

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 17-78: )  
MONTANA PUBLIC EMPLOYEES ASSOCIATION, INC., )  
Complainant, )  
- vs - )  
STATE OF MONTANA, DEPARTMENT OF ADMINISTRATION, )  
PERSONNEL DIVISION, )  
Defendant. )

FINAL ORDER

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No exceptions having been filed, pursuant to ARM 24.26.107,  
to the Findings of Fact, Conclusions of Law and Recommended Order  
issued on November 24, 1978;

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

BOARD OF PERSONNEL APPEALS

By: *Brent Cromley*  
Brent Cromley  
Chairman

\*\*\*\*\*

CERTIFICATE OF MAILING

I, Jennifer Jacobson, hereby certify and state that I did on  
the 11<sup>th</sup> day of January, 1979, mail a true and correct copy of  
the above FINAL ORDER to the following persons:

David W. Stiteler, Attorney  
State Personnel Division  
Department of Administration  
Room 101, Mitchell Building  
Helena, MT 59601

Barry Hjort  
Attorney at Law  
3030 North Montana Avenue  
Helena, MT 59601

*Jennifer Jacobson*  
Jennifer Jacobson

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE )  
NO. 17-1978: )  
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INC., )  
Complainant, )  
- vs - )  
STATE OF MONTANA, DEPARTMENT OF )  
ADMINISTRATION, PERSONNEL DIVISION, )  
Defendant. )

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND  
RECOMMENDED ORDER

\*\*\*\*\*

INTRODUCTION

Complainant filed an unfair labor practice charge with this Board on June 23, 1978 alleging that Defendant had violated Section 59-1605 (e) R.C.M. 1947, by making certain unilateral changes in a promotion or classification system which affected some of the employees represented by Complainant and by later imposing limitations and conditions on proposed negotiations. In its answer, Defendant denied the charges and alleged that its actions were within the scope of its statutory authority. A hearing was held on September 21, 1978, at which the Montana Public Employees Association, Inc. (MPEA) was represented by Mr. Barry L. Hjort; the state was represented by Mr. David W. Stiteler.

ISSUES

Whether Defendant had a duty to bargain with Complainant on the promotion and/or classification change made. If there was a duty to bargain with the exclusive representative, whether Defendant's refusal to do so, except under certain conditions, constituted a violation of Section 59-1605 (1) (e) R.C.M. 1947. If the Defendant refused to bargain in good faith, what is the appropriate remedy?



FINDINGS OF FACT

1  
2 1. The Montana Public Employees Association is the exclusive  
3 representative for certain data processing employees in the Depart-  
4 ments of Administration, Highways and Labor and Industry.

5 2. The State of Montana and MPEA entered into an agreement  
6 which covers the above employees in June 1977; the expiration date  
7 of that agreement is June 30, 1979.

8 3. Article 20, Section 2 of the agreement provides as follows:

9 "The Employer shall insure reasonable access to the Association  
10 and each employee an up-to-date policy manual of its rules, regulations  
11 and policies on employment related matters. The Association shall be  
12 notified of any proposed changes or additions to personnel rules,  
13 regulations and policies issued by the Department of Administration  
14 and the individual departments, sufficiently in advance to allow  
15 discussion and comment by the Association.

16 4. Article 24, Section 1 of the agreement reads as follows:

17 "The parties acknowledge that during negotiations which resulted  
18 in this agreement, each had the unlimited right and opportunity to  
19 make demands and proposals with respect to any subject or matter not  
20 removed by law from the area of collective bargaining, and that the  
21 understandings and agreements arrived at by the parties after the  
22 exercise of that right and opportunity are set forth in this  
23 agreement.

24 Therefore, the employer and the Association, for the duration  
25 of this agreement, each voluntarily and unqualifiedly waives the  
26 right, and each agrees that the other shall not be obligated to  
27 bargain collectively with respect to any subject or matter specifi-  
28 cally referred to or covered by this agreement. This article shall  
29 not be construed to in any way restrict parties from commencing  
30 negotiations under Article 1 or under the applicable law on any  
31 succeeding agreement to take affect upon termination of this  
32 agreement."

1           5. Article 4, Section 1 of the agreement reads as follows:

2           "Management rights shall be retained and exercised in accord-  
3           ance with the provisions of 59-1603 (2) R.C.M. 1947, except as  
4           such rights are specifically relinquished in this agreement."

5           6. Section 59-1603 (2) R.C.M. 1947 provides in part that  
6           "Public employees and their representatives shall recognize the  
7           prerogatives of public employers to . . . promote . . . employees;  
8           determine the . . . job classifications and personnel by which  
9           government operations are to be conducted; establish the methods  
10          and processes by which work is performed."

11          7. Section 59-907 R.C.M. 1947 provides that "The department  
12          shall continuously review all positions on a regular basis and  
13          adjust classifications to reflect significant changes in duties  
14          and responsibilities; provided, however, employees and employee  
15          organizations will be given the opportunity to appeal any changes  
16          in classifications or positions. Anything relevant to the deter-  
17          mination of reasonable classifications and grade levels for state  
18          employees shall be a negotiable item appropriate for the considera-  
19          tion of the state and exclusive representatives under the provisions  
20          of Title 59, Chapter 16, R.C.M. 1947."

21          8. The state experienced a high turnover among its keypunch  
22          operators and, as a result of a study conducted by the Personnel  
23          Division, Classification Bureau, decided that certain changes were  
24          needed.

25          9. On March 1, 1978, the Administrator of the Personnel  
26          Division issued a memorandum to Department Directors in which he  
27          stated in part:

28                 "Attached are final copies of new class specifications that  
29                 are being implemented to replace the specifications for the Keypuncher  
30                 Operator class series."

31                 "The education and experience requirements in the new specifi-  
32                 cations have been significantly reduced."

1 "In order to overcome turnover and staffing problems, manage-  
2 ment may set the staffing pattern within their budgeted appropria-  
3 tion and FTE amounts by allowing individual employees to be promoted  
4 without waiting for a vacancy to occur. The primary objective is to  
5 allow individuals to be quickly promoted as they gain increased  
6 skill and assume additional responsibility."

7 "The net effect is that we are relying on management to deter-  
8 mine which positions are performing at what level based on the  
9 general criteria contained in the specification."

10 "At this time we can find no justification for an upgrade of  
11 the series."

12 "We feel the additional flexibility to modify positions as  
13 outlined above should relieve many of the turnover problems."

14 9. Some of the keypunch operators in the departments with  
15 which we are concerned here and who are represented by MPEA received  
16 upgrades as a result of the change made by the Personnel Division.

17 10. In March, 1978, representatives of MPEA became aware of  
18 the change through complaints from unit members and from an official  
19 in the Employment Security Division.

20 11. After meeting with employees of the three departments  
21 and deciding that there was considerable unrest over the change  
22 made, the MPEA representative, Mr. Brown, talked with the Chief of  
23 the Labor Relations Bureau, Mr. Schramm, who was, at that time,  
24 unaware of the change; MPEA wanted to go to the bargaining table.

25 12. At a subsequent meeting Mr. Schramm told Mr. Brown he  
26 would be willing to discuss the matter with MPEA, but that the no-  
27 strike provision of the contract would apply.

28 13. In a letter dated May 15, 1978, Mr. Schneider of MPEA  
29 informed Mr. Schramm of his concern over the change which had been  
30 made and stated ". . . action should be taken at the bargaining  
31 table to correct the problem . . . I am formally requesting that  
32 we immediately re-open the following contracts for purposes of

1 negotiating the classifications of all employees we represent in  
2 the Key punch Operator Series."

3 14. On May 17, 1978, Mr. Schramm replied to the above request  
4 by stating that the state was under no obligation to negotiate;  
5 that the Classification Bureau of the Division had the statutory  
6 authority to adjust classifications for all employees, union and  
7 non-union; but, that the state would be willing to discuss the  
8 issue with MPEA staff.

9 15. On June 23, 1978, Mr. Schramm wrote a letter to Mr.  
10 Schneider and reiterated his offer to " . . . negotiate over the  
11 new promotional policies . . . while maintaining all other provisions  
12 of the contract in effect."; he expressed disappointment in learning  
13 of MPEA's intent to "file unfair labor practice charges based on  
14 the recent classification changes . . ."; and requested that they  
15 sit down and discuss the key punch promotional policies.

16 16. On June 27, 1978, Mr. Schneider declined the offer to  
17 discuss, but offered to go to the table to settle the issue as  
18 long as no conditions were attached.

19 17. Mr. Schramm testified that he used the term "new promo-  
20 tional policy" interchangeably with "reclassification" and further,  
21 that if there was a duty to bargain, the imposition of conditions  
22 was improper.

23

#### OPINION

24

25 The facts in this matter were not in dispute at the hearing.  
26 The testimony of both Mr. Brown and Mr. Schramm was substantially  
27 identical with respect to the events which led to the filing of the  
28 unfair labor practice charge by MPEA. The Personnel Division  
29 implemented a change which resulted in the upgrading of certain  
30 employees represented by MPEA. The decision and implementation  
31 were made without notice to or an offer to bargain with the exclusive  
32 representative. The change involved modifications to the class

1 specifications in the minimum qualifications area, allowed more  
2 rapid movement from one level to the next and allowed the agencies  
3 to initiate individual reclassifications based on requirements and  
4 employee performance. After learning of the change and after  
5 communicating with the Personnel Division, MPEA brought this  
6 charge

7 Complainant asserts that the change made by Defendant was a  
8 unilateral management initiated promotion. Defendant contends the  
9 change was a reclassification made under authority of Montana law.  
10 The facts in the record clearly show that the class specifications,  
11 which include the positions occupied by the affected employees,  
12 were changed. They were changed by reducing the minimum qualifica-  
13 tions required so that promotions could be made more rapidly. Based  
14 on the evidence presented and the arguments made by the representatives,  
15 I must conclude that the change was a classification action primarily,  
16 which resulted in the promotion of certain employees. The minimum  
17 qualifications required by the specifications were lowered to allow  
18 managers to elevate employees to higher grades within the class  
19 series.

20 Section 59-907 R.C.M. 1947 makes anything relevant to the  
21 determination of classifications negotiable. That amendment  
22 enacted by the legislature subsequent to the enactment of the  
23 original law imposes an obligation on the state to bargain on  
24 classification for state employees represented by an exclusive  
25 representative under Title 59, Chapter 16. It must be assumed that  
26 the legislature knew what the law was when it amended Title 59,  
27 Chapter 9. Therefore, the conflict between the Defendant's mandate  
28 to review and adjust classifications and the management prerogative  
29 on job classifications set forth in Section 59-1603 (2) R.C.M. 1947  
30 must be resolved in favor of the obligation to bargain collectively  
31 on classification matters. Where employees are represented by an  
32 exclusive representative, the state must negotiate classification

1 matters with the representative unless there has been a waiver of  
2 that right by the union.

3 I find no clear and unmistakable language in the contract  
4 which can be said to constitute a waiver of Complainant's right to  
5 bargain on classifications. Neither Article 20 nor Article 24  
6 specifically deal with that subject. Article 4 deals with the  
7 rights retained by management under Section 59-1603 (2) R.C.M. 1947;  
8 however, the right to make unilateral classification changes, where  
9 there is an exclusive representative, was removed by the 1975  
10 Legislature.

11 When Defendant was asked to bargain on the change made, it  
12 agreed to sit down and negotiate, but only if Complainant agreed  
13 not to engage in concerted activities. Whether such imposition  
14 indicates bad faith depends upon whether the condition was unreasonable.  
15 On its face, it would appear that to take away the right to strike (or  
16 other concerted activities) from a union amounts, in effect, to the  
17 elimination of the one real power organized employees have. Without  
18 the right to withdraw their services, they would be left in a signi-  
19 ficantly weakened position at the bargaining table.

20 Defendant urges that if its conduct is found to constitute an  
21 unfair labor practice, the proper remedy is to cause both parties to  
22 revert to the status quo. Obviously, Defendant believed it was  
23 necessary to make the change which resulted in benefits to some of  
24 the employees. It does not follow that those benefits must be with-  
25 drawn - that is a subject which may be discussed during negotiations.  
26 Defendant's error was not in making the change, but rather in circum-  
27 venting the exclusive representative.

28 In summary, I conclude that the action taken by the Defendant  
29 was a classification change; that classification is a statutorily  
30 mandated subject of bargaining; that no action on the part of  
31 Complainant or contract language waived its right to bargain on the  
32 subject; that Defendant's imposition of conditions on bargaining was

1 improper and indicated bad faith; and, that the proper remedy is a  
2 bargaining order.

3  
4 CONCLUSION OF LAW

5 The State of Montana, Department of Administration, Personnel  
6 Division violated Section 59-1605 (1) (e) R.C.M. 1947 by making  
7 unilateral classification changes affecting employees represented  
8 by the Montana Public Employees Association and by imposing condi-  
9 tions upon proposed bargaining.

10 RECOMMENDED ORDER

11 In accordance with the authority granted this Board under  
12 Section 59-1608 R.C.M. 1947, it is hereby ordered that the State  
13 of Montana, Department of Administration, Personnel Division, its  
14 officers, agents and representatives shall:

15 1. Cease and desist from refusing to bargain on the subject  
16 of classification for keypunch operators represented by the Montana  
17 Public Employees Association.

18 2. Cease and desist from imposing the condition that MPEA  
19 not engage in concerted activities during the course of bargaining  
20 over the classifications of the keypunch operators represented by  
21 MPEA.

22 3. Not withdraw any benefits previously awarded keypunch  
23 operators represented by MPEA.

24 DATED this 24<sup>th</sup> day of November, 1978.

25 BOARD OF PERSONNEL APPEALS

26  
27 By: Jack H. Calhoun  
28 Jack H. Calhoun  
Hearing Examiner

29 \* \* \* \* \*

30 CERTIFICATE OF MAILING

31 I, Jennifer Jacobson, do hereby certify and state that I did,  
32 on the 27<sup>th</sup> day of November, 1978, mail a true and correct copy  
of the above FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED



1 ORDER to the following:

2 David W. Stiteler, Attorney  
3 State Personnel Division  
4 Department of Administration  
5 Room 101, Mitchell Building  
6 Helena, Montana 59601

7 Barry Hjort  
8 Attorney at Law  
9 3030 North Montana Avenue  
10 Helena, Montana 59601

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12 \_\_\_\_\_  
13 Jennifer Jacobson

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