montana State Department of Public Instruction.

2. Teachers shall not be assigned outside the scope of their teaching certificates and/or their major or minor fields of study.

3. All teachers shall be given written notice of their schedules for the forthcoming year by no later than May 15th. In the event that changes in such schedules are proposed, all teachers affected shall be notified at least thirty (30) days prior to the effective date of the proposed change, shall be consulted as to the nature and extent of the change, and may exercise the transfer rights herein stated. In no event will changes in teachers' schedules be made later than the 15th day of August preceding the commencement of the school year.

4. Teachers involved in voluntary, extra-duty assignments as set forth in Appendix C, attached hereto and made a part hereof, shall be compensated in accordance with the provisions of this Agreement without deviation or exception.

5. Any assignment in addition to the normal teaching schedule during the regular school year, including adult education, driver education, coaching, extra duties and summer school assignment, shall not be obligatory but with the consent of the teacher affected, and shall be in accordance with the provision of state law regarding the termination or reelection of a teacher's services. In making such assignment, preference will be given to teachers based on their seniority in the district.

9.2 Vacancies

1. A vacancy shall be defined as a bargaining unit or supervisory position previously held by a teacher or supervisor or a position that is created by the Board, including summer school and other duty positions.

2. Whenever a vacancy occurs or is anticipated, the Board or its agent shall promptly notify the Association, post notice of same on at least one bulletin board in each school building for no less than thirty (30) days prior to the deadline for application and for no less than fifteen (15) days prior to public advertisement of vacancy, and direct a copy of same by registered mail to each,

1 if any, laid off teacher. Where specific training,  
2 experience, certification, or other qualifications  
3 shall be stated in the posting notice.

4 3. Whenever vacancies occur during the normal  
5 summer months when regular school is not in session,  
6 the following procedure, in addition to the pro-  
7 cedure heretofore outlined, shall be followed:

8 (a) Teachers with specific interests in  
9 possible vacancies will notify the super-  
10 intendent of their interest, in writing,  
11 during the last regular week of school and  
12 shall include a summer address.

13 (b) Should a vacancy occur, the teacher who  
14 has expressed an interest in said position or  
15 a similar position shall be contacted in  
16 writing by the superintendent and notified of  
17 the vacancy.

18 (c) The teacher so notified shall have the  
19 responsibility of contacting the superintend-  
20 ent indicating their interest in said posi-  
21 tion within three (3) days of receiving such  
22 notification.

23 4. Vacancies shall be filled on the basis of the  
24 experience, qualifications, and seniority of the  
25 applicant.

### 26 9.3 Transfers

27 1. The Board recognizes that it is desirable in  
28 making assignments to consider the interest and  
29 aspirations of its teachers. Requests by a teacher  
30 for transfer to a different class, building, or  
31 position shall be made in writing, on forms fur-  
32 nished by the Board, one copy of which shall be  
with the superintendent and one copy shall be  
filed with the Association. The application shall  
set forth the reasons for transfer, the school,  
grade, or position sought, and the applicant's  
academic qualifications. Voluntary transfers  
shall be granted on the basis of experience,  
qualifications, and seniority of the applicant.

Should the Board deny a request for transfer, it  
will promptly provide the teacher and the Associ-  
ation specific written reasons for its denial.

2. An involuntary transfer will be made only in  
case of an emergency or to prevent undue dis-  
ruption of the instructional program. Involuntary  
transfers, if made, will be on the basis of reverse  
seniority among teachers with the same certifica-  
tion, endorsement, or license. The Board shall  
notify in writing the affected teacher and the  
Association of the specific reason given for such  
transfer. If the teacher objects to such transfer  
for the reason given, the dispute may be resolved  
through the grievance procedure.

1           The large part of Section 9.1, Assignments, Vacancies, and  
2 Transfers, is either a matter of statute or Board of Public  
3 Education Policy (see page 9 for ruling on Montana statutes).  
4 Section 9.1,2, relates to the assignment of teachers. The right  
5 to assign is a management right and inability to make assignments  
6 could cause great harm to the school district. However, the  
7 effect of a mis-assignment of a teacher may have significant  
8 adverse effects on the individual teacher. For example, the  
9 assignment of an Algebra class to an English teacher might result  
10 in significantly lower teacher evaluations for that teacher.  
11 Assignment of teachers is a permissive subject of bargaining  
12 while the effect of those assignments is mandatory. Subsection 3  
13 is a proposal for a procedure for informing teachers of their  
14 work schedules. The school district must at some time in some  
15 manner notify the teachers of their assignments. Whether this  
16 notification is made on one date as opposed to another should  
17 cause the district little problem. Lack of a consistent policy  
18 might cause great inconvenience to an individual teacher. The  
19 proposal in 9.1,3 is a mandatory subject of bargaining. Section  
20 9.1,4 provides for wages for extra-duty assignments. Wages are,  
21 of course, a mandatory subject of bargaining.

22           Section 9.2, 1, 2, and 3 are suggested procedures for adver-  
23 tising job openings within the district to members of the teaching  
24 staff. Whether or not an individual teacher is able to apply for  
25 a different job can clearly make a substantial difference to that  
26 teacher's work life. Advertising the positions to incumbent  
27 teachers may cause a small increase in clerical work to the  
28 district but the effect should be minimal. Procedures for adver-  
29 tising job vacancies are a mandatory subject of bargaining.

30           Subsection 4 of Section 9.2 is proposed criteria for filling  
31 vacancies: experience, qualifications, and seniority. Experience  
32 and qualifications will automatically be used by any employer.

1 The National Labor Relations Board has long recognized seniority,<sup>6</sup>  
2 promotions, and transfers as mandatory subjects for bargaining.  
3 We shall not hold differently.

4 Section 9.3 proposes procedures to be used in making teacher  
5 transfers, both voluntary and involuntary. Transfers are, in the  
6 Montana Public Employees Collective Bargaining Act, set forth as  
7 a management right. On the other hand, a transfer is clearly a  
8 condition of employment. Applying the balancing test, we must  
9 come to the conclusion that a transfer, or lack thereof, can have  
10 a great impact on the well-being of an individual teacher. The  
11 effect of a transfer or transfer procedure on the operation of  
12 the school system will be minimal. Procedures for making teacher  
13 transfers are a mandatory subject of bargaining.

14  
15 ARTICLE X

16 LAYOFFS

17 Layoff Procedures:

- 18 10.1 In the event of a decline in enrollment  
19 during a period of one school year, the  
20 Board, on or before February 15, may declare  
21 that staff reductions will be made effective  
at the start of the fall semester. The  
decline in enrollment must be so significant  
as to justify such staff reductions.
- 22 10.2 The superintendent or his designee shall  
23 notify the teaching staff, on or before  
24 February 15, that staff reductions may be  
25 necessary. The superintendent shall make  
available all pertinent information supporting  
the anticipated need to reduce staff.
- 26 10.3 Pupil/teacher ratio, accreditation require-  
27 ments, district goals, and state department  
of education standards shall be used when  
determining the need for staff reductions.
- 28 10.4 When the board of education deems it neces-  
29 sary to reduce the certified staff, the  
30 following items will be considered in the  
reduction process in the order they are  
31 listed: 10-4-1/certification status;  
10-4-3/seniority using the following criteria  
32 in the order listed: 10-4-3-1/years of service  
in the district; 10-4-3-2/length of service  
in current assignment; 10-4-3-3/number of  
years teaching experience in current area of

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<sup>6</sup>U.S. Gypsum Company, 94 NLRB 112, 28 LRRM 1015 (1951)

1 certification; 10-4-3-4/total number of years  
2 teaching experience; 10-4-3-5/all other  
3 qualifications being substantially equal,  
inverse order of employment will be used as a  
4 criterion.

4 10.5 Normal attrition shall be considered prior to  
any staff reduction.

5 10.6 At no time shall there be reduction of staff  
6 on full-time contracts if the district con-  
tinues to employ part-time certified faculty.

7 10.7 If further reductions are necessary after  
8 fulfilling the staff reduction listed above,  
9 reductions of full-time staff including  
administrators and other employees shall be  
10 considered.

11 10.8 The Board shall notify the faculty affected  
12 by the required reduction not later than  
13 March 15, of that academic year. The reasons  
14 for this reduction shall be clearly stated  
and the faculty member shall be notified of  
his right to appeal through the grievance  
procedure.

15 10.9 When positions again become available in the  
16 district, they shall first be offered to  
17 those faculty members whose contracts were  
cancelled last and running in inverse chronol-  
ogy through the list of those whose contracts  
were cancelled first.

18 10.10 A teacher whose employment has been terminated  
19 shall be offered a letter of intent at least  
20 30 days prior to the date of re-employment.  
The faculty member shall accept or reject the  
21 position within ten days. If he accepts the  
position, he shall immediately conform in  
every way with the provisions of this Agreement.

22 10.11 The temporary separation will not affect the  
23 following accumulated benefits if the teacher  
24 is rehired within 18 months of the date of  
25 termination; accumulated temporary leave and  
status in the sick leave bank providing no  
previous reimbursement has occurred; position  
of the salary schedule; tenure status.

26 This article deals with the procedure to be used in case  
27 staff reduction is necessitated by decline in pupil enrollment.  
28 There is also a proposed procedure for rehiring teachers laid off  
29 during a period of declining enrollment. Section 59-1608, R.C.M.  
30 1947, specifically states that management has the right to hire  
31 or relieve employees from duties because of lack of work or  
32 funds. However, it can hardly be denied that having a job or not

1 is a condition of employment and is clearly one which can cause  
2 great anxiety in any person. Applying the balancing test we can  
3 see that lack of procedure for lay-offs would have a substantially  
4 greater impact on the well-being of the individual teacher than  
5 on the operation of the school district as a whole. That is, in  
6 a district with a declining enrollment and no reduction-in-force  
7 policy, more individual teachers would be likely to suffer anxiety  
8 about an impending lay-off than in a district with a predictable  
9 policy. A procedure for lay-offs and re-hires is a mandatory  
10 subject of bargaining. School districts facing the possibility  
11 of declining student enrollment would be well advised to have  
12 such a procedure in place before it is needed.

## 13 ARTICLE XII

### 14 WORK YEAR

#### 15 12.1 School Calendar

16 The school calendar is set forth in Appendix D.  
17 It reflects a work year of one hundred eighty-  
18 seven (187) days, of which 180 are pupil-instruc-  
19 tion days and seven (7) are pupil-instruction  
20 related days.

#### 21 12.2 Changes in School Calendar

22 There shall be no deviation from or change in the  
23 school calendar except by mutual agreement of the  
24 Board and the Association.

#### 25 12.3 Emergency Situations

26 In the event a teacher duty day is lost for any  
27 emergency situation, a teacher shall perform  
28 duties at such other time in lieu thereof by  
29 mutual agreement of the Board and the Association.

30 It makes little difference whether or not Section 12.1 is  
31 bargainable. By law (Section 75-7402), there must be 180 pupil  
32 instruction days. Pupil instruction related days are restricted  
to seven (Section 75-7405) and must be approved by the Superin-  
tendent of Public Instruction in accordance with Board of Public  
Education policy. (See p. 9 for a discussion of the bargain-  
ability of Montana statute.)

1 Section 12.2 is a mandatory subject of bargaining. The  
2 school calendar ultimately deals with hours of employment which  
3 are specified in the Act as a subject upon which the employer  
4 must bargain.

5 Section 12.3 is clearly a matter which must be bargained.  
6 Hours of work whether on a day to day schedule or "make-up time"  
7 are specified as a subject of bargaining in Section 59-1603,  
8 R.C.M. 1947.

### 10 ARTICLE XIII

#### 11 STUDENT DISCIPLINE AND TEACHER PROTECTION

##### 12 13.1 School Board Responsibilities

13 The Board recognizes its responsibility to  
14 give all reasonable support and assistance to  
15 teachers with respect to the maintenance of  
16 control and discipline in the classroom.  
17 Whenever it appears that a particular pupil  
18 requires the attention of special counselors,  
19 social workers, law enforcement personnel,  
20 physicians, or other professional person, or  
21 whenever it appears that the presence of a  
22 particular student in the class will impede  
23 the education of the balance of the class  
24 because of disruptions caused by said student,  
25 the Board will [emphasis added] relieve the  
26 teacher of responsibilities with respect to  
27 said pupil, upon recommendation of the School  
28 Discipline Review Committee, as provided in  
29 this article.

##### 22 13.2 Establishment of Discipline Rules and 23 Regulations

24 The Board, in conjunction with the Associa-  
25 tion, shall promulgate rules and regulations  
26 setting forth the procedures to be utilized  
27 in disciplining, suspending or expelling  
28 students for misbehavior. Such rules and  
29 regulations shall be distributed to students,  
30 teachers, and parents at the commencement of  
31 each school year.

##### 28 13.3 Pupil Exclusion From Class

29 A teacher may exclude a pupil from one class  
30 when the grossness of the offense, the per-  
31 sistence of the misbehavior, or the disruptive  
32 effect of the violation makes the continued  
presence of the student in the classroom  
intolerable. In such cases, the teacher will  
promptly furnish the principal full partic-  
ulars of the incident in writing. The pupil  
shall not be returned to the class until

1 after consultation by the principal with the  
2 teacher.

3 13.6 Discipline Committee

4 A Student Discipline Review Committee shall  
5 be established consisting of two administra-  
6 tors, three teachers appointed by the Associa-  
7 tion, three students appointed by the student  
8 governing body, and two parents appointed by  
9 the Board, who shall study and recommend  
10 student discipline policies and procedures to  
11 the Board. Said Student Discipline Review  
12 Committee shall determine all cases involving  
13 transfer, removal, suspension, or expulsion  
14 of students for disciplinary reasons.

15 [Emphasis added] All decisions of the Student  
16 Discipline Review Committee on individual  
17 discipline cases shall be final except that  
18 appeals may be taken to the Board by the  
19 student involved. No member of the Student  
20 Discipline Review Committee shall sit on any  
21 case in which he/she is personally involved.  
22 Any transfers of students for disciplinary  
23 reasons shall be with the consent of the  
24 teacher to whom the student is transferred.

25 The subject matter of the sections of Article XIII are  
26 sufficiently intertwined that they must be dealt with as a whole  
27 rather than individually. Basically, this is a proposal which,  
28 if adopted, would set up a school Discipline Review Committee.  
29 These proposals prescribe the membership and the duties of the  
30 committee. The proposals give the committee the authority to  
31 transfer, remove, suspend or expel students. Further, they give  
32 this committee the authority to direct the board to relieve the  
teacher of responsibility toward specific students.

This particular proposal infringes upon the school board's  
rights and authority to manage the school. The teachers propose  
a Discipline Review Committee composed of non-school board members  
which has the authority to make final decisions and to direct  
board actions. The teachers are asking that the board give up  
authority which is rightfully theirs.

This proposal on student discipline is a permissive, not a  
mandatory, subject of bargaining. This determination is confined  
to this specific proposal; there may be other proposals which  
would be considered mandatory and not permissive.



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18.6 Nondiscrimination Clause

The provisions of this Agreement shall be applied without regard to race, creed, religion, color, national origin, age, sex, marital status, domicile, residence, or family relationship to another teacher, supervisor, or Board member.

18.7 Duplication and Distribution

Copies of this Agreement shall be printed at the expense of the Board within 30 days after the Agreement is signed. Copies shall be presented to all teachers now employed, hereafter employed, or considered for employment by the Board. The Association shall be provided \_\_\_\_\_ copies of this Agreement. Any teacher who does not receive a copy of this Agreement from the Board or its agents, shall not be disciplined, reprimanded, suspended, terminated, dismissed, or otherwise adversely affected in employment status because of failure to comply with the provision of which there was no actual knowledge at the time of the alleged infraction.

Section 18.1 is confusing. Boards of trustees adopt policy unilaterally and may change that policy at will. At the same time, they are legally bound by a collective bargaining contract which they may not change. Since the contract is of a higher order than policy, the proposal appears to be meaningless.

Section 18.2 states a legal truism. A contract cannot be changed except by agreement of the parties signatory to the contract.

Section 18.3. This Board continues to hold, as it has in previous cases, that an individual contract must agree with the master Agreement. This does not need to be bargained.

Section 18.4 is a proposal for a savings clause to protect the body of the Agreement if an individual section should prove to be illegal. It also contains a provision for re-opening negotiations on sections found to be illegal. The proposal here should be equally beneficial to the two parties and should not have to be bargained. Sensible negotiators will automatically include a savings clause in a contract.

1 Section 18.5 deals with maintenance of standards of working  
2 conditions embodied in school board policy. By inference, it  
3 incorporates Board policy into the contract. Since the proposal  
4 ultimately addresses itself to working conditions, this proposal  
5 is a mandatory subject of bargaining.

6 Section 18.6, a nondiscrimination clause, proposes that the  
7 agreement be applied without regard to race, creed, age, sex,  
8 domicile, residence, family relationship to another teacher,  
9 supervisor, or Board member. This proposal is a mixture of the  
10 mandatory and the illegal. The phrase "family relationship to  
11 another teacher, supervisor, or Board member" may violate Section  
12 59-519, R.C.M. 1947, which specifically prohibits school trustees  
13 from appointing relatives to any position of trust or involvement.  
14 The Board may not bargain to violate the law. On the other hand,  
15 this Board has previously held that residence is a mandatory  
16 subject of bargaining.

17 Workers are protected against discrimination for race,  
18 creed, age, and sex by the Montana Human Rights Act. A properly  
19 drawn nondiscrimination clause can be considered a mandatory  
20 subject of bargaining.

21 In Section 18.7, the teachers propose to have the Board pay  
22 for the printing of the Agreement. It also charges the Board  
23 with distributing the Agreement. It excuses any teacher from  
24 discipline for violating the Agreement if the teacher did not  
25 receive a copy of the contract from the Board.

26 This is a fairly standard proposal from a union and must be  
27 bargained.

#### 28 CONCLUSION OF LAW

29 The allegation that the Board of Trustees of Florence-Carlton  
30 School District No. 15-6, has engaged in an unfair labor practice  
31 within the meaning of Sections 59-1605 (1)(e), R.C.M. 1947, by  
32 refusing to bargain in good faith with an exclusive representative,  
has been sustained.

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RECOMMENDED ORDER

It is hereby ordered that the Board of Trustees of Florence-Carlton School District 15-6 cease and desist from refusing to negotiate on those items named herein which are found to be mandatory subjects of bargaining.

DATED this 13<sup>th</sup> day of December, 1978.

  
LINDA SKAAR  
Hearing Examiner

NOTICE

Exceptions may be filed to these Findings of Fact, Conclusions of Law, and Recommended Order within twenty working days service thereof. If no exceptions are filed with the Board of Personnel Appeals within that period of time, the Recommended Order shall become the Final Order. Exceptions shall be addressed to the Board of Personnel Appeals, Box 202, Capitol Station, Helena, Montana 59601.

\* \* \* \* \*

CERTIFICATE OF MAILING

I, \_\_\_\_\_, hereby certify and state that I did on the \_\_\_\_\_ day of December, 1978, mail a copy of the above AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER, to the following people:

Dr. William Willavize  
Superintendent  
Florence-Carlton School District No. 15-6  
Florence, Montana 59833

Michael Schestedt *Montana*  
Office of the County Attorney  
Missoula County Courthouse  
Missoula, Montana 59801

Judith Shea  
President  
Florence-Carlton MEA  
3819 Stephens  
Missoula, Montana 59801

Philip Campbell  
UniServ Director  
3819 Stephens  
Missoula, Montana 59801

Emilie Loring  
Hilley & Loring  
1713 Tenth Avenue South  
Great Falls, Montana 59405

Executive Director  
Montana Education Association  
1232 East Sixth Avenue  
Helena, Montana 59601

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BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF ULP#5-77 )  
FLORENCE-CARLTON UNIT OF THE )  
MONTANA EDUCATION ASSOCIATION, )  
Complainant, )  
vs- )  
BOARD OF TRUSTEES OF FLORENCE- )  
CARLTON SCHOOL DISTRICT NO. 15-6, )  
Defendant. )

ORDER

\* \* \* \* \*

Upon request of the parties concerned the Board of  
Personnel Appeals has remanded the above matter to the  
Hearing Examiner for further conclusions.

Dated this 11<sup>th</sup> day of May, 1978.

BOARD OF PERSONNEL APPEALS  
By Robert R. Jensen  
Robert R. Jensen  
Administrator

CERTIFICATE OF MAILING

1 I, Trenna Scoffield, hereby certify and state that I did  
2 on the 12th day of May, 1978, mail a true and correct copy of  
3 the ORDER in ULP#5-77 to the following persons:

4 Ms. Emilie Loring  
5 Attorney  
6 1713 Tenth Ave. So  
7 Great Falls, Mt 59405

8 Mr. Michael Sehestedt  
9 Deputy County Attorney  
10 Courthouse  
11 Missoula, Mt 59801

12   
13 Trenna Scoffield  
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BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR )  
LABOR PRACTICE CHARGE #5-77: )  
FLORENCE-CARLTON UNIT )  
OF THE MONTANA EDUCATION )  
ASSOCIATION, )  
Complainant, )  
VS )  
BOARD OF TRUSTEES OF SCHOOL )  
DISTRICT NO. 15-6, FLORENCE- )  
CARLTON, MONTANA, )  
Defendant, )

FINDINGS OF  
FACT  
CONCLUSIONS OF  
LAW  
AND  
RECOMMENDED  
ORDER

\* \* \* \* \*

Teachers in Florence-Carlton School District No. 15-6, Florence, Montana, are represented for the purposes of collective bargaining by the Montana Education Association.

During negotiations on the 1977-78 contract, the complainant presented several proposals on which Defendant, Board of Trustees, refused to bargain. Defendant offered to consider the proposed articles as amendments to the District Policy Manual.

On March 24, 1977, the Association filed charges with the BPA alleging that the School District refused to bargain on items which are mandatory subjects of bargaining under the Public Employees Collective Bargaining Act, R.C.M. 1947, 59-1605(1)(c) and (e).

The School District claims that the association's proposals infringe on management rights reserved for the School District by the Montana Constitution and the Public Employees Collective Bargaining Act (Sec. 59-1601 et seq, R.C.M. 1947)

The parties agreed to submit the matter for decision on the following agreed statement of facts:



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I

Complainant, the Florence-Carlton Unit of the Montana Education Association, is the exclusive bargaining agent for nonsupervisory teachers employed by Defendant, the Board of Trustees of Florence-Carlton School District No. 15-6, Florence, Montana.

II

The parties have a Professional Negotiations Agreement for the 1976-77 academic year, Joint Exhibit #1.

III

The parties have been negotiating for a contract for the 1977-78 academic year. During negotiations, Complainant Association presented proposals in seven areas, Articles VIII through XVIII, attached to the charge and by reference incorporated herein.

IV

Defendant, School District, refused to bargain on these matters, as a part of the basic contract, but Defendant offered to consider the proposed articles as amendments to District Policy Manual.

V

Defendant believes Articles VIII through XVIII\* deal with areas included in the management rights reserved to the district by Section 59-1608(2), R.C.M. 1947 and has stated, if Complainant would produce some material showing that these were not management rights, the board would consider including them directly in the contract rather than considering them as amendments to the District Policy Manual. Complainant has not offered any materials showing that these items are not included in the management rights provision of the statute.

VI

Complainant and Defendant have settled or abandoned Article XI and that is no longer an issue between them.

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\*Only Articles VIII, IX, X, XII, XIII, and XVIII were included in the complaint.

1 THE 1972 MONTANA CONSTITUTION

2  
3 Defendant relies upon Section 8 of Article X of the  
4 1972 Montana Constitution to substantiate the claim that  
5 being forced to negotiate on the proposals would be an  
6 unconstitutional infringement on the powers of local school  
7 districts. Article X, Section 8 provides: "The supervision  
8 and control of schools in each school district shall be  
9 vested in a board of trustees to be elected as provided by  
10 law."

11 Defendant claims that "the delegate's intent in includ-  
12 ing this section was to give school boards a constitutional  
13 status which preserved local autonomy and to vest the school  
14 boards the same measure of control over their schools that  
15 the Board of Regents exercises over the university system."

16 In support of the contention that the application of  
17 the Public Employees Collective Bargaining Act to local  
18 school districts "is an unconstitutional infringement on the  
19 'supervision and control of schools'....", Defendant cites  
20 School District No. 12 V. Hughes, \_\_\_\_\_, Montana \_\_\_\_\_  
21 \_\_\_\_\_, 552 p. 2d 328 (1976).

22 A careful examination of the decision in that case  
23 reveals that the local school board claimed that statutes  
24 providing for hearings by county and state superintendents  
25 in cases where teachers' contracts are allegedly terminated  
26 illegally, became unconstitutional by the adoption of the  
27 1972 Montana Constitution.

28 The court held that the 1972 State Constitution does  
29 not grant control and supervision of schools of each dis-  
30 trict solely to district boards of trustees and that local  
31 boards of trustees are subject to legislative control and do  
32 not have control over local schools to the exclusion of other

1 governmental entities.<sup>1</sup> In reaffirming the long held principle  
2 that legislatures are in control of local school boards  
3 the court said, "The fundamental purpose of construing a  
4 constitutional provision is to give effect to the intent  
5 of its framers and the people who adopted it." They con-  
6 tinued, "The rule is well established that, in construc-  
7 tion of a constitution, recourse may be had to proceedings  
8 of the constitutional convention."<sup>2</sup>

9 This hearing examiner retraced the steps of the court  
10 by reading that section of the transcript which dealt with  
11 the education article. A reading of this transcript leads  
12 me to the exact same conclusion as the one arrived at by  
13 the Montana Supreme Court: the constitutional convention  
14 acted to preserve the existing powers of local boards of  
15 trustees, not to expand them.

16 When a Montana Supreme Court decision is as clearly  
17 applicable to the question raised by Defendant as is  
18 School District No. 12, Phillips County, Montana, vs. Hughes,  
19 \_\_\_\_\_, Montana \_\_\_\_\_, 552 P. 2d 328 (1976).,  
20 it would appear to be redundant to repeat the reasoning  
21 in this decision. Interested parties are referred to Volume  
22 VIII of the Transcript of the Proceedings of the Montana  
23 Constitutional Convention as well as School District No. 12  
24 vs. Hughes, supra.

25  
26 The Public Employees Collective  
Bargaining Act

27 At issue here is whether the proposals of the MEA are  
28 ones upon which the school board must negotiate.

29  
30 <sup>1</sup>Constitution, 1972, Article 10, Section 9(3)(a)

31 <sup>2</sup>School District No. 12 vs. Hughes, \_\_\_\_\_, Montana  
32 \_\_\_\_\_, 552 P. 2d 328

1 The Montana Public Employees Collective Bargaining  
2 Act was modeled closely on the National Labor Relations Act  
3 (as amended). The paradigmatic nature of the NLRA becomes  
4 obvious when we examine the wording in the two acts. The  
5 Montana Act mandates that the two parties "negotiate in good  
6 faith with respect to wages, hours, fringe benefits, and  
7 other conditions of employment...." (59-1603 R.C.M. 1947)  
8 while the National Labor Relations Act uses the words "wages,  
9 hours, and other terms and conditions of employment."<sup>3</sup>

10 As originally passed, the National Labor Relations Act  
11 contained no management rights clause. It was not until  
12 1952 that the U.S. Supreme Court held that management does  
13 have rights and has a right to bargain for management rights.

14 In 1958, the Court divided subjects for bargaining into  
15 two classes, mandatory and permissive. As defined by the  
16 court, mandatory subjects of bargaining are those things  
17 which have to do with rates of pay, wages, hours of employ-  
18 ment or other conditions of employment. That is, those  
19 things set forth in Section 8(d) of the NLRA (as amended).<sup>4</sup>  
20 Since most subjects which arise at the bargaining table are  
21 at least tangentially related to wages, hours, and other  
22 conditions of employment, further definition of the division  
23 between mandatory and permissive subjects of bargaining may  
24 be useful, viz, those things which are ordinarily in the  
25 purview of only one party, i.e., internal union affairs or  
26 management's right to hire or fire are those things which  
27 are permissive subjects of bargaining.

28 Since 1958, the courts have continued to define and  
29 redefine mandatory and permissive subjects of bargaining in  
30

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31 <sup>3</sup>Section 8(d) National Labor Relations Act as amended

32 <sup>4</sup>NLRB vs. Wooster Division of Borg-Warner, 356 U.S. 342, 42 LRRM 2034

1 the private sector.

2 In what may have been an attempt to avert some of the  
3 problems of case by case adjudication, when collective  
4 bargaining rights were granted public employees, the enabling  
5 legislation frequently contained management rights' pro-  
6 visions. The first of these, the executive order establishing  
7 collective bargaining rights for federal employees, contains  
8 a management rights' clause very similar to that found in  
9 the Montana Act.

10 Including a management rights section in collective  
11 bargaining legislation has done very little to clarify the  
12 distinction between mandatory and permissive subjects of  
13 bargaining. One distinguished committee put the problem  
14 this way:

15 "Topics proposed for negotiation, like words in a  
16 sentence, take on color and meaning from their surround-  
17 ing context. Viewed in the abstract, the demand to  
18 negotiate over 'the level of service to be provided'  
19 for example, would seem to be a matter . . . not  
20 negotiable except at the discretion of the County. . . .  
21 In the context of a specific situation, however, a  
22 demand for a lower maximum case load for social workers,  
23 for example, although theoretically related to the  
24 level of service to be provided, might be much more  
25 directly related to terms and conditions of employ-  
26 ment."<sup>5</sup>

27 As the question of what is a mandatory subject of  
28 bargaining and what is not has continued to plague neg-  
29 otiators, the question has frequently been referred to state  
30 public employees relations boards and the courts. In order  
31 to deal with the difficulty of defining the terms, the  
32 boards and courts have generally adopted a balancing approach.

33 The balancing test adopted by the Kansas Supreme Court  
34 in 1973 (N.E.A. vs. Shawnee Mission Board of Education, 512

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35 <sup>5</sup>Aaron Committee Report - July, 1968, formed the basis for public  
36 employee relations ordinance for Los Angeles County quoted in Wollett &  
37 Chanin, The Law and Practice of Teacher Negotiations, 6:56. Bureau of  
38 National Affairs, Washington, D.C., 1974.

1 P2d 426, 84 LRRM 2223) and later by the Pennsylvania Supreme  
2 Court (Pennsylvania Labor Relations Board vs. State College  
3 Area School District, 337 A2d 262, 90 LRRM 2081) is one  
4 which, if judiciously applied, should result in the greatest  
5 benefit to all concerned. The Kansas Court said,

6 It does little good, we think, to speak of  
7 negotiability in terms of "policy" versus something  
8 which is not "policy". Salaries are a matter of  
9 policy, and so are vacation and sick leaves. Yet we  
10 cannot doubt the authority of the Board to negotiate  
11 and bind itself on these questions. The key, as we  
12 see it, is how direct the impact of an issue is on  
13 the well being of the individual teacher, as opposed  
14 to its effect on the operation of the school system  
15 as a whole. [Emphasis added] The line may be hard  
16 to draw, but in the absence of more assistance from  
17 the legislature the courts must do the best they can.  
18 The similar phraseology of the N.L.R.A. has had a  
19 similar history of judicial definition. See Fibre-  
20 board Corporation v. Labor Board., 379 U.S. 203,  
21 13 L.Ed. 2d 233, 85 S. Ct. 398, 57 LRRM 2609 and  
22 especially the concurring opinion of Stewart, J.  
23 at pp. 221-222.

24 This test is the one that we shall adopt here.

25 Before this test is applied to the proposals, some  
26 comments on the problem of negotiability versus non-nego-  
27 tiability are in order. To begin with, we must remember  
28 that the purpose of collective bargaining is to achieve  
29 labor peace rather than strife. If negotiators approach  
30 the table in the spirit of cooperation and problem solving,  
31 much is to be gained by discussing problems of mutual  
32 interest and much is to be lost by refusing to talk at all.  
We must remember that it is always the prerogative of the  
employer to say "no".

The balancing test adopted here is applied in this  
spirit. No judgment is made on the merits of the MEA's  
proposals. The judgment which is made is whether or not  
the subject of the proposal is a mandatory subject of  
bargaining.

1 MEA PROPOSALS

2 ARTICLE VIII

3 EMPLOYMENT STATUS OF TEACHERS

4  
5 8.1 Considerations Prior to Termination

6 Prerequisite to the consideration of termination  
7 of a teacher's services, the following steps  
8 will have been taken:

9 1. The teacher has been observed and written  
10 evaluation reports have been made in accordance  
11 with Article VII of this Agreement.

12 2. These observation and evaluation reports  
13 have been made by competent evaluators who shared  
14 the reports with the person being evaluated.  
15 Every effort was made by the evaluator to point  
16 out specific weaknesses, if any existed, and to  
17 assist the teacher in overcoming such deficiencies.  
18 A report of such deficiencies will include the  
19 following:

20 (a) A precise definition of the problem in  
21 terms of professional deficiency;

22 (b) A precise set of expectations delin-  
23 eating what levels of performance would  
24 constitute acceptable performance in the  
25 problem areas defined;

26 (c) A prescription for remediation which  
27 spells out courses of action and time-  
28 expectations so the teacher involved can  
29 reach an acceptable level of performance; and

30 (d) A prescription for assistance by the  
31 principal or immediate supervisor which  
32 spells out courses of action whereby the  
teacher will be assisted, counseled, and  
tutored in improving the level of perfor-  
mance to an acceptable level.

3 3. Any incident or situation that arose during  
4 the current school year, that could possibly be  
5 cited as a reason for termination of a teacher's  
6 services, was discussed promptly with the teacher.

7 4. The principles of progressive discipline  
8 have been followed.

9 8.2 Notice of Termination (Nontenure)

10 1. The teacher shall be notified in writing before  
11 the fifteenth (15th) day of April.

12 2. Within ten (10) days after receipt of such  
13 notice, the teacher may request in writing, a  
14 written statement declaring clearly and explicitly

1 the specific reason or reasons for the termination  
2 of his/her services. The Board shall supply such  
statement within ten (10) days after the request.

3 3. The teacher may, within ten (10) days after  
4 receipt of the statement of reason, appeal the  
termination through the grievance procedure.

5 8.3 Notice of Termination (Tenure)

6 Every teacher being terminated shall be entitled  
7 to all rights under the law and this Agreement.

8 8.4 Dismissal (Tenured and Nontenured)

9 Every teacher being dismissed before the expira-  
10 tion of the employment contract shall be entitled  
to all rights under the law and this Agreement.

11 8.5 Notification of Reelection

12 Notification of Reelection for all teachers shall  
13 be in accordance with the law.

14 8.6 Individual Contract

15 All individual teacher contracts shall be subject  
16 to and consistent with Montana State Law and the  
17 terms and conditions of this Agreement. Any  
18 individual teacher contract hereinafter executed  
shall expressly provide that it is subject to  
19 the terms of this and subsequent agreements  
between the Board and the Association. If any  
20 individual teacher contract contains any language  
inconsistent with this Agreement, this Agreement  
21 shall be controlling. The Board shall not issue  
any individual personal service contracts prior  
22 to the execution of the Collective Bargaining  
Agreement and shall within ten (10) days there-  
23 after submit a complete individual contract to  
all teachers.

24 The major part of Article VIII involves the procedures  
25 to be followed by the school district before a teacher is  
26 terminated. It sets forth what a teacher is to be told and  
27 when he/she is to be told it.

28 Applying the test of how direct the impact of an issue  
29 is on the well-being of an individual teacher, as opposed  
30 to its effect on the operation of the school system as  
31 a whole, the conclusion is inescapable that the effect of  
32 these proposals on the individual teacher will be substan-

1 tially greater than that on the school system. What the  
2 teacher is told and when he/she is told may have a direct  
3 effect on his future employment.

4 A number of subsections in Article VIII are matters  
5 of statute. Teachers do not have to negotiate the provisions  
6 of Montana Law; these provisions are theirs by right.

7 This Board does not feel it necessary to rule upon the  
8 bargainability of Montana statute.

9 Section 8.6, individual contracts, is again a provision  
10 which does not need to be bargained. Individual contracts  
11 must conform to the master agreement signed with the exclu-  
12 sive representative. There would be no harm to either party  
13 in including this provision in the agreement.

14  
15 ARTICLE IX

16 ASSIGNMENTS, VACANCIES, TRANSFERS

17 9.1 Assignments

18 1. All teachers to be employed by the Board  
19 shall hold a bachelor's degree from an accredited  
20 college or university, and, if employed for a  
21 regular classroom teaching assignment, a teaching  
certificate issued by the Montana State Depart-  
ment of Public Instruction.

22 2. Teachers shall not be assigned outside the  
23 scope of their teaching certificates and/or their  
major or minor fields of study.

24 3. All teachers shall be given written notice of  
25 their schedules for the forthcoming year by no  
26 later than May 15th. In the event that changes  
27 in such schedules are proposed, all teachers  
28 affected shall be notified at least thirty (30)  
29 days prior to the effective date of the proposed  
change, shall be consulted as to the nature and  
extent of the change, and may exercise the  
transfer rights herein stated. In no event will  
changes in teachers' schedules be made later than  
the 15th day of August preceding the commence-  
ment of the school year.

30 4. Teachers involved in voluntary, extra-duty  
31 assignments as set forth in Appendix C, attached  
32 hereto and made a part hereof, shall be compen-  
sated in accordance with the provisions of this  
Agreement without deviation or exception.

1 5. Any assignment in addition to the normal  
2 teaching schedule during the regular school year,  
3 including adult education, driver education,  
4 coaching, extra duties and summer school assign-  
5 ment, shall not be obligatory but with the consent  
6 of the teacher affected, and shall be in accordance  
7 with the provision of state law regarding the  
8 termination or reelection of a teacher's services.  
9 In making such assignment, preference will be  
10 given to teachers based on their seniority in the  
11 district.

## 7 9.2 Vacancies

8 1. A vacancy shall be defined as a bargaining  
9 unit or supervisory position previously held by a  
10 teacher or supervisor or a position that is  
11 created by the Board, including summer school and  
12 other duty positions.

13 2. Whenever a vacancy occurs or is anticipated,  
14 the Board or its agent shall promptly notify the  
15 Association, post notice of same on at least one  
16 bulletin board in each school building for no less  
17 than thirty (30) days prior to the deadline for  
18 application and for no less than fifteen (15) days  
19 prior to public advertisement of vacancy, and  
20 direct a copy of same by registered mail to each,  
21 if any, laid off teacher. Where specific training,  
22 experience, certification, or other qualifications  
23 are prerequisites for the vacancy, such conditions  
24 shall be stated in the posting notice.

25 3. Whenever vacancies occur during the normal  
26 summer months when regular school is not in  
27 session, the following procedure, in addition to  
28 the procedure heretofore outlined, shall be  
29 followed:

30 (a) Teachers with specific interests in  
31 possible vacancies will notify the super-  
32 intendent of their interest, in writing,  
during the last regular week of school and  
shall include a summer address.

(b) Should a vacancy occur, the teacher  
who has expressed an interest in said pos-  
ition or a similar position shall be contacted  
in writing by the superintendent and notified  
of the vacancy.

(c) The teacher so notified shall have the  
responsibility of contacting the superintend-  
ent indicating their interest in said posi-  
tion within three (3) days of receiving such  
notification.

4. Vacancies shall be filled on the basis of the  
experience, qualifications, and seniority of the  
applicant.

1           9.3   Transfers

2           1.   The Board recognizes that it is desirable in  
3           making assignments to consider the interest and  
4           aspirations of its teachers. Requests by a  
5           teacher for transfer to a different class, build-  
6           ing, or position shall be made in writing, on  
7           forms furnished by the Board, one copy of which  
8           shall be with the superintendent and one copy  
9           shall be filed with the Association. The appli-  
10          cation shall set forth the reasons for transfer,  
11          the school, grade, or position sought, and the  
12          applicant's academic qualifications. Voluntary  
13          transfers shall be granted on the basis of expe-  
14          rience, qualifications, and seniority of the  
15          applicant.

16          Should the Board deny a request for transfer,  
17          it will promptly provide the teacher and the  
18          Association specific written reasons for its  
19          denial.

20          2.   An involuntary transfer will be made only  
21          in case of an emergency or to prevent undue  
22          disruption of the instructional program. In-  
23          voluntary transfers, if made, will be on the  
24          basis of reverse seniority among teachers with  
25          the same certification, endorsement, or license.  
26          The Board shall notify in writing the affected  
27          teacher and the Association of the specific  
28          reason given for such transfer. If the teacher  
29          objects to such transfer for the reason given,  
30          the dispute may be resolved through the grievance  
31          procedure.

32          The large part of Section 9.1, Assignments, Vacancies,  
and Transfers, is either a matter of statute or Board of  
Public Education Policy and need not be ruled upon. Sub-  
section 3 is a proposal for a procedure for informing  
teachers of their work schedules. The school district must  
at some time in some manner notify the teachers of their  
assignments. Whether this notification is made on one date  
as opposed to another should cause the district little  
problem. Lack of a consistent policy might cause great  
inconvenience to an individual teacher. The proposal in  
9.1, 3 is a mandatory subject of bargaining.

Section 9.2, 1, 2, and 3 are suggested procedures for  
advertising job openings within the district to members of  
the teaching staff. Whether or not an individual teacher

1 is able to apply for a different job can clearly make a  
2 substantial difference to that teacher's work life. Adver-  
3 tising the positions to incumbent teachers may cause a  
4 small increase in clerical work to the district but the  
5 effect should be minimal.

6 Subsection 4 of Section 9.2 is proposed criteria  
7 for filling vacancies: experience, qualifications, and  
8 seniority. Experience and qualifications will automati-  
9 cally be used by any employer. The National Labor Relations  
10 Board has long recognized seniority, promotions, and trans-  
11 fers as mandatory subjects for bargaining.<sup>6</sup> We shall not  
12 hold differently.

13 Section 9.3 proposes procedures to be used in making  
14 teacher transfers, both voluntary and involuntary. Trans-  
15 fers are, in the Montana Public Employees Collective  
16 Bargaining Act, set forth as a management right. On the  
17 other hand, a transfer is clearly a condition of employ-  
18 ment. Applying the balancing test, we must come to the  
19 conclusion that a transfer, or lack thereof, can have a  
20 great impact on the well-being of an individual teacher.  
21 The effect of a transfer or transfer procedure on the  
22 operation of the school system will be minimal.

23  
24 ARTICLE X

25 LAYOFFS

26 Layoff Procedures:

27 10.1 In the event of a decline in enrollment during  
28 a period of one school year, the Board, on or  
29 before February 15, may declare that staff  
30 reductions will be made effective at the start  
31 of the fall semester. The decline in enrollment  
32 must be so significant as to justify such

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<sup>6</sup>*U.S. Gypsum Company, 94 NLRB 112, 28 LRRM 1015 (1951)*

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staff reductions.

- 10.2 The superintendent or his designee shall notify the teaching staff, on or before February 15, that staff reductions may be necessary. The superintendent shall make available all pertinent information supporting the anticipated need to reduce staff.
- 10.3 Pupil/teacher ratio, accreditation requirements, district goals, and state department of education standards shall be used when determining the need for staff reductions.
- 10.4 When the board of education deems it necessary to reduce the certified staff, the following items will be considered in the reduction process in the order they are listed: 10-4-1/certification status; 10-4-3/seniority using the following criteria in the order listed: 10-4-3-1/years of service in the district; 10-4-3-2/length of service in current assignment; 10-4-3-3/number of years teaching experience in current area of certification; 10-4-3-4/total number of years teaching experience; 10-4-3-5/all other qualifications being substantially equal, inverse order of employment will be used as a criterion.
- 10.5 Normal attrition shall be considered prior to any staff reduction.
- 10.6 At no time shall there be reduction of staff on full-time contracts if the district continues to employ part-time certified faculty.
- 10.7 If further reductions are necessary after fulfilling the staff reduction listed above, reductions of full-time staff including administrators and other employees shall be considered.
- 10.8 The Board shall notify the faculty affected by the required reduction not later than March 15, of that academic year. The reasons for this reduction shall be clearly stated and the faculty member shall be notified of his right to appeal through the grievance procedure.
- 10.9 When positions again become available in the district, they shall first be offered to those faculty members whose contracts were cancelled last and running in inverse chronology through the list of those whose contracts were cancelled first.
- 10.10 A teacher whose employment has been terminated shall be offered a letter of intent at least 30 days prior to the date of re-employment. The faculty member shall accept or reject the position within ten days. If he accepts the position, he shall immediately conform in every way with the provisions of this Agreement.



1 10.11 The temporary separation will not affect the  
2 following accumulated benefits if the teacher  
3 is rehired within 18 months of the date of  
4 termination; accumulated temporary leave and  
status in the sick leave bank providing no  
previous reimbursement has occurred; position  
of the salary schedule; tenure status.

5 This article deals with the procedure to be used in  
6 case staff reduction is necessitated by decline in pupil  
7 enrollment. There is also a proposed procedure for re-  
8 hiring teachers laid off during a period of declining enroll-  
9 ment. Section 59-1608, R.C.M. 1947, specifically states  
10 that management has the right to hire or relieve employees  
11 from duties because of lack of work or funds. However, it  
12 can hardly be denied that having a job or not is a condition  
13 of employment and is clearly one which can cause great  
14 anxiety in any person. Applying the balancing test we can  
15 see that lack of procedure for lay-offs would have a sub-  
16 stantially greater impact on the well-being of the individual  
17 teacher than on the operation of the school district as a  
18 whole. That is, in a district with a declining enrollment  
19 and no reduction-in-force policy, more individual teachers  
20 would be likely to suffer anxiety about an impending lay-off  
21 than in a district with a predictable policy. A procedure  
22 for lay-offs and re-hires is a mandatory subject of bargaining.  
23 School districts facing the possibility of declining student  
24 enrollment would be well advised to have such a procedure in  
25 place before it is needed.

26  
27 ARTICLE XII

28 WORK YEAR

29 12.1 School Calendar

30 The school calendar is set forth in Appendix D.  
31 It reflects a work year of one hundred eighty-  
32 seven (187) days, of which 180 are pupil-  
instruction days and seven (7) are pupil-  
instruction related days.



1 Discipline Review Committee, as provided in  
2 this article.

3 13.2 Establishment of Discipline Rules and Regulations

4 The Board, in conjunction with the Association,  
5 shall promulgate rules and regulations setting  
6 forth the procedures to be utilized in disciplining,  
7 suspending or expelling students for misbehavior.  
8 Such rules and regulations shall be distributed  
9 to students, teachers, and parents at the commence-  
10 ment of each school year.

11 13.3 Pupil Exclusion From Class

12 A teacher may exclude a pupil from one class  
13 when the grossness of the offense, the persis-  
14 tence of the misbehavior, or the disruptive effect  
15 of the violation makes the continued presence  
16 of the student in the classroom intolerable. In  
17 such cases, the teacher will promptly furnish  
18 the principal full particulars of the incident  
19 in writing. The pupil shall not be returned to  
20 the class until after consultation by the  
21 principal with the teacher.

22 13.4 Discipline Committee

23 (1) A Student Discipline Review Committee shall  
24 be established consisting of two administrators,  
25 three teachers appointed by the Association, three  
26 students appointed by the student governing body,  
27 and two parents appointed by the Board, who shall  
28 study and recommend student discipline policies  
29 and procedures to the Board. Said Student  
30 Discipline Review Committee shall determine all  
31 cases involving transfer, removal, suspension,  
32 or expulsion of students for disciplinary reasons.  
33 [Emphasis added] All decisions of the Student  
34 Discipline Review Committee on individual dis-  
35 cipline cases shall be final except that appeals  
36 may be taken to the Board by the student involved.  
37 No member of the Student Discipline Review Committee  
38 shall sit on any case in which he/she is personally  
39 involved. Any transfers of students for dis-  
40 ciplinary reasons shall be with the consent of  
41 the teacher to whom the student is transferred.

42 The subject matter of the sections of Article XIII are  
43 sufficiently intertwined that they must be dealt with as a  
44 whole rather than individually. Basically, this is a proposal  
45 which, if adopted, would set up a school Discipline Review  
46 Committee. These proposals prescribe the membership and  
47 the duties of the committee. The proposals give the committee  
48 the authority to transfer, remove, suspend, or expel students.  
49 Further, they give this committee the authority to direct

1 the board to relieve the teacher of responsibility toward  
2 specific students.

3 This particular proposal infringes upon the school board's  
4 rights and authority to manage the school. The teachers propose  
5 a Discipline Review Committee composed of non-school board  
6 members which has the authority to make final decisions and  
7 to direct board actions. The teachers are asking that the  
8 board give up authority which is rightfully theirs.

9 This proposal on student discipline is a permissive,  
10 not a mandatory, subject of bargaining. This determination is  
11 confined to this specific proposal; there may be other proposals  
12 which would be considered mandatory and not permissive.

13  
14 ARTICLE XVIII

15 EFFECT OF AGREEMENT

16 18.1 School Board Policy

17 This Agreement constitutes Board policy for the  
18 term of said Agreement, and the Board shall carry  
19 out the commitments contained herein and give  
20 them full force and effect as Board policy.

21 18.2 Changes in Agreement

22 During its term, this Agreement may be altered,  
23 changed, added to, deleted from, or modified only  
24 through the voluntary, mutual consent of the parties  
25 in written and signed amendment to this Agreement.

26 18.3 Compliance of Judicial Contract

27 Any individual contract (Appendix C) between the  
28 Board and an individual teacher, heretofore or  
29 hereafter executed, shall be subject to and  
30 consistent with the terms and conditions of this  
31 Agreement. If an individual contract contains  
32 any language inconsistent with this Agreement,  
this Agreement, during its duration, shall be  
controlling.

18.4 Savings Clause

If any provision of this Agreement or any appli-  
cation thereof to any teacher is finally held to  
be contrary to law, then such provision or  
application shall be deemed invalid, to the extent  
required by such decision, but all other provisions  
or applications shall continue in full force

1 and effect. If such provisions exist which are  
2 so held, at the request of either party, negoti-  
3 ations shall immediately commence in order to  
4 alter said section(s) providing the benefit(s)  
5 according to the intent of the parties.

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14 18.5 Maintenance of Standards

15 All existing district policies involving terms  
16 and conditions of professional service, matters  
17 relating directly to the Board-teacher relationship,  
18 and other terms of employment not specifically  
19 referred to in this Agreement shall be maintained  
20 at not less than the highest minimum standards  
21 in effect in the district at the time this Agree-  
22 ment is signed, provided that such conditions  
23 shall be improved for the benefit of teachers  
24 as required by the express provisions of this  
25 Agreement.

26  
27 This Agreement shall not be interpreted or  
28 applied to deprive teachers of professional  
29 advantages heretofore enjoyed unless expressly  
30 stated herein.

31  
32 18.6 Nondiscrimination Clause

The provisions of this Agreement shall be applied  
without regard to race, creed, religion, color,  
national origin, age, sex, marital status,  
domicile, residence, or family relationship to  
another teacher, supervisor, or Board member.

18.7 Duplication and Distribution

Copies of this Agreement shall be printed at  
the expense of the Board within 30 days after  
the Agreement is signed. Copies shall be  
presented to all teachers now employed, hereafter  
employed, or considered for employment by the  
Board. The Association shall be provided \_\_\_\_\_  
copies of this Agreement. Any teacher who does  
not receive a copy of this Agreement from the Board  
or its agents, shall not be disciplined, reprimanded,  
suspended, terminated, dismissed, or otherwise  
adversely affected in employment status  
because of failure to comply with the provision  
of which there was no actual knowledge at the  
time of the alleged infraction.

Section 18.1 is confusing. Boards of trustees adopt  
policy unilaterally and may change that policy at will. At  
the same time, they are legally bound by a collective bargaining  
contract which they may not change. Since the contract is

1 of a higher order than policy, the proposal appears to be  
2 meaningless.

3 Section 18.2 states a legal truism. A contract cannot  
4 be changed except by agreement of the parties signatory to  
5 the contract.

6 Section 18.3. This Board continues to hold, as it has  
7 in previous cases, that an individual contract must agree  
8 with the master Agreement. This does not need to be bargained.

9 Section 18.4 is a proposal for a savings clause to  
10 protect the body of the Agreement if an individual section  
11 should prove to be illegal. It also contains a provision for  
12 re-opening negotiations on sections found to be illegal.  
13 The proposal here should be equally beneficial to the two  
14 parties and should not have to be bargained.

15 Section 18.5 deals with maintenance of standards of  
16 working conditions embodied in school board policy. By  
17 inference it incorporates Board policy into the contract.  
18 Since the proposal ultimately addresses itself to working  
19 conditions, this proposal is a mandatory subject of bargaining.

20 Section 18.6, a nondiscrimination clause, proposes that  
21 the agreement be applied without regard to race, creed, age,  
22 sex, domicile, residence, family relationship to another  
23 teacher, supervisor, or Board member. This proposal is a  
24 mixture of the mandatory and the illegal. The phrase "family  
25 relationship to another teacher, supervisor, or Board member"  
26 may violate Section 59-519, R.C.M. 1947, which specifically  
27 prohibits school trustees from appointing relatives to any  
28 position of trust or involvement. The Board may not bargain  
29 to violate the law. On the other hand, this Board has  
30 previously held that residence is a mandatory subject of  
31 bargaining.

32 Workers are protected against discrimination for race,

1 creed, age, and sex by the Montana Human Rights Act. We will  
2 not rule on the bargainability of Montana statute.

3 In Section 18.7, the teachers propose to have the Board  
4 pay for the printing of the Agreement. It also charges  
5 the Board with distributing the Agreement. It excuses any  
6 teacher from discipline for violating the Agreement if the  
7 teacher did not receive a copy of the contract from the  
8 Board.

9 This is a fairly standard proposal from a union and must  
10 be bargained.

11  
12 CONCLUSION OF LAW

13 The allegation that the Board of Trustees of Florence-  
14 Carlton School District No. 15-6, has engaged in an unfair  
15 labor practice within the meaning of Sections 59-1605 (1)(e),  
16 R.C.M. 1947, by refusing to bargain in good faith with an  
17 exclusive representative, has been sustained.

18  
19 RECOMMENDED ORDER

20 It is hereby ordered that the Board of Trustees of  
21 Florence-Carlton School District 15-6 cease and desist from  
22 refusing to negotiate on those items named herein which are  
23 found to be mandatory subjects of bargaining.

24 Dated this 24th day of February, 1978.

25  
26   
27 LINDA SKAAR  
28 Hearing Examiner  
29  
30  
31  
32

1 CERTIFICATE OF MAILING

2 I, Elaine Schillinger, hereby certify and state that I  
3 did on the 24th day of February, 1978, mail a copy of the  
4 above FINDINGS OF FACT, CONCLUSION OF LAW AND RECOMMENDED  
5 ORDER, to the following people:

6  
7 Dr. William Willavize  
8 Superintendent  
9 Florence-Carlton School District No. 15-6  
10 Florence, Montana 59833

11  
12 Michael Schestedt  
13 Office of the County Attorney  
14 Missoula County Courthouse  
15 Missoula, Montana 59801

16  
17 Judith Shea  
18 President  
19 Florence-Carlton MEA  
20 3819 Stephens  
21 Missoula, Montana 59801

22  
23 Philip Campbell  
24 UniServ Director  
25 3819 Stephens  
26 Missoula, Montana 59801

27  
28 Emilie Loring  
29 Hilley & Loring  
30 1713 Tenth Avenue South  
31 Great Falls, Montana 59405

32  
Maurice Hickey  
Executive Director  
Montana Education Association  
1232 East Sixth Avenue  
Helena, Montana 59601

  
Elaine Schillinger