BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF ULP #19- 1977:

MONTANA EDUCATION ASSOCIATION,

Complainant,

-vs-

SCHOOL DISTRICT #87, ROCKY BOY ROUTE, BOX ELDER, MONTANA,

Defendant.

FINAL ORDER

* *

A Proposed Order was issued in the above-entitled matter by Rick D'Hooge, Hearing Examiner, on March 18, 1978. Exceptions to the Proposed Order were submitted on April 5, 1978 by the Defendant.

Oral argument was heard on the matter before the Board of Personnel Appeals on May 2, 1978. After reviewing the record and considering the briefs, the Board makes the following Order:

1. IT IS ORDERED that the Exceptions to the Order are denied.

2. IT IS ORDERED, the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Examiner are hereby adopted as the Final Order of this Board.

Dated this 17th day of July, 1978.

BOARD OF PERSONNEL APPEALS

By Brent Cromley
Brent Cromley,
Chairman

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF ULP #1977: MONTANA EDUCATION ASSOCIATION, Complainant, -vs- SCHOOL DISTRICT #87 ROCKY BOY ROUTE, BOX ELDER, MONTANA Defendant.	PROPOSED ORDER

****

I. INTRODUCTION

The question before Rick D'Hooge, Hearings Examiner for the Board of Personnel Appeals, in Unfair Labor Practice #1977 is whether or not Carolyn Velk's and/or Charles Nau's contracts were not renewed by Rocky Boy School District #87 because of their concerted union activities as defined in Title 59, Chapter 16, R.C.M., 1947. A hearing in the above entitled matter was held at the Administration Building of the school district on September 20, 1977.

I wish to divide this unfair labor practice into the major areas of findings of fact, discussion, conclusion of law, remedies, and proposed order. The findings of fact will be divided into the areas of general findings, Velk findings, and Nau findings.

Because the Board of Personnel Appeals has very little case history, I will be citing a few federal statutes and cases for guidance in the application of Montana's collective bargaining act, Title 59, Chapter 16, R.C.M. 1947 (ACT). The Montana Supreme Court in State Department of Highways vs Public Employees Craft Council, 165 Mont. 249, 529 P 2d 785 at 787 (1974) approved this principal by these citings:

> "When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after federal statutes."

> [Citing cases] Although the cases which have interpreted the italicized words involved private employees, the act before us incorporates the exact language, consisting of 16 words, found in the earlier statutes, and it is unlikely that the same words would have been repeated without any qualification in a later statute in the absence of an intent that they be given the construction previously adopted by the courts.
>
> "We think similar standards of judicial construction apply in the present case. For example, section 19-102, R.C.M., 1947, provides:
>
> "Words and phrases used in the codes or other statutes of Montana are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, as amended, are to be construed according to such peculiar and appropriate meaning or definition." (Emphasis added).

After a thorough review of the briefs, exhibits, conflicting testimony and the demeanor of the witnesses, I set forth the following:

II. FINDINGS OF FACT

A. General

1. The Hearings Examiner is taking Administrative note of ULP #13-76, Rocky Boy Education Association (RBEA) vs Rocky Boy School District #87, as requested by MEA. Tr120. RBEA...

> "...has charged that Defendant has interfered with the administration of a labor organization, has discriminated in regard to tenure of employment to discourage membership in a labor organization, and has refused to bargain collectively in good faith with Complainant." ULP #1376, Recommended Order, Page 1, Lines 1216, December 14, 1976.

2. There is no Master Labor Agreement governing school administration/teachers relationships for the 1976-77 school year. The RBEA was trying to negotiate a retroactive contract for the 1976-77 school year. There is no contract at Rocky Boy for the 1977-78 school year. Tr5,24.

3. On February 7, 1977, Charles Nau, RBEA's Chief Negotiator (Tr23,42,62), contacted Harold Gray, the School Board's chief negotiator (Tr31,42,104), to arrange the first negotiation meeting.

4. Carolyn Velk, Bob Veithenheimer, Helen Ford, Charles Nau, and Mark Poor, teachers, (Tr43) met with Harold Gray, Dorothy Small

and Alfred Nault, School Board representatives, to consider negotiating a Master Agreement. At the February 8, 1977 meeting, Mr. Gray told RBEA that the School District was under no obligation to negotiate because decision in ULP #1376 was being appealed. Gray also added that the School Board would negotiate if RBEA (a) dropped MEA affiliation, or (b) formed a different type of teachers organization, or (c) dropped the evaluation charges in ULP #13-76. If RBEA dropped ULP #13-76, RBEA was to advise the Board of Personnel Appeals of such and write a letter of apology to the School Board for filing the the charges. Tr43,44.

5. During class on February 9, 1977, Alfred Nault appeared at the classroom of Mr. Nau and requested that he sign a copy of the "minutes" for the meeting of February 8, 1977. Tr45. Mr. Nau complained about the "minutes" because they demonstrated only one side of the meeting. Mr. Nault quickly smoothed over Mr. Nau's complaint. Mr. Nau made some changes in the "minutes" and signed them. Tr47. Mr. Nault did not leave a copy of the "minutes" with Mr. Nau. Tr48. During class, Mr. Nault made the same request of Ms. Velk. Tr30.

6. On February 10, 1977, Pat Scott, a secretary, informed Nau of a news article being produced from the "minutes" of the February 8, 1977 meeting. Tr46,64.

7. In the lunchroom on February 11, 1977, Velk, Nau and Dorothy Small had a few sharp words over the proposed news article. Dorothy Small, Vice Chairman of the School Board, is attributed with saying..."if we would have withdrawn our evaluation charges... there wouldn't be a lot of problem" and if you do not..."we'll continue to fight you...and...we have the money to fight you all the way to the Supreme Court, if necessary." Tr48(1724).

Later, Superintendent Crain called Nau to have a meeting with Small and himself. Nau reviewed the proposed news article and

commented that it was untrue, libelous and slanderous. Tr46, 48, 49, 65. Crain and Nau then had a meeting with Velk concerning the proposed news article. Tr64.

8. On February 13, 1977, Gray had a few beers with Nau, Velk and _____. Nau told Gray why they were so discontented with the proposed news artical. Tr46.

9. On February 14, 1977, Gray appeared at an MEA meeting and assured them there would be no news article. Tr49. That evening, The Havre Daily News carried a news article which was highly critical of the Montana Education Association's (MEA) staff, attorneys and RBEA's past president, Richard Leetang. MEA Exhibit #1 states in part:

> "...ROCKY BOY--Five teachers at the Rocky Boy School have complained of failure of those hired to represent them in a disagreement with the school trustees to provide them access to legal documents pertinent to the case.
>
> "...Gray since has written Mrs. Loring supplying her with a copy of the official minutes of the February 8 meeting which the five signed. He said: 'This meeting last night resulted because the teachers who are members of RBEA want to negotiate a new contract for the coming year.' We would like to negotiate but are reluctant because of their lack of information as to the nature of the unfair labor charges your office and the State MEA office filed against the Rocky Boy School..."

10. Before February 17, 1977; Nau, Velk, Viethenheimer and Ford, RBEA's Negotiations Committee, met with Sean Matthews, MEA Uniserve Director, to draft a Letter to the Editor in reply to the news article of February 14, 1977. Tr7,49,101. The Letter to the Editor was highly critical of the School Board and stated in part:

> "...With regard to Harold E. Gray's statement 'we would like to negotiate a new contract for the coming year...' Gray actually said that the board would not negotiate with us unless the teachers did one of the following: 1. Withdraw from M.E.A. and form a new group for the teachers. 2. Negotiate separately with individual teachers for contracts. 3. Have the R.B.E.A. contact Mr. Jerry Painter and withdraw the unfair labor practice charge on evaluation and send the board of Trustees a letter of apology.
>
> "...It was also stated that if the teachers did not choose one of the above the board would continue fighting this charge all the way to the Supreme Court

if necessary. This is an interesting point as Dorothy Small, Vice Chairman, stated: 'That they have the kind of money necessary to fight the Rocky Boy teachers to the Supreme Court.' At Rocky Boy we have insufficient supplies to provide for the proper education of the students.

"What has hapened to the hundreds of thousands of dollars granted by the taxpayers of this state and country for the school when our students neither have the paper to write on nor the pencils to write with had they had the paper..." MEA Exhibit #2.

11. Gray went into Nau's classroom on February 10, 1977, raising cane and wondering "...where we got off putting such newspaper articles in the paper..." Tr50 (11-15). The same day Velk wrote a letter to Leona Mitchell, School Board Chairman, which states in part:

"...Please be advised that Mr. Harold Gray has repeatedly burst into classrooms while your teachers were trying to teach, interrupted classes, and demanded information on association matters. This type of outburst is extremely detrimental to the students and the educational process here at Rocky Boy. We also understand that it is in violation of at least two state statutes..." MEA Exhibit #4.

A short meeting, called by Gray to discuss the newspaper article, was held between Velk, Viethenheimer, Ford, Nau, Matthews and Mitchel, Crain, and others. MEA Exhibit #5. The meeting ended abruptly when Gray tried to accuse the teachers with calling the meeting and leaving the classrooms. Tr51,52,67.

On February 18, 1977, Gray wrote to RBEA's negotiating committee (Velk, Nau, Viethenheimer, Ford) which states in part:

"...On February 8, 1977 I told you in the presence of Dorothy Small and Alfred Nault that because of charges against us we were under no obligation to negotiate, and, that because you were all members of MEA we could not negotiate separately because MEA had been recognized as the exclusive bargaining agent. We were therefore bound to negotiate with MEA.

The other things I told you I clearly stated as being your choice. Specifically that because you as a group of teachers wanting to get negotiations under way you could choose to join another union, drop the charges, or choose to negotiate as individuals and not as members of any bargaining unit. These were my suggestions as the way out of the difficulty as we viewed it at that time. Therefore, I must vigorously disagree with you when you put in the paper: ..." MEA Exhitit #3.

12. A negotiating meeting was to take place on February 28, 1977. At the begining of the meeting, Gray told the RBEA that they would not negotiate because of the ULP and the new Tribal Resolution. Tr32,54,68,85,86. The Tribal Resolution reads in part:

> "...WHEREAS, the ChippewaCree Tribal Business Committee has heard and duly considered the evidence that the Montana Education Association and its affiliate the Rocky Boy Education Association have and continue to denigrate the good name and effort of the Rocky Boy School, its Board of Trustees and Administrators; and,
>
> "WHEREAS, the ChippewaCree Tribal Business Committee considers these acts of denigration to be a clear and blatant attempt to subvert the right of Tribal members to control the quality of education for their children, and, as a challenge of our peoples right to make laws and be ruled by them according to our customs and beliefs; and,
>
> "WHEREAS, the ChippewaCree Tribal Business Committee now chooses to exercise its power as it pertains to Trade and Teacher Unions operating on our Reservation.
>
> "NOW THEREFORE BE IT RESOLVED, that all trade and teacher unions are prohibited from operating on the Rocky Boy's Reservation until such time as Tribal Laws are enacted governing their activities; and,
>
> "BE IT FURTHER RESOLVED, that this decision is not to be construed as prohibiting the rights of Tribal Members and others to meet and ask for pay raises, fringe benefits, sick leave, vacation time, health and accident insurance, and,
>
> "BE IT FURTHER RESOLVED, that Montana Laws as they pertain to trade and Teacher Unions are hereby declared null and void, but in so doing we declare our willingness to meet with officials of Montana State Government to work out matters of mutual concern and benefit to all people..." MEA Exhibit #14.

13. On March 14, 1977, a meeting was held between Sean Matthews, Charles Nau, Bob Viethenheiner, Carolyn Velk, and School Board representatives Dorothy Small, Allen Crain, Harold Gray, Walter "Moose" Denny, Mr. Sangry, Alfred Nault, Lydia Sutherland concerning the questions that were asked by the RBEA in the newspaper. MEA Exhibit #9; Tr15,69. The School Board made a motion to bar Sean Matthews from the meeting. The motion passed. Mr. Matthews was asked to leave or the School Board would call the Tribal Police to remove him from the meeting. The teachers argued that if this was a School Board/Teachers meeting only, then Mr. Gray should also leave. Gray and Matthews left the meeting.

Tr15,56,84,85,89,90. During the meeting, Mr. Crain questioned the teachers about the first two questions in MEA Exhibit #6 (Tr16,30,70) which states in part:

> "TO: Carolyn Velk, Bob Vietenheimer, Helen Ford, Charles Nau
>
> FROM: Leona Mitchell, Chairperson, Rocky Boy School Board
>
> SUBJECT: Questions Listed Below
>
> We are very concerned about the letter to the editor which was published in the Havre Daily News on February 17, 1977. It is our concern that you have unjustly attacked the Rocky Boy School system without just and proper cause. We would appreciate your response to these questions by 5:00 p.m. today, February 28th.
>
> 1. Why did you choose to question the spending of hundreds of thousands of dollars of Montana taxpayers and U.S. taxpayers money in your February 17th letter to the editor of Havre Daily News?
>
> 2. Why didn't you ask the school board for audits or financial reports covering the expenditure of public money, if you were so concerned?..."

Mr. Denny, School Board member, was reported as asking the teachers why they wanted MEA. Tr16,17,33,103. The Record sets forth the following in part:

> "RICE [School Board's Attorney]: Okay. At the time of that meeting, were there any, uh, negative comments or criticisms made of the MEA involvement in this matter or you involvement with them?
> NAU: They [The School Board] were interested, at that time, why we [the teachers, RBEA] wanted Sean out here and, they were also interested at that time why we were affiliated with MEA and why we needed them. They felt that there should be a common trust and, you be good to us, we'll be good to you type of feeling among, you know, between the two parties and, uh, et cetera, you know." Tr70 (12-20).

Lydia Sutherland is generally attributed with initiating a School Board Policy of limiting the freedom of the press. Tr20, 34,117,118. The Policy is in part:

> "DENNY: ...We [The School Board] don't know about them [Letter to the Editor, News Releases] until we see them in the paper so we discussed it and we made it a policy that any correspondence or news articles that were to appear in the paper were to have approval of the School Board prior to going out..." Tr112 (19-26).

14. On April 1, 1977, Velk and Nau tried to continue negotiations by writing a letter to Mr. Gray which states:

"April 1, 1977

To: Harold Gray and Negotiating Team
From: R.B.E.A. Negotiating Team
Subject: Negotiations--April 6th and 7th.

Due to prior commitments of the R.B.E.A. Negotiating Team on April 7th, we will be unable to meet to negotiate on that day. We will be glad, however, to negotiate on April 5th and 6th at 7:00 p.m. in the administration building.

S/_____
President of R.B.E.A.

S/_____
Chief Negotiator

Carolyn & Charlie:

I am confused as to who we are to negotiate with so I've referred this matter to Supt. Crain for clarification. I don't know what to do in view of Tribal Resolution #14-77.

S/Signed in Cree by Harold Gray

4/6/77
11:30 a.m."

MEA Exhibit #20.

15. The School Board met on April 12, 1977 and voted not to offer a new contract to Velk, Nau and others for the next school year. The School Board's minutes for April 12, 1977, state in part:

"Present: School Board members Sharon Watson, Lydia Sutherland, Minnie Watson, Walter Denny. Others Dennis LeVegue, Leon Stansfield, John Mitchell, Ivan Raining Bird, Duane Jeanotte, Dog Rehder, and Sylvia Ryan.

"...Lydia Sutherland moved that Walter Denny be chairman of the School Board. Sharon Watson seconded the motion. Motion carried.

"...Minnie Watson requested to withdraw from the negotiation team.

"...Lydia Sutherland made a motion to send a letter of non-renewal to Carolyn Velk. Minnie Watson seconded the motion. Motion carried.

"Walter Denny made a motion to send letter of non-renewal to Charles Nau. Sharon Watson seconded the motion. Motion carried.

"...Sharon Watson recommended to go along with Harold Gray's request to be removed as chief negotiator.

"Lydia Sutherland made a motion to send a letter to each one of the Indian certified teachers to set up a meeting with the School Board for negotiations. Sharon Watson seconded the motion. Motion carried..." District #87 Exhibit #8.

A letter from the School Board to the Indian teachers was sent in which the School Board requested the Indian teachers to negotiate. Tr22,36.

16. Before April 26, 1977, Velk and Nau requested the reasons for nonrenewal of their contracts. The School Board's letters in reply state in part:

"...This is in reference to your letter of April 13, 1977, which was received on Friday, April 27, 1977, requesting that the School Board of District #87 Rocky Boys' Reservation state reasons of non-renewal of your teaching contract for school year 1977 and 1978.

"The School Board has reviewed your past services, and has determined that it would prefer to consider, for this position, other candidates.

Sincerely,

S/_____
Walter Ray Denny
School Board Trustees"

MEA Exhibit #15, 18.

17. When Mr. Stansfield, Principal, was asked for the reasons for nonrenewal of Velk's and Nau's contracts, the Record sets forth the following in part:

"LORING [MEA's Attorney]: Do you recall any discussion on the part of the Board as to the reasons for nonrenewal? Normally these decisions, there are a lot of factors involved as we all know, and whether a teacher is satisfactory or not; but, uh, do you recall any discussion of areas where they may have been lacking?
STANSFIELD: Yes, I do.
LORING: Uh, would you explain to us where the School Board felt that there were problems:
STANSFIELD: Uh, I don't feel at liberty to divulge the things that were, uh, discussed by the Board unless I'm required to by the Hearings Examiner.
D'HOOGE: In order for a Hearings Examiner to rule on this type of matter, we would like as complete a record possible. I do not know the ins and outs of requiring you to answer it. Would counsel wish to say anything about it?
LORING: Uh, I've called him as an adverse witness and I suggest that the School District's counsel address the matter.
RICE: I guess the only thing I can say about it is that I

think that Mr. Crain is wondering whether he can probably fairly represent what was in the minds or thoughts of the School Board.
LORING: I asked - I'm not asking what was in the minds or thoughts. I'm asking what was said.
RICE: Okay. I guess then basically he would probably - I think what we have is a conflict here probably between the, uh, Section 75-6105.1, which allows a non-tenured teacher to request a statement of reasons for non-renewal, as opposed to this matter which deals with the question of whether or not they were dismissed for union activities; and so it becomes a question of the School Board being required to, uh, defend their action and, of course, state reasons which, uh, would possibly or I assume by the petitioners, not substantiate the non-renewal which actually is not required under the non-tenured teacher statute. Just that my comment is that, you know, there is no need for reasons as such for dismissal although there is a request that statement can be made. And so, I have no particular feelings about this. I don't think that Mr. Stansfield is going to, uh, indicate anything other than what he heard at that time and Board members themselves will probably come to indicate what they said also. And so, I have no strong objection to his making those comments as long as the Hearing Examiner appreciates our feelings about that which I think will be probably some substance of our brief in response in this matter anyway.
D'HOOGE: What was the statute section?
RICE: 75-6501.1, sub 2 in parenthesis, R.C.M. 1947.
D'HOOGE: We basically, I am of the feeling that, uh, in order for me to adequately weigh this case, I can only do it if I have a complete record. Uh, then I would request that you answer it as you see fit.
STANSFIELD: Well, my feeling is, I'm willing to discuss, you know, uh, I don't, I'm not intending to hide anything that would have a material effect on the case but at the same time I don't wish to implicate the Board in anything that they might have discussed at that meeting which could lead to some further complication of this matter. Uh, I could answer the question as far as their discussing, uh, the teacher's association activities and that was that there was absolutely nothing said about their association activities at that meeting.
LORING: Was anything said about the article in the paper:
STANSFIELD: I don't recall that either. I don't recall anything that was discussed about those matters which are really the substance of the case." Tr76 Line 19 to Tr78 Line 25.

When Mr. Denny was asked for the reasons for nonrenewal of contracts, he states the following in part:

"RICE: And were your reasons other than any involvment [sic] they had with the MEA or this newspaper matter or whatever occurred before?
DENNY: Yes, uhhuh.
RICE: And did you feel that, as a board member, they were valid reasons?
DENNY: Yes." Tr105(13-18). And,

"LORING: Have, uh, have you ever visited Mr. Velk's, uh, Mr. Nau's classroom?
DENNY: No.
LORING: At the School Board meeting, did the, uh, the meeting

of April 12th, did the School Board members review the evaluation that, uh, had been made?
DENNY: Yes, I'm sure they did that.
LORING: Did you, uh, both, the evaluations of both of these people, the principal recommended, uh, that they be, uh, their contracts be renewed, was there a discussion at the School Board meeting of why you decided not to accept his resig or his recommendations?
DENNY: Yes, there were.
LORING: You made the motion to not renew Mr. Nau. Uh, barely a month earlier you hadn't even known who he was, and you'd never visited his classroom, what was the basis on which you made the motion to nonrenew?
RICE: I'd object to that question upon the grounds that it goes into privileged matters which I think by School Board law are not to be dealt with in this matter, in this hearing. There's no duty upon the School Board to divulge those matters other than that the statement was submitted, which it was; and the law does not require details as to nontenured teachers renewal or nonrenewal.
LORING: I think it's very relevant to this proceeding."
Tr108, Line 22 to Tr109, Line 6.
"...D'HOOGE: Back on the record. I believe that the question is in order since it was not an executive session and if there is major objections to it, I'd like to see that point briefed in the briefs.
LORING: Uh, Mr. Denny, my question was, you made the motion to not renew Mr. Nau. Yet, a month before you hadn't visited his classroom. What was the basis for your motion not to renew?
DENNY: I guess the only thing that we discussed at this particular meeting was the School Board felt and I felt, went along with their feelings, is that they wanted to review other applicants for this particular position. And that's on that basis that I made my motion on it." Tr111 Line 26 to Tr112 Line 11.

18. The School Board requested either a retraction of the letter to the editor or the evidence in support of it. MEA Exhibits #6,7, 8,10,12.

19. MEA Exhibit #22 is a letter from Sean Matthews to Mr. Crain requesting a copy of the School's budget. Mr. Matthews had repeatedly requested the budgetary information and received no reply. Tr82,83.

B. Velk Findings

1. Velk was a first grade teacher at Rocky Boy School District #87 for the school years of 1975-76 and 1976-77. Tr2,3,25.

2. Velk has a Bachelor of Arts degree from Northern Montana College and is certified to teach kindergarten through the eighth grade. Rocky Boy School was her first employment as a teacher. Tr3.

3. For the 1976-77 school year, Velk was president of RBEA. Because of the prior experience of Richard Leetang, former president of RBEA, Velk did not want the presidency of RBEA. Velk informed Mr. Crain that if she accepted the presidency, she would lose her job at the end of the school year. Tr4,26. A letter written to Velk by Leona Mitchell, School Board Chairman, and Dorothy Small, School Board Vice Chairman, states the following in part:

"February 28, 1977

...

1. Do you speak for yourself or are you speaking for all teachers at the school? Please specify who you represent?

...

6. Verbal reports have reached us that you are making comments to the effect that you and other MEA negotiators will be fired at the end of the year because of your union activities. Are you making such comments? If so, why have you reached this conclusion?..."

MEA Exhibit #5.

4. Velk was a member of the RBEA's negotiating team both years of her employment. The first year, Velk only kept the notes for the negotiating team. Tr5,27.

5. Velk was one of the authors and signed the Letter to the Editor. MEA Exhibit 2, Tr7.

6. Mr. Stansfield, Principal, talked to Velk about a different labor organization called National Association of Professiona Educators (NAPE). Tr14,75,92. NAPE is a labor organization which operates on the principles of employment benefits being gained by individualized merits not collective merits such as MEA. Tr72,67. Stansfield also talked to Velk about individual bargaining and being paid on individual merits. Tr115,116.

7. Velk was evaluated by Mr. Stansfield on December 9, 1976 and on March 10, 1977. The evaluations were reviewed by the School Board on April 12, 1977 before they make their decision not to renew Velk's contract. Tr98,108. The evaluations reflect the following in part:

Ratings	December 9, 1976 Number of Items Rated	March 10, 1977 Number of Items Rated
Poor	0	6
Fair	0	0
Average	0	3
Good	8	21
Excellent	70	46

Some of the items and the comments on those items:

December 9, 1976: None
March 10, 1977:

"...
JOB RESPONSIBILITY ATTRIBUTES:
THE TEACHER EXHIBITS THE FOLLOWING RESPONSIBILITY ATTRIBUTES:

...

11. Displays a willingness to volunteer for off-schooltime activities if possible, in order to alleviate the necessity of an assignment system.

...

[Comment:] 11. Carolyn took a risk when she accepted the presidency of RBEAa job no one else seemed to wantand she has made some mistakes it appears, but I do not think it is her intent to hurt the school in the long run.

PERSONAL ATTRIBUTES:
THE TEACHER EXHIBITS THE FOLLOWING PERSONAL ATTRIBUTES:

...

7. Exhibits and openmindedness toward the community, local concerns, and the school:
a. does not make judgements without gathering, interpreting, and weighing out all the facts that are gathered from all involved
b. is not prejudiced in forming opinions, ideas, argumen and/or judgements.
c. does not present a onesided view of things

...

[Comment:] 7. The letter written to the editor of The Havre Daily News and signed by Carolyn and three other teachers may not have been the best way to settle an argument. At least it was questionable because it affected negatively the image of the entire school and administration when in fact the argument was with a single individual, it is believed. However, this single mistake should not be considered as grounds for nonrenewal.

...

PROFESSIONAL ATTRIBUTES:
THE TEACHER EXHIBITS THE FOLLOWING PROFESSIONAL ATTRIBUTES:

...

4. Practices professional ethics--keeps matters private, confidential; personal or home problems should not interfere with job--See note

...

7. Respects the opinions of others, does not show disrespect by making negative comments--See note

...

13. Displays loyality to the school and its objectives;
    a. willing to defend its objectives and philosophies
    b. suggestions for improvement are brought to coordinators and principal
    c. does not criticize the school program or staff in the community without first knowing the information is correct, and then going through the proper channels

...

15. Exhibits a willingness to direct criticism to the appropriate people for the improvement of the school through thes channels:

    ...

    c. superintendent
    d. school board
    e. community

[Comments:] 7 & 4 13 15c,d,e refer to PERSONAL ATTRIBUTES #7 NOTE.

Summary Comment: March 31, 1977

Carolyn Velk is one of the hardest working teachers I have known. I will feel a measure of success with her (as a teacher under my supervision) if I am able to channel her energies and enthusiasm into the highest priority areas of teaching. Given constructive supervision and tactful consideration she could become a very productive professional. I recommend renewal of contract for the succeeding school year.

S/_____
Principal"

MEA Exhibit #13, Tr21.

8. MEA Exhibit #16 is a very good letter of recommendation, dated June 6, 1976, for Carolyn Velk from James L. Davis, former Principal of Rocky Boy School.

9. Carolyn Velk was a primary contact for Sean Matthews, MEA's Uniserv Director. Tr88,89.

10. The School Board and Velk had a good relationship before February 14, 1977. Tr27.

11. At the April 12, 1977 School Board meeting, the School Board did not discuss Velk's teaching abilities. The Record states the following in part:

"LORING: In regard to the nonrenewal of Carolyn Velk, was there and [sic] discussion, uh, other than the same thing that

you said about Mr. Nau that you wanted to interview other people. Was there any discussion of her teaching, uh, abilities or any particular problems that you had with her? DENNY: No." Tr113(7-12)

12. Volk is now employed as a second and third grade teacher in Big Sandy, Montana. She is currently earning $9300 annually. During the summer of 1977, Volk incurred $1100 in moving expenses from Havre to Big Sandy. Tr24.

C. Nau Findings

1. Charles Nau was a junior high school teacher at the Rocky Boy School for the 197677 school year. Tr41.

2. Nau has a degree from Western Montana College. After college, Mr. Nau taught for one year at Willow Creek, Montana, and then at Rocky Boy, Montana. Tr41,42.

3. Nau was elected Chief Negotiator of RBEA. Nau testified that he had a fear of losing his teaching job because he was Chief Negotiator. Tr27,28,42,62.

4. Nau was one of the authors and signed the Letter to the Editor. MEA Exhibit #2, Tr49.

5. Stansfield evaluated Nau from November 23, to December 20, 1977 and on March 28, 1977. The evaluations were reviewed by the School Board on April 12, 1977 before they made their decision not to renew Nau's contract. Tr98,100. The evaluations reflect the following in part:

Ratings	November 23, 1976 to December 20, 1976 Number of Items Rated	March 28, 1977 Number of Items Rated
Poor	0	3
Fair	0	0
Average	0	3
Good	2	16
Excellent	76	54

Some of the items and the comments to those items:

First Evaluation: None
March 28, 1977:

"...

PERSONAL ATTRIBUTES:
THE TEACHER EXHIBITS THE FOLLOWING PERSONAL ATTRIBUTES:

...

7. Exhibits and openmindedness toward the community, local concerns, and the school:
   a. does not make judgements without gathering interpreting, and weighing out all the facts that are gathered from all involved
   b. is not prejudiced in forming opinions, ideas, arguments, and/or judgements.
   c. does not present a onesided view of things

...

[Comment:] 7. This relates to a letter to the editor of The Havre Daily News which reflected negatively upon the school and its administration.

...

PROFESSIONAL ATTRIBUTES:
THE TEACHER EXHIBITS THE FOLLOWING PROFESSIONAL ATTRIBUTES:

...

4. Practices professional ethics--keeps matters private, confidential; personal or home problems should not interfere with job

...

7. Respects the opinions of others, does not show disrespect by making negative comments

...

13. Displays loyality to the school and its objectives:

...

   c. does not criticize the school program or staff in the community without first knowing the information is correct, and then going through the proper channels

[Comment:] 4 7 13c refers to comment under 'Personal Attributes' #7. It appears that all regular channels of the school administration including grievance procedure should have been exhausted prior to making pulic issue of teacher negotiations problems.

[Comment:] 14 Mr. Nau has shown a great deal of initiative by developing a competency-based curriculum for his classes for next year. He is continuing on this project hoping to complete it for both 7th and 8th grades by the end of the year.

Summary Comment: Mr. Nau's work has been of a high level considering that this is his first year with the district and his second year of teaching. His efforts in discipline, communication with administration and curriculum have been outstanding. He is respected by students and, I believe, by parents. I have no reservation in recommending Charles for renewal of contract for 1977-78.

S/_____
PRINCIPAL

Nau's reply:

I feel that my professional ethics have been unfairly judged

because of a article not having to do with my teaching or involvement with the kids. This is shown by the low marks given on page 4 questions 4, 7, and 13."--MEA Exhibit #17; Tr58,59.

6. MEA's Exhibit #19 is the Teacher of the Year Award which was awarded to Mr. Nau by the Junior High Students. Tr61.

7. Mr. Nau testified that he and Mr. Stansfield had had several discussions on individualized contract negotiation. Tr70,71,72,73. The Record states the following in part:

> LORING: Uhm, during this period, when there was problems of getting to the bargaining table, did you have any discussions with, uh, Mr. Stansfield regarding teacher organizations?
> NAU: Uh, well, uh, there were many times when I'd stopped at Leon's [Stansfield] office, you know. Uh, Harold [Gray] was gone an awful lot of time and Leon was kind of an intermediary there it seemed like between the Board. He knew what was going on for them and I knew what was going on for myself, uh, and my negotiating team and the teachers; and we had discussed many times what the problems were and how we could get the problems out of the way and continue down the line to, uh, get the ball rolling as far as negotiations. And, uh, Leon seemed to - felt in many occasions the fact that if we went on an individualized basis with the exclusion of MEA and went on our own merits and everything, that would be the route to go because there would be no hassel as far as, uh, evaluation or any other complaints lodged against the School Board because that was the MEA doing that and if we disaffiliated ourselves individually from MEA then there would be no complaint with the School Board negotiating with us singlely.
> LORING: You started by saying that Leon seemed to feel this. Is this what he said?
> NAU: Yeah, well, you know, his feelings on the subject is what he had mentioned.
> LORING: What his verbalized feelings were because none of us know what was in his head?
> NAU: Yeah, yeah..." Tr57 Line 19 to Tr58 Line 17.

Mr. Stansfield replied:

> RICE: What is your comment about the statements that you appear to be urging that individual negotiation was the way to go, what did you mean by that?
> STANSFIELD: Uh, I don't, I never made any comments to any staff member, including Mr. Nau or Mrs. Velk, that I thought that they should have individual negotiations. I never said this. Uh, the one thing I did, which I believe has confused a number of teachers and I think it's of interest to note, that many teachers have, on our staff, have only taught here and they're not familiar with procedures used in other places. But last year, I discovered after I came here that our teachers, as well as not having a master contract, neither did they have an individual contract, which is required by law. And late in the spring, uh, after teachers had been notified of renewal or non-renewal, uh, I was able to persuade the School Board that an individual contract was required by law and we actually issued individual contracts which would be for those teachers which were renewed. Now, I believe that if they thought that

I had urged them to do individual negotiations, that they were confusing that idea with the idea that they needed to have an individual teaching contract as required by law.
RICE: So that was the basis of your comment about individual involvment [sic]?
STANSFIELD: Yes, I never used the word individually negotiate or I never discussed with any staff member, including these two people, the idea that I thought that they should negotiate individually with the board.
RICE: Okay.
STANSFIELD: Because I know that the law requires something else, at least when there's an organization involved..."
Tr93 Line 23 to Tr 94 Line 24.

Mr. Nau's rebuttal testimony is as follows:

"LORING: Uh, you were here when Mr. Stansfield testified that the only conversation he had had about NAPE was one conversation with Carolyn Velk. Uh, your original testimony, uh, was to the contrary. Do you want to revise your testimony?
NAU: Well, at the, at the, time I testified previously, I'd mentioned that he and I had discussed this at many times, uh, and at great length during some of the time. He, uh, to the contrary mentioned that it was due to the fact that all teachers had to have an individual contract by state law. Well, what I was talking about was the meetings I had with him in his office and the discussions that took place during the months of February and March before the non-renewal. Now the individualized contracts that he mentioned didn't come about or take place until the end of May so what I had talked to him about was, uh, how we could get the ball rolling at that particular time last winter and how we could do it and he'd mentioned the fact well the only way to really get around this evaluation, uh, was to go individualized because the evaluation was the holdup and the Board was under no obligation to negotiate with the ULP being, uh, in the courts. And so consequently, he mentioned the individualized way was the only way to go."
Tr119(2-22).

8. Nau was a primary contact for MEA's Uniserv Director, Sean Matthews. Tr88-89.

9. There was no dissatisfaction with Mr. Nau's teaching. The Record sets forth the following in part:

"LORING: Had there been dissatisfaction with Mr. Nau, uh, teaching and where he, uh, the classes that he was teaching?
DENNY: No, not - I don't think so. Tr112(11-13).

10. Mr. Nau has been unable to find satisfactory employment. Tr62,71.

III. DISCUSSION

I would like to start by comparing the National Labor Relations Act (NLRA) with the Montana Collective Bargaining Act for Public Employees.

Rights of the Employees

NLRA	Act
"Sec. 7. Employees shall have the right to selforganization form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3). [49 Stat. 452, 29 U.S. Code, Sec. 157, as amended by P.L. 101, 80th cong., 1st Sess.]	"59-1603. Employees' right to join or form labor organization to and engage in collective bargaining activities. (1) Public employees shall have, and shall be protected in the exercise of, the right of self-organization, to form, join or assist any labor organization, 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 bargaining or other mutual aid or protection, free from interference restraint or coercion.

Unfair Labor Practices

NLRA	Act
Sec. 8. (a) It shall be an unfair practice for an employer (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. [49 Stat. 452, 29 U. S. Code, Sec. 158 (1).] ...(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:..."	59-1605. Unfair labor practices of employer or labor organization. (1) It is an unfair labor practice for a public employer to: (a) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 59-1603 of this act; (c) discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;..."

I think the above federal and state statutes are comparable. Therefore, I will look at the NLRB case law for a reasonable application of Montana's collective bargaining statute. This principle was approved in State Department of Highways vs Public Employees Craft Council, (op. cit. page 2)

A. The First Test

The Commerce Clearing House, Inc., Labor Law Course, ¶ 1572 (1972) sets forth the following test (in part):

"In determining whether the employer has violated the Act [NLRA], the Board [National Labor Relations Board (NLRB)] endeavors to determine the motivating cause of the action alleged to be discriminatory. In a great many instances, the employer asserts that legitimate reasons existed for his action. Improper motive distinguishes an unlawful discharge from a lawful discharge. NLRB v. Continental Pipe Line Company 161 F. (2d) 382; NLRB v. Robbins Tire & Rubber Co, 161 F. (2d) 798. In determining whether the action was discriminatory or justified on the grounds assigned by the employer, the Board gives consideration to the following factors:

(1) The entire background, including anti-union activity;
(2) Percentage of union members or leaders among the employees affected;
(3) Admissions;
(4) Statement by the discharging supervisor tending to show his state of mind;
(5) Answers to complaints which do not deny the discrimination;
(6) Failure to explain a discharge at the hearing;
(7) Failure to call as witness management representative having personal knowledge of the reason assigned;
(8) Effect of discharge on unionization--whether or not the leading organizers and officials of the union have been eliminated;
(9) Espionage directed toward identity of union members;
(10) Extent to which the discharged employee engaged in union activity;
(11) Relation in point of time of employer's action to employee's union affiliation or activity;
(12) Disparate treatment of competing unions.

In addition, the Board considers the affected employee's service record, his efficiency, and whether or not the discharge was peremptory and without warning.

Applying this test to Velk and Nau, I find:

(1) The entire background, including anti-union activity:

The highest anti-union background was committed by the School Board when they removed Sean Matthews, MEA's 'union representative,' from the meeting of March 14, 1977. Tr15,56,84,85,89,90. Even after complaints from Nau and Velk and the reassurance from Gray that there would not be a news article, the School Board and/or Administration provided information for an anti-MEA news article. Tr46,48,49,64,65.

This unfair labor practice appears to be a non-stop continuation of ULP#13-76. This is best demonstrated by Mr. Gray when he wrote ...the RBEA has three choices:

(a) Join some other union,
(b) Drop ULP#13-76, or
(c) Negotiate individually.

and when Dorothy Small stated...if the teachers did not choose one of the above, the Board would continue to fight the charges in ULP#13-76 all the way to the Supreme Court, if necessary. MEA Exhibits #2 and #3.

(2) The percentage of union members or leaders among the employees affected: The RBEA's negotiating team primarily consisted of Velk, Nau, Viethenheimer, and Ford. Fifty percent of the negotiating team was not rehired--the president and the chief negotiator. Tr4,5,26,28,42.

(3) Admissions: None

(4) Statement by the discharging supervisor tending to show his state of mind: No statements were made by the School Board or Administration. The activities of the School Board and the committee were: (a) Mr. Denny quizzed the teachers about why they wanted MEA and Sean Matthews, (b) A letter to the Indian teachers requesting they negotiate, (c) Minnie Watson's and Harold Gray's request to be removed from the School Board's negotiating team, and (d) The prohibition of labor unions on the Rocky Boy Reservation by a Tribal Resolution. Tr16,17,33,103. MEA Exhibit #14, School District Exhibit #B.

(5) Answers to complaints which do not deny the discrimination: None.

(6) Failure to explain a discharge at the hearing: Mr. Denny and Mr. Stansfield never did explain why the teachers were not rehired. When they were asked if the teachers were not rehired because of union activities or unionrelated activities, they replied "No." Tr78,104. When Mr. Denny was asked if the teachers were unsatisfactory or problem teachers, Mr. Denny replied "No." Tr112,113.

(7) Failure to call as witness management representative having personal knowledge of the reason assigned: The School Board

called two witnesses--neither one explained why Velk and Nau were not rehired.

(8) Effect of discharge on unionization--whether or not the leading organizers and officials of the union have been eliminated: RBEA never finished negotiating the contract for the 1977-78 school year. The teachers at Rocky Boy currently do not have a master labor agreement. Tr5,24. I believe if the School Board had voted to renew President Velk and Chief Negotiator Nau, the RBEA would have had a Master Labor Agreement. Velk and Nau were Mr. Matthew's and MEA's primary contacts at Rocky Boy. Tr88,89. With Nau and Velk being the primary contacts for the parent labor organization, the leadership at Rocky Boy was effectively eliminated when they were fired.

(9) Espionage directed toward identity of union members: None.

(10) Extent to which the discharged employee engaged in union activities: Chief Negotiator Nau and President Velk were very active in the RBEA. Mr. Nau arranged some of the negotiations meetings and met with Dorothy Small and Mr. Crain to object to the proposed news article. Mr. Gray raised cain with Nau when the Letter to the Editor appeared. Ms. Velk and Mr. Nau wrote to Mr. Gray on April 1, 1977 to request additional negotiations. Velk wrote to Mitchell in regards to Gray's activities and Mitchell wrote back. Tr31,42,48,49,50,65, 104. MEA Exhibits #4, #5, and #20.

(11) Relation in point of time of employer's action to employee's union affiliation or activity: The RBEA activities consisted of pushing the School District to negotiate a Master Labor Agreement. I believe the School District had only one way to slow down RBEA's push, i.e., Velk's and Nau's push; that is not to rehire Velk and Nau.

(12) Disparate treatment of competing unions: I give no weight to Stansfield's answer about individualized contracts. Tr94,119. Mr. Stansfield's NAPE and individualized contract negotiations and Mr. Gray's three choices--(a) join some other union, (b) drop the ULP, or (c) negotiate individually--all add up to very poor treatment of MEA in comparison to management's ideal union.

Looking at MEA's Exhibits #13 and #17 (Velk's and Nau's evaluations), I find Excellent first evaluations and Good second evaluations. The first evaluation was before Nau's and Velk's strong involvement in RBEA's contact negotiations. If I remove all laborrelated activities from the second evaluations, I once again find Excellent evaluations.

B. A Second Test

The U.S. Supreme Court in NLRB vs Great Dane Trailers, Inc. (1967) 388 U.S.26, 65 LRRM 2465 at 2469 set forth the following principles in part:

> "From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board [NLRB] can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him."

In the same case at 65 LRRM 2469, the U.S. Supreme Court applied the above principles as follows in part:

> "Applying the principles to this case then, it is not necessary for us to decide the degree to which the challenged conduct might have affected employee rights. As the Court of Appeals correctly noted, the company came forward with no evidence of legitimate motives for its discriminatory conduct.

363 F.2d, at 134, 62 LRRM 2456. The company simply did not meet the burden of proof, and the court of Appeals misconstrued the function of judicial review when it proceeded nonetheless to speculate upon what might have motivated the company. Since discriminatory conduct carrying a potential for adverse effect upon employee rights was proved and no evidence of a proper motivation appeared in the record, the Board's conclusions were supported by substantial evidence, Universal Camera Corp. v. Labor Board, 340 U.S. 474, 27 LRRM 2373 (1951), and should have been sustained."

The facts in this case are:

a. the RBEA was trying to negotiate a Master Labor Agreement for the 1976-77 School Year. The master contract was never completed. There is no current labor agreement at Rocky Boy for the teachers. Tr5,24.

b. on April 12, 1977, the School Board's Chief Negotiator and one member of the Negotiating team asked to be relieved of their negotiation duties.

c. on April 12, 1977, the School Board voted to inform the Indian teachers that the School Board would negotiate with them.

d. on April 12, 1977, the School Board voted not to rehire RBEA's President and RBEA's Chief Negotiator--Velk and Nau.

e. the School Board repeatedly refused to negotiate because of the Unfair Labor Practices Proposed Order and the Tribal Resolution.

I judge the above actions of the School Board as a calculated plan not to negotiate with RBEA. I further judge the calculated plan of the School Board to be inherently destructive to the employees' rights to negotiate.

At the same time, I find the School Board offered no business reason for the non rehiring of Velk and Nau.

C. A Third Test

In ULP28-76, Billings Education Association vs Billings School District, the Montana School Board Association's attorney argued before the Board of Personnel Appeals that Mt. Healthy should be applied in non rehire cases.. The Mt. Healthy case involves, among other items, the exercise of a constitutionally protected right of

the First and Fourteenth Amendments.

The U.S. Supreme Court in Mt. Healthy City School District Board of Education vs Fred Doyle, No. 751278, 45LW4079, Bureau of National Affairs 691:24(1-17-77) at 691:27, set forth the following in part:

> "A rule of causation which focuses soley on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision--even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision."

The U.S. Supreme Court applied this rule as follows:

> "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct as a 'substantial factor'--or, to put it in other words, that is was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."

The complainant in this case did show that the labor conduct of Velk and Nau--negotiating a labor contract--is a protected activity. The complainant went on to show that Velk and Nau were good teachers. Tr112,113. MEA Exhibits #13, #17. Therefore, Velk and Nau must not have been rehired because they were the president and chief negotiator for RBEA. If I remove all labor activities from the Record in this case, the School Board fails to demonstrate that they would have reached the same decision in the absence of such protected labor activities.

In review of prior Board of Personnel Appeals' cases, I find the above arguments compatible with Frazer Education Association vs Valley County School District No 2 & 2B, ULP1576 and Teamsters vs Havalli County Commissioners ULP 473.

IV. CONCLUSIONS OF LAW

The Rocky Boy School District #87 did commit an unfair labor practice by the non-renewal of Velk's and Nau's teaching contracts for the 1977-78 school year. The School did violate Section 59-1605(1)(a):

> "...interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 59-1603 of this act;..."

and Section 59-1605(1)(c):

> "...discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;..."

V. REMEDIES

A. General

The NLRA and Montana's Collective Bargaining Act for Public Employees provides for the following remedies:

NLRA	The Act
Sec.10. (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, aw will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee,	59-1607. (2) The testimony taken by the board or its agent shall be reduced to writing and filed with the board. Thereafter in its discretion the board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the board is of the opinion that any person named in the complaint has engaged in or is engaging in an unfair labor practice, it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act. The order may further require the person to make reports from time to time showing the extent to which he has complied with the order."

back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him:..."

I will once again look to the NLRB for guidance in applying Montana's Statute. From the Montana Act and the case at hand, I believe the minimum I should do is to require the School Board to reinstate Nau and Velk. At the same time, I must look at back pay for the loss of wages, loss of benefits, moving expenses incurred, and interest.

B. Reemployment Contracts or Letters of Reemployment

To make Velk's career whole, I will order that this reemployment contract be considered her fourth consecutive contract when calculating salary and benefits. When offering Nau this reemployment contract, the contract is to be considered his third consecutive contract when addressing the questions of wages and benefits. Each contract offered Velk and Nau after the reemployment contract is to be calculated by adding one year experience to each contract, respectively.

The School Board is to offer Velk and Nau the reemployment contracts for the 1978-79 school year in April of 1978 in the same manner as the other contracts are offered to the other teachers. Velk and Nau are to return their reemployment contracts in the same manner as the other teachers return their renewal contracts.

C. Duty to Seek Other Employment

If an employee is not rehired because of his union activities and the employee is asking for back pay, the employee must make a reasonable effort to seek new employemnt. Phelps Dodge Corp. vs NLRB (1941), 313 U.S. 177, 8 LRRM 430. The NLRB (and this Board) considers each case of back pay with respect to the individuals involved and with respect to the record as a whole. NLRB vs Rice Lake Creamery (1972) 62LRRM 2332.

Because the Record states only that Nau has been unable to find satisfactory employment, I cannot determine that Nau has made a reasonable effort to seek new employment as stated above. Did Mr. Nau make a reasonable effort to seek employment? I believe this question and other questions can best be answered by Nau. I will attach an affidavit to this Order and order that Nau complete the affidavit within 15 calendar days after receipt of this Order. Within 20 calendar days after the receipt of Nau's affidavit, all attorneys of record may address any matter raised by the affidavit in a brief which is to be mailed to all parties of record. After a review of Nau's affidavit and the attorneys' briefs, if appropriate, I will then order back pay, benefits and expenses.

Because Velk is employed, to make her whole, I believe if the pay and benefits at her present employment are less than what she would have received at Rocky Boy, Rocky Boy is liable for the difference.

D. Computing Back Pay

The NLRB in the Woolworth Co. case set forth a back pay principle. The U.S. Supreme Court in NLRB vs Seven-Up Bottling Co. (1953), 344 U.S. 344,31 LRRM 2237, upheld the Woolworth pay formula. The Woolworth pay formula basically stops reluctant employers from stalling a reemployment order decreasing the amount of back pay. The reluctant employer would stall reemployment as the aggrieved employee would possibly earn higher wages. The higher wages would then be applied to the back pay award. The NLRB set forth the following in the Woolworth Co. case (1950) 90 NLRB No. 41, 26 LRRM 1185 and 1186:

> "The deleterious effect upon the companion remedy of reinstatement has been twofold. Some employers, on the one hand, have deliberately refrained from offering reinstatement, knowing that the greater the delay the greater would be the reduction in back pay liability. Thus, a recalcitrant employer may continue to profit by excluding union adherents from his enterprise. Employees on the other hand, faced with the prospect of steadily diminishing back pay, have frequently countered by waiving their right to reinstatement in order to

toll the running of back pay and preserve the amount then owing. Upon analysis of a substantial number of cases involving such action, we have found the economic motivation and compulsion upon the employee not difficult to discern. Unemployment or employment at lesser wages may have resulted in the exhaustion of the employee's savings, his incurrence of debts, and even in the deprivation of the necessities of life. Our observation on this score accords with the view of the United States Supreme Court which, in treating this general problem, recognized that the worker is 'not likely to have sufficient resources' to sustain the necessary 'minimum standard of living necessary for health, efficiency, and general well-being' during such periods. The consequent desire for the victim of discrimination to recoup the maximum amount possible in order to offset such losses, even if this must be accomplished at the price of relinquishing the right to be returned to his former position, may readily be anticipated. The Board has viewed these results with concern because we, as well as the courts of review, have long regarded the remedy of reinstatement as one of the most effective measures expressly provided by the Act [National Labor Relations Act] for expunging the effects of unfair labor practices and maintaining industrial peace.

"The public interest in discouraging obstacles to industrial peace requires that we seek to bring about, in unfair labor practice cases, 'a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. In order that this end may be effectively accomplished through the medium of reinstatement coupled with back pay, we shall order, in the case before us and in future cases, that the loss of pay be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondent's discriminatory action to the date of a proper offer of reinstatement. The quarterly periods, hereinafter called 'quarters,' shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which... [employee] would normally have earned for each such quarter or portion thereof, her net earnings, if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back pay liability for any other quarter."

I hereby adopt the above logic and formula in computing Velk's and Nau's back pay, benefits and expenses.

Due to the fact that teachers teach for a nine-month school year, Nau's back pay, if ordered, calculation will end at the end of the school year in the year that Rocky Boy School District offers Nau a contract for reemployment. Because Velk is now teaching at the Big Sandy school system for the 1977-78 school year and not wanting to inflict any harm on Big Sandy School System, Velk's back pay calculations will end at the end of the school year in the year that Rocky Boy School District offers Velk a contract for reemployment.

Because there is no contractually determined salary schedule (Tr24), I will direct the parties to use the following formula to calculate Velk's and Nau's back pay for each quarter:

> VELK: The average quarterly base salary for all full-time teachers, kindergarten through eighth grade with two, three and four years teaching experience at Rocky Boy or teachers assigned at that level at Rocky Boy, less Velk's quarterly salary from Big Sandy, less any additional income.
>
> NAU, if back pay is so ordered: The average quarterly base salary for all fulltime teachers, kindergarten through eighth grade with one, two and three years teaching experience at Rocky Boy or teachers assigned at that level at Rocky Boy, less any quarterly salary earned.

Unemployment compensation income is not to be considered as income. NLRB v. Gullett Gin Co. (1951) 340 U.S. 361,27LRRM 2230.

The Record shows no other benefits--insurance, teacher retirement, Social Security--that Velk and Nau may have lost. I grant any difference in any benefit that Velk and, if applicable, Nau may have lost to be paid by the School District to the respective agency with interest.

In order to accomodate this Order, the parties are directed to exchange and provide this Board a copy of all calculations, averages, listing of wages, quarterly earnings, lost benefits and other needed items within 30 days of the last day of school in the year that the School District offers Velk and Nau reemployment.

E. Moving Expenses

The NLRB has ruled that if any fees or extra expenses are accrued in obtaining or retaining new employment, the expenses are a liability to the employer. Harvest Queen Mill & Elevator Co. vs NLRB (1950) 26 LRRM 1189 and Local 249 International Brotherhood of Teamsters vs NLRB (1956) 38 LRRM 1254. In light of the above, I grant Velk's prayer for $1100 in moving expenses (Tr24) plus a reasonable amount for moving back to Havre, Montana if she accepts reemployment at Rocky Boy.

F. Interest

The NLRB in 1962 adopted a policy of adding 6 percent interest to their back pay orders. Reserve Supply Corp. vs NLRB (1963) 317 f2d 785, 53 LRRM 2374 and Aztec Ceramics Co. vs NLRB (1963) 53 LRRM 2480. I hereby grant 6 percent annual interest to be added to all awarded back pay, benefits and expenses.

VI. PROPOSED ORDER

I. Rocky Boy School District #87 is ordered to cease and desist from:

A. interfering with, restraining, or coercing employees in exercising the rights guaranteed in section 591603 and

B. discriminating in regard to hiring or tenure of employemnt or any terms or conditions of employment to encourage or discourage membership in Rocky Boy Education Association and any other labor organization.

Rocky Boy School District #87 is ordered to:

A. offer reemployment to Carolyn Velk in the same position or equivalent position for the 197879 school year as directed in this Order,

B. make Carolyn Velk whole in regards to lost wages, lost benefits, accrued expenses and interest in full compliance with this Order,

C. provide all needed information to all parties to effectively execute this order and,

D. offer Charles Nau reemployment to the same position or equivalent position for the 197879 school year as directen in this Order.

II. Charles Nau and Carolyn Velk are ordered to provide all needed information to all parties to effectively execute this order.

Charles Nau is further ordered to complete and mail to all parties the attached affidavit within 15 calendar days after the receipt of this order.

III. After reviewing Nau's affidavit and attorneys' briefs, the Hearings Examiner in this matter will rule on the question of Charles Nau's back pay.

DATED the 10th day of March, 1978

BOARD OF PERSONNEL APPEALS

By [signature]
Hearings Examiner

NOTE: All parties have 20 calendar days to file written exceptions to this Proposed Order. If no written exceptions are received by this Board, the Proposed Order becomes a Final Order of the Board.