

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 7-1978

UNIVERSITY TEACHERS UNION AFT, )  
MONTANA FEDERATION OF TEACHERS, )  
Complainant, )

vs.

FINAL ORDER

COMMISSIONER OF HIGHER )  
EDUCATION, STATE BOARD OF )  
REGENTS AND PRESIDENT BOWERS, )  
and the administration, )  
Respondents. )

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A Findings of Fact, Conclusions of Law, and Recommended Order was issued on July 10, 1978, by Hearing Examiner, Jerry Painter.

Exceptions to the Recommended Order were filed by the Complainant August 14, 1978, and oral argument was heard on the matter before the Board of Personnel Appeals on September 26, 1978.

After reviewing the record and considering the briefs and oral arguments, the Board makes the following Order:

1. IT IS ORDERED, that the Exceptions to the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law, and Proposed Order are denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law, and Proposed Order issued by the Hearing Examiner as the final order of this Board.

DATED this 4<sup>th</sup> day of October, 1978.

BOARD OF PERSONNEL APPEALS

By Brent Cromley  
Brent Cromley, Chairman

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CERTIFICATE OF MAILING

I, Jennifer E. Jacobson, do hereby certify that on the 4<sup>th</sup> day of October, 1978, a true and correct copy of the above captioned FINAL ORDER was mailed to the following:

Richard Volinkaty  
601 Western Bank Building  
Missoula, Mt. 59801

George Mitchell  
Legal Counsel  
University of Montana  
Missoula, Montana 59801

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BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 7-1978

UNIVERSITY TEACHERS UNION AFT-)  
MFT 119, AN AFFILIATE OF THE )  
AMERICAN FEDERATION OF )  
TEACHERS, AND MONTANA )  
FEDERATION OF TEACHERS, )

FINDINGS OF FACT,  
CONCLUSIONS OF LAW, and  
RECOMMENDED ORDER

Complainant, )

vs. )

COMMISSIONER OF HIGHER )  
EDUCATION OF THE STATE OF )  
MONTANA, THE STATE BOARD OF )  
REGENTS FOR THE STATE OF )  
MONTANA, AND PRESIDENT BOWERS )  
AND THE ADMINISTRATION AT THE )  
UNIVERSITY OF MONTANA, )

Defendants. )

On March 29, 1978, the University Teachers Union, AFT-MFT 119, (hereinafter UTU) filed an unfair labor practice charge against the Commissioner of Higher Education of the State of Montana, the State Board of Regents for the State of Montana, and President Bowers and the administration at the University of Montana (hereinafter University) charging the University with violation of section 59-1605 (1) (a), (b), and (e), R.C.M. 1947. On April 5, 1978, the University filed an answer to the charge, denying the allegations that it had violated section 59-1605, R.C.M. 1947.

A hearing was held on May 4, 1978, and continued over to May 11, 1978. Present at the hearing was George Mitchell representing the University and Richard Volinkaty representing UTU. Briefs were filed after the hearing date. From the evidence and testimony submitted at the hearing, and after a review of the briefs presented in this matter the following are my findings of fact.

FINDINGS OF FACT

1. Notice is hereby given that the hearing examiner has taken administrative notice of the proceedings which took place

1 in UD 21-77, and the results of those proceedings. Specifically,  
2 the hearing examiner takes administrative notice that an election  
3 was conducted on January 20, 1978, and as a result of that  
4 election, UTU was certified by this Board as the Bargaining  
5 Representative for certain faculty members of the University of  
6 Montana.

7 2. On December 12, 1977, letters signed by Richard C.  
8 Bowers, President of the University Of Montana, were sent out  
9 to certain faculty members giving them formal notification that  
10 their contract for the following academic year would not be  
11 renewed. Also in that letter was the statement that there was  
12 a right to appeal the termination, if notice of his/her intent  
13 to appeal was given within ten days of receipt of the letter.  
14 (Defendant's exhibit 1)

15 3. On December 15, 1977, another letter was sent by  
16 President Bowers again stating that employees whose contracts  
17 were not renewed may appeal their nonrenewal by notifying the  
18 President's office in writing within 10 days after receiving  
19 the December 12th Notice, or by December 27, 1977, whichever  
20 is later. That letter stated in pertinent part:

21 "The rights of appeal is an individual right and the scope  
22 of the appeal must be limited to questions of infringements  
23 of your rights as afforded or protected by your employment  
24 contract or by law. The decision of non-renewal was based  
25 upon matters wholly unrelated to your performance or con-  
26 duct. Therefore, those matters do not constitute a basis  
27 for appeal.

28 "More specifically, the proper basis for appeals centers  
29 around whether the notice of non-renewal (1) violated the  
30 state or federal law, (2) violated your constitutional  
31 rights, or (3) violated your contract of employment."  
32

1           The letter went on to state that after receipt of the  
2 committee recommendations that President Bowers will inform  
3 the faculty member of his final decision within 10 days.

4 (Defendant's exhibit 3)

5           4. Letters were sent to faculty members who filed an  
6 intent to appeal acknowledging the receipt of the appeal and  
7 stating that the appeal would be scheduled as soon as  
8 practicable. (Defendant's exhibit 4)

9           5. The Faculty Advancement Standards and Procedures  
10 (FASAP) is a document which sets out procedures dealing with  
11 non-renewal of contract as well as other matters. The document  
12 establishes a Faculty Appeals Committee and the function of  
13 that committee in part is set out in section III, paragraph 12:

14           "12. In the case of appeals of a unit's decision of non-  
15 renewal of contract the Faculty Appeals Committee will  
16 investigate and determine whether the substantive issue  
17 resulting in the unit's and/or dean's decision was proper cause  
18 for non-renewal and whether the faculty member in questions  
19 received due process. The Committee will then submit its  
20 recommendation to the Academic Vice President and will forward  
21 a notice of its recommendation to the faculty member involved  
22 and to his chairperson and/or dean." (defendant's exhibit 5)  
23 The scope of review under the FASAP document by the Faculty  
24 Appeals Committee is for cause. No party in this proceeding  
25 contended that any faculty member in question here was terminated  
26 for cause. Therefore, the appeals procedure set out in FASAP  
27 was not an appropriate hearing process.

28           6. President Bowers met with the Executive Committee of  
29 the Faculty Senate (ECOS) to obtain faculty involvement in the  
30 upcoming appeals process. On January 5, 1978, ECOS wrote  
31 President Bowers, and stated that the Service Committee would  
32 be the appropriate committee to serve on the appeals process.

1 Members of the service committee are Fred Henningsen, Howard  
2 Reinhardt, and Janet Wollersheim. (Defendant's exhibit 6)

3 7. On January 13, 1978, President Bowers sent to the  
4 Committee on Service members a memo appointing them to the  
5 appeals committee and setting out certain "guidelines to assure  
6 a common understanding of the nature of this ad hoc appointment  
7 and the extent of the participation of those Committee on  
8 Service faculty members in the hearing as well as to describe  
9 the nature of the hearings:" (Defendants exhibit 7)

10 8. On January 20, 1978, President Bowers sent out notices  
11 of the date and time of the scheduled appeals. The memo also  
12 listed the members of the committee. (Defendant's exhibit 8)  
13 President Bower's uncontroverted testimony was that the January  
14 20 memo went out on that date because Mr. Thomas Boone, chair-  
15 man of the committee, accepted the chairmanship just briefly  
16 before that date, and his acceptance was the only matter holding  
17 up the memo. Mr. Boone, who is an attorney in Missoula,  
18 corroborated that statement.

19 9. Testimony was presented by witnesses for UTU that the  
20 actual grievance procedure was not sufficiently jelled to the  
21 point of being an actual grievance procedure at the time that  
22 UTU won the representation election on January 20, 1978. This  
23 hearing examiner finds that in view of findings of fact 2, 3,  
24 4, 6, 7, and 8 there was a grievance procedure established  
25 prior to the election of UTU as bargaining representatives.  
26 The members of the grievance panel were selected; the grounds  
27 upon which an appeal could be brought were stated; the pro-  
28 cedure was specifically made very loose; and the dates and time  
29 for each appeal had been set.

30 10. It was the uncontroverted testimony of James Walsh,  
31 professor of psychology and president of UTU, that he, James  
32 Todd, associate professor of humanities and grievance chairman,

1 and Richard Volinkaty, counsel for UTU, met with the admini-  
2 stration, President Bowers and George Mitchell, counsel for the  
3 university, to bargain concerning the appeals procedure.

4 President Bowers informed UTU that he did not have the author-  
5 ity to bargain, but that the Commissioner of Higher Education  
6 has that authority. President Bowers did offer to discuss the  
7 matter informally. The representatives of UTU did not care to  
8 discuss the matter informally.

9 11. On approximately March 16, 1978, Dr. Walsh, Dr. Todd,  
10 Mr. Volinkaty went to Helena to meet with certain staff members  
11 of Dr. Pettit, Commissioner of Higher Education. Included in  
12 that meeting was George Mitchell, and Donald Habbe, academic  
13 vice president for the university, as well as Dr. Dayton, Mr.  
14 Noble and Ms. Swift, from Dr. Pettit's office. Certain ques-  
15 tions were asked at the meeting concerning the possible rami-  
16 fications of the grievance procedure to the current unit. The  
17 responses to the questions proved to be alarming to the UTU  
18 representatives. The answer to the question of the source of  
19 funding for reinstating positions as a result of the grievance  
20 procedure was contradictory.

21 12. The Commissioner of Higher Education, Lawrence Pettit,  
22 does not challenge that an appeals procedure for reinstatement  
23 is a negotiable subject. Dr. Pettit has declined, however, from  
24 negotiating the contract piecemeal. (Defendant's exhibit 12)

25 13. President Bowers' uncontroverted testimony was that  
26 to date there have been four faculty members reinstated under  
27 the grievance procedure. President Bowers further testified  
28 that the only ground for reinstatement was if the contractual  
29 relationship between the university and the employee had been  
30 abridged. That testimony was also uncontroverted.

31 14. Mr. George Mitchell, counsel for the University,  
32 stated to Natalie Paul in response to Ms. Paul's motion to

1 continue her hearing date until negotiations with UTU were  
2 completed, that if she waited until negotiations were completed  
3 with UTU she might waive her right to the appeals process.

#### 4 DISCUSSION

5 From the above findings of fact, I can find no basis to  
6 support UTU's charges. Although there was conflicting testi-  
7 mony on the matter, I find that there was a grievance procedure  
8 established prior to the election of UTU. Nothing transpired  
9 after the election of UTU which altered that appeals procedure.  
10 The testimony and exhibits clearly show that the hearings were  
11 conducted only to determine whether there had been any contract  
12 violations in the nonrenewals. It amounted, therefore, to  
13 nothing more than a fancy trip to the lawyer's office. I am  
14 not certain what the legal background of the members of the  
15 services committee was. But unless they had legal expertise, I  
16 believe they served merely as figureheads, and Mr. Boone issued  
17 his legal opinion on the contractual question, which is what  
18 management was really interested in. My conclusion is sup-  
19 ported by the exhibits introduced into evidence concerning Dr.  
20 Bakke. (Complainant's exhibits H, I, and J) Although the  
21 faculty members of the grievance committee supported Dr. Bakke's  
22 reinstatement,<sup>1</sup> Mr. Boone on legal grounds could find no basis  
23 for reinstatement. President Bowers did not reinstate Dr.  
24 Bakke.

25 There was no controversy over whether or not reinstatement  
26 is a mandatory subject of bargaining. The University has  
27 agreed that reinstatement is a mandatory subject of negotia-  
28 tions. The grievance procedure, however, was established prior  
29 to UTU's election, and therefore prior to any duty to bargain.  
30

31 <sup>1</sup>In view of the above analysis, I do not believe that the  
32 term "reinstatement" is the correct word. Since the only basis  
for revocation of the notice of nonrenewal was if the original  
nonrenewal letter was issued in violation of the contractual  
relationship between the university and the employee, then we  
are not talking about reinstatement but rather the alteration  
of an error.

1 The grievance procedure was to determine whether or not a prior  
2 contractual obligation on the part of the university, that is,  
3 an obligation which existed prior to the election of the bar-  
4 gaining agent, had been violated. On that very narrow fact  
5 situation, I cannot find that the university failed to meet its  
6 duty to bargain.

7 My rationale for that determination rests on the amount of  
8 discretion exercised by President Bowers. Since the only basis  
9 for reinstatement of the appealing faculty members was a prior  
10 contractual relationship, President Bowers exercised no dis-  
11 cretion. Had there been any discretion exercised, I might have  
12 reached a different conclusion. The difference, I believe, is  
13 that if we are dealing with a contractual relationship entered  
14 into prior to the election of the collective bargaining agent,  
15 the employer is doing nothing more than realizing and acting in  
16 accordance with that prior contractual obligation. If, however,  
17 President Bowers was exercising complete discretion, and  
18 thereby reinstating individuals on any number of basis, then  
19 the university would be entering into new relationships after  
20 the bargaining agent was elected and such new relationships  
21 would definitely have a significant impact on the bargaining  
22 unit in areas that are mandatory subjects of bargaining. The  
23 duty to bargain would then arise.

24 In view of the above analysis, I do not believe that  
25 anything has transpired which would prevent UTU from negotia-  
26 ting a reinstatement clause to its contract on the basis of the  
27 merits of each case involved. Perhaps it could also negotiate  
28 a retroactive provision to that clause.

29 I cannot find that the University has refused to bargain  
30 because it has refused to negotiate an agreement piecemeal.  
31 The duty to bargain in good faith established in section 59-1604,  
32 R.C.M. 1947, requires the parties to negotiate an agreement.

1 In some circumstances there is a duty to negotiate outside the  
2 negotiated agreement as in the case of the arbitration clause  
3 of the contract. But I can find no duty on the part of the  
4 employer to negotiate one section of a contract outside the  
5 formal negotiating sessions exclusive of the other issues of  
6 the contract. To find otherwise might give rise to an entirely  
7 new negotiating tactic, which could prove contraproductive to  
8 the act itself. I am aware that it was only in the interest of  
9 its unit members and the time factor involved that UTU requested  
10 this extraordinary procedure. But without the agreement of  
11 the University, the extraordinary procedure must give way to  
12 the more traditional.

13 Addressing that portion of UTU's charge concerning Mr.  
14 Mitchell's statement made to Natalie Paul, that if she waited  
15 until negotiations were completed with the union she might  
16 waive her right to the appeals process: UTU is alleging that  
17 that statement was an interference in an attempt to prevent the  
18 faculty members from their use of their chosen collective  
19 bargaining agent after the election in protecting their legit-  
20 imate areas concerning employment. I cannot find that to  
21 be correct. Mr. Mitchell's statement was merely a statement of  
22 the facts as he saw it. Whether or not UTU would be successful  
23 in negotiating a reinstatement clause with retroactive appli-  
24 cation was not something that could be foreseen. Nor was the  
25 University under any duty to postpone its review. It is true  
26 that Ms. Paul's contractual rights would not be waived if she  
27 did not participate in the appeals procedure. There might,  
28 however, be a question of what remedies would be available to  
29 her if the University did not revoke any nonrenewal notice  
30 issued in violation of her contract. Mr. Mitchell's statement  
31 was correct as far as anyone's current knowledge was concerned  
32 and it has not been shown that Mr. Mitchell made the statement

1 to interfere rather than inform. Furthermore, the University  
2 specifically stated that any representative of his or her  
3 choosing may represent the faculty member at the appeals pro-  
4 cess. (Defendant's exhibit 8) Therefore, the faculty member  
5 concerned could use his or her bargaining representative in the  
6 proceedings.

7 CONCLUSIONS OF LAW

8 1. The University did not violate section 59-1605 (1)  
9 (a), (b), or (e) by carrying out its appeals procedure to  
10 review the nonrenewal of faculty members after the election and  
11 certification of UTU.

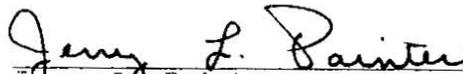
12 2. The University has not refused to bargain in good  
13 faith and therefore has not violated section 59-1605 (1) (e).

14 3. The University did not violate section 59-1605 (1)  
15 (a) by stating to Natalie Paul that if she didn't proceed with  
16 the appeals process she may waive her right.

17 RECOMMENDED ORDER

18 The Unfair Labor Practice Charge filed by UTU against the  
19 University is dismissed.

20 DATED this 10th day of July, 1978.

21  
22   
23 Jerry L. Painter  
Hearing Examiner

24  
25 NOTICE

26 Written exceptions to the hearing examiner's Findings of  
27 Fact, Conclusions of Law and Recommended Order may be filed  
28 within 20 days after its service. If no exceptions are filed  
29 within those 20 days, the Findings of Fact, Conclusion of Law  
30 and Recommended Order shall become the Final Order of the Board  
31 of Personnel Appeals.  
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CERTIFICATE OF MAILING

I, Jenna Seiffeld, do certify and state  
that on the 11th day of July, 1978, I mailed a true and  
correct copy of the above captioned FINDINGS OF FACT,  
CONCLUSIONS OF LAW, and RECOMMENDED ORDER to the following:

Richard Volinkaty  
MORALES, VOLINKATY & HARR  
601 Western Bank Building  
Missoula, Montana 59801

George Mitchell  
Legal Counsel  
Main Hall  
University of Montana  
Missoula, Montana 59801

Jenna Seiffeld