

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE #16-78:

AMERICAN ASSOCIATION OF UNIVERSITY )  
PROFESSORS, E.M.C. CHAPTER, Affiliated )  
with the NATIONAL AMERICAN ASSOCIATION )  
OF UNIVERSITY PROFESSORS, )

Complainant, )

- vs - )

FINAL ORDER

EASTERN MONTANA COLLEGE, JOHN E. )  
VAN DEWETERING, President, )

Respondent. )

\*\*\*\*\*

No exceptions having been filed, pursuant to ARM 24.26.107,  
to the Findings of Fact, Conclusions of Law and Recommended  
Order issued on August 10, 1979:

THEREFORE, this Board adopts that Recommended Order in this  
matter as its FINAL ORDER.

BOARD OF PERSONNEL APPEALS

By Brent Cromley  
Brent Cromley  
Chairman

DATED this 9th day of October, 1979.

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CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that I  
mailed a true and correct copy of the above FINAL ORDER to the  
following persons on the 9th day of October, 1979:

Ms. Rosemary Boschert  
Attorney at Law  
219 Hedden-Empire Building  
Billings, MT 59101

President John E. Van DeWeterling  
Eastern Montana College  
Billings, MT 59101

Dr. Anneke-Jan Boden  
President, EMC AAUP  
2621 Beth Drive  
Billings, MT 59101

Mr. Steven A. Veazie  
Attorney at Law  
Montana University System  
33 South Last Chance Gulch  
Helena, MT 59601

Jennifer Jacobson

BEFORE THE BOARD OF PERSONNEL APPEALS

1			
2	In the Matter of Unfair Labor	)	
3	Practice Charge No. 16-78:	)	
4	American Association of University	)	
5	Professors, E.M.C. Chapter, Affiliated	)	FINDINGS OF FACT,
6	with the National American Association	)	CONCLUSIONS OF LAW,
7	of University Professors,	)	AND
8		)	RECOMMENDED ORDER
9	Complainant,	)	
10	vs.	)	
11	Eastern Montana College, John E.	)	
12	Van deWetering, President,	)	
13	Respondent.	)	

\* \* \* \* \*

On June 14, 1978, the American Association of University Professors, Eastern Montana Chapter of the National American Association of University Professors (AAUP) filed Unfair Labor Practices (ULP) charges with the Board of Personnel Appeals against Eastern Montana College (EMC), John E. Van deWetering, President, Montana University System. On August 4, 1978, AAUP filed an amendment to ULP 16-78 in compliance with an order issued by the Board of Personnel Appeals on July 24, 1978.

The amended ULP charged EMC as follows:

1. Discrimination in pay schedule with members of a bargaining unit 16-5905(c), (e) R.C.M. 1947 (sic) [59-1605(1)(c), (e)].
2. Negotiating contracts with individual members of a bargaining unit 16-5905(e) R.C.M. 1947 (sic) [59-1605(1)(e)].
3. Interference in the exercise of rights of employees guaranteed in Section 3 (59-1603), 59-1605(a), (b) R.C.M. 1947.

A hearing was held on ULP 16-78, as amended, on October 5, 1978.

INTRODUCTION

In June of 1975, the Board of Personnel Appeals certified a coalition of the American Federation of Teachers and AAUP (Coalition) as the designated bargaining agent for the faculty at Eastern Montana College. The Coalition and EMC signed a collective bargaining agreement on March 23, 1976, with a

1 retroactive effective date of July 1, 1975.

2 In April of 1977, a decertification petition was filed by  
3 members of the bargaining unit. On January 25, 1978, a decertifi-  
4 cation election was held and the AAUP became the sole bargaining  
5 representative for the faculty of Eastern Montana College.

6 Cases interpreting the National Labor Relations Act will be  
7 used as persuasive authority in application of Montana's Collec-  
8 tive Bargaining Act in accordance with the Montana Supreme Court's  
9 holding in State Department of Highways vs. Public Employee Craft  
10 Council 165 Mont. 249, 529 P2d 785 at 787 (1974).

11 FINDINGS OF FACT

12 The Contract

13 1. Section 17.200 of the Collective Bargaining Agreement (the  
14 Contract) between the Coalition and EMC reads as follows:

15 This Agreement shall be in full force and effect from  
16 July 1, 1975, to and including June 30, 1977, and shall  
17 be considered as renewed from year to year thereafter  
18 unless either party to this Agreement notifies the  
19 other party in writing at least 180 days prior to the  
20 expiration of the contract, or any anniversary date  
21 thereafter, of its desire to modify or terminate the  
22 Agreement.

23 2. Letters between Catherine Swift, Staff Attorney, Montana  
24 University System and Dr. Stanley Fawcett, Chief Spokesman  
25 for the Coalition (Complainant's Exhibit No. 14) clearly  
26 establish that the Contract was not opened for modification  
27 or terminated under Section 17.200. The automatic renewal  
28 provision extended the contract for the period July 1, 1977  
29 through June 30, 1978. The decertification election was  
30 held January 25, 1978.

31 3. On February 14, 1978, the administration of Eastern Montana  
32 College and AAUP agreed in writing to the following:

- a. The provisions of the 1975-77 Faculty Contract shall serve as the interim contract until June 30, 1978, or until a new contract is negotiated and ratified, whichever occurs first.
- b. Negotiations for a new contract shall commence immediately with regard to terms and conditions of employment

- 1 and faculty salaries for the 1977-78 and 1978-79 contract  
2 years.
- 3 c. In all places in the 1975-77 Faculty Contract, except  
4 as noted in (d) below, all references to the Eastern  
5 Montana College Faculty Bargaining Coalition shall be  
6 changed from "Coalition" to "AAUP" to indicate that the  
7 Eastern Montana College Chapter of the American Association  
8 of University Professors is the agent for the  
9 Faculty.
- 10 d. The "Coalition-Administration Committee" shall be  
11 renamed the "Faculty-Administration Committee."
- 12 4. EMC and AAUP verbally agreed at the bargaining table that  
13 the provisions of the 1975-77 Faculty Contract would serve  
14 as the interim contract beyond the June 30, 1978 date set  
15 forth in the agreement signed February 14, 1978.
- 16 5. The 1975-77 Faculty Contract did not contain a table on  
17 salaries for either 1977-78 or 1978-79.
- 18 6. Section 11.100, II, E, of the Faculty Contract reads in  
19 part:  
20 Future faculty employed by EMC may not be paid less  
21 than the appropriate year's floor schedule salary.  
22 However, with consent of the Coalition [AAUP], salaries  
23 may exceed the floor schedule.
- 24 Charge No. 1
- 25 7. The salaries of bargaining unit members who were under  
26 contract to Eastern for 1976-77 were frozen by EMC at the  
27 1976-77 level for 1977-78 and 1978-79. They did not receive  
28 credit for experience earned after June 30, 1977.
- 29 8. Salaries for 1977-78 new faculty hires (persons not holding  
30 a contract with Eastern for 1976-77) were set by EMC as  
31 follows:  
32 a. EMC computed the "modified years of experience" to  
include experience earned between July 1, 1976 and  
June 30, 1977 and  
b. Used the floor schedule for 1976-77 (set forth on page  
14 of the 1975-77 Faculty Contract) to set the salary  
amount.

- 1 9. AAUP bargaining unit members were paid different salaries  
2 for 1977-78 depending on whether or not they held a contract  
3 with Eastern for 1976-77.
- 4 10. Correspondence from the administration, EMC, to the new  
5 faculty hires for 1978-79 stated salary offers based on  
6 experience earned during the period July 1, 1976 through  
7 June 30, 1978.
- 8 11. At the bargaining session held September 25, 1978, EMC  
9 verbally proposed that AAUP agree to the payment of the  
10 salary amounts stated in letters of appointment sent by EMC  
11 to new faculty hires for 1978-79. This request was reduced  
12 to writing in the letter of October 4, 1978 (Complainant's  
13 exhibit #8).
- 14 12. Correspondence to new faculty member for 1978-79 stating  
15 salaries included the statement that such salaries were  
16 "subject to collective bargaining."
- 17 13. EMC did not formally confer with AAUP concerning the salary  
18 amounts paid to new faculty for 1977-78.

19 Charge No. 2

- 20 14. Memorandum regarding offer to Aaron Hause from Robert J.  
21 McRae to Dr. John Van de Wetering dated April 14, 1978  
22 states: "By the way, the salary level of \$17,150 includes  
23 the summer appointment at a rate of .22 of the ten month  
24 contract."
- 25 15. President Van de Wetering's letter of April 17, 1978 reads  
26 in part: "I am pleased to offer you an appointment as Serials  
27 Librarian, effective September 15, 1978, on an academic year  
28 appointment at a salary level of \$17,150, subject to collec-  
29 tive bargaining. The salary level of \$17,150 includes the  
30 summer appointment at a rate of .22 of your ten month con-  
31 tract."
- 32 16. Van de Wetering's April 26, 1978 letter to Hause changed the

- 1 effective date from September 15 to July 1.
- 2 17. The May 31, 1978 Board of Regents agenda item 20-700-R0578  
3 reads: "\*Hause, Aaron, M.L.S. Serials/Documents Librarian to  
4 replace Jo Self effective July 1, 1978, \$17,150 (FY)  
5 \*subject collective bargaining!" Minutes show item  
6 approved.
- 7 18. The September 11, 1978 Board of Regents agenda item  
8 22-700-R0978 reads: "Corrections in 1978-79 Contract  
9 \*Hause, Aaron, M.L.S.  
10 FR: Serials/Documents Librarian \$17,150 (FY)  
11 TO: Serials/Documents Librarian \$14,572 (AY)  
12 \*Subject to Collective bargaining"
- 13 19. John McRae testified for EMC that the listing of Aaron Hause  
14 as an FY employee in Item 20-700-R0578 was a mistake and was  
15 corrected by Board Item 22-700-R0978 at the Board of Regents  
16 meeting held September 11, 1978.
- 17 20. Mark Rider's name is on the list attached to the October 4,  
18 1978 letter from Ken Hickes, Vice President, EMC to Harry  
19 Gaghen, Spokesman, AAUP. (Complainants exhibit No. 8)
- 20 21. Sections 9.420 and 9.430 of the contract are as follow:  
21 9.420 TEACHING BEYOND  
22 RETIREMENT AGE
- 23 A faculty member who has reached 65 years of age  
24 or who has taken early retirement may continue teaching  
25 on annual appointment on either a full-time or part-  
26 time basis under the following procedure:  
27 A written application is submitted to the Admini-  
28 strative Unit Head at least four months before the  
29 retirement would become effective.  
30 The faculty member's application is submitted to  
31 his department for its recommendation. The application  
32 is then submitted with the departmental recommendation  
to the Dean of the appropriate school.  
The recommendations of the Administrative Unit  
Head and appropriate Dean shall be transmitted to the  
President of Eastern Montana College for his recommen-  
dation to the Board of Regents of Higher Education. If  
the recommendation of the Administrative Unit Head and  
appropriate Dean are both negative, the application  
will be deemed rejected.  
By December 31 of each subsequent year the faculty  
member who has reached age 65 or who has taken early

1 retirement shall submit a request to continue teaching.  
2 During such years of continued service, the faculty  
3 member involved shall be entitled to the continuation  
4 of all applicable fringe benefits, with appropriate  
5 payroll deduction.

6 The approval of full-time or part-time teaching  
7 may be continued up to and including the academic year  
8 the faculty member attains age seventy.

9 9.430 END OF TENURE

10 A faculty member's tenure automatically shall  
11 terminate when the faculty member reaches age 65 and,  
12 thereafter, the faculty member shall be deemed to hold  
13 a year-to-year contract, in accordance with the retire-  
14 ment procedures set forth above.

- 15 22. EMC president, John Van DeWetering, wrote a memorandum on  
16 May 22, 1978 in response to a request for information from  
17 the President of AAUP to Dr. Larry Pettit (see Complainant's  
18 exhibit #13). Item 3 on page 2 of the memo to Dr. Anneke-  
19 Jan Boden reads in part:

20 Generally, what we are able to provide faculty who wish  
21 to retire early includes: One academic quarter teaching  
22 at one quarter pay until age 65, one final half-summer  
23 session, and the pay-out on whatever financial obliga-  
24 tion the institution has, such as accumulated leave,  
25 accumulated sick leave pay, etc. Those who have chosen  
26 to retire this year have been particularly interested  
27 in the opportunity to continue teaching for one quarter  
28 a year.

- 29 23. The early retirement agreement between EMC and Mr. Miller is  
30 dated June 1, 1978. The agreement with Mr. Thompson is  
31 dated July 13, 1978.

- 32 24. On September 5, 1978, AAUP and EMC reached the following  
tentative agreement (Respondents exhibit #1):

33 9.450 EARLY RETIREMENT

34 A Task Force shall be established by the Faculty-  
35 Administration Committee, consisting of two faculty and  
36 two administrators, to recommend policies and procedures  
37 for early retirement. The task force shall be appointed  
38 when the contract is ratified.

39 Final recommendations shall become effective when  
40 approved by the AAUP and the Commissioner of Higher  
41 Education.

- 42 25. A separate amount of money was not identified as a salary  
pool for the bargaining unit.
26. The contract is silent on the issue of extra compensation  
for faculty members.

- 1 27. The only contract provision addressing Summer Session is  
2 Section 11.300 setting the formula to be used to set salaries.  
3 28. E.M.C.'s President testified that the administration used  
4 the same procedures for assigning summer session faculty in  
5 1978-79 as it did in prior years.  
6 29. Karen Olsen and Mike Malloweny are full-time faculty members  
7 in the Health, Physical Education and Recreation Department.  
8 Karen Olsen was assigned duties as the assistant women's  
9 basketball coach and Mike Malloweny was assigned duties as  
10 the men's track coach. Olsen and Malloweny were each paid  
11 \$1500 for coaching duties.

12 DISCUSSION

13 Format

14 The discussion is divided into three separate parts. Each  
15 part deals with one of the three charges stated in the amended  
16 ULP. The language of the charge and the referenced section of  
17 R.C.M., 1947 are included at the beginning of each part.

18 Part 1, Charge 1

19 Discrimination in pay schedule with members of a  
20 bargaining unit. 16-5905(c), (e) [sic] R.C.M.,  
1947.

21 The administration at Eastern Montana College has  
22 failed to negotiate in good faith. The Administra-  
23 tion has applied different pay schedules to the  
24 faculty within a single bargaining unit. Faculty  
25 members employed before the academic year 1977-78  
26 were not reimbursed at their current years of  
27 experience and current rank appropriate to the  
extended 1975-77 contract. New faculty employed  
for 1977-78 and others have been paid on the basis  
of their years experience at the end of the academic  
year 1976-77 while faculty employed before 1977-78  
were paid on the basis of their experience at the  
end of the academic year 1975-76.

28 Section 59-1605 (1)(c) R.C.M., 1947:  
29 It is an unfair labor practice for a public employer  
30 to discriminate in regard to hire or tenure of  
31 employment or any term or condition of employment  
to encourage or discourage membership in any labor  
organization.

32 Section 59-1605(1)(c) is parallel to Section 8(a)(3) of the  
National Labor Relations Act, 29 USCS Section 158(a)(3). In

1 order to show a violation of 59-1605(1)(c) R.C.M., 1947, it is  
2 necessary to prove or infer (1) employer discrimination as to  
3 hire or tenure of employment or any term or condition of  
4 employment; (2) resulting encouragement or discouragement of  
5 membership in a union; and (3) unlawful intent.<sup>1</sup> Employer  
6 discrimination consists of treating like classes differently.  
7 The necessity of specific evidence of a discriminatory motive  
8 depends on which of two categories the employer's act falls into:  
9 (1) discriminatory conduct "inherently destructive" of important  
10 employee rights, or (2) discriminatory conduct having a  
11 "comparatively slight" adverse effect on employee rights.

12 In Great Dane Trailers, Inc.<sup>2</sup>, the Supreme Court laid down  
13 the following rules:

14 (1) If an employer's discrimination is "inherently  
15 destructive" of important employee rights, the NLRB can find that  
16 an unfair practice has been committed, even without proof of  
17 antiunion motivation and even if the employer proves he was  
18 motivated by business reasons.

19 (2) If the effect upon employee rights of an employer's  
20 discrimination is "comparatively slight," antiunion motivation  
21 must be proved in order to find an unfair practice only if the  
22 employer has proved the discrimination was for business reasons.

23 (3) If it has been proved that an employer's discrimination  
24 could have adversely affected employee rights to some extent, the  
25 burden is on the employer to prove that he was motivated by  
26 business objectives.

27 Once it has been proven that the employer engaged in  
28 discriminatory conduct which could have adversely affected  
29 employee rights to some extent, the burden is upon the employer  
30 to establish that it was motivated by legitimate objectives since  
31

32 1. NLRB v. Brown, 380 US 278, 58 LRRM 2663 (1965)

2. NLRB v. Great Dane Trailers, Inc., 388 US26, 65 LRRM  
2465(1967)

1 proof of motivation is most accessible to him.<sup>3</sup>

2 Mere protestations that he did not intend to encourage or  
3 discourage union membership is unavailing where a natural  
4 consequence of his conduct was such encouragement or  
5 discouragement.<sup>4</sup>

6 Dr. John E. Van deWetering, President, Robert J. McRae,  
7 Acting Academic Vice-President, and Kenneth Heikes,  
8 Administrative Vice-President, testified for the respondent,  
9 Eastern Montana College.

10 The record does not establish a legitimate and substantial  
11 business justification for discrimination in salaries paid  
12 members of the AAUP bargaining unit for 1977-78 and 1978-79.  
13 Dr. Van deWetering, President of EMC, testified that there was  
14 no intent to discourage or encourage union membership.

15 The record does contain evidence that the motivation for  
16 discriminating in 1978-79 was to "put as much money out front as  
17 possible to be competitive" and "that a number of very good  
18 candidates in a number of departments were lost because of the  
19 uncertainty of the dollars offered [subject to collective  
20 bargaining]." This evidence is insufficient to establish  
21 substantial business justification.

22 Section 11.100, II, E. was available as a mechanism whereby  
23 EMC could have sought the consent of the bargaining agent to  
24 exceed the floor schedule in paying new faculty.

25 I find that EMC's discriminatory conduct in paying similarly  
26 situated persons in the bargaining unit different salary rates  
27 for 1977-78 and 1978-79 could have adversely affected employee  
28 rights to some extent. Therefore, EMC had the burden to establish  
29 that it's conduct was motivated by a legitimate and substantial  
30 justification. EMC failed to meet this burden of proof.

31  
32 3. NLRB vs. Great Dane, Trailers, Inc., supra note 2.

4. Radio Officer's Union of Commercial Telegrapher's Union  
v. NLRB 347 U.S. 17, 33 LRRM 2417(1954)

1 Section 59-1605(1)(e), R.C.M., 1947:

2 It is an unfair labor practice for a public employer to  
3 refuse to bargain collectively in good faith with an  
4 exclusive representative.

5 An employer's unilateral action in altering the terms and  
6 conditions of employment for new hires without first giving  
7 notice to, and conferring in good faith with, the union  
8 constitutes an unlawful refusal to bargain.<sup>5</sup> Wages are a  
9 mandatory bargaining subject. The employer must bargain with the  
10 union on a mandatory subject. Respondent acknowledges that new  
11 employees should have been treated in the same manner as old  
12 employees. I find that EMC unilaterally changed the wages of new  
13 faculty hires.

13 Part 2, Charge 2

14 Negotiating contracts with individual members of a bargaining  
15 unit 59-1605(e) R.C.M., 1947.

16 The administration at Eastern Montana College has  
17 bypassed the exclusive representative, A.A.U.P., by  
18 engaging in negotiations concerning wages, hours, and  
19 other conditions of employment with faculty members on  
20 an individual basis since February 14, 1978. The  
21 administration also has discussed terms of employment  
22 such as individual salaries, stipends above and beyond  
23 the salary schedule, early retirement, summer session  
24 employment, and arrangements for 1978 and thereafter.

21 Section 15-1605(1)(e)

22 It is an unfair labor practice for a public  
23 employer to refuse to bargain collectively in good  
24 faith with an exclusive representative.

24 Item 1 of Charge 2:

25 INDIVIDUAL SALARIES:

26 Faculty Involved: Arron Hause  
27 Mark Rider

27 Following negotiations for 1975-1977 faculty contract  
28 the Administration required all members of the  
29 bargaining unit on 12 month and Fiscal year contracts  
30 to contract on the Academic year. The source used for  
31 this requirement by the Administration was Section  
32 15-000 of the faculty contract of 1975-1977.  
33 Librarians forced to go to the Academic year contracts  
34 were:

34 Jo Self  
35 Winnie Griffith  
36 Joan Mead

5. NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177(1962).

1 When the Administration hired Arron Hause to replace Jo  
2 Self as a Librarian and member of bargaining unit he  
was hired on a fiscal year contract.

3 Documentation; Staff recommendations of the Board  
of Regents meeting May 31, 1978, minutes of May 31,  
4 1978, Item no. 20-700-R0578.

5 The administration contract proposal of June 29,  
1978, to the faculty negotiating team, contained Section  
6 11.7 in which the Administration proposed that all  
librarians and counselors be returned to a fiscal year  
7 contract basis. In the case of Arron Hause the admini-  
stration implemented their intent before it was negoti-  
8 ated into the contract. Mark Rider newly hired for the  
academic year of 1978-79. The salary schedule was  
9 circumvented and without regard to the contract. Only  
known information concerning faculty member Rider who  
10 was hired as a Music Therapist is a meeting of July 5,  
1978 to discuss his conditions and terms of employment  
with the Administration.

11 I conclude that the listing of Aaron Hause as a fiscal year  
12 employee on the May 31, 1978 Board of Regents' agenda was an  
13 error and not unilateral implementation of the subsequent admini-  
14 stration's bargaining proposal that librarians be returned to a  
15 fiscal year contract.

16 The only information in the record concerning Mark Rider is  
17 the inclusion of his name on the list of new faculty hires for  
18 1978-79 in which E.M.C. requested AAUP to agree to pay the new  
19 hires at the rates quoted to them in letters of correspondence  
20 (See Complainant's Exhibit No. 8).

21 Item 2 of Charge 2

22 STIPENDS ABOVE THE SALARY SCHEDULE

23 Faculty involved: Mike Malloweny \$1500.00  
Karen Olsen \$1500.00

24 When faculty is paid stipend above the contract salary  
schedule the money comes out of the salary pool. Money  
25 paid out of the salary pool must be negotiated when it  
is paid to members of the bargaining unit. Members of  
26 the bargaining unit were paid stipends for the academic  
year of 1978-1979 without negotiating with the exclusive  
27 bargaining agent.

28 Item 4 of Charge 2:

29 SUMMER SESSION EMPLOYMENT

Faculty involved: Dick Edwards  
30 Jere Lee Dobbys

31 Two newly hired faculty for the academic year of 1978-79  
were promised summer session employment when they were  
hired. Simultaneously the administration was demanding  
32 that the bargaining agent, AAUP, negotiate summer  
session employment. It is obvious from the proposal  
submitted to the AAUP negotiating team Section 11.300  
that the Administration wants complete control of

1 summer session employment and implemented that intent  
2 before it was negotiated with the bargaining unit.  
3 Fiscal year contracts were also tendered to the above  
4 faculty members. (Faculty meeting notes, May 11, 1978)

5 In J. I. Case Co.<sup>6</sup> the Supreme Court said:

6 Care has been taken in the opinions of the Court  
7 to reserve a field for individual contracts...  
8 because there are circumstances in which it may  
9 legally be used. Men may continue work after a  
10 collective agreement expires and, despite nego-  
11 tiation in good faith the negotiation may be  
12 dead-locked or delayed; in the interim expressed  
13 or implied individual agreements may be held to  
14 govern.

15 We know of nothing to prevent the employee's  
16 making any contract [with the employer] provided  
17 it is not inconsistent with a collective agreement  
18 or does not amount to or result from or is not  
19 part of an unfair labor practice.

20 Individual contracts may not be availed of to  
21 defeat or delay the procedures prescribed by the  
22 National Labor Relations Act looking to collective  
23 bargaining.

24 Individual contracts not used for coercive purposes which  
25 are consistent with and subservient to the terms of the collec-  
26 tive bargaining agreement are permitted. Individual contracts  
27 which continue the status quo and do not contain unilateral  
28 changes in regard to terms and conditions of employment which are  
29 subjects of collective bargaining are permitted.

30 EMC's contention that the stipends paid to Malloweny and  
31 Olsen and that the Summer Session Employment of Edwards and  
32 Dobbys were merely continuations of the status quo is uncontra-  
dicted. Therefore, I find the action of EMC setforth in Items 2  
and 4 of Charge 2 do not violate 56-1605(1)(e).

Item 3 of Charge 2:

EARLY RETIREMENT

Faculty involved: Fred Miller  
C. Paul Thompson

Memorandum of February 6, 1978 from Fred Miller to Dr.  
John Van De Wetering concerning his possible early  
retirement. Correspondence from Miller to Van de  
Wetering dated March 16, 1978, in regard to his early  
retirement. Memo from Van de Wetering to Miller on  
presenting an early retirement proposal. Memo of April  
14, 1978, from Larry K. Hannah, Associate Professor,

6. J.I. Case Co. v. NLRB 321 U.S. 332, 14 LRRM 501(1944).

1 Communication Arts Department to Miller in regard to  
2 summer session employment and early retirement.

3 C. Paul Thompson and the Administration at Eastern  
4 engaged in negotiations which culminated in an early  
5 retirement contract signed by Commissioner Pettit dated  
6 July 14, 1978. Memo to Jay F. Kirkpatrick, Interim  
7 Dean from Robert J. McRae, Acting Academic Vice  
8 President, dated May 1, 1978 concerning Thompson early  
9 retirement and negotiations for early retirement.

10 In determining whether an unlawful refusal to bargain has  
11 occurred, usually the conduct of the parties is examined to  
12 determine the presence or absence of subjective "good faith".  
13 However, certain types of conduct have been held "per se"  
14 violations without regard to any consideration of good or bad  
15 faith. Unilateral changes by an employer during the course of a  
16 collective bargaining relationship concerning matters which are  
17 proper subjects of bargaining are normally regarded as "per se"  
18 refusals to bargain.<sup>7</sup>

19 Section 9.420 of the Contract sets forth a procedure under  
20 which "[a] faculty member. . . who has taken early retirement may  
21 continue teaching on an annual appointment on either a full-time  
22 or part-time basis."

23 EMC's agreement with Mr. Thompson states that he will be  
24 offered to teach during one academic quarter each year through  
25 the spring of 1983. The agreement with Miller states that he  
26 will have the option of teaching one quarter per year through  
27 1982. The fact that the agreements provided for teaching for one  
28 quarter time for a period longer than one year is inconsistent  
29 with Section 9.420 of the contract.

30 EMC contends that the action taken by them in entering into  
31 the retirement agreements with Miller and Thompson are within the  
32 scope of the Management Rights Clause or in the alternative that  
AAUP waived its right to challenge these agreements by its failure  
to negotiate retirement benefits into the 1975-77 contract or to  
propose anything during current negotiations.

---

7. NLRB v. Katz, supra note 5.

1           The Management Rights Clause of the contract, 7.000, reads  
2 in part:

3           The policies of the Board and the College shall  
4 extend, except as modified by this agreement, to the  
5 following: (b) hire, promote, transfer, assign and  
6 retain faculty.

7           Any specific provision in the Contract is controlling over  
8 the general powers of the Management Rights Clause.

9           Before concluding that AAUP had waived its right to bargain  
10 retirement benefits during the negotiations which culminated in  
11 the 1975-77 contract it would be necessary to evaluate those  
12 negotiations in regard to the subject of retirement benefits and  
13 determine whether or not the matter was "fully discussed" or  
14 "consciously explored" and "consciously yielded." The record  
15 does not contain the evidence necessary to make this finding.

16           The remaining question in regard to the retirement agree-  
17 ments is whether or not the union waived its right to bargain  
18 after it had knowledge of the action of EMC in regard to the  
19 pending agreement with Thompson and Miller. The duty to bargain  
20 arises upon request, and where an opportunity exists to bargain  
21 but no request is made a waiver may result.<sup>8</sup>

22           AAUP received notice of EMC's action in regard to retirement  
23 upon receipt of Dr. Van deWetering's memo of May 22, 1978. The  
24 retirement agreement with Miller was signed nine days later and  
25 the one with Thompson, July 13, 1978. In the interim on June 14,  
26 1978, AAUP filed ULP 16-78 charging EMC with failure to bargain  
27 in good faith in regard to the retirement agreements.

28           The Contract between EMC and AAUP was in effect at the time  
29 EMC signed individual agreements with Mr. Thompson and Mr. Miller.  
30 In addition EMC and AAUP were in the process of negotiating a new  
31 collective bargaining agreement.

32 8. Medicenter, Mid South Hospital, 221 NLRB 105, 90 LRRM 1576 (1975).

1           EMC and AAUP reached tentative agreement on a retirement  
2 provision on September 5, 1978.

3           I find that AAUP did not waive it's right to bargain retire-  
4 ment benefits and that EMC's agreements with Mr. Thompson and Mr.  
5 Miller contained a provision inconsistent with an existing collec-  
6 tive bargaining agreement. Therefore, I find that EMC did violate  
7 RCM 59-1605(1)(e) in negotiating the retirement agreements with  
8 Mr. Thompson and Mr. Miller.

9           Part 3, Charge #3

10          Interference in the exercise of rights of employees  
11          guaranteed in Section 3(59-1603), 59-1605(a), (b)  
12          R.C.M., 1947.

13          The President of Eastern Montana College has  
14          called faculty meetings at which articles of the  
15          contract and matters under negotiation were placed on  
16          the agenda and discussed on February 28, 1978; April 4,  
17          1978; May 2, 1978; and May 16, 1978.

18          Section 59-1603(3):

19          Labor organizations designed in accordance with  
20          the provisions of this act are responsible for repre-  
21          senting the interest of all employees in the exclusive  
22          bargaining unit without discrimination for the purposes  
23          of collective bargaining with respect to rates of pay,  
24          hours, fringe benefits and other conditions of employ-  
25          ment.

26          Section 59-1605(1)(a)(b):

27          It is an unfair labor practice for a public employer  
28          to (a) interfere with, restrain, or coerce employees in  
29          the exercise of the rights guaranteed in section 59-1603  
30          of this act; (b) dominate, interfere or assist in the  
31          formation or administration of any labor organization;...

32          Section 59-1605(1)(a) and (b) is parallel to Section 8(d)(1)  
and (2) of the NLRA (29 USCS Section 158(a)(1) and (2)) There  
is no provision in the Montana Act similar to NLRA Section 8(c):

        The expressing of any views, arguments, or opinion or  
the dissemination thereof, whether in written, printed,  
graphic or visual form, shall not constitute or be  
evidence of an unfair labor practice under any of the  
provisions of this Act, if such expressions contain no  
threat of reprisal or force or promise of benefit.

        However, the U.S. Supreme Court in NLRB v. Gissel Packing<sup>9</sup>  
held that Section 8(c) of the NLRA "merely implements the First

9. NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 reh den 396 U.S.  
869 (1969).

1 Amendment by requiring that the expression of any views, argument  
2 or opinion" shall not be "evidence of an unfair labor practice"  
3 so long as such expression contains "no threat of reprisal or  
4 force or promise of benefit in violation of Section 8(a)(1)."

5 Testimony by AAUP members in regard to Charge 3 emphasized  
6 the fact that John Van deWetering is the President of EMC and  
7 because of that fact his discussing subject matters under negoti-  
8 ation at a faculty meeting interfered with the rights of members  
9 of the bargaining unit.

10 Evidence for the complainant does not address the content of  
11 the remarks made by Dr. Van deWetering beyond the subject matter  
12 discussed.

13 An employer's free speech right to communicate his views to  
14 his employees is firmly established and cannot be infringed upon  
15 by the board.<sup>10</sup>

16 I find that complainant has not shown that EMC violated  
17 59-1605(1)(a) or (b).

18 CONCLUSIONS OF LAW

19 I find that E.M.C. violated Section 59-1605(1)(c) and (e)  
20 R.C.M., 1947 by unilaterally altering the salaries for new hires  
21 for the years 1977-78 and 1978-79.

22 I find that E.M.C. did violate Section 59-1605(1)(e) as  
23 specified in Item 3 of Charge 2 but did not violate Section  
24 59-1605(1)(e) as specified in Items 1, 2, and 4 of Charge 2.

25 I find that E.M.C. did not violate 59-1605(1)(a) and (b) as  
26 stated in Charge 3 of ULP 16-78.

31  
32 10. NLRB v. Gissel, supra note 9.

1 RECOMMENDED ORDER

2 The hearing on amended ULP 16-78 was held on October 5,  
3 1978. Since the hearing, EMC and AAUP have successfully  
4 negotiated a Collective Bargaining Agreement effective July 1,  
5 1977 through June 30, 1979. The fact that the efforts of the  
6 parties culminated in a negotiated contract speaks directly to  
7 the issue of bargaining in good faith. The negotiated contract  
8 remedied the 59-1605 (1) (e) R.C.M., 1947 [39-31-401(5) MCA]  
9 violations. Therefore, this recommended order contains no addi-  
10 tional remedies for the 59-1605 (1) (e) R.C.M., 1947 violations."

11 Eastern Montana College is ORDERED to cease and desist  
12 violating 59-1605 (1) (c), R.C.M., 1947 [39-31-401(3) MCA] by  
13 paying new faculty hires a different salary than the salary paid  
14 similarly situated faculty members.

15 Dated this 10<sup>th</sup> day of August 1979.

16 BOARD OF PERSONNEL APPEALS

17  
18 By Kathryn Walker  
19 Kathryn Walker  
20 Hearing Examiner

21 NOTICE

22 Written exceptions may be filed to these Findings of Fact,  
23 Conclusions of Law, and Recommended Order within twenty days  
24 after service thereof. If no exceptions are filed with the Board  
25 of Personnel Appeals within that period of time, the Recommended  
26 Order shall become the Final Order of the Board of Personnel  
27 Appeals. Exceptions shall be addressed to the Board of Personnel  
28 Appeals, Capitol Station, Helena, Montana 59601.

29  
30  
31 11. Complainant requested a remedy regarding the furnishing of information  
32 to the exclusive bargaining representative. ULP 16-78 did not charge EMC  
with failure to supply information.

1 CERTIFICATE OF MAILING

2 I, Jennifer Jacobson, hereby certify and state that I did,  
3 on the 14<sup>th</sup> day of August, 1979 mail a true and correct copy of  
4 the FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER,  
5 ULP 16-78, to the following persons:

6 Ms. Rosemary Boschert  
7 Attorney at Law  
8 219 Hedden-Empire Building  
9 Billings, MT 59101

10 Dr. Anneke-Jan Boden  
11 President, EMC AAUP  
12 2621 Beth Drive  
13 Billings, MT 59101

14 President John E. Van DeWetering  
15 Eastern Montana College  
16 Billings, MT 59101

17 Mr. Steven A. Veazie  
18 Attorney at Law  
19 Montana University System  
20 33 South Last Chance Gulch  
21 Helena, MT 59601

22   
23 Jennifer Jacobson

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