

40/918

5/28/80

1 IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF
2 THE STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

3 No. DV-79-425

4 BOARD OF TRUSTEES OF SCHOOL DISTRICT)
5 NO. 38, FLATHEAD AND LAKE COUNTIES,)
6 MONTANA,)

7 Plaintiff,)

8 and)

JUDGMENT

9 THE BOARD OF PERSONNEL APPEALS AND)
10 THE BIGFORK AREA EDUCATION ASSOCIATION,)

11 Defendants.)

FILED May 29 1980
JOHN VAN
Clerk of the District Court

12 * * * * *

By Cathy J. Nash
Deputy Clerk

13 The matter of Judicial Review of the final order dated
14 July 20, 1979, of the Board of Personnel Appeals, Department
15 of Labor and Industry, State of Montana, having come on
16 regularly before this Court, and briefs having been sub-
mitted and filed by Plaintiff Board of Trustees of School
District No. 38 of Flathead and Lake Counties, Montana, and
by Defendant Board of Personnel Appeals and by Defendant
Bigfork Area Education Association, and the Court having
carefully examined same as well as the transcript and other
documents and exhibits filed in the case; and

17 THIS COURT FINDING:

18 1. That the Administrative Findings, Conclusions and
19 Order of the Defendant Board of Personnel Appeals are:

20 (a) Not in violation of constitutional or statu-
21 tory provisions;

22 (b) Not in excess of the statutory authority of
23 the agency;

24 (c) Not made upon unlawful procedure;

25 (d) Not affected by other error of law;

26 (e) Not clearly erroneous in view of the reliable,
27 probative, and substantial evidence on the whole record;

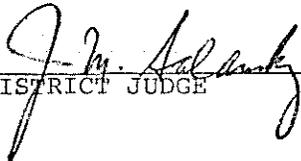
28 (f) Not arbitrary or capricious or characterized
29 by abuse of discretion nor clearly unwarranted exercise
30 of discretion;

31 2. That no substantial rights of Plaintiff have been
32 prejudiced.

33 WHEREFORE, by virtue of the foregoing and the statutory
34 requirement that this Court not substitute its judgment as
35 to the weight of the evidence on questions of fact, this

1 Court concludes that there is substantial evidence on the
2 whole record to support the aforesaid findings, conclusion,
3 and final order of the State Board of Personnel Appeals,
4 and therefore, the aforesaid findings, conclusion and order
5 are hereby affirmed.

6 DATED this 28th day of May, 1980.

7 
8 DISTRICT JUDGE

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

I hereby certify that I have mailed a true
copy of this document to:

Leslie S. White, III
Hiley & Spring, P.C. Board of Personnel Appeals
by depositing same in the U. S. Mail this
29 day of *May*, 19 *80*

JOHN VAN
Clerk of the District Court
By *Cathy J. Nash*
Deputy Clerk

8/16/79

RECEIVED

AUG 16 1979

BOARD OF PERSONNEL APPEALS

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 14739

THE STATE OF MONTANA, ex rel. THE
BOARD OF PERSONNEL APPEALS,

Relators,

vs.

THE DISTRICT COURT OF THE ELEVENTH
JUDICIAL DISTRICT, OF THE STATE OF
MONTANA, IN AND FOR THE COUNTY OF
FLATHEAD, AND THE HON. ROBERT SYKES,
PRESIDING JUDGE,

Respondents.

OPINION AND ORDER

This matter comes before us on the petition of the State of Montana through its Board of Personnel Appeals as relators, asking us either to stay or vacate by writ of supervisory control or otherwise, a writ of mandate issued against BPA out of the District Court, Eleventh Judicial District, Flathead County.

In the District Court, Bigfork Teachers Association (BTA) had filed its petition for writ of mandate or other appropriate writ against Robert R. Jensen, as administrator of the Board of Personnel Appeals (BPA) requesting that he be ordered to hold a decertification election to determine that the Bigfork Area Education Association (BAEA) was no longer the bargaining agent for teachers employed in School District No. 38, Flathead and Lake Counties.

It appears that BAEA had been recognized by School District No. 38 as the exclusive representative for collective bargaining for the teachers employed in the Bigfork schools. The parties had negotiated a two year contract, beginning July 1, 1976, and were engaging in collective bargaining for

FILED
AUG 15 1979
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

a successor contract during the spring and summer of 1978. BAEA and the School District failed to reach an agreement on such successor contract.

BAEA had filed with BPA a number of unfair labor practice charges against the School District. These charges were pending before BPA at the time the petition for a decertification election was filed by BAEA. The administrator took the position, and notified the parties, that until the Board's investigation and decision on the unfair labor practice charges was completed, BPA would not schedule a decertification election until it was assured "that the necessary laboratory conditions are present."

The Bigfork Area Education Association intervened in the District Court action as an interested party.

The District Court, after hearing, argument, and submission of briefs by all parties, issued its writ of mandate requiring BPA to "forthwith conduct an election" to determine the question of the proper bargaining representative for the members of the teachers' unit.

The application of BPA to this Court for an order to stay or vacate the writ of mandate followed.

A writ of mandate is an extraordinary writ which, according to statute, may be issued by a District Court "to compel the performance of an act which the law specially enjoins as a duty resulting from an office." Section 27-26-102 MCA. Without a clear legal duty, mandamus does not lie. *Cain v. Department of Health, Etc.* (1978), ___ Mont. ___, 582 P.2d 332, 35 St.Rep. 1056. The basic question for our decision in this case therefore, is whether BPA has a present affirmative legal duty to hold a decertification election. We hold that it does not.

The "laboratory conditions" under which BPA conducts a decertification election occur where there are no pending charges against the employer, of conduct constituting an unfair

labor practice. The purpose of BPA in seeking laboratory conditions is to accomplish a fair election and to determine the uninhibited desires of the employees.

In seeking the laboratory conditions, BPA is following the lead of the National Labor Relations Board which interprets and administers the Labor Management Relations Act under federal statutes, 29 U.S.C. §141 et seq. The NLRB has adopted what it calls the "blocking charge" rule to the effect that it will not conduct an election to determine the bargaining representative of a group where there is pending against the employer charges of unfair labor practice. Application of the "blocking charge" rule by NLRB has been held to be within its administrative procedural practices. *Furr's Inc. v. N.L.R.B.*, (10th C.A. 1965), 350 F.2d 84, 59 LRRM 2769. It is said in *Surprenant Mfg. Co. v. Alpert* (1st C.A. 1963), 318 F.2d 396, 53 LRRM 2405:

"Whenever, shortly prior to a representation election, it is charged that the employer has engaged in an unfair labor practice which might affect the outcome, the Board, upon investigation and a determination that the charge has prima facie merit, customarily postpones the election until it has been found that no unfair labor practice has been committed, or until the union waives any claim to rely upon the employer's conduct to invalidate the election. There is no provision in the statute, or even any regulation, which expressly authorizes such action, but, concededly, the Board has followed this 'blocking charge' procedure from the beginning. *United States Coal and Coke Company*, (1937), 3 NLRB 398; *Third Annual Report of the NLRB* (1939) 143. So far as we can discover it has never been judicially overturned."

We held in *State, Dept. of Hwys. v. Public Employees Craft Coun.* (1974), 165 Mont. 349, 529 P.2d 785, and in *Local 2390 of Amer. Fed., Etc. v. City of Billings* (1976), 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753, that it is appropriate for the BPA to consider NLRB precedents in interpreting and administering the Public Employees Collective Bargaining Act.

BTA contends that it is improper for BPA to apply the "blocking charge" rule since it has not been adopted by regulation nor has the power been granted by statute to BPA. However, in view of the federal precedents, it appears to be proper and logical to determine that in the conduct of a certification election, BPA has certain discretionary powers in order to assure that an election for a bargaining agent, when held, will be held under the best possible conditions insofar as the freedom of choice of the employees involved is concerned. The legislature appears to have given BPA a broad discretionary power in this matter in section 39-31-202, MCA, wherein it is stated:

"Board to determine appropriate bargaining unit - factors to be considered. In order to assure employees the fullest freedom in exercising the rights guaranteed by this chapter, the board or an agent of the board shall decide the unit appropriate for the purpose of collective bargaining and shall consider such factors as community of interest, wages, hours, fringe benefits, and other working conditions of the employees involved, the history of collective bargaining, common supervision, common personnel policies, extent of integration of work functions and interchange among employees affected, and the desires of the employees."

The duty of BPA on the presentation of a petition to determine the bargaining representative is set forth in section 39-31-207, MCA. There it is stated in pertinent part:

"(1) The board or an agent of the board shall investigate the petition and, if it has reasonable cause to believe that a question of representation exists, it shall provide for an appropriate hearing upon due notice whenever, in accordance with such rules as may be prescribed by the board, a petition has been filed:

"(a) by an employee or group of employees or any labor organization acting in their behalf alleging that 30% of the employees:

". . .

"(ii) assert that the labor organization which has been certified or is currently being recognized by the public employer as bargaining representative is no longer the representative of the majority of employees in the unit; or

". . ." (Emphasis added.)

In view of the discretionary provisions that are set forth in sections 39-31-202, MCA, and 39-31-207, MCA, BPA may not be required by writ of mandate to conduct an election forthwith, absent a showing of an abuse of discretion by BPA.

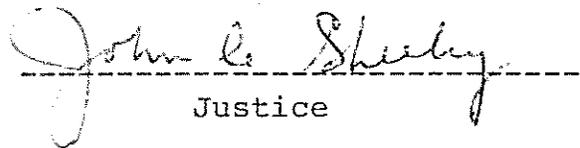
There is therefore no clear legal duty on the part of BPA to conduct the decertification election forthwith. As long as the blocking charges are not being used simply to delay the decertification election, and until BPA is satisfied that the necessary laboratory conditions exist, BPA is under no clear statutory duty to conduct the decertification election. Section 39-21-207, MCA.

Accordingly,

IT IS ORDERED:

1. The writ of mandate dated March 12, 1979 by the District Court for the Eleventh Judicial District of the State of Montana, in and for the County of Flathead, in its cause no. DV-79-008, is hereby vacated and set aside.

2. Copies of this opinion shall be served by the Clerk of this Court by ordinary mail upon the said District Court and counsel of record.


Justice

We Concur:



Chief Justice



Justices

Mr. Justice Daniel J. Shea, deeming himself disqualified, did not participate.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

BEFORE THE BOARD OF PERSONNEL APPEALS
OF THE STATE OF MONTANA

In the Matter of Unfair Labor)
Practice Charges #20, 22, 25,)
26, and 33, 1978:)
Bigfork Area Education)
Association,)

Complainant,)

vs.)

Board of Trustees, Flathead and)
Lake County School District #38,)

Defendant.)

FINAL ORDER

* * * * *

The Findings of Fact, Conclusions of Law, and Recommended Order were issued on April 30, 1979, by Hearing Examiner, Rick D'Hooge.

Exceptions of Defendant were filed by Mr. Leonard W. York on behalf of the Defendant.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant to the Findings of Fact, Conclusions of Law, and Recommended Order filed by Mr. Leonard W. York are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law, and Recommended Order of Hearing Examiner, Rick D'Hooge as the Final Order of this Board.

DATED this 20th day of July, 1979.

BOARD OF PERSONNEL APPEALS

By Brent Cromley
Brent Cromley, Chairman

LEG3:j

CERTIFICATE OF MAILING

I, Jennifer Jacobson, hereby certify and state that on the 23 day of July, 1979, a true and correct copy of the above captioned FINAL ORDER was mailed to the following:

Mr. William Pederson
Board of Trustees
School District #38
Bigfork, MT 59911

Mr. Leonard York
Board of Trade Building
Suite 421, 310 SW 4th
Portland, OR 97204

Mr. Mike Keedy, Director
UNISERV, Region 1
Montana Education Association
P.O. Box 1154
Kalispell, MT 59901

Hilley & Loring
Attorneys at Law
1713 Tenth Avenue
Great Falls, MT 59404

Jennifer Jacobson

LEG3:j

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

BEFORE THE BOARD OF PERSONNEL APPEALS
OF THE STATE OF MONTANA

In the Matter of Unfair Labor)
Practice Charges #20, 22, 25,)
26 and 33, 1978:)
Bigfork Area Education)
Association,)
Complainant,)
vs.)
Board of Trustees, Flathead)
and Lake County School)
District #38,)
Defendant.)

* * * * *

FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

The Bigfork Area Education Association (herein BAEA or BFEA) has charged the Board of Trustees, Flathead and Lake County School District #38 (herein School District) with improperly issuing individual teaching contracts (ULP #20-1978, count I), bypassing the exclusive bargaining agent (ULP #20-1978, count II), conditional bargaining (ULP #22-1978, count I), improperly calling impasse (ULP #22-1978, count II), withdrawal of recognition and refusing to bargain (ULP #25-1978), recognizing and bargaining with the Bigfork Teachers Association (herein BTA) (ULP #26-1978), and making unilateral changes in working conditions (ULP #33-1978).

This RECOMMENDED ORDER is divided into the major areas of I. Introduction, II. Stipulations, Administrative Note and Motions, III. Findings of Fact, IV. Charges, Discussion and Conclusion of Law, V. Remedy, and VI. Recommended Order.

Because the Board of Personnel Appeals has very little precedent in some areas, I will cite federal statutes and cases for guidance in the application of Montana's Collective

1 Bargaining Act, Title 39, Chapter 31, MCA (ACT). The Federal
2 Statutes will generally be the National Labor Relations Act, 29
3 USCA, Sections 151-166 (NLRA). The Montana Supreme Court in
4 State Department of Highways vs. Public Employee Craft Council,
5 165 Mont. 249, 529 P 2d 785 at 787 (1974) approved this principle:

6 When legislation has been judicially construed and a
7 subsequent statute on the same or an analogous subject is
8 framed in the identical language, it will ordinarily be
9 presumed that the Legislature intended that the language as
10 used in the later enactment would be given a like interpre-
11 tation. This rule is applicable to state statutes which are
12 patterned after federal statutes. [Citing cases] Although
13 the cases which have interpreted the italicized words
14 involved private employees, the act before us incorporates
15 the exact language, consisting of 16 words, found in the
16 earlier statutes, and it is unlikely that the same words
17 would have been repeated without any qualification in a
18 later statute in the absence of an intent that they be given
19 the construction previously adopted by the courts.

20 We think similar standards of judicial construction
21 apply in the present case. For example, section 19-102,
22 R.C.M., 1947 [Section 1-2-106 MCA] provides:

23 "Words and phrases used in the codes or other statutes
24 of Montana are construed according to the context and the
25 approved usage of the language; but technical words and
26 phrases, and such others as have acquired a peculiar and
27 appropriate meaning in law, or are defined in the succeeding
28 section, as amended, are to be construed according to such
29 peculiar and appropriate meaning or definition [Emphasis
30 added].

31 The question of what constitutes substantial evidence has
32 been addressed by the Montana Supreme Court, as illustrated by
33 the following quotation from Olson v. West Fork Properties, Inc.,
34 _____ Mont. _____, 557 P.2d 821 (1976):

35 Substantial evidence has been defined by this Court as
36 such as will convince reasonable men and on which such may
37 not reasonably differ as to whether it establishes the
38 plaintiff's case, and if all reasonable men must conclude
39 that evidence does not establish such case, then it is not
40 substantial evidence. The evidence may be inherently weak
41 and still be deemed "substantial," and one witness may be
42 sufficient to establish the preponderance of a case. See:
43 Staggers v. U.S.F. & G. Co., 159 Mont. 254, 496 P.2d 1161;
44 Greene v. Knapp's Service, 161 Mont. 438, 440, 506 P.2d 1381
45 [emphasis added].

46 This RECOMMENDED ORDER will use the above when considering
47 the evidence.

48

1 II. STIPULATIONS, ADMINISTRATIVE NOTE AND MOTIONS

2
3 1. The following Stipulations were entered into at the hearing
4 held October 25 and 26, 1978 concerning Unfair Labor Practice
5 Charges (ULP) #20, 22, 25 and 26, 1978:

- 6 a. The Board of Personnel Appeals has jurisdiction in the
7 charges as defined by 39-31-406 MCA. (Tr2).
8 b. The Board of Trustees, Flathead and Lake County School
9 District #38 is a public employer as defined by
10 39-31-103 Subsection 1 MCA. (Tr2).
11 c. The teachers of the Board of Trustees of Flathead and
12 Lake County School District #38 are public employees as
13 defined by 39-31-103 Subsection 2 MCA. (Tr2).
14 d. Bigfork Area Education Association affiliated with the
15 Montana Education Association is a Labor Organization
16 as defined by 39-31-103 Subsection 5 MCA. (Tr3).
17 e. A correction of a typographical error in Unfair Labor
18 Practice Charge #20-78, Count II, Line 1 and Line 10
19 should read 1978 not 1968 as typed. (Tr3).
20 f. Joint Exhibit 1, a Collective Bargaining Labor agree-
21 ment between the Complaintant and the Defendant effec-
22 tive from July 1, 1976 to June 30, 1978, is entered
23 into the record. (Tr3).
24 g. The first briefs will be simultaneously submitted and
25 exchanged thirty calendar days following the receipt of
26 the transcript of this hearing. Reply briefs will be
27 simultaneously submitted and exchanged 15 days later.
28 (Tr236).

29 2. The parties stipulated in regard to Unfair Labor Practice
30 Charge #33-78 as follows:

31 It is hereby stipulated by the parties hereto that
32 the final decision of the Board of Personnel Appeals as
33 to whether or not an impasse existed under the facts and
34 circumstances as presented in ULP #22-1978 may be deemed
35 controlling on the question of whether or not impasse
36 existed on August 31, 1978, as alleged in Defendant's answer
37 to the charge in the above entitled matter [ULP #33-78].

38 DATED this 25 day of January, 1979.

39 The Board of Personnel Appeals entered the following
40 order for Procedure for Unfair Labor Practice Charge #33-78:

41 In light of the attached [Above] stipulation, IT
42 IS HEREBY ORDERED that the following procedures be
43 followed:

- 44 1. A recommended ruling in ULP #33-78 will be
45 contained within the recommended ruling on ULP #20,
46 22, 25 and 26, 1978.

1 2. The ruling in ULP #33-78 will be based on the
2 record and supporting briefs of the hearing held on
3 October 25, and 26, 1978, plus the agreed to facts that
4 the defendant did make unilateral changes in working
5 conditions on or after August 31, 1978.

6 3. If the Board's Final Order in ULP #33-78
7 finds a valid charge, the parties, within 30 calen-
8 dar days, will attempt to reach an agreement on any
9 possible remedy required by the unilateral changes
10 in working conditions or related activities, and the
11 Board Order.

12 4. If the parties are unable to reach an agree-
13 ment on the remedy, the question of remedy will be
14 referred to the Administrator of the Board of Personnel
15 Appeals for further assignment and proposed remedy order.

16 DATED this 7th day of February, 1979.

17 3. At the hearing, Administrative Note was taken of both the
18 Bigfork Teacher Association's Petition for Decertification
19 (DC#5-78) of the Bigfork Area Education Association as the
20 exclusive bargaining representative for the Bigfork teachers and
21 employer's (Defendants) petition alleging that one or more labor
22 organizations has presented a claim to be recognized as the
23 exclusive representative. (Tr143).

24 4. At the hearing, the representative of the Defendant
25 submitted the following motion:

26 COMES NOW, the Defendant, Board of Trustees,
27 Flathead and Lake County School District #38, and
28 respectfully moves the Board of Personnel Appeals
29 dismiss the complaint [in ULP 26-78] of the Bigfork
30 Education Association on the grounds and for the
31 reasons that the complaint as filed herein and served
32 on Defendant does not state a cause upon which relief
can be granted; and, for the further grounds and
reasons [lack of clarity], set-out in the Defendant's
Memorandum Brief In Support Of Motion To Dismiss,
appended hereto.

 Respectfully submitted this 25th day of October,
1978, at Bigfork, Montana.

 The Defendants motion to dismiss ULP #26-78 is granted on
Count I because the complaint is set forth in a more concise
charge contained in ULP #20, 22, and 25, 1978 which is considered
by this recommended order. This dismissal of ULP #26-78, Count I
is limited to material outside of the charges setforth in ULP

1 #20, 22, 25 and 26, 1978. It is ordered that materials outside
2 of the charges in ULP #20, 22, 25 and 26, 1978 will not be con-
3 sidered when drafting the conclusion of law in the above unfair
4 labor practice charges. The Defendant's Motion to dismiss is not
5 granted in Count II of ULP #26-78 because the complaint contains
6 a clear charge which the Defendant can understand. A Review of
7 the Defendant's answer in ULP #26-78, Count II further demon-
8 strates the Defendant's clear understanding of the allegations.
9 5. At the beginning of the hearing, the Complainant's attorney
10 submitted a demand upon the representative of the School District
11 for proof of his authority to represent the Defendant. Section
12 20-1-204 MCA sets forth the following:

13 Upon request of the county superintendent or the
14 trustees of any school district or community college
15 district, the county attorney shall be their legal
16 adviser and shall prosecute and defend all suits to
17 which such persons, in their capacity as public
18 officials, may be a party; however, the trustees of
19 any school district or community college district may,
20 upon consent of the county attorney, employ any other
21 attorney licensed in Montana to perform any legal
22 services in connection with school or community
23 college board business. (Emphasis added).

24 The Complainant's attorney is questioning the lack of express
25 consent from the county attorney's offices. (Tr11). The complain-
26 ant argues that if the consent of the county attorney to represent
27 a school board is required, such consent is also necessary if a
28 school board chooses to select a non-attorney to perform their
29 legal services, namely trying a case before the Board of Personnel
30 Appeals.

31 The issue raised by the Complainant's demand of proof is
32 beyond the authority of this quasi-judicial board to rule on.
Therefore this issue will not be addressed.

6. On January 25, 1979, the Defendant filed a motion to strike
part of the Complainant's Brief and Reply Brief on the grounds
that the Briefs introduced additional materials not contained in

1 the official stenographic report of the hearing. And further
2 some of the materials contained in Briefs were later reported in
3 the local newspaper. On February 1, 1979, it was ordered that
4 the motion to strike part of the Complainant's briefs would be
5 ruled on in this Recommended Order.

6 The Defendant's Motion to Strike part of the Complainant's
7 Briefs is denied. The denial is based on the belief that a
8 portion of or all of the questionable material is contained
9 within the official report of the hearing, to wit:

- 10 a. A witness for the Complainant did state that the third
11 negotiation session did take place on February 1, 1978
12 as stated in the Complainant's first Brief, page 10,
13 Line 11. (Tr19, 20).
14 b. Exhibit C of the School District states in the upper
15 right hand corner that the ninth negotiation session
16 did take place on August 22, 1978 as stated in the
17 Complainant's first Brief, page 10, Line 24.

18 New facts introduced in the briefs that have not been sub-
19 ject to or have not had an opportunity to be subject to cross
20 examination will not be given weight in this Recommended Order.
21 The arguments set forth in the briefs stand on their own merits.

22 III. FINDINGS OF FACT

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

- 26 1. There was a master labor contract between the BAEA and
27 the School District for the 1976-77 and the 1977-78 school years.
28 (Joint Exhibit 1, Tr 19). In relationship to this Recommended
29 Order, Joint Exhibit 1 contains the following significant
30 articles:

31 Article II
32 [Page A-3]

33 RECOGNITION OF EXCLUSIVE REPRESENTATIVE

34 Section 1. Recognition: In accordance with the Act,
35 the school district recognizes the Bigfork Area Education
36 Association (BAEA) as the exclusive representative of
37 teachers employed by the school district, which exclusive
38 representative, shall have those rights and duties as
39 prescribed by the Act and as described in this Agreement.

1 Article VII
2 [Page A-11]

3 DUTY DAY

4 Section 1. Basic Day: The basic teacher's day,
5 including lunch, shall be eight (8) hours.

6 Section 4. Duty Free Lunch: Each certified teacher
7 grades 1 - 8 shall have a duty free period during the
8 noon lunch and recess period of not less than 45 minutes.
9 During this time no teacher shall be required to
10 supervise students in the lunch room. Teachers shall
11 be allowed to leave the school grounds, provided they
12 have notified the office, during this duty free lunch
13 period. Duty free recess shall be contingent upon staff
14 providing at least 1 teacher for playground supervision
15 for grades 4 - 8.

16 Section 5. Elementary Teacher Planning Time: Each
17 teacher in one (1) through sixth (6) grade shall have one
18 (1) hour of planning time per week. Kindergarten teacher
19 shall have 1/2 hour per session planning time per week.

20 Article IX
21 [Page A-15]

22 EXTRACURRICULAR COMPENSATION

23 Section 1. Extracurricular Compensation: The wages
24 and salaries reflected in Schedule B, attached hereto,
25 shall be effective for the 1976-77 school year.

26 Section 2. Assignment of Extracurricular Duties: The
27 Superintendent or his designee may assign with the
28 teachers approval, extracurricular assignments, subject
29 to established compensation for such services, which
30 exceed the teaching or non-teaching services prescribed
31 in the basic contract. Extra assignments associated
32 with additional compensation shall not be construed to
be a tenure assignment unless expressly so provided in
the individual contract.

Article X
[Page A-16]

GROUP INSURANCE

Section 2. Health and Hospitalization Insurance -Coverage:
The Board agrees to pay health insurance premiums for certi-
fied personnel on the following basis:

\$49.63 for family coverage per month
41.50 for couples coverage per month
20.69 for singles coverage per month

Any additional costs of the premium shall be borne by the
employee and paid by payroll deduction.

1 Article XIII
2 [Page A-27]

3 DURATION

4 Section 1. Duration of Agreement: This agreement
5 shall be effective as of July 1, 1976, and shall
6 continue in full force and effect until June 30,
7 1978, except salary and fringe benefits which may be
8 reopened annually. The Association must provide
9 to Board not later than February 1 all their wage
10 and fringe benefit proposals. Said Agreement will
11 automatically be renewed and will continue in force
and effect for additional periods of two years unless
the Association gives notice to the Board not later
than February 1 prior to the aforesaid expiration
date or any anniversary thereof, of its desire to
reopen certain provisions of this Agreement and/or
additions to this Agreement, and to negotiate over
the terms of these provisions, the notice to reopen
shall name these provisions.

12 2. On December 13, 1977, the parties entered into contract
13 negotiations for the purpose of establishing a new master labor
14 contract for the 1978-79 and 1979-80 school years. (BAEA Exhibit
15 1, Petition for mediation, Tr 19, 176).

16 3. The third contract negotiation session took place on
17 February 1, 1978 with Mike Keedy, MEA UniServe Director; William
18 L. Pederson, Chairman of the School District's Negotiating Com-
19 mittee; Leonard W. York, School District's labor consultant; and
20 others present. (Tr 20, 83, 177). The session produced an
21 agreement on the concept of a "closed" two year labor contract
22 and the first year's compensation for those teachers who accepted
23 extracurricular responsibilities. (Tr 20). At the end of the
24 third session, the contract negotiations still had a number of
25 unresolved items. (Tr 24).

26 The concept of a "closed" two year labor contract for the
27 1978-80 school year is "...that the parties would not reopen
28 negotiations or new negotiations during the course of the 1978-79
29 school year." (Tr 20,15-17)

30 4. On February 2, 1978, Mr. Pederson presented to Mike
31 Dockstader, BAEA's President, the School District's first full
32 and final offer. (BAEA Exhibit 1). By attached letter, Mr.

1 Pederson requested Mr. Dockstader to conduct a vote of the member-
2 ship to determine if the full and final offer of February 1, 1978
3 was acceptable to a majority. Mr. Pederson's letter contained
4 the following statement: "In the event the Board's offer is
5 rejected, we shall submit the matter to the State Board of
6 Personnel Appeals for mediation, no later than Monday, February
7 13, 1978." (BAEA Exhibit 1, letter to Mr. Dockstader; Tr22.)

8 The majority of the teachers rejected the full and final
9 offer of February 1978. (Tr 23)

10 5. The full and final offer of February 1978 contained the
11 following significant articles:

12 Article VII
13 [Page A-11]

14 DUTY DAY

15 Section 1. Basic Day: The basic teacher's day including
16 lunch, shall be seven (7) hours and forty-five (45)
17 minutes - 8:15 A.M. to 4:00 P.M.

18 Section 4. DELETED.

19 Section 5. DELETED.

20 Article VIII
21 [Page A-12]

22 BASIC WAGE COMPENSATION

23 Section 1. Basic Compensation.

24 Subd. 1. 1978-79 Rates of Pay: The wages reflected
25 in Schedule A, attached hereto, shall be effective only
26 for the 1978-79 school year and teachers shall advance
27 one (1) increment on the salary schedule. [Base starting
28 Wage \$9227 of a pay matrix]

29 Subd. 2. 1979-80 Rates of Pay: Schedule "A" wages,
30 shall be increased by an amount of 9% of the certified
31 teachers salaries, computed on the 1978-79 total salary
32 amount; and, teachers shall advance one (1) increment
on the salary schedule.

Article IX
[Page A-15]

EXTRACURRICULAR COMPENSATION

Section 1. Extracurricular Compensation: Certified
personnel covered by this Agreement, assigned extraduty
activities during the term of this Agreement, shall
receive appropriate compensation for the position assigned
pursuant to Schedule "B" attached hereto.

- 1 7:10 Mike Keedy presented the BFEA view on:
- 2 1. Duty free lunch period
 - 3 2. Scheduled preparation time
 - 4 3. Extra-curricular activities--wished voluntary rather than assigned
 - 5 4. Personal leave
 - 6 5. Dental insurance
 - 7 6. Salary schedule for extra-duty
 - 8 The salary schedule itself is not the problem; rather the appointment versus the voluntary assignment.
 - 9 7. Length of duty-day.
 - 10 8. Pay schedule--not acceptable
 - 11 9. Health and welfare insurance

- 12 7:20 Bill Pederson presented the Board's view on:
- 13 1. Length of duty-day
 - 14 2. Personal leave
 - 15 Have emergency leave in contract now
 - 16 3. Board's right to appoint extra-curricular duties
 - 17 4. Group insurance
 - 18 5. Duration of contract - 2 years
 - 19 6. Pay schedule
 - 20 9% spread on attainment level 4 for first year.
 - 21 Same for second year plus the increase on the extra-duty pay schedule.

22 (School District 38 Exhibit A)

23 The School District's notes reflected agreement on the assignment of extracurricular duties:

24 ARTICLE IX, Section 2
25 [Page A-15]

26 First sentence as in present contract.
27 Change second sentence to read:

28 All extra assignments shall be made pursuant to a separate contract, apart from the teacher's regular academic responsibility. No teacher holding an extra assignment shall be deprived thereof in subsequent years, over his objection, without reasonable and just cause, directly and substantially related to the performance of that assignment.

29 Add:

30 In the event that the Board is unable to find a qualified teacher who is willing to accept a particular extracurricular assignment, it shall have the right to assign the same in accordance with the following conditions:

- 31 1. The Board shall first offer the proposed assignment, in writing, to no fewer than three clearly qualified and eligible employees, or such lesser number as there may be available in the school system, and obtain from each of them a rejection thereof, also in writing;
- 32 2. The Board, having complied with subsection 1 herein, shall then have the right to assign the extracurricular duty in question to an employee qualified and eligible to accept the same.

1 The Board's right to assign extracurricular responsibilities
2 in accordance with subsection 2 herein shall be limited to
3 one such assignment per employee.

4 S/ O.K. W.L. Pederson

5
6 S/ O.K. D.H.
7 (Doug Holzum, BAEA's Spokesman)

8 (School District 38 Exhibit A, Tr24)

9 The School District and the BAEA exchanged and refused
10 the following package offers:

11 Board's Offer - 12:45 P.M. (BAEA REFUSED)
12 Package

- 13 1. Revised Section 2 of Article XI:
14 Personal leave - 2 days; deduct from sick leave; only 2
15 employees from High and Elementary Schools (A-18 old
16 CBA as par.)
- 17 2. Duty Day as proposed (A-11)
- 18 3. Basic Compensation, Article VIII (A-12)
- 19 4. Article IX, Extra Compensation as revised (A-15)
- 20 5. Article X, Group Insurance, as proposed (A-16)
- 21 6. Article XIII, Duration, as proposed (A-27)
- 22 7. Schedule "A" as proposed
- 23 8. Schedule "B" as proposed

24 * * * * *

25 BAEA's Offer - 1:15 P.M. (BOARD REFUSED)

- 26 1. Duty Day - Same as present contract (A-11)
- 27 2. Personal Leave - Change "will" to "shall" and add one
28 day Emergency Leave as in contract
- 29 3. Salary: A base of \$9750 on attainment level 4 with
30 BA+1 and BA+2 out to 12 years. Second year a 9% raise
31 on total dollars and attached to attainment level 4.5.
- 32 4. Insurance: Board pays all increased costs
5. Drop dental proposal

(School District 38 Exhibit A)

The notes of the March 21, 1978 meeting end with an agreement
"....to apply for a fact-finder as both sides are still so far
from agreement on one another's proposals." (School District 38
Exhibit A)

8. Mr. Keedy states that during the March 21, 1978 meeting
there was no problem or reference to the concept of a "closed"
two year contract and there was no change in the extra duty
compensation pay. (Tr25)

1 9. The School District's first mill levy was rejected by
2 the voters on April 6 or 7, 1978. (Tr200)

3 10. On April 17, 1978, the parties met with Fact-Finder
4 John H. Abernathy, Ph.D., in pre-fact-finding mediation. No
5 additional issues were agreed to at the mediation. (BAEA Exhibit
6 2, Tr25)

7 11. The fact-finding hearing took place on April 22, 1978.
8 The issues of teacher's salaries, health & dental insurance,
9 personal leave, length of school day, deletion of duty free lunch
10 and deletion of elementary teacher's planning time were submitted
11 and argued by the parties. (BAEA Exhibit 2, Tr26)

12 12. The issues of extra duty compensation and the concept
13 of a "closed" two year contract were not submitted to the Fact-
14 finder. (Tr31, 74, 75, 76, 116.)

15 13. On May 22, 1978, the factfinder submitted his findings
16 and recommendations which states in part:

17 The School District has proposed a base salary of \$9227
18 and...argued that...it is within the ability of the
District to pay without risking another budget levy....

19 (BAEA Exhibit 2, Page 5; Tr206)

20 In light of the above, the BAEA felt the School District was
21 using the failure of the second mill levy as an excuse for the
22 School District to reduce its salary offer. (Tr207, 212)

23 The Factfinder's report contains a "closed" two year recom-
24 mendation for salaries, health insurance premium costs, personal
25 leave, length of duty day, and the retention of duty free lunch
26 and elementary teachers planning time. (BAEA Exhibit 2; Tr29.)

27 14. Shortly after receiving the report, the BAEA voted to
28 accept the Factfinder's recommendations. (Tr29)

29 15. The voters rejected the School District's second mill
30 levy on June 6, 1978. (Tr200)

31 16. A short seventh negotiation session took place on June
32 28, 1978 with the School District setting forth the reasons for
non-acceptance of the factfinder's recommendations. (Tr30, 55)

1 The School District presented a new base salary of \$9058,
2 for the first year, requested the second year's salary be open
3 for mid-contract negotiations, approved the first year's health
4 insurance premium cost, requested the second year's health insur-
5 ance premium cost be open for mid-contract negotiations, and
6 stated that they could not provide duty free lunch and elementary
7 teacher planning time along with a shorter basic duty day. Mr.
8 Pederson explained that the new offers and the withdrawal of some
9 of the previous offers were due to the mill levy failures.
10 (School District 38 Exhibit B; Tr160, 161). The School District
11 also proposed a new draft, Section 2 of Article XI. (Emergency
12 and Personal Leave)

13 (RECOMMENDED DRAFT)

14 ARTICLE XI
15 SECTION 2
[Page A - 18]

16 SECTION 2. EMERGENCY AND PERSONAL LEAVE:

17 Subd. 1. A full time teacher may be granted an emer-
18 gency or personal leave of no more than two (2) days per
19 year, nonaccumulative, the day(s) used to be deducted from
20 sick leave, for emergency or personal situations that arise
requiring the teacher's personal attention which cannot be
attended to when school is not in session and which are not
covered under other provisions of this Agreement.

21 Subd. 2. Requests for emergency leave must be made in
22 writing to the Superintendent of Schools at least three (3)
23 days in advance, whenever possible and, the request shall
state the reason for the proposed leave.

24 Subd. 3. Requests for personal leave must be made to
25 the teacher's immediate supervisor with sufficient time to
26 allow the supervisor to arrange for a substitute teacher.
The District shall pay the substitute teacher and there-
27 after, deduct the District's rate of pay for substitute
28 teachers from the appropriate teacher's next paycheck. This
benefit is intended to be used as an entire work day at a
29 time. Any such request made by a teacher for this benefit
to the supervisor must only indicate that such leave is "for
personal reasons". Only 2 teachers from high school; from
junior high school; and/or, grade school, at any one time,
may be allowed to request this benefit.

30 Subd. 4. An emergency or personal leave day shall not
31 be granted for the day preceding or the day following holi-
32 days or vacations, and the first and last five (5) days of
the school year. (School District 38 Exhibit B, Tr161, 166)

1 The notes of the June 28, 1978 negotiation session also
2 state:

3 Bill [Pederson]: Since the mill levy has failed twice
4 that's where we're at.

5 Doug [Holzum]: We are prepared to accept Factfinding
(May 22, 1978) and nothing less.

6 Bill: We cannot accept the Association's proposal.

7 8:24 Recess.

8 8:53 Re-opened.

9 Leonard [York]: As explained, defeat of the mill levy makes
10 it impossible for the Board to change their offer. If
you have not changed your stand?

11 Mike [Keedy]: We have not.

12 Leonard: Then we will draft a full and final written offer
13 and mail it to you. Will you advise the Association
not to sign individual contracts? (This to Mr. Keedy)

14 Mike: We must reject the Board's position; and yes, I will
15 advise them refrain from signing while negotiations are
still open.

16 9:07

17 Mike: I feel you should understand that we will ask the
18 Personnel Board for help in Crisis Mediation. We do
not want to go into the new school year without a
contract.

19 Leonard: Do you intend to negotiate? Because by Doug's
20 prior statement I gathered that you do not.

21 Mike: You seem to be "back-peddling" on what you have
22 offered through-out our bargaining sessions. Now you
want us to meet you half way. We can't, in good faith,
23 bargain under those circumstnaces. No, we do not
intend to yield.

24 Leonard: Then we seem to have reached an impasse.

25 Mike: I do not say that we are at an impasse, but still
26 believe in the value of bargaining.

27 Leonard: Are you saying you will bargain, or are you still
saying you want the Board to do the giving?

28 Mike: I'm saying we have not reached an impasse.

29 9:30 Adjourned.

30 (School District 38 Exhibit B)

31 17. In the BAEA's version of the June 28, 1978 negotiation
32 session, Mike Keedy states that:

- 1 a. The School District was waiting for the BAEA to
- 2 indicate some movement or make some movement before
- 3 School District would make some offer. (Tr30, 33)
- 4 b. The factfinders recommendations were acceptable to the
- 5 teachers and until the teachers saw movement from the
- 6 School District, the BAEA would not make further con-
- 7 cessions. (Tr55, 56, 58)
- 8 c. The BAEA was attempting to resume negotiations but to
- 9 no avail. (Tr55)
- 10 d. The BAEA made no contract proposals. (Tr55)
- 11 e. The BAEA requested mediation with the School District
- 12 refusing. (Tr31, 32, 34)
- 13 f. The School District believed impasse had been reached.
- 14 The BAEA believed impasse had not been reached. (Tr31,
- 15 33)
- 16 g. When questioned about his recommendations in the event
- 17 the School District issued individual teaching contracts
- 18 reflecting the School District's latest full and final
- 19 position, Mr. Keedy replied that he hoped the School
- 20 District would not embark upon that course and individ-
- 21 ual contracts should not be issued until an agreement
- 22 had been reached. (Tr56)

18. On July 10, 1978, the School District issued its second full and final offer. The second full and final offer was sent to all teachers individually. (BAEA Exhibit 8, Page 2; Tr35). The full and final offer received by Mr. Keedy on July 17, 1978 contained the following cover letter and the significant articles:

Mr. Michael Keedy
 UniServ Director, Region #1
 Montana Education Association
 Box 1154
 Kalispell, Montana 59901

Re: Bigfork Public Schools, School District No. 38, Flathead & Lake Counties, Bigfork, Montana, its "FULL AND FINAL OFFER", to Bigfork Area Education Association as a result of an IMPASSE reached in collective bargaining June 28, 1978.

Dear Mr. Keedy:

Pursuant to the discussion held with you and your collective bargaining committee on the evening of the 28th of June, 1978; and, pursuant to the Board of Trustees of the District, we hereby enclose the District's Full and Final Offer.

Briefly, the parties have exhausted all administrative procedures, i.e. mediation and fact finding, all to no avail as neither party is able or willing to concede any further. Therefore, in view of the situation, the District has prepared the Full and Final Offer and, is now respectfully

1 requesting that it be immediately considered for vote by the
2 Association members no later than July 23, 1978, either to
accept or reject.

3 Please advise the Association members that: in the
4 event the full and final offer is rejected, then and in that
5 event, such offer will be placed into effect July 24, 1978
6 for any Association member that responds to the District's
offer of employment.

7 S/
8 William L. Pederson
9 Chairman, Negotiation Committee

10 ARTICLE VIII

11 BASIC COMPENSATION
12 [Page A-12]

13 Section 1. Basic Compensation:

14 Subd. 1. 1978-79 Rates of Pay: The wages reflected in
15 Sechedule A, attached hereto, shall be effective only for
16 the 1978-79 school year and teachers shall advance one (1)
17 increment on the salary schedule. [Base starting wage \$9058
of a pay martrix]

18 Subd. 2. 1979-80 Rates of Pay: Schedule "A" wages,
19 shall be increased by an amount to be negotiated pursuant to
20 Article XIII, Section 1 hereinafter setforth; and, teachers
21 shall advance one (1) increment on the salary schedule.

22 ARTICLE IX

23 EXTRACURRICULAR COMPENSATION
24 [Pages A-15, A-15(a)]

25 Section 1. Extracurricular Compensation: Certified personnel
26 covered by this Agreement, assigned extra-duty activities
27 during the term of this Agreement, shall receive appropriate
28 compensation for the position assigned pursuant to Schedule
29 "B" attached hereto.

30 Section 2. Assignment of Extracurricular Duties: The
31 Superintendent or his designee may assign with the teachers
32 approval, extracurricular assignments, subject to estab-
lished compensation for such services, which exceed the
teaching or non-teaching services prescribed in the basic
contract. All extra assignments shall be made pursuant to a
separate contract apart from the teachers regular academic
responsibility. No teacher holding an extra assignment
shall be deprived thereof in subsequent years over his
objection without reasonable and just cause directly and
substantially related to the performance of that assignment.

In the event that the Board is unable to find a quali-
fied teacher which would be willing to accept a particular
extracurricular assignment, it shall have the right to
assign the same in accordance with the following conditions:

Subd. 1.: The Board shall first offer the proposed
assignment, in writing to no fewer than three fairly quali-

1 fied eligible employees, or such lesser number as there may
2 be available in the school system and, obtain from each of
 them a rejection thereof, also in writing.

3 Subd. 2.: The Board having complied with Subsection 1
4 herein shall then have the right to assign extracurricular
5 duties in question to an employee qualified and eligible to
6 accept the same.

7 The Board's right to assign extracurricular responsi-
8 bilities in accordance with Subsection 2 herein shall be
9 limited to one such assignment per employee.

10 ARTICLE X

11 GROUP INSURANCE 12 [Pages A-16]

13 Section 2. Health and Hospitalization Insurance - Coverage:
14 The Board agrees to pay health insurance premiums for certi-
15 fied personnel on the following basis:

16 \$51.23 for family coverage per month
17 \$43.16 for couples coverage per month
18 \$20.92 for singles coverage per month

19 Any additional cost of premium shall be borne by the
20 employee and paid by payroll deduction.

21 ARTICLE XI

22 LEAVES OF ABSENCE 23 [Pages A-18, A-18(a)]

24 Section 2. Emergency and Personal Leave:

25 Subd. 1: A full-time teacher may be granted an emer-
26 gency or personal leave of no more than two (2) days per
27 year, non-accumulative, the day(s) used to be deducted from
28 sick leave, for emergency or personal situations that arise
29 requiring the teacher's personal attention which cannot be
30 attended to when school is not in session and which are not
31 covered under other provisions of this Agreement.

32 Subd. 2: Requests for emergency leave must be made in
 writing to the Superintendent of Schools at least three (3)
 days in advance, whenever possible and, the request shall
 state the reason for the proposed leave. The District shall
 pay the substitute teacher's salary in the case of approved
 emergency leave.

33 ARTICLE XII

34 GRIEVANCE PROCEDURE 35 [Page A-24]

36 Section 4. Time Limitation and Waiver: Grievances shall
37 not be valid for consideration unless the grievance is
38 submitted in writing to the School District's designee,
39 setting forth the facts and the specific provision of the
40 Agreement allegedly violated and the particular relief
41 sought within five (5) days after the date of the first
42 event giving rise to the grievance becomes known to the

1 aggrieved party. Failure to appeal a grievance from one
2 level to another within the time periods hereafter provided
3 shall constitute a waiver of the grievance. An effort shall
4 first be made to adjust an alleged grievance informally
5 between the teacher and the School District's designee.

6 ARTICLE XIII

7 DURATION

8 [Pages A-28, A-29]

9 Section 1. Duration of Agreement: This Agreement shall
10 be effective as of July 1, 1978, and shall continue in full
11 force and effect until June 30, 1980, provided however,
12 Article X, Group Insurance, Section 2., premium amounts;
13 and Schedule "A" salaries, not steps nor educational
14 columns therein, may be reopened annually. The Associa-
15 tion must provide to the Board, not later than February 1st,
16 all of their appropriate proposals. Said Agreement will
17 automatically be renewed and will continue in full force
18 and effect for additional periods of two years unless the
19 Association or the Board gives notice to the other party
20 not later than February 1st prior to the aforesaid expira-
21 tion date or any anniversary thereof, of its or their
22 desire to reopen certain provisions of this Agreement
23 and/or additions to this Agreement, and to negotiate over
24 the terms of those provisions; the notice to reopen shall
25 name those provisions.

26 (BAEA Exhibit 3, Tr35)

27 19. Some time before July 24, 1978, Mr. Holzum, wrote to
28 Mr. Pederson inquiring about provisions in the Second full and
29 final offer that were not discussed at the bargaining table.

30 (Tr78)

31 20. In Mr. Pederson's explanation of the second full and
32 final offer, he testified that:

- 33 a. The Grievance Procedure (Article XII, Section 4)
34 was not open or the subject of negotiations. The
35 sentence of "Failure to file any grievance within
36 such period shall be deemed a waiver thereof." was
37 mistakenly left out and was a typographical error.
38 (Tr165-167, also see Tr35, 89)
- 39 b. The sentence of "The School District shall pay the
40 substitute teacher's salary in the case of approved
41 emergency leave." was added to the second full and
42 final offer, emergency and personal leave (Article
43 XI, Section 2, Subsection 2.) because there was some
44 confusion about what was presented at the bargaining
45 table. (Tr166-168)

1 c. The agreement signed on March 21, 1978 for Article IX,
2 Section 2 is almost identical to Article IX, Section 2
in the second full and final offer. (Tr163)

3 21. In a further explanation of the second full and final
4 offer, Mr. York questioned Mr. Pederson as follows:

5 Mr. York: On School Board's Exhibit B, we would like
6 official notice to be taken of the document that starts at
7 the top, 'Recommended Draft, Article XI, Section 2', moving
8 down, then, to subdivision 2, that the Board conceded paying
9 for the substitutes, which is a concession far and above
what the teachers had requested and what the Board presented
on June 28th; that BAEA Number 3, in fact, gives the teachers
much more than what they had requested or what had been
bargained for on June 28th.

10 Mr. York: Is that a correct statement, Mr. Pederson?

11 Mr. Pederson: Well, it is a clarification of what we pre-
12 sented on the 28th. We added that sentence there to -- in
13 other words, there was confusion on subsection 2 when it was
14 presented as to who was to pay the substitute on emergency
15 leave. We had agreed that we were not changing that, but we
16 were still going to pay the substitute in emergency leave so
we incorporated that into our Full and Final offer, a
sentence so that there was no misunderstanding that the
School District would pay the substitute for emergency
leave. (Tr167, 17-28- 168, 1-9)

17 Mr. York's statement above is not an admission of wrong
18 doing (bypassing the exclusive bargaining agent) but a leading
19 question. Therefore, I add validity to finding 20b because Mr.
20 Pederson's first response was of his own free thought.

21 22. In Mr. Keedy's testimony about the second full and
22 final offer, he stated that:

23 a. Mr. Pederson did make a proposal on June 28 which would
24 have left the determination of the second year's wage
25 schedule and other economic items up to mid contract
negotiations. The teachers never accepted this change
from the February agreement on a "closed" two year
contract. (Tr 72-75, 77)

26 b. Article IX (Section 1, Extracurricular Compensation) of
27 the second full and final is equal to the same Article
28 in the first full and final offer. The objection is
29 that no agreement had been reached and/or no discussion
had taken place with respect to certain provisions of
both the first and second full and final offer with the
second full and final offer being mailed to all members.
30 (Tr85, 86, 79, 80). More specific, our objection is
31 the reference to "certified personnel" in section 1 of
Article IX. (Tr79)

32 c. The second full and final offer clearly contains a
dollar amount in the Extra Duty Schedule "B". (Tr82)

1 d. On June 28, 1978, the parties did discuss the principal
2 subject of emergency and personal leaves but he could
not recall the facts of the discussion. (Tr91)

3 e. The grievance procedure was not open for negotiations.
4 (Tr35, 89)

5 23. On July 24, 1978, the School District prepared indivi-
6 dual teaching contracts and mailed the contracts the next day or
7 so:

8 TEACHER'S CONTRACT

9 SCHOOL DISTRICT NO. 38, BIGFORK, MONTANA

10 THIS AGREEMENT made and entered into this 24th day of July,
11 1978 by and between the Board of Trustees of School District
12 No. 38, Flathead and Lake Counties, Bigfork, Montana, here-
13 inafter designated as the School District, and
14 Lois Ann Pile a legally certified teacher under the
15 laws of Montana, hereinafter designated as the Teacher.

16 WITNESSETH:

17 1. That the School District hereby agrees to employ
18 the said Teacher to teach or to render related
19 professional services, where assigned for the school year,
20 which begins September 5, 1978 and continues
21 thereafter for a period of not less than 180, nor more than
22 187, teaching days (exclusive of legal holidays and vaca-
23 tions), as designated by the School District.

24 2. That the annual salary to teachers, principals,
25 special teachers, or supervisors, shall be paid in twelve
26 (12) equal installments, the first being due September 24,
27 and the remaining on the same day of each succeeding month.
28 Any balance accruing during the year shall be paid in the
29 last installment. As amended page A-14 Sub-2, 1978-79
30 Master Contract.

31 The Teacher's salary shall be at the rate of
32 Eleven Thousand Three Hundred Eighty-six and no/100----
DOLLARS (\$11,386.00) per annum.

33 3. That said teacher represents himself, or herself,
34 to be competent and legally qualified to teach in said
35 District and that the information given in the application,
36 upon which this contract is based, is true and correct.
37 Said teacher shall be required to have affidavits of experi-
38 ence and transcripts of College and University training on
39 file in the Superintendent's office.

40 4. That said Teacher shall conduct the school in
41 accordance with provisions contained in The Teacher's Guide
42 and Handbook of School District No. 38, Bigfork, and which
43 provisions are incorporated herein by this reference, and it
44 is further understood and agreed as one of the conditions of
45 this contract, that should the Teacher be found inefficient
46 in the discharge of his or her duty, disloyal to the inter-
47 ests of the school, or guilty of unprofessional conduct, the
48 Board of Trustees reserves the right to dismiss said Teacher
49 and cancel this contract; and in such case the part of the

1 ment reached on the morning of July 25, 1978 but the
2 teaching contract did not address the salary schedule
for the 1979-80 school year. (Tr 42)

3 c. Some teachers executed their teaching contracts while
4 others held their teaching contracts. (Tr 44)

5 d. There were no mass firings or incidents because the
6 teachers did not execute the teaching contracts. (Tr
45)

7 25. The eighth negotiation session took place on the evening
8 of July 24 and early July 25, 1978 with Mediator Skaar. The
9 negotiation session produced a tentative agreement on all out-
10 standing issues including duty free lunch, elementary teacher
11 planning time, health insurance premium cost, emergency leave,
12 personal leave and the second year's wage salary. BAEA did make
13 modifications to their positions in order to reach an agreement
14 but not in the area of a "closed" two year agreement. Mr. York
15 was to prepare the tentative agreement. (Tr 40, 58, 59, 63, 64,
16 93, 110, 113)

17 On July 24, a substantial number of other teachers joined
18 the four teachers on the BAEA negotiation team. As the meeting
19 progressed, the number of additional teachers decreased to about
20 7 or 8. (Tr 61, 62)

21 26. On July 26, 1978, Mr. York produced and mailed to Mr.
22 Keedy the tentative agreement reached on July 25. The tentative
23 agreement consisted of the second full and final offer plus
24 certain additions but did not include a new salary schedule for
25 the first year of the contract. The additions contained the
26 following significant sections:

27 Article VII
28 Duty Day

29 Add the following language to [page A-11] of the Board's
Full and Final offer, dated: July 10, 1978, as follows:

30 Section 4, Duty Free Lunch: Each certified teacher
31 grades K-6 shall have a free period during the noon lunch
32 and recess period of not less than 20 minutes. Playground
and lunch duty will be on a rotating basis and, such assigned
teacher will be provided with a hot lunch, provided however,
in the event the hot lunch program is discontinued the
parties hereby agree to immediately negotiate a benefit of
comparable value. During this free time, no teacher

1 shall be required to supervise students in the lunch room or
2 on the playground. Teachers shall be allowed to leave the
school grounds, provided they have notified the office,
3 during this duty free lunch period.

4 Section 5. Elementary Teacher Planning Time: Each
full time teacher in K-6 grade shall have one (1) hour of
5 planning time per week between hours of 8:45 and 3:30.
6 Planning time may be in half hour increments. During this
planning time, such teacher shall not be required to have
pupil contact.

7 (BAEA Exhibit 8)

8 27. The BAEA voted to reject the tentative agreement on
9 July 31, 1978. (Tr 44). Mr. Keedy stated ratification was
10 virtually impossible because he guessed the teachers received the
11 teaching contracts on or about July 25 or 26 with directions to
12 execute them by August 1. Mr. Keedy continued to explain by
13 stating that he had not received Mr. York's tentative agreement
14 draft at the time the teachers received their teaching contracts.
15 (Tr 43, 41)

16 Mr. Keedy wrote to Mr. York on August the 1, 1978:

17 At least in part, this vote was a result of the Board's
18 issuance of individual contracts to the teaching staff prior
to my receiving the Board's draft language (and thus prior
19 to the local's being able to vote on the tentative agreement).
Those contracts are dated July 24, and the teachers were
20 given until today to sign and return them.

21 The contracts indicate that unless teachers did so the
positions would be considered vacant, and filled by the
22 Board. However, as you know, the teachers in the spring
signed so-called "letters of intent" to return to the dis-
23 trict in the fall, and consider themselves already re-hired
by the Board, to teach in 1978-79 under terms and conditions
24 of employment to be determined through the negotiations
process.

25 (BAEA Exhibit 6)

26 28. On August 16, 1978, Mr. York replied to Mr. Keedy:

27 First, we acknowledge that the teachers' association
28 rejected the tentatively agreed upon modified full and final
offer;

29 Second, we acknowledge that the teachers' signed letters
30 of intent to return to the district in the fall and, we too,
consider them re-hired by the Board and, encourage them to
31 report for work at the designated date and time as instructed.
However, all teachers' returning to work on the designated
32 date and time will be paid and their conditions of employment
shall be governed by the Board's modified full and final
offer which, is that modified full and final offer tenta-
tively agreed upon July 25;

1 Third, we acknowledge your request for further bar-
2 gaining. In view of the impasse, further bargaining would
not be fruitful, therefore, we must respectfully decline...

3 Further, as we have been unable to reach you by tele-
4 phone, we hereby, invite and encourage you to attend the
5 public meeting on the evening of August 21, 1978. Please be
6 advised that this meeting is informational only and, not for
the purposes of either, separate or collective bargaining.

7 (BAEA Exhibit 7)

8 29. A public information meeting arranged by the School
9 District took place on August 21, 1978. The School Board,
10 Mediator Skaar, numerous teachers and interested citizens were
11 present. The parties explained their positions and answered
12 questions. (Tr 45, 118)

13 At the conclusion of the public meeting, a conversation took
14 place between Mediator Skaar, Mr. Pederson and Mr. Keedy. During
15 the conversation, Mediator Skaar offered her services and Mr.
16 Keedy requested they resume negotiations the following evening or
17 as soon as possible. Mr. Pederson replied the School District
18 would not meet again with the BAEA until the School District
19 received in writing a proposal which they considered sincere.
20 Mr. Keedy protested and stated he would not allow the bargaining
21 unit to couch their position in a context which would meet the
22 general approval of the School District first before the District
would agree to sit down and negotiate again.

23 After a short conference with the other School Board members,
24 Mr. Pederson returned and agreed to meet the next night. (Tr 46,
25 47)

26 30. The ninth and last negotiation session between the
27 parties took place on August 22, 1978 with Mediator Skaar present.
28 For the most part of the session, Mediator Skaar kept the parties
29 apart and acted as a go-between. (Tr48). The notes of the
30 School District state the following, in part:

31 Terry Gross presented package offer to the Board from BAEA:

- 32 1) Willing to lower base salary to \$9,000 (from Bd. offer
of \$9,058) (Mr. Keedy felt would give extra \$58

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

to \$75 per teacher for Board to finance rest of package) -- then 79-80 base \$9,800.

- 2) Teachers would pick up entire increase (45%) on their Blue Shield policy this year, Board pick up entire cost on health insurance 79-80.
- 3) Duty Free Lunch, Section 4 remain intact except delete last sentence "Duty free recess shall be contingent upon staff providing at least 1 teacher for playground supervision for grades 4 - 8."
- 4) Preparation Time - amend proposal to read: "All teachers K-6 shall have 1/2 hour per day preparation time between 9:00 a.m. and 3:30 p.m. of non-pupil contact time exclusive of before or after school, and lunch time.
- 5) Personal Leave -- 2 days, pay substitutes, not deduct from sick leave.
- 6) 2 year closed contract.

Teachers feel that since they have gone backward and are also willing to pay the substitutes on their personal leave, it is really a non-money package.

8:00 [p.m.] Bill Pederson asked for a caucus.

8:30 Bill discussed BAEA proposal:

At first the offer looks attractive, but savings in the High School would not help in the Grade School and it seems to discriminate against the High School faculty.

Personal Leave--the Board wants to maintain their July 24th offer.

Duty Free Lunch--Board wants to maintain management flexibility to provide supervision that may be needed, so offer of July 24th remains as is.

Bill Don Tigny asked for some guarantee of free time, said they didn't care how long but would like some idea of a schedule.

Bill Pederson responded that if it was dropped from the contract the administration and teachers could work out some schedule.

Prep Time--The Board re-submits their offer of July 24th. Health Insurance - Same as July 24th. Closed Contract - Will agree to a 2-year closed contract.

This is basically the same offer Board made on July 24th.

8:35 BAEA requested a caucus.

Ms. Skaar asked to talk with the Board members. Took an offer to the BFEA to lengthen duty-free lunch time to 30 minutes (wording remain the same, just change amount from 20 minutes to 30 minutes)

1 10:05 BAEA presented another proposal:

2 1) Lower rates on Schedule B to standard 7%

3 2) Base salary of \$9,000 for 1978-79 and \$9,800

4 3) Health Insurance for 78-79: Board pay full

5 4) Duty Free Lunch: 30 minutes while students

6 5) Personal Leave: 2 days, teacher pay substi-

7 6) Preparation Time: 1/2 hour per day.

8

9 10:48 Board responded to Ms. Skaar:

10 1) Reject the change on Schedule B. We already

11 2) \$9,000 base is deceptive because of the

12 3) Too much for us to be willing to accept the

13 4) Health and Salary proposals remain as of July

14 5) K-6 previously offered 30 minutes, but cannot

15 6) Personal Leave: 1 day, teacher pay the

16 7) Preparation Time: Stay with July 24th offer--

17 8) no change.

18

19 10:55 Ms. Skaar took offer to BAEA.

20

21 11:20 BAEA proposal to Board.

22 1) 1978-79 Base Salary of \$9,058

23 2) 1979-80 Base Salary of \$9,800

24 3) Health Insurance: Increase in premiums paid

25 4) by teachers in 78-79, Board pick up total

26 5) package cost in 1979-80.

27 6) Duty Free Lunch: 30 minutes duty free lunch

28 7) and free of playground duty--but would take

29 8) if base was raised to \$9,227.

30 9) Personal Leave: Will take 1 day as offered.

31 10) Preparation Time: K-6 teachers have 2 hours

32 11) exclusive of pupil contact per week--if want

 12) to, can lump--not before or after school.

 13) Pe [sic]

 14) Board to BAEA:

 15) Will stay with the 30 minute duty-free lunch time

 16) and personal leave of 1 day as offered. We feel

1 we are not getting anywhere, so will stay with
2 offer of July 24th and propose we break off for
3 tonight.

4 12:00 BAEA would like to open again tomorrow at 7:30.
5 Promise to have proposal for consideration.

6 Bill Pederson told mediator that board felt they
7 were not getting anywhere. She proposed we meet
8 again on August 23 at 7:30. Board told her if the
9 BFEA have any proposals they (the Board) would
10 wait until 1:00 a.m. to consider any such proposals.

11 12:38 BAEA to Board:

12 1) Duty Free Lunch--30 minutes with a maximum of
13 2 teachers on playground duty per day.
14 1 intermediate and 1 primary teacher, on
15 rotating basis.

16 2) Insurance--Teachers this year, Board total
17 package next year.

18 3) Salary--as proposed on July 24th O.K.

19 4) Personal Leave--1 day O.K.

20 5) Preparation Time--2 hours per week as proposed
21 (K-6)

22 12:57 Board asked BAEA to clarify on how plan to handle
23 the lunchroom duty.

24 1:18 Linda Skaar: Well, if rest of the package is
25 acceptable both sides could get together and work
26 out the wording.

27 Bill Pederson: Rest of the package is not accept-
28 able. We cannot possible go with the insurance
29 and prep time as they propose.

30 Linda: Well, tomorrow--7:30!

31 Bill: No. If they want to submit, in writing, a
32 different proposal we will consider it and then
meet if we feel it would be profitable. We will
stay with the proposed change on personal leave of
1 day, not deducting it from sick or emergency
leave; and the 30 minutes duty free lunch time as
we proposed.

1:30 Meeting adjourned.

(School District 38 Exhibit C)

31. In addition to the notes above, Mr. Pederson explained
the School District requested through the mediator during the
session that the BAEA put their counter proposals in written form
because the proposals were hard to follow and evaluate. The BAEA
did not reduce their counter proposals to writing. (Tr 181-183)

Mr. Pederson agreed the "profitable" statement (see above)
means that if a proposal is submitted in writing and the proposal

1 is acceptable to the School District, they will then decide
2 whether or not to return to the bargaining table. (Tr188, 189)

3 Mr. Pederson also stated that at this session both parties
4 made proposals different from previous proposals. (Tr169)

5 32. In explanation of the last negotiation session, Mr.
6 Keedy stated that:

- 7 a. No tentative agreement was reached at the August 22,
8 1978 meeting.
- 9 b. Both the School District and the BAEA made proposals,
10 counter proposals and concessions. (Tr64, 48)
- 11 c. The BAEA made several different proposals, increasing
12 some benefits and decreasing other benefits, in an
13 effort to arrive at a labor contract. (Tr48, 65, 66,
14 207, 210)
- 15 d. During the mediation session the issues of the negoti-
16 ation were clear to the BAEA. The parties mutually
17 understood the outstanding issues. He does not know
18 what he could have done differently in a written pro-
19 posal. (Tr209-211)
- 20 e. The School rejected the BAEA's later proposals stating
21 the proposals were not sincere, and declared an impass.
22 (Tr48)
- 23 f. He did consider the BAEA's proposals intelligent.
24 (Tr68)
- 25 g. The School District would only meet if the BAEA first
26 submitted a written proposal to the School Board and if
27 the proposal appeared sincere. (Tr49)
- 28 h. Early on August 23, 1978, the mediator was attempting
29 to arrange another negotiating session for that evening.
30 (Tr202, 209)
- 31 i. The parties have not met in negotiations again. (Tr48,
32 50)
- 33 j. Playground duty or not, during duty free lunch, effects
34 about 12 out of 44 or 45 teachers. (Tr68).

35 33. At the conclusion of the August 22, 1978 negotiation
36 session, Mr. York advised the School District to implement the
37 third full and final offer which contained the latest School
38 District concessions. (BAEA Exhibit 9, Tr135, 136)

39 34. The News Release issued by the School District on
40 August 24, 1978, stated:

41 In regards to the negotiations session with the Bigfork
42 Area Education Association affiliated with the Montana
43 Education Association on August 22, I would like to make the
44 following statement on behalf of the Board of Trustees.

1 First, it was not hard to recognize that the Education
2 Association was more interested in setting the Board up for
3 a press release than they were in negotiating. Their offer
4 to reduce the base salary to \$9,000 and reduce the extracur-
5 ricular pay for coaches in order to provide duty free lunch
6 and preparation time for the Kindergarten thru 6th grade
7 teachers appears very generous at first observation. However
8 they did not go on to say that it was a package offer with
9 provision for a base salary of \$9,800 and the Board picking
10 up the entire health insurance premium for the 79-80 school
11 year, which would amount to an estimated 15 to 20% budgetary
12 increase next year. Also we can not transfer money from the
13 high school budget to the grade school budget, therefore,
14 the Board felt it was discriminatory to ask the high school
15 teachers to take a reduction in pay and in extra-duty salary
16 to provide the K thru 6 teachers additional benefits in the
17 Master Contract.

18 At the public meeting the teachers indicated that
19 salary was not the issue but Personal leave and Duty Free
20 lunch were. In regards to Personal Leave the Board did
21 modify their offer to provide for one day Personal Leave,
22 non-deductible from sick or emergency leave.

23 In regard to Preparatory time and Duty Free Lunch.
24 These items involve only the K thru 6th grade teachers. The
25 Board did modify their offer to provide for a minimum of 1/2
26 hour of Duty Free lunch but did not change their offer of 1
27 hour preparatory time.

28 The Education Association's last proposal of a minimum
29 of 1/2 hour Duty Free lunch with a maximum of 2 teachers per
30 day assigned noon playground duty and 2 hours of preparation
31 time exclusive of pupil contact per week between the hours
32 of 9 a.m. and 3:30 p.m. does not appear like much on the
33 surface. What it means is that based on 12 teachers in the
34 1st thru 6th grade, they could be assigned 1/2 hour of noon
35 duty every 6th day. The other 5 days they would have 1 hour
36 Duty Free lunch. Considering the school day for the students
37 is 9 a.m. to 3:30 p.m. or 32 1/2 hours per week, the K thru
38 6th grade teachers, in effect, propose that the administra-
39 tion can only assign them pupil contact of 26 hours per
40 week, while state standards provide up to 28 hours per week.

41 The Board's position is that an impasse has been reached
42 with the Bigfork Area Education Association and that if they
43 have any further proposals they should submit them in writing
44 to the Board and if it appears that the Association is
45 sincere in their proposal the board will meet with them.

46 (BAEA Exhibit 14; Tr171, 172)

47 35. Mr. Pederson states that BAEA never proposed any trans-
48 fer of monies from the high school budget to the elementary
49 school budget or vice-versa. Mr. Pederson further states that
50 BAEA never proposed to the school district the addition or the
51 elimination of teaching positions in the school system. (Tr 198,
52 199)

1 36. On the witness stand Mr. Pederson explained impasse as
2 follows:

3 a. Mr. York, direct examination:

4 Mr. York: They are alleging in the Complaint that you
5 called an impasse to bargaining; can you state narra-
6 tive-wise why you felt the need to call an impasse?

7 Mr. Pederson: Well, first of all, I didn't feel that what
8 they were asking for was to reduce the salaries of all
9 the teachers in order to provide the duty free lunch
10 and preparatory time for the K through 6, and then were
11 also asking us to pick up, I believe it was in the
12 neighborhood of around 20 percent commitment for the
13 following year -- 18 to 20 percent. Anyway, all the
14 proposals were proposals that I did not feel were
15 really sincere that we could accept, and you might
16 review in the notes here that we expressed that the
17 mediator -- I believe it was around midnight -- and
18 then we did agree to stay on after that to see if the
19 BAEA would present something that appeared sincere, and
20 we didn't feel that their last offer was sincere, and
21 we were just as far off as we ever were as far as
22 reaching an agreement. (Tr172, 6-24).

23 Mr. York: Again, I would ask you, do you consider this
24 11:20 proposal made to you as a sincere effort by a
25 party to reach an agreement?

26 Mr. Pederson: No.

27 Mr. York: Why?

28 Mr. Pederson: Because asking \$9227 in which to accept the
29 duty free lunch; in other words, to take the duty free
30 lunch. In other words, I think we narrowed down in
31 negotiations that duty free lunch and preparation time
32 are a couple of the items that we had held out to for
quite some time; that we wanted deleted from the con-
tract. And if you go back to our meeting where we
reached tentative agreement, Mr. Keedy said that there
was no way that he could reach agreement if we left
those out of the contract so we did concede to put
those back in the contract with some modifications at
that meeting and then to reach tentative agreement that
night. Then we go into this meeting, and we just start
in manipulating around, it appeared to me. (Tr 174,
24-28 - 175 1-14)

33 b. Mr. Hilley, cross examination:

34 Mr. Hilley: July. After July, what was the big hang-up
35 between the parties, and the reason I am asking you
36 this is yesterday, we were characterizing quite a bit
37 about negotiations and what the real hang-up was. What
38 was the real core difficulty or difficulties between
39 the parties in August primarily? I think we have to
40 put August.

41 Mr. Pederson: I really don't know. We reached tentative
42 agreement, and it seemed like everything still came
back around to Sections 4 and 5 [Article VII; Duty Free

1 Lunch, Elementary Teacher Planning Time] in the contract.
(Tr 194, 8-16)

2 c. Examination by Hearing Examiner:

3 Hearing Examiner: But the hard core seemed to be those
4 groups; in other words, 4 and 5 on one side; wages on
5 the other?

6 Mr. Pederson: Well, wages had been pretty well settled at
7 one time. In other words, everything -- we reached a
8 tentative agreement on the 24th. When we went back in
9 on August 22nd, it was hard to tell just what was the
10 issue. In other words, 4 and 5 seemed to get back into
11 it. In other words, there was manipulations with the
12 wages that I thought were pretty well settled; our
13 schedules and so forth in order to get at items 4 and
14 5.

15 Hearing Examiner: Basically, what my big question is is
16 this; I would like to know the subjects that were
17 outstanding or so-called impasse or that you guys
18 couldn't agree upon at -- if you want to use 7/24
19 negotiation meeting and 8/22 negotiation meeting; in
20 other words, what were the subjects that were out-
21 standing? That is my question.

22 Mr. Pederson: I believe it was health insurance, personal
23 leave and preparation time. Basically, the salary was
24 fluctuating back and forth. It was the moving of the
25 salary back and forth as to providing money for those
26 other items. (Tr203, 10-27, also see Tr181)

27 I believe the outstanding issues in negotiations are duty
28 free lunch, health insurance and preparation time as stated in
29 finding 30, 12:38 p.m. and 1:18 a.m. I reject Mr. Keedy's
30 expanded list of outstanding issues in findings 38c. In finding
31 30, 12:38 p.m., the BAEA proposed duty free lunch, health insur-
32 ance and preparation time and approved salary's and personal
leave.

33 37. Mr. Pederson further answered that preparation time and
34 duty free lunch, Section 4 and 5, are policy decisions of the
35 School Board. (Tr178, 179)

36 38. Mr. Keedy explained impasse as follows:

37 a. Mr. York, re-cross:

38 Mr. York: So both parties were giving and taking and moving
39 along in what they felt was good faith bargaining on
40 certain subjects, and parties were retaining a fixed
41 position on certain other subjects; isn't that a fair
42 evaluation?

43 Mr. Keedy: I think it is. (Tr103, 15-19)

1 b. Mr. Hilley, re-redirect:

2 Mr. Hilley: After August 22nd, was the Board's position
3 very fixed?

4 Mr. Keedy: I am sure it was because the Board said at the
5 conclusion of the August 22nd meeting that we had
6 reached an impasse and that they wouldn't meet with us
7 again to resume negotiations unless we met certain
8 conditions. (Tr 103, 25-28 - 104, 1).

9 c. Mr. Hilley, rebuttal:

10 Mr. Hilley: All right. Now, I think I do have one other
11 question which was asked by Mr. D'Hooge to Mr. Pederson,
12 and that was at the end, and let's say August 22nd,
13 what were the gut core issues, so to speak, of collec-
14 tive bargaining, and why didn't the parties reach an
15 agreement?

16 Mr. Keedy: Well, on the 22nd of August, there was movement
17 on both sides, and we were, in our judgment, moving
18 closer and closer with every passing hour to an agree-
19 ment. I guess in answer to the second part of your
20 question, the meeting did not result in a settlement
21 because it was adjourned by the School District at 1
22 A.M. or some similar hour with the announcement to us
23 that they wouldn't return to the bargaining table until
24 we submitted a written proposal which they considered
25 serious or sincere. The gut or core issues that you
26 referred to, I guess were those that were still out-
27 standing on the table, including salaries, health
28 insurance benefits, the length of the duty day, the
29 question of personal leave, its availability to the
30 teachers, a preparation period in the elementary system;
31 in order to forge an agreement, we tried everything we
32 could as a bargaining team to offer a series of propos-
33 als to the School District's team in package form,
34 reworking the package from time to time in an attempt
35 to find something in that mix of issues which would
36 appeal to the School District enough for them to either
37 make a productive counterproposal to us or actually
38 reach agreement.
39 (Tr 207, 7-28 - 209, 1-5)

40 39. On August 29, 1978, Mr. Keedy wrote to Mr. York as
41 follows, in part:

42 This is simply our request, on behalf of the Bigfork
43 Area Education Association (BAEA), that you and/or the
44 trustees' negotiating team meet with us at the earliest
45 possible opportunity to resume negotiations on the 1978-80
46 contract.

47 We're prepared to meet any time, but for your consider-
48 ation propose the following, alternative dates: September
49 5, 6, 7 or 8; September 11, 12, 13, 14 or 15, 1978. Would
50 you please advise.

51 (BAEA Exhibit 5)

52 40. Neither Mr. Keedy nor the BAEA received a reply to Mr.
53 Keedy's August 29 letter. (Tr 50, 194). Mr. Pederson explained

1 that he was aware of the letter, but at about the same time the
2 School District became aware of some of the teachers forming the
3 Bigfork Teachers Association (BTA) and the School District was
4 not sure which group they should bargain with. (Tr 134, 144)

5 41. At a special School Board meeting on August 30, 1978,
6 the School Board ordered the implementation of the wages, hours
7 and working conditions contained in the third full and final
8 offer. (BAEA Exhibit 9; Tr 140, 156). The implemented wages,
9 hours and working conditions included, insurance premium cost,
10 extra duty pay, personal leave, basic work day, plus the August
11 22 School District concessions. (Tr 156). Some of the items
12 implemented in the third full and final offer were unsettled
13 points of negotiation. (Tr 120, 121)

14 Mr. Pederson explained the reason for implementing the third
15 full and final offers as:

- 16 a. Both the teachers and the administration had to be
17 aware of the conditions they were working under. (Tr
18 136)
- 19 b. School was starting and the School District unilaterally
20 implemented the third full and final offer and imposed
21 the offer upon the teachers. (Tr 137)

22 42. On August 31, 1978, the School District called all
23 teachers to a system wide orientation meeting. At the meeting,
24 the School District passed out the third full and final offer and
25 Joe Eslick (superintendent of Bigfork schools) stated that he was
26 instructed to inform the teachers they would be working under the
27 conditions set forth under the third full and final offer. Tr
28 119, 120.

29 43. In early September 1978, the BTA circulated the
30 following petition:

31 A majority of the employees of Bigfork School District
32 #38 have elected to disclaim any interest in the Montana
Education Association and/or Bigfork Area Education Association of representation for the purposes of wages, hours, and any other conditions of employment.

We have formed our own alternate group hereafter to be called the Bigfork Teacher's Association.

1 AMENDMENTS TO THE JULY 1, 1978 MASTER CONTRACT AS AGREED
2 UPON BY THE SCHOOL BOARD AND THE BIGFORK TEACHERS' ASSOCIA-
TION SUBJECT TO THE RATIFICATION VOTE.

3 Agreement page: Bigfork Area Education Association affil-
4 iated with MEA

5 Article I: To--Bigfork Teachers' Association
6 Bigfork Area Education Association

7 Article II, Section 1: Bigfork Area Education Association
8 (BAEA)

9 To--Bigfork Teachers' Association (BTA)
10 Article V, Section 5: Addition - In such case that the
11 teacher involved in such a matter feels
12 that an extended period of time is neces-
13 sary to seek professional advice, he shall
14 be granted a maximum of 15 days to obtain
15 this advice; provided he notifies the super-
16 intendent of his intentions within the
17 original 48 hour time span.

18 Article VIII, Section 1, Subd. 2: Change entire Subd. to
19 actual salary schedule "C".

20 Article VIII, Section 2, Subd. 7: Addition-".... one princi-
21 pal, and one teacher from the high school
22 and one teacher from the elementary school,
23 each teacher being elected by the BTA.

24 Article X, Section 2, Paragraph 3: delete to read: Health
25 and Hospitalization Insurance will be open
26 to negotiations for the reconsideration of
27 both the basic plan and the amount of the
28 district contribution for the second year
29 of this agreement.

30 (BAEA Exhibit 11, Tr128, 129)

31 This tentative agreement was put into each teacher's mail box.

32 (Tr124)

50. On September 19, 1978, the Board of Personnel Appeals
wrote to the BTA as follows:

In response to your petition of September 5, Section
59-1603(4) [39-31-206, MAC] provides:

"Certification as an exclusive representative shall be extended or continued, as the case may be, only to a labor or employee organization the written bylaws of which provide for and guarantee the following rights and safeguards and whose practices conform to such rights and safeguards as: Provisions are made for democratic organization and procedures; elections are conducted pursuant to adequate standards and safeguards; controls are provided for the regulation of officers and agents having fiduciary responsibility to the organization; and requirements exist for maintenance of sound accounting and fiscal controls including annual audits."

As soon as your local group, the Bigfork Teachers Association, provides this office with a constitution and bylaws as required in the above section of Montana collective bargaining statute, we will immediately serve the peti-

1 d. We directed Mr. York to file an employer's petition
2 with the Board of Personnel Appeals. (Tr155)

3 46. On September 12, 1978, Mr. York wrote to the Board of
4 Personnel appeals as follows, in part:

5 Please consider this letter as a valid petition pursuant
6 to Section 59-1606 (1) (b) [39-31-207(b), MAC] of the Montana
7 Public Employees Collective Bargaining Act. If a particular
8 form is required, please supply my office (C.O.D.) with
9 such.

10 This petition is filed in view of conflicting represen-
11 tation claims, i.e., between the Bigfork Area Education
12 association, affiliated with Montana Education Association
13 (BAEA); and, the Bigfork Teachers' Association (BTA).

14 47. Mr. York advised the School District to withhold nego-
15 tiation with the BAEA and stated they would need an election to
16 determine the majority status. (Tr135)

17 48. At a special meeting of the School Board on September
18 15, 1978, the School Board and representatives of the BTA met.
19 The School Board voted to recognize the BTA. (Tr155). The
20 Board's minutes reflect the following:

21 "..... these minutes are under date of September 15, 1978.
22 The next to last paragraph, "Gordon Guenzler moved to recog-
23 nize Bigfork Teachers Association and authorize negotiations
24 committee to enter into negotiations with them. Motion was
25 seconded by Ronald Pierce and carried unanimously." The
26 last paragraph is "Motion carried to adjourn." These
27 minutes were approved on October 9, 1978." (Tr127, 8-14).

28 In explanation of the School District actions, Mr. Pederson
29 stated that they had received a copy of the decertification
30 petition from the BTA which contained signatures of the majority
31 of the teachers and the School District felt that since it was
32 the majority of the teachers, they should deal with the BTA. The
above School Board minutes do not state a withdrawal of recogni-
tion from the BAEA, but the School Board's intent was to withdraw
recognition from the BAEA. The School District recognized the
BTA without an election. (Tr127, 185, 186)

49. The School District and the BTA met once on September 18,
1978 and reached a tentative agreement. The following changes to
the third full and final offer were agreed to:

1 tion on the employer and begin the election proceedings.

2 (DC #5-78)

3 51. During the week of September 18, 1978, the following
4 notices appeared in the teachers room, elementary school:

5 Attention All Teachers!

6 There will be a general vote among all teaches in the
7 Bigfork Schools for the purpose of determining ratification
8 or non-ratification of the negotiations agreement reached by
9 the B.T.A. and the School Board last week. The voting will
10 take place in the GUIDANCE OFFICE, ROOM 106 of the HIGH
11 SCHOOL on TUESDAY, SEPTEMBER 26, 1978 between the hours of
12 8:00 A.M. and 5:00 P.M. Full details of the voting proce-
13 dure can be determined by consulting the appropriate section
14 of the By-Laws of the Bigfork Teacher's Association.

15 (BAEA Exhibit 10, Tr122)

16 52. On September 29, 1978, the BTA filed the necessary
17 by-laws with the Board of Personnel Appeals. (DC #5-78)

18 53. The board of Personnel Appeals served the decertifica-
19 tion petition on the employer on October 2, 1978. (DC #5-78)

20 54. The Board of Personnel Appeals entered the following
21 order, in part, on October 12, 1978:

22 The validity of this Employer Petition, First Amendment,
23 is recognized insofar as the above-cited information indi-
24 cates that there has been a sufficient demand for recognition
25 made of the employer by the BTA and there is a question as
26 to the recognized bargaining representative's majority
27 status.

28 However, the Employer Petition, First Amendment, is
29 based on and seeks the same remedy as the BTA's Decertifica-
30 tion Petition (i.e., an election to determine the exclusive
31 representative of the bargaining unit in this matter).
32 Because the BTA's Decertification Petition is now being
33 processed, it is deemed unnecessary to repeat the process of
34 determining who in fact represents the majority of those
35 employees in the bargaining unit by serving the Employer
36 Petition, First Amendment, at this time. Therefore, the
37 Employer Petition, First Amendment, will not be served
38 pending resolution of the BTA's Decertification Petition in
39 this matter.

40 (Employer's Petition, Bigfork)

41 55. At the time of the hearing in this matter, the School
42 District had not voted to accept the tentative agreement with the
43 BTA but will vote on the tentative agreement. (Tr128)

44 56. On October 31, 1978, the Board of Personnel Appeals
45 entered the following order:

1 Having considered the incumbent labor organization's
2 Motion to Dismiss or to Postpone Indefinitely and the
3 employer's Brief in Opposition, the Board of Personnel
4 Appeals orders as follows:

5 1. That the Motion to Dismiss or to Postpone Indefin-
6 itely be denied.

7 2. That, in view of this Board's investigation and
8 the unfair labor practice charges filed prior to the filing
9 of this decertification petition, an election will not be
10 scheduled until this Board is assured that the necessary
11 laboratory conditions are present.

12 (DC #5-78)

13 IV CHARGES, DISCUSSION, AND CONCLUSION OF LAW

14 A. ULP #20-78, Count I.

15 Issuing Individual Teaching Contracts

16 1. THE CHARGE (in part):

17 On or about July 24, 1978 during the bargaining process,
18 the Defendant issued individual contracts to the teachers
19 with a demand to return them within ten (10) days. This was
20 individual bargaining, coercive in nature, and an attempt to
21 deny teachers their rights as protected by Section 59-1603(1),
22 R.C.M. 1947. It constitutes a failure to bargain in good
23 faith under the rationale of ULP 17-1975, Billings Education
24 Association v. School District #2, Billings High School
25 District. Notice of re-employment letters had been issued
26 to the teachers on or about March 23, 1978 which were to
27 have been returned no later than April 20, 1978. The
28 Defendant School District had all information necessary
29 relating to which teachers would be returning for the
30 1978-79 academic year and where there were vacancies which
31 would have to be filled during the summer. Issuance of
32 individual contracts in July, with a ten day period for
acceptance, served no purpose except harrassment of the
teachers and interference with bargaining.

33 2. DISCUSSION.

34 The school district issued individual teaching contracts.
35 (FF 23). The question here is the School District's intentions,
36 timing and the effect of issuing the individual teaching contracts.
37 The School District argued that the individual teaching contracts
38 were needed to employ teachers under section 20-4-201 MCA, which
39 states in part:

40 Each teacher shall be employed under written contract,
41 and each contract of employment shall be authorized by a
42 proper resolution of the trustees and shall be executed in
duplicate by the chairman of the trustees and the clerk of
the district in the name of the district and by the teacher.

The Montana Statute does not outline the contents needed for

1 the individual teaching contract or state when the individual
2 teaching contracts are to be issued.

3 Because the teachers in the spring of 1978 signed letters of
4 intent to return, the parties considered the teachers employed.
5 (FF 27,28). Therefore, I do not believe the school district's
6 immediate intentions were to employ teachers by issuing the
7 individual teaching contracts.

8 The School District must issue individual teaching contracts
9 as required by section 20-4-201 MCA. In complying with the above
10 section, the School District must issue individual teaching
11 contracts in such a way that the teaching contracts are contracts
12 of employment and not an erosion of the public employee's collec-
13 tive bargaining rights. The public employees rights are set
14 forth in section 39-31-201 MCA as follows:

15 Public employees shall have and shall be protected in
16 the exercise of the right of self-organization, to form,
17 join, or assist any labor organization, to bargain collec-
18 tively through representatives of their own choosing on
19 questions of wages, hours, fringe benefits, and other condi-
20 tions of employment, and to engage in other concerted acti-
21 vities for the purpose of collective bargaining or other
22 mutual aid or protection free from interference, restraint,
23 or coercion.

24 For the NLRB, this balance between the individual contracts
25 and a master labor agreement was first addressed by the U.S.
26 Supreme Court in J.I. Case 321 U.S. 332, 14 LRRM 501, (1944)
27 which states:

28 Collective bargaining between employer and the repre-
29 sentatives of a unit, usually a union, results in an accord
30 as to terms which will govern hiring and work and pay in
31 that unit. The result is not, however, a contract of employ-
32 ment except in rare cases; no one has a job by reason of it
and no obligation to any individual ordinarily comes into
existence from it alone. The negotiations between union and
management result in what often has been called a trade
agreement, rather than a contract of employment.....

33 After the collective trade agreement is made, the
34 individuals who shall benefit by it are identified by indi-
35 vidual hirings. The employer, except as restricted by the
36 collective agreement itself and except that he must engage
37 in no unfair labor practice or discrimination, is free to
38 select those he will employ or discharge. But the terms of
39 the employment already have been traded out. There is
40 little left to individual agreement except the act of hiring.
41 [Emphasis added]. This hiring may be by writing or by word

1 of mouth or may be implied from conduct. In the sense of
2 contracts of hiring, individual contracts between the
3 employer and employee are not forbidden, but indeed are
4 necessitated by the collective bargaining procedure.

5 But, however engaged, an employee becomes entitled by
6 virtue of the Labor Relations Act somewhat as a third party
7 beneficiary to all benefits of the collective trade agreement,
8 even if on his own he would yield to less favorable terms.
9 The individual hiring contract is subsidiary to the terms of
10 the trade agreement and may not waive[Emphasis added]

11 Individual contracts, no matter what the circumstances
12 that justify their execution or what their terms, may not be
13 availed of to defeat or delay the procedures prescribed by
14 the National Labor Relations Act looking to collective
15 bargaining, nor to exclude the contracting employee from a
16 duly ascertained bargaining unit; nor may they be used to
17 forestall bargaining or to limit or condition the terms of
18 the collective agreement....

19 It is equally clear since the collective trade agreement
20 is to serve the purpose contemplated by the Act, the indivi-
21 dual contract cannot be effective as a waiver of any benefit
22 to which the employee otherwise would be entitled under the
23 trade agreement. The very purpose of providing by statute
24 for the collective agreement is to supersede the terms of
25 separate agreements of employees with terms which reflect
26 the strength and bargaining power and serve the welfare of
27 the group....

28 The above balance and case is in compliance with Section
29 1-4-101 MCA which states in part "...Where there are several
30 provisions or particulars, such a construction is, if possible to
31 be adopted as will give effect to all." By allowing Section
32 20-4-201 MCA to be used as an employment contract and a section
33 39-31-201 MCA to be used as a contract for wages, hours and
34 fringe benefits, the two contracts meet the requirements of
35 section 1-4-101 MCA.

36 This same principle was reviewed by the thirteenth Judicial
37 District in Board of Trustees of Billings School District No. 2,
38 v. State of Montana ex rel Board of Personnel Appeals, Cause No.
39 70652. The District Court stated in part:

40[The] third basis for requesting review is its
41 claim that the BPA's final order effectively repealed a
42 statute of the state of Montana (Section 75-6102, R.C.M.
43 1947 [20-4-201 MCA]) which action is in excess of the
44 agency's statutory authority. We find no such administrative
45 repeal of a Montana statute. The final order of the Board
46 of Personnel Appeals clearly recognizes the validity of
47 Section 75-6102 [20-4-201 MCA].

48 It is (a) fundamental principle of statutory
49 interpretation that when interpreting statutes they

1 must be interpreted, if possible, so that they are not
2 conflicting. Therefore, in interpreting the action of
3 the Legislature of placing the teachers under the
4 Public Employees Collective Bargaining Act which gives
5 public employees the right to bargain collectively and
6 to engage in other concerted activities, along with
7 75-6102 [20-4-201 MCA] requiring the issuance of indi-
8 vidual contracts. It becomes obvious that the inten-
9 tion of the Legislature was not to allow the substitu-
10 tion of individual contracts for that of the Master
11 Agreement. Final Order, ULP #17-1975, page 5, lines
12 3-11.

13 The order of the administrative agency merely requires
14 the School Board to "cease and desist from including in
15 individual contracts issued to teachers any matters concern-
16 ing wages, hours, fringe benefits and other conditions of
17 employment which have not been agreed to in a Master Agree-
18 ment". Also, the School District is forbidden to use indi-
19 vidual contracts to interfere with teachers' rights guaran-
20 teed in Section 59-1603 R.C.M. 1947 [39-31-201 MCA]. Indi-
21 vidual contracts as required by Section 75-6102 R.C.M. 1947
22 [20-4-201 MCA] may certainly still be issued to Billings
23 teachers by the Billings School Board. The statute has not
24 been repealed.

25 Note: This cause is under appeal to the Montana Supreme
26 Court.

27 Parts of the individual teaching contract contain statements
28 making the contract subject to the 1978-79 master contract as
29 amended. Other statements added to the teaching contract are not
30 a clear statement of subservience. The wages in the individual
31 teaching contract contain no statement making the wages subject
32 to the wages in the master agreement. (FF23). Because item 6 of
the individual teaching contract requires the teachers to execute
the teaching contract by August 1, I believe the intent of the
School District was to force a wage offer and other possible
provisions onto the teachers or have their jobs vacated. On June
28, 1978, the School District questioned the BAEA's attitude
concerning Individual Teaching contracts. The question was if
the School District should draft its second full and final offer
and issue individual teaching contracts to reflect the full and
final offer, would the BAEA advise the individual teachers to
sign the contracts? The BAEA protested and stated "no". (FF16,
17g). In order to start the implementation of the School
District's second full and final offer, the School District
issued its second full and final offer on July 10, 1978 to each

1 teacher. (FF 18). In an attached letter to Mr. Keedy, the
2 School District requested the BAEA to vote on the second full and
3 final offer no later than July 23. The letter also stated that
4 if the BAEA rejected the second full and final offer, the offer
5 would be put into effect on July 24. (FF18). On July 24, the
6 School District prepared individual teaching contracts. (FF23).
7 Also on July 24 and early July 25, the parties reached a tenta-
8 tive agreement. (FF25). The teachers received the individual
9 teaching contracts on July 25 or 26. (FF27). The individual
10 teaching contracts were consistent with the tentative agreement
11 and earlier School District proposals because the teaching
12 contracts addressed only one year of a two year agreement and the
13 first year's wage offer did not change from June 28. (FF16, 18,
14 23, 24b, 25, 26). On July 31, the BAEA rejected the tentative
15 agreement, (FF27). The teachers had until August 1, to execute
16 and return the individual teaching contract or their teaching
17 positions would be assumed vacant. (FF23, 24a).

18 Montana's statute is silent as to when the School District
19 must issue individual teaching contracts. Why did the School
20 District issue the individual teaching contracts before the
21 negotiation session or during the negotiation sessions on July 24
22 and 25? Why did the School District issue the individual teaching
23 contracts before the teachers had a chance to vote on the tenta-
24 tive agreement? Why did not the School District issue the indi-
25 vidual teaching contracts in May or at the system-wide meeting on
26 August 31 or after an approval of a tentative agreement? I can
27 only conclude that the School District timed the issuance of the
28 individual teaching contracts with the collective bargaining
29 process. The School District issued the individual teaching
30 contracts before or during a mediation-negotiation session that
31 produced a tentative agreement. A mediation-negotiation session
32 is a delicate time. I can only conclude that the timing of the

1 teaching contracts interfered with the collective bargaining
2 process. The School District argues the affect of issuing the
3 individual teachers contracts was immaterial because a substan-
4 tial number of teachers had joined the BAEA negotiating team and
5 the vote on the tentative agreement was only a matter of formality.
6 I disagree because at the time the tentative agreement was reached
7 only 12 teachers out of a possible 44 or 45 teachers were present,
8 not a majority. (FF25, 32j). I also disagree because a tentative
9 agreement can only become a ratified contract after being subject
10 to a vote in a democratic process--adequate notice of the meeting,
11 review of the tentative agreement, discussions and a democratic
12 vote. See finding number 50 for Montana's Requirements for a
13 union to be a democratic organization.

14 The School District also argues that since there were no
15 mass firings or incidents because some of the teachers did not
16 execute an individual teaching contract, there was no affect in
17 issuing the individual teaching contracts. (FF24). The School
18 District states in a letter to Mr. Keedy that the BAEA had until
19 July 23 to vote on the second full and final offer and if the
20 offer was rejected, the School District would still put the offer
21 into effect on July 24. The same day, July 24, the School Dis-
22 trict prepared individual teaching contracts. On the evening of
23 July 24, the parties started a mediation session that produced a
24 tentative agreement on early July 25. (FF18, 25).

25 Looking at the above course of action, the School District
26 was effectively telling the BAEA on July 24 that the teachers
27 were going to work under the wage set forth with or without a
28 mediation session that evening. The School District was effec-
29 tively telling the BAEA on July 24 that the teachers were going
30 to work for the wages setforth with or without a tentative agree-
31 ment. The School District was effectively telling the BAEA on
32 July 24 that the teachers were going to work for the wages set-

1 forth with or without the membership approval of the tentative
2 agreement. The effect of the School District issuing the indivi-
3 dual teaching contracts was to tell the teachers that the BAEA
4 may bargain or not, may reach a tentative agreement or not, may
5 vote to accept the tentative agreement or not, but the teachers
6 were going to work under the conditions determined by the School
7 District., Franks Bros Company vs. NLRB, 321 U.S. 702, 14 LRRM
8 591 (1944)... "The unlawful refusal of an employer to bargain
9 collectively with its employees' chosen representatives disrupts
10 the employees' morale, deters their organizational activities and
11 discourages their membership in unions."

12 With the parties agreeing the teachers were already employed,
13 with the wages in the individual teaching contracts not being
14 governed by the master labor agreement, with the issuances of the
15 individual teaching contracts being before or during a sensitive
16 mediation session and with the issuing of the individual teaching
17 contracts having the effect of telling the teachers they may do
18 as they wished but the School District would determine the work
19 conditions, I find the School District interfered with the col-
20 lective bargaining process.

21 3. CONCLUSIONS OF LAW

22 For the reasons stated above, I conclude the School district
23 violated section 39-31-401(5) MCA by issuing individual teaching
24 contracts that negate the collective bargaining process.

25 B. ULP #20-78, Count II

26 Bypassing the Exclusive Bargaining Agent

27 1. THE MORE DEFINITE STATEMENT OF THE CHARGE (in part):

28 During the week of July 10, 1978, Defendant School
29 Board engaged in individual bargaining with teachers repre-
30 sented by Complainant in that it sent each teacher a copy of
31 the Board's "full and final offer" containing provisions
32 which had not been submitted to Complainant at the bargaining
table, as follows:

[Item a.] The parties had tentatively agreed to a "closed"
two year contract, to contain specific wages for the second
year of the agreement and no opening clause. The "full and

1 final offer" presented individually to the teachers contained
2 no wage proposal for the second year, and provided an opening
clause for second year wages available to either party.

3 [Item b.] Tentative agreement had been reached on extra duty
4 compensation. The "full and final offer" presented indivi-
5 dually to the teachers contained new language on eligibility
for extra duty compensation and no dollar amounts for such
duties.

6 [Item c.] The "full and final offer" individually presented
7 to the teachers changed the grievance procedure discussed by
8 the parties at the bargaining table in that it omitted a
sentence relating to waiver in Article XII, Section 4.

9 [Item d.] The "full and final" offer presented individually
10 to the teachers contained a unilateral change, not presented
at the bargaining table, in Article XI, Section 2, relating
to Emergency and Personal Leave.

11 This attempt at individual bargaining with the teachers
12 represented by Complainant, by-passing the negotiating
13 committee, constitutes a refusal to bargain in good faith
and violates Section 59-1605 (1) (e), R.C.M. 1947 [39-31-401
(5) MCA] as amended.

14 2. DISCUSSION

15 There is no question of the existence of the second full and
16 final offer which was mailed to the individual teachers on or
17 about July 10, 1978. (FF18). Also there is no question that the
18 second full and final offer contains language different from
19 earlier offers. (FF5, 18). The question is was different lan-
20 guage first discussed and offered to the collective bargaining
21 agent during negotiations?

22 The School District offered the negotiating committee a
23 proposal on June 28, 1978 which called for the second years'
24 wages and other economic items to be determined by mid-contract
25 negotiations. (FF16, 18, 22a). This was a change from the first
26 full and final offer and agreement on a "closed" two year contract.
27 (FF3, 5, 18). Because these changes were presented at the bar-
28 gaining table to the BAEA negotiating committee on June 28, I
29 must dismiss item "a" of count II in ULP #20.

30 Article IX, Section 1 of the first full and final offer is
31 identical to the same section in the second full and final offer.
32 (FF5, 18, 22b). The complaint is the addition of the words

1 "'certified personnel' covered by this agreement". (FF22b).
2 Therefore, I presume the complaint is not the change in the
3 wording in subdivision 1, Section 2 of Article IX from
4 ".....clearly qualified and eligible employees to" to "....fairly
5 qualified eligible employees". (FF7, 18, 20c).

6 The second full and final offer contained a dollar amount
7 for extra duty compensation. (FF22c).

8 Because the "certified personnel" section was presented in
9 the first full and final offer and therefore not new in the
10 second full and final offer, and because the second full and
11 final offer did contain a dollar amount for extra duty compen-
12 sation, I must dismiss item "b", Count II in ULP #20.

13 In reference to both items "a" and "b", Mr. Keedy testified
14 that there was little or no discussion or agreement between the
15 parties. This complaint will be covered in Section D. ULP #22-78,
16 Count II.

17 Both parties agree the Grievance Procedure was not open or
18 subject of negotiations. (FF20a, 22e). I believe the deleted
19 sentence in the Grievance Procedure was a typographical error
20 because two sentences in a row started with the word "Failure".
21 I see no advantage to the School District by deleting the sen-
22 tence "Failure to file any grievance within such period shall be
23 deemed a waiver thereof". (FF17, 20a). Therefore, a dismissal
24 of item "c", Count II in ULP #20 is in order.

25 Was the extra sentence part of the discussion of the Article
26 XI, Section 2 proposal added on June 28? The BAEA's complaint
27 states the extra sentence was not presented at the bargaining
28 table. The School District's written proposal on Article XI,
29 Section 2 of June 28 does not contain the extra sentences.
30 (FF16).

31 The NLRB decision in General Electric Co. (1964) 150 NLRB
32 194, 57 LRRM 1491 addressed the question of Bypassing the Collec-

1 tive Bargaining Representative and dealing with the employees
2 directly. In that decision, the NLRB states:

3 "Good-faith bargaining thus involves both a procedure
4 for meeting and negotiating, which may be called the exter-
5 nals of collective bargaining, and a bonafide intention, the
6 presence or absence of which must be discerned from the
7 record. It requires recognition by both parties, not merely
8 formal but real that 'collective bargaining' is a shared
9 process in which the right to play an active role. On the
10 part of the employer, it requires at a minimum recognition
11 that the statutory representative is the one with whom it
12 must deal in conducting bargaining negotiations, and that it
13 can no longer bargain directly or indirectly with the
14 employees.....

15As the Trial Examiner phrased it, the employer's statu-
16 tory obligation is to deal with the employees through the
17 union, and not with the union through the employees.

18 Using this for a guideline, if the School District's inten-
19 tion was to deal directly with the individual teachers, the
20 action of the School District would be an unfair labor practice.
21 On June 28, the School District did present a new Article XI,
22 Section 2. (FF16). During the June 28 meeting, the parties did
23 discuss the principal subject of Article XI. Mr. Keedy can not
24 recall the facts of the discussion. (FF22d). Mr. Pederson
25 states there was some confusion about what was presented at the
26 bargaining table so when the School District drafted up their
27 second full and final offer they added one sentence. (FF20b).
28 On July 10, the School District mailed the second full and final
29 offer to the individual teachers. The second full and final
30 offer contains the new Article XI, Section 2 as proposed by the
31 School District plus one extra sentence. (FF18).

32 With the BAEA not being able to recall the facts of the
Discussion on Article XI and with the School District stating
there was some confusion about what was presented at the bargain-
ing table, I am not convinced the School District added the extra
sentence to their proposal at the June 28 meeting to intentionally
bypass the collective bargaining agent. Therefore, I am dismissing
item "d" of the Count II in ULP #20.

1 3. CONCLUSIONS OF LAW

2 For the reasons stated above, I conclude that the School
3 District did not submit provisions to the individual teachers
4 which had not first been submitted to the complainant at the
5 bargaining table. Therefore, the School District did not violate
6 section 39-31-401 (5) MCA.

7
8 C. ULP #22-78, Count I
Conditional Bargaining

9 1. THE CHARGE (in part):

10 Defendant is violating Section 59-1605 (1) (3) [39-31-401
11 MCA] by engaging in merely conditional bargaining, which
12 constitutes a refusal to bargain collectively in good faith
with complainant, the exclusive representative of defendant's
teaching employees.

13 Bill Pederson, chairman of the Bigfork School Board, issued
14 a news release on or about August 25, 1978 stating that the
15 Board would "bargain again with teachers if the teachers
first submit a new written proposal that the Board considers
to be sincere".

16 2. DISCUSSION

17 The first appearance of a condition being placed on future
18 negotiations was during a conversation after the public meeting
19 on August 21. The condition of August 21 was that the School
20 District would not negotiate until they received a written pro-
21 posal which they considered sincere. The School District did not
22 hold to that position. (FF29).

23 The second appearance of a condition being placed on future
24 negotiations was at the termination of the ninth negotiation ses-
25 sion on August 22. The condition of August 22 was that the
26 School District would not negotiate until they received a written
27 proposal and then they would only meet if they felt it would be
28 profitable. (FF30). Mr. Pederson agrees the profitable state-
29 ment means a written proposal that is acceptable to the School
30 District. (FF31).

31 During the mediation session, via the mediator, Mr. Pederson
32 requested the BAEA to put their proposal in written form because

1 their proposals were hard to follow and evaluate. (FF31). Mr.
2 Keedy states that the parties mutually understood the outstanding
3 issues and he does not know what he could have done differently.
4 (FF32d).

5 The last appearance of a condition being placed on future
6 negotiations was contained in a news release by the School Dis-
7 trict on August 24. The condition of August 24 was that if the
8 BAEA had any further proposals they should submit them in writing
9 to the School District and if the BAEA appeared sincere in their
10 proposals, the School District would meet with the BAEA. (FF34,
11 32g). The parties have not met again. (FF32i).

12 Mr. Keedy considered the BAEA's proposals intelligent.
13 (FF32f). Mr. Pederson did not consider the BAEA's proposals
14 sincere. (FF36a).

15 To the question of reducing a proposal to written form
16 during a mediation session, I am of the opinion that if a written
17 proposal was needed the mediator would have demanded such. Also,
18 the School District's notes of the last mediation session reflect
19 only once, at 12:57 p.m., did the School District request a
20 clarification of a BAEA proposal.

21 To the question of whether the BAEA's proposals were sincere,
22 the record lacks a charge of surface or regressive bargaining
23 with no intent of reaching an agreement. The record also lacks
24 evidences of surface or regressive bargaining. The end of Section
25 39-31-305 (2) MCA, Duty to Bargain Collectively in good faith
26 states "Such obligation does not compel either party to agree to
27 a proposal or require the making of a concession." If the Board
28 of Personnel Appeals were to judge the sincerity of a proposal it
29 could be forcing one or both parties to make a concession. The
30 Board of Personnel Appeals can only judge if a proposal was made
31 in a good faith intent to reach an agreement.

32 The question at hand is may the School District condition

1 future negotiations on receiving, in advance, a sincere or profit-
2 able proposal in their judgement from the BAEA before the School
3 District will negotiate?

4 The third Circuit Court of Appeals in NLRB vs. George P.
5 Pilling & Sons, Co. (1941) 119 F2d 32; 8 LRRM 557 addressed
6 conditional bargaining:

7for Pilling's [Employer] requirement, as a condition
8 precedent to the respondent's bargaining with the union,
9 that the latter first organize the industry in general, and
10 later, that Cort, the union's representative, make known to
11 Pilling the names of the members of the shop committee.
12 Section 7 of the Act [NLRA] guarantees to the employees the
13 right to bargain collectively through a representative of
14 their own choosing and it is not for the employer to restrain
15 or interfere with the exercise of that right by insisting
16 upon unwarranted conditions.

17 In NLRB vs. C. and J. Camp Inc. (1954). 216 F2d 113, 35
18 LRRM 2015, The fifth circuit court found a violation of the NLRA
19 where the employer "..... as a condition to meeting with the
20 union for bargaining, that the union agree in advance of the
21 meeting that the demand it had already made would be to some
22 extent abated or lessened."

23 The NLRB in Valley Oil Co., Inc. (1974) 210 NLRB 370 adopted
24 the administrative law judge's decision which states in part:

25 Finally, there is the matter of Respondent's [Employer,
26 after the thirteenth meeting] refusal to meet after the
27 Union's rejection of its final offer unless the Union changed
28 its position. Respondent defends this refusal on the ground
29 that an impasse existed. However, an impasse caused by a
30 party's failure to bargain in good faith is not a legally
31 cognizable impasse and does not justify a refusal to meet.
32 North Land Camps, Inc., 179 NLRB 36. [72 LRRM 1280] I
find, therefore, that Respondent's refusal to meet since
March 2, 1973, was a further refusal to bargain in violation
of Sections 8(a)(5) and (1) of the Act [NLRA].

With Mr. Pederson agreeing a profitable proposal means a
proposal that is acceptable to the School District and with the
School District's statement in the news release about the BAEA's
unacceptable proposals, the School District's sincere or profit-
able statements can only mean a request for a reduction in the
BAEA's demand before the School District would bargain further.
Using the NLRB case for a guideline I find the School District

1 did insist upon an unwarranted condition before the School Dis-
2 trict would return to the bargaining table.

3 3. CONCLUSIONS OF LAW

4 The School District did violate Section 39-31-401(5) MCA by
5 insisting the BAEA first submit a proposal to the School District;
6 if the proposal appeared sincere to the School District or if the
7 negotiations looked profitable to the School District, then the
8 School District would consider a meeting.

9
10 D. ULP #22-78, Count II
Impasse

11 1. THE CHARGE (in part):

12 The last negotiating session between the parties was
13 August 22, 1978. At that time both parties made proposals,
14 differing from ones previously on the bargaining table.
15 While none of these were accepted by the other party, they
16 demonstrate movement continues to be possible. However,
17 Chairman Pederson's news release states that "The board's
18 position is that an impasse has been reached".

16 2. DISCUSSION

17 The Discussion will first address the question of the negoti-
18 ability of duty free lunch and preparation time. The discussion
19 will then apply the test for Impasse.

20 Mr. Pederson stated that duty free lunch and preparation
21 time are policy decisions of the School District and not negoti-
22 able. (FF39). The question of the negotiability of duty free
23 lunch and preparation time must be answered first because a party
24 may not insist to impasse on the incorporation, of a permissive
25 subject of bargaining into the collective bargaining contract,
26 NLRB vs. Wooster Division of Borg-Warner (1958) 356 U.S. 342, 42
27 LRRM 2034.

28 Montana's Collective Bargaining Act sets forth the following
29 pertinent sections on the question of negotiability:

30 39-31-201. Public employees protected in right of
31 self-organization. Public employees shall have and shall be
32 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

1 activities for the purpose of collective bargaining or other
2 mutual aid or protection free from interference, restraint,
or coercion.

3 39-31-303. Management rights of public employers.
4 Public employees and their representatives shall recognize
5 the prerogatives of public employers to operate and manage
6 their affairs in such areas as, but not limited to:

- 7 (1) direct employees;
- 8 (2) hire, promote, transfer, assign, and retain em-
9 ployees;
- 10 (3) relieve employees from duties because of lack of
11 work or funds or under conditions where continu-
12 ation of such work be inefficient and nonproduc-
tive;
- 13 (4) maintain the efficiency of government operations;
- 14 (5) determine the methods, means, job classifications,
15 and personnel by which government operations are
16 to be conducted;
- 17 (6) take whatever actions may be necessary to carry
18 out the missions of the agency in situations of
19 emergency;
- 20 (7) establish the methods and processes by which work
21 is performed.

22 39-31-304. Negotiable items for school districts.
23 Nothing in this chapter shall require or allow boards of
24 trustees of school districts to bargain collectively upon
25 any matter other than matters specified in 39-31-305(2).

26 39-31-305. Duty to bargain collectively - good faith.
27(2) For the purpose of this chapter, to bargain
28 collectively is the performance of the mutual obligation of
29 the public employer or his designated representatives and
30 the representatives of the exclusive representative to meet
31 at reasonable times and negotiate in good faith with respect
32 to wages, hours, fringe benefits, and other conditions of
employment or the negotiation of an agreement or any question
arising thereunder and the execution of a written contract
incorporating any agreement reached. Such obligation does
not compel either party to agree to a proposal or require
the making of a concession.

23 The Kansas Supreme Court in N.E.A vs. Shawnee Mission Board
24 of Education (1973) 512 P2d 426, 84 LRRM 2223 setforth the fol-
25 lowing balance between the scope of bargaining and management
rights:

26 It does little good, we think, to speak of negotiability
27 in terms of "policy" versus something which is not "policy".
28 Salaries are a matter of policy, and so are vacation and
29 sick leaves. Yet we cannot doubt the authority of the Board
30 to negotiate and bind itself on these questions. The key,
31 as we see it, is how direct the impact of an issue is on the
32 well-being of the teachers, as opposed to its effect on the
operation of the school system as a whole. The line may be
hard to draw, but in the absence of more assistance from the
legislature the courts must do the best they can. The
similar phraseology of the N.L.R.A. has had a similar history
of judicial definition. See Fibreboard Corp., v. Labor
Board, 379 U.S. 203, 13 L.Ed. 2d 233, 85 S. Ct. 398, 57 LRRM
2609 and especially the concurring opinion of Stewart, J. at
pp. 221-222. [Emphasis Added]

1 The Pennsylvania Public Employees Relation Act (Act 195)
2 contains the following Sections:

3 Section 701. [Scope of Bargaining]. Collective bar-
4 gaining is the performance of the mutual obligation of the
5 public employer and the representative of the public employ-
6 ees to meet at reasonable times and confer in good faith
7 with respect to wages, hours and other terms and conditions
8 of employment, or the negotiation of an agreement or any
9 question arising thereunder and the execution of a written
10 contract incorporating any agreement reached but such obli-
11 gation does not compel either party to agree to a proposal
12 or require the making of a concession.

13 Section 702. [Managerial Policy]. Public employers
14 shall not be required to bargain over matters of inherent
15 managerial policy, which shall include but shall not be
16 limited to such areas of discretion or policy as the func-
17 tions and programs of the public employer, standards of
18 services, its overall budget, utilization of technology, the
19 organizational structure and selection and direction of
20 personnel. Public employers, however, shall be required to
21 meet and discuss on policy matters affecting wages, hours
22 and terms and conditions of employment as well as the impact
23 thereon upon request by public employee representatives.

24 In Pennsylvania Labor Relation Board vs. State College Area
25 School District (1974-75) 337 A2d 262, 90 LRRM 2081, the Penn-
26 sylvania Supreme Court used the Kansas Surpeme Court test to
27 strike a balance between Section 701 and 702. The Pennsylvania
28 Supreme Court stated:

29 Thus we hold that where an item of dispute is a matter
30 of fundamental concern to the employees' interest in wages,
31 hours and other terms and conditions of employment, it is
32 not removed as a matter subject to good faith bargaining
under section 701 simply because it may touch upon basic
policy....

33 This Kansas-Pennsylvania balancing test was used by the
34 Board of Personnel Appeals in Florence-Carlton, ULP #5-77.

35 The Nevada's State Public Employment Relations Act has two
36 Sections similar to Montana's Section 39-31-303 and 39-31-305 (2)
37 MCA:

38 "288.150 Negotiations by employer with recognized
39 employee organization concerning wages, hours and conditions
40 of employment: rights of employer without negotiation.

41 "1. It is the duty of every local government employer,
42 except as limited in subsection 2, to negotiate in good
43 faith through a representative or representatives of its own
44 choosing concerning wages, hours, and conditions of employment
45 with the recognized employee organization, if any, for each
46 appropriate unit among its employees. If either party
47 requests it, agreements so reached shall be reduced to
48 writing. Where any officer of a local government employer,

1 other than a member of the governing body, is elected by the
2 people and directs the work of any local government employee,
3 such officer is the proper person to negotiate, directly or
4 through a representative or representatives of his own
5 choosing, in the first instance concerning any employee
6 whose work is directed by him, but may refer to the governing
7 body or its chosen representative or representatives any
8 matter beyond the scope of his authority.

9 "2. Each local government employer is entitled, with-
10 out negotiation or reference to any agreement resulting from
11 negotiation:

- 12 (a) To direct its employees;
- 13 (b) To hire, promote, classify, transfer, assign,
14 retain, suspend, demote, discharge or take disciplinary
15 action against any employee;
- 16 (c) To relieve any employee from duty because of lack
17 of work or for any other legitimate reason;
- 18 (d) To maintain the efficiency of its governmental
19 operations;
- 20 (e) To determine the methods, means and personnel by
21 which its operations are to be conducted; and
- 22 (f) Take whatever actions may be necessary to carry
23 out its responsibilities in situations of emergency.

24 "Any action taken under the provisions of this
25 subsection shall not be construed as a failure to
26 negotiate in good faith." (At 88 LRRM 2775, NOTE: The
27 above sections were later amended).

28 In Clark County School District vs. Local Government Employ-
29 ees - Management Relation Board (1974) 530 P2d 114, 88 LRRM 2774,
30 the Nevada Supreme Court approved the following balance between
31 Section 1 and 2:

32 In this case the EMRB concluded that the applicable
standard to reconcile Section 1 and 2 is that the government
employer be required to negotiate if a particular item is
found to significantly relate to wages, hours and working
condition even though that item is also related to manage-
ment prerogative. The standard and the findings thereon are
reasonable.

Looking at the duty free lunch provisions (Article VII
Section 4) in the 1976-78 Labor contract, in the tentative agree-
ment and during the last negotiation session, the section provides
either that no teacher, or teachers on a rotating basis, shall be
required to supervise students in the lunchroom. The section
also provides for playground duty. (FF1, 26, 30).

All Bigfork teachers are paid on a yearly pay matrix, not an
hourly wage rate. A teacher's wage is determined by the teacher's
experience and education fitted into the pay matrix. If we
remove the duty free lunch provision from the labor contract, the

1 teachers who are assigned lunchroom work in addition to their
2 regular required work would have an increase in the number of
3 hours worked for the same yearly salary.

4 Looking at the preparation time provision (Article VII,
5 Section 5) in the 1976-78 labor contract, in the tentative agree-
6 ment and during the last negotiation session, the section requires
7 a given amount of time during the day to be set aside for prepa-
8 ration of class materials. (FF1, 26, 30). If we remove the
9 preparation time from the labor contract, the teacher would do
10 this preparation work at home. The preparation work done at home
11 would increase the number of hours worked for the same yearly
12 salary. Like lunch duty, non-scheduled preparation time would
13 increase the number of hours worked for the same salary, there-
14 fore becoming nonpay hours.

15 With the amount of time required for lunch duty and prepara-
16 tion being a balance against a yearly salary, I can only see
17 these items as having a direct impact on the well-being of the
18 individual teachers. Therefore, duty free lunch and preparation
19 time are negotiable items.

20 There is no question that the School District called an
21 impasse in a news release on August 24. (FF34). In the School
22 District's notes of the ninth negotiation session, there is no
23 reference to impasse (FF30). Compare the notes of the June 28
24 meeting and the following letter on July 10 in which the School
25 District states impasse loud and clear. (FF16,18). Did impasse
26 exist at the end of the ninth negotiation session on August 22 as
27 stated by the School District on August 24?

28 The Board of Personnel Appeals adopted two tests for impasse
29 in Columbia Falls, ULP #25, 26, 27 and 36,1976. Also See:
30 Helena Fire Fighters, ULP #19-78. The first test is from the
31 NLRB and the courts acceptance of impasse where negotiations have
32 been frequent, numerous and exhausting. See: NLRB vs. Intra-

1 Coastal terminal, Inc., 286 F2d 945, 47 LRRM 2629; Celanese
2 Corp. of America, 95 NLRB 664, 28 LRRM 1362.

3 The School District's notes of the last negotiation session
4 reflect the outstanding issues of duty free lunch, health insur-
5 ance cost, and preparation time. It appears from the School
6 District's question at 12:57 and Mediator Skaar's statement, the
7 issue of duty free lunch was near settlement. (FF30). Have the
8 parties exhausted all possible ways of funding the health insur-
9 ance cost and all possible ways of providing preparation time?
10 The record is silent on whether the parties explored other
11 formulas for funding health insurance cost, e.g. the School
12 District will increase its contribution to the health insurance
13 by "X" percentage this year and by "Y" percentage next year
14 non-compounded. The BAEA decreased its demand from 2½ hours per
15 week for preparation time to 2 hours. The BAEA also proposed
16 that all 2 hours of preparation time could be used in one block.
17 (FF30).

18 The School District offered one hour per week for preparation
19 time. (FF30, 26). But, at no time did the parties explore the
20 possibility of dividing the difference in preparation time, or
21 the reasons why a party needs more or less preparation time.

22 The record is lined with signs that the School District was
23 not willing to exhaust every avenue of discussion in order to
24 reach a mutual understanding and a mutual agreement. The School
25 District issued its first full and final offer the day following
26 the third negotiation session. But at the conclusion of the
27 third session, a number of items remained unresolved. The first
28 full and final offer also requested a vote of the teachers before
29 a tentative agreement. (FF3, 4). The factfinder's report states
30 that the School District argued that it had the ability to pay a
31 base salary of \$9227 without risking another budgetary levy. But
32 at the next session, the School District stated that it could

1 only pay \$9058 because of the mill levy failure. (FF13, 16).
2 Looking at the School District's second full and final offer, Mr.
3 Keedy testified that no agreement had been reached and/or dis-
4 cussion taken place with respect to certain provisions of both
5 the first and second full and final offers. (FF22b). With the
6 School District passing out full and final offers and not exploring
7 the offers or alternative offers freely and truthfully with the
8 BAEA, I am of the opinion that the School District did not exhaust
9 every avenue of understanding and had no intent of doing so in
10 order to reach a mutual agreement.

11 The second test for impasse is one modified from Taft Broad-
12 casting Co. (1967) 163 NLRB 475, 64 LRRM 1386; employer petition
13 for review dismissed 395 F2d 622, 65 LRRM 2292.

14
15 Whether a bargaining impasse exists is a matter of
16 judgment. Things which must be considered are:

- 17 a. The bargaining history,
- 18 b. The good faith of the parties in negotiation,
- 19 c. The length of the negotiation i.e. frequent,
20 numerous, exhausting-exploring all grounds of settle-
21 ment,
- 22 d. The importance of the issue or issues as to which
23 there is disagreement i.e. mandatory subject of
24 bargaining,
- 25 e. The contemporaneous understanding of the parties as
26 to the state of negotiations i.e. positions
27 solidified,
- 28 f. Has mediation or fact finding been requested. What
29 have been the actions of the fact finder or the
30 mediator?

31
32

1 Application of the impasse test:

- 2
- 3 a. The record contains no past bargaining history.
- 4 b. The School District did not negotiate in good faith by
5 imposing conditions on further negotiations at the
6 termination of negotiations early August 23. (FF30).
7 The School District did not declare impasse until the
8 following day. (FF34). Also see Section C. ULP #22,
9 Count I above.
- 10 c. The parties have met nine times in negotiations from
11 early December 1977 to late August 1978. (FF2, 30). I
12 do not believe the parties have met frequent and numer-
13 ous times.
- 14 d. Preparation time, health insurance cost and duty free
15 lunch are all mandatory subjects of negotiations.
- 16 e. At no time did Mr. Pederson state the parties were
17 solidified in their positions. In fact at the last
18 meeting, both parties made different proposals. Con-
19 cessions were made. (FF31, 32b). Mr. Pederson's only
20 reason for calling an impasse was that BAEA's proposals,
21 in the School District's Judgement, were not sincere.
22 (FF36) With the BAEA willing to settle for less wages
23 than the School District offer in order to provide duty
24 free lunch and preparation time for teachers in grades
25 1 through 6 and to provide an increase in health insur-
26 ance premiums paid by the School District for all
27 teachers, I do not believe the parties are solidified
28 in their positions. (FF30, 32, 34, 36, 37). Mr. Kedy
29 stated the parties were moving closer and closer to an
30 agreement with each passing hour. (FF38c).
- 31 f. Mediator Skaar did not believe the parties were at
32 impasse because she was trying to continue mediation
the next evening. (FF30).

1 The School District implemented its third full and final
2 offer which contained the latest School District concessions.
3 (FF 33, 41, 42).

4 With the parties not fully exploring all grounds for settle-
5 ment, with the School District acting in bad faith by imposing
6 conditions on future negotiations, with the positions of the
7 parties not fixed and with the mediator trying to continue media-
8 tion, I do not believe impasse existed in late August.

9 3. CONCLUSIONS OF LAW

10 The School District violated Section 39-31-401(5) MCA by
11 declaring impasse when impasse did not exist.

12
13 E. ULP #25-78

14 Withdrawal of Recognition and Refusing to Bargain

15 1. THE CHARGE (in part):

16 Defendant has violated the Public Employees Collective
17 Bargaining Act, Section 59-1605(1)(e), R.C.M. 1947 [Section
39-31-40 1(5) MCA].

18 On or about September 15, 1978, Defendant, in a special
19 meeting of the Board of Trustees, took action to withdraw
continued recognition of the charging party and to refuse
20 any bargaining whatsoever with the charging party.

21 A closely related charge is the first half of ULP #26-78,
which states in part:

22 Defendant has violated the Public Employees Collective
23 Bargaining Act, Section 59-1605 (1) (b), 59-1605 (1) (a) and
24 59-1605 (1) (e), R.C.M. 1947 [Section 39-31-401 (2), (1) and
(5) MCA].

25 On or about July, continuing through September, 1978,
26 the Employer interfered with, restrained and coerced employ-
ees in the exercise of the rights guaranteed in Section
27 59-1603 [Section 39-31-201 MCA] of this Act;

28 On or about September 16, 1978, the Employer interfered
with the administration of the Bigfork Area Education Associ-
29 ation and has dominated and assisted in the formation of an
alleged labor organization for the purposes of withdrawing
30 recognition of the Bigfork Area Education Association.

31 This charge will be considered at this time in relationship
to withdrawal of recognition.

32 2. Discussion.

1 On August 29, Mr. Keedy requested the resumption of negoti-
2 ations but, neither Mr. Keedy or the BAEA received a reply.
3 (FF39,40). Early in September, a decertification Petition was
4 circulated among the teachers to decertify the BAEA by the BTA.
5 The Petition was executed by 23 out of 44 or 45 Bigfork teachers.
6 The Petition was delivered to the School District on September 6.
7 (FF43, 32j). On September 7, the BTA requested the School Dis-
8 trict to recognize them as exclusive bargaining representative
9 and the BTA requested negotiations be opened as soon as possible.
10 (FF44). On September 12, representatives of the School District
11 decided to meet with the BTA and file an Employer's Petition with
12 the Board of Personnel Appeals. (FF45, 46). On September 15,
13 the School Board at a special meeting voted to recognize the BTA
14 and open negotiations. The School District's intent was to
15 withdraw recognition from the BAEA. (FF48). The School District
16 also setforth that the BAEA was a voluntarily recognized bargaining
17 representative. (Defendant's Reply Brief, P18 (17-19)).

18 By not replying to Mr. Keedy's request, the School District
19 did refuse to bargain with the BAEA. (FF40).

20 Because the Board of Personnel Appeals has no case history
21 on withdrawal of recognition coupled with a refusal to bargain,
22 the Board of Personnel Appeals will use the NLRB for guidance.
23 State Department of Highways vs. Public Employees Craft Council,
24 supra. Section 7 (Rights of Employees, 29 U.S.C.A. Sec. 157),
25 Section 8(a)(1) (interfere with, restrain, or coerce employees in
26 exercise of rights guaranteed in Sec. 7, 29 U.S.C.A. Sec. 158(1)),
27 Section 8(a)(5) (Refusal to Bargain, 29 U.S.C.A. 159(5)), Section
28 8(d) (Duties of the Parties in Collective Bargaining 29 U.S.C.A.
29 Sec. 158 (d)) and Section 9(c)(1)(A) & (B) (Representatives and
30 Elections, 29 U.S.C.A. Sec. 159(c)) of the NLRA are equivalent to
31 Section 39-31-201 (Public Employees Protection in Right of Self-
32 organization), Section 39-31-401-1 (interfere, restrain and

1 coerce employees), Section 39-31-401-5 (Duty to Bargain Collec-
2 tively) and Section 39-31-207 (Petition on Representation Question)
3 of MCA.

4 The Third Circuit Court of Appeals in NLRB vs. Frick Co.
5 (1970) 423 F2d 1327, 73 LRRM 2889, the Ninth Circuit Court in
6 NLRB vs. Denham (1972) 469 F2d 239, 81 LRRM 2697 (vacated Judge-
7 ment and Remanded on other Points, 411 U.S. 945, 82 LRRM 3184)
8 and U.S. District Court, District of New Jersey in Hirsch vs.
9 Pick-Mt. Laurel Corp. (1977) 436 F supp 1342, 96 LRRM 2255 has
10 ruled that the withdrawal of recognition from a union that was
11 voluntarily recognized should be governed by the same standards
12 as the withdrawal of recognition from a Board-certified union.

13 In NLRB vs. Frick, supra, the Third Circuit Court has set
14 forth the requirements for withdrawal of recognition and refusing
15 to bargain:

16 The Board's [NLRB] holding that the Company violated
17 the Act when it withdrew recognition of the Union rests in
18 the first instance on the rules of the Board respecting the
19 establishment and continuance of bargaining relationships.
20 Where a bargaining relationship has been properly estab-
21 lished either by Board certification or as here, by voluntary
22 recognition, the representative status of the Union is
23 presumed to continue for a reasonable period and the presump-
24 tion is irrebuttable. Brooks v. NLRB 348 U.S. 96, 103-104,
25 35 LRRM 2158 (1954); Keller Plastics, Inc., 157 NLRB 583, 61
26 LRRM 1396 (1966).

27 In the case of a certified union the reasonable time
28 during which its majority status may not be challenged is
29 ordinarily one year. Brooks v. NLRB, supra, at 98; NLRB v.
30 Little Rock Downtowner, Inc., 414 F.2d 1084, 1090, 72 LRRM
31 2044 (8 Cir. 1969). And although a presumption of majority
32 status continues after one year, it then becomes rebuttable.
In such circumstances an employer may refuse to bargain
without violating the Act "if but only if, he in good faith
has a reasonable doubt of the Union's continuing majority."
Laystrom Manufacturing Co., 151 NLRB 1482, 1483-1484, 58
LRRM 1624 (1965), enforcement denied on other grounds, 359
F.2d 799, 62 LRRM 2033 (7th Cir. 1966); accord NLRB v. Rish
Equipment Co., supra, note 5, 407 F.2d at 1101, 70 LRRM
2904. An employer must, however, come forward with evidence
casting "serious doubt on the union's majority status."
Stoner Rubber Co., 123 NLRB 1440, 1445, 44 LRRM 1133 (1959).
As the court said in NLRB v. Rish Equipment Co., supra, note
5, 407 F.2d at 1101, 70 LRRM 2904: "'[M]ore than an employer's
mere mention of [its good faith doubt] and more than proof
of the employer's subjective frame of mind'...[is necessary.]
What is required is a 'rational basis in fact.'" (at 73 LRRM
2890-2891)

1 The Ninth Circuit Court in NLRB vs. Tangeniew, Inc. and Con-
2 solidated Hotels (1972) 470 F2d 669, 81 LRRM 2339 stated that the
3 objective evidences submitted by the company must be "clear,
4 cogent and convincing evidence." The Fifth Circuit Court in
5 J. Ray McDermott & Co. Inc. vs. NLRB (1978) 571 F2d 850, 98 LRRM
6 2191 states:

7 The kind of "objective evidence" ordinarily sufficient
8 to overcome a rebuttable presumption of majority support
9 would be greater than fifty percent employee support for a
10 decertification petition. Automated Business Systems v.
11 NLRB, 6 Cir. 1974, 497 F.2d 262, 86 LRRM 2659, or thirty
percent support for decertification combined with other
indicia of non-support, National Cash Register Co. v. NLRB,
8 Cir. 1974, 494 F.2d 189, 85 LRRM 2657.

12 Using the above NLRB cases for a guideline, the question of
13 BAEA's majority status is timely because the BAEA was exclusive
14 bargaining representative for the Bigfork teachers from at least
15 1976. (FF1). The employer did present sufficient objective
16 evidence to have good faith doubt about BAEA's majority status by
17 presenting the BTA's decertification Petition which contained the
18 signatures of 23 out of 44 or 45 teachers. (FF43).

19 However, if I were to uphold the employer's action without
20 taking into account the unfair labor practices in ULP #22-78, I
21 would be side-stepping a major labor principle.

22 The U.S. Supreme Court in Medo Photo Supply Corporation vs.
23 NLRB (1944) 321 U.S. 679, 14 LRRM 581 at 585 states:

24 Petitioner [Employer] cannot, as justification for its
25 refusal to bargain with the union, set up the defection of
26 union members which it had induced by unfair labor practices,
27 even though the result was that the union no longer had the
28 support of a majority. It cannot thus, by its own action,
29 disestablish the union as the bargaining representative of
30 the employees, previously designated as such of their own
31 free will. Labor Board v. Bradford Dyeing Ass'n, 310 U.S.
318, 339-340 [6 LRR Man. 684]; International Ass'n. of
Machinists v. Labor Board, supra, 82; of National Licorice
Co. v. Labor Board, supra, 359. Petitioner's refusal to
bargain under those circumstances was but an aggravation of
its unfair labor practice in destroying the majority's
support of the union, and was a violation of Subsection 8(1)
and (5) of the Act [NLRA].

32 The fifth circuit court in NLRB vs. A.W. Thompson, Inc.
(1971) 449 F2d 1333, 78 LRRM 2593 at 2596 states:

1 A bargaining order is appropriate even in the absence
2 of proof that the Union's loss of majority was attributable
3 to the unfair labor practices which had been perpetrated by
4 the Company. In N.L.R.B. v. Movie Star, Inc., 5 Cir., 1966,
5 361 F.2d 346, 62 LRRM 2234, we found that "[w]hile it may be
6 that at some earlier point in time the Respondents might
7 have validly asserted a good-faith doubt as to the Union's
8 majority status, they did nothing to dispute that majority
9 status until August 28, when the course of conduct found by
10 the Board to have been violative of the Act was in high
11 gear. The effect of Respondents' numerous Section 8(a)(1)
12 violations was to transform a possible good-faith doubt of
13 the Union's majority into a bad-faith virtual certainly."
14 361 F.2d at 351.

9 More recently, in J.P. Stevens & Co., Inc., Gulistan
10 Div. v. N.L.R.B., 5 Cir., 1971, 441 F.2d 514, 76 LRRM 2817,
11 we recognized as did the Trial Examiner herein, that many of
12 the employees of the Company might not have been affected by
13 the Company's unfair labor practices, and that many of the
14 employees, in the exercise of their free choice would not
15 choose the Union in any event. "But the Board's evaluation
16 of the propriety of a bargaining order cannot be based on
17 employee motivations, determined individual by individual.
18 We cannot require the Board to engage in the hopeless and
19 impossible task of evaluating the subjective reasons for
20 each employee recantation." 441 F.2d at 527. The Trial
21 Examiner found that "the loss of majority caused in whole or
22 in part by Respondent's unfair labor practices does not
23 justify its refusal to bargain and, under the circumstances,
24 the Respondent cannot be said to have entertained a good-
25 faith doubt as to the Union's majority status. To hold
26 otherwise would result in permitting Respondent to profit
27 from its own unlawful refusal to bargain."

19 In ULP #22-78, on August 23 and 24, the School District
20 violated Section 39-31-401(5) MCA by conditioning future negoti-
21 ations on the receipt of an offer, in the School District's
22 judgement, that is sincere or profitable. Also in ULP #22-78,
23 the School District declared impasse when no impasse existed. In
24 ULP #33-78, on August 31, the School District violated Section
25 39-31-401(5) MCA by making unilateral changes in working condi-
26 tions that were items of negotiation and before impasse was
27 reached. The above unfair labor practices would naturally disrupt
28 the bargaining unit employees' morale, deters their organizational
29 activities and discourages their membership in the BAEA. Franks
30 Bros. supra.

31 The next day after the third negotiation session, the School
32 District issued their first full and final offer while many items
remained unresolved. (FF3, 4). The School District may have not

1 been honest when telling the factfinder that they could pay
2 \$9,227 without risking another budget levy, but then at the next
3 meeting the School District stated they could only pay \$9,058
4 because of the mill levy failure. FF(13, 16). During the last
5 negotiation session, when a member of the BAEA negotiation team
6 asked for some guarantee of free time (duty free lunch, personal
7 leave) and would like some idea of a schedule, Mr. Pederson
8 replied that if it was dropped from the contract the administra-
9 tion and the teachers could work out some schedule. (FF30 at
10 8:30 p.m.) When the BAEA proposed a reduction in the School
11 District's offer in schedule B (extra duty pay) to standard 7%,
12 the School District replied we already have personnel working and
13 that change would be inconsistent with our full and final offer.
14 (FF30 at 10:48). The above incidents would be very frustrating
15 to the members of any bargaining unit.

16
17 The membership of a labor organization facing all the above
18 actions of the School District would feel very frustrated and
19 helpless in the negotiation processes. Because of the frustra-
20 tions, the teachers would naturally become disillusioned with the
21 ineffectiveness of the BAEA which was caused by the School
22 District's multiple ULP's and other actions. Therefore, I con-
23 clude that the loss of majority status was due to the employer's
24 actions. This conclusion is also based on the lack of evidences
25 that no decertification petition was present until after the
26 employers action in August. To let the School District withdraw
27 recognition and refuse to bargain with the BAEA, would be letting
28 the School District profit from their own wrong doing and would
29 be stating that conditional bargaining, declaring non-existing
30 impasse, making unilateral changes in working conditions and
31 other School District actions had no affect on the bargaining
32 unit.

1 3. CONCLUSION OF LAW.

2 The School District violated Section 39-31-401(1) and (5) by
3 withdrawing recognition from the BAEA and refusing to bargain
4 with the BAEA.

5 F. ULP #25-78

6 Recognizing and Bargaining with the BTA

7
8 1. The charge (in part):

9 Defendant has violated the Public Employees Collective
10 Bargaining Act, Section 59-1605(1)(b), 59-1605(1)(a) and
11 59-1605(1)(e), R.C.M. 1947 [Section 39-31-401(2), (1) and
12 (5) MCA].

13 On or about September 16, 1978, the Employer interfered
14 with the administration of the Bigfork Area Education Associ-
15 ation and has dominated and assisted in the formation of an
16 alleged labor organization for the purposes of withdrawing
17 recognition of the Bigfork Area Education Association. The
18 action of the Employer is contrary to the Rules of the Board
19 of Personnel Appeals which requires a fair election of such
20 employees before the exclusive bargaining representative can
21 be changed. Upon information and belief the Employer has
22 negotiated with the alleged labor organization and has
23 reached a collective bargaining agreement which should be of
24 no force and effect since the Bigfork Area Education Asso-
25 ciation is still the exclusive bargaining representative.
26 [Emphasis added].

19 2. DISCUSSION

20 The BTA delivered a decertification petition to the School
21 District which contained the signatures of 23 out of 44 or 45
22 Bigfork teachers. (FF43). The BTA requested recognition and
23 negotiations. (FF44). The School District did recognize,
24 negotiate and reached a tentative agreement with the BTA. (FF48,
25 49).

26 Once again, the Board of Personnel Appeals will look to the
27 NLRB cases for guidance.

28 The NLRB has developed a policy that calls for an employer
29 to remain neutral when faced with a claim of majority status from
30 two or more competing unions. This policy is set forth in the
31 Midwest Piping Doctrine, Midwest Piping Co., Inc. (1945) 63 NLRB
32 1060, 17 LRRM 40. The NLRB's new version of this Doctrine is
stated in Shea Chemical Corp. (1958) 121 NLRB 1027, 42 LRRM 1486,
which states in part at 1487-1488:

1 We [NLRB] now hold that upon presentation of a rival or
2 conflicting claim which raises a real question concerning
3 representation, an employer may not go so far as to bargain
4 collectively with the incumbent (or any other) union unless
and until the question concerning representation has been
settled by the Board.

5 However, we wish to make it clear that the Midwest
6 Piping doctrine does not apply in situations where because
7 of contract bar or certification year or inappropriate unit
or any other established reason, the rival claim and petition
do not raise a real representation question.

8 The Fifth Circuit Court in NLRB vs. Western Commercial
9 Transportation, Inc. (1973) 487 F2d 332, 84 LRRM 2815 set forth
10 the following guidelines where an employer recognized and nego-
11 tiated with a rival union that presented designation cards signed
12 by 89 out of 162 unit employees, a violation of the NLRA:

13 An employer who assumes the responsibility of deciding
14 which of two rival unions represents his employees assumes
15 also the risk that the Board will find a genuine issue of
16 representation and an unfair labor practice in his lack of
17 neutrality. The Company could have avoided this result by
petitioning the Board for an election under Section 9(c) (1)
(B) of the Act. See NLRB v. Hunter Outdoor Products, Inc.,
440 F.2d 876, 880, 76 LRRM 2969 (1st Cir. 1971); NLRB v.
Signal Oil & Gas Co., supra, at 788 n.3.

18 NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481
19 (1969), does not mandate otherwise. That case upheld the
20 Board's authority to find violation of Section 8 (a) (5)
21 until the Board determines that a representation question
22 does not exist. NLRB v. Downtown Bakery Corp., 330 F.2d
921, 928, 56 LRRM 2097 (6th Cir. 1964); NLRB v. Signal Oil
& Gas Co., supra, at 788 n.3.
ENFORCED. (at 2815).

23 In a like case, the Fifth Circuit Court set forth the facts
24 of the case and outlined the effect of the employer's action on
25 the employees' rights. Oil Transport Co. vs. NLRB (1971) 440 F2d
26 664, 76 LRRM 2609:

27 The only issue requiring discussion is the Board's
28 conclusion that the Company also violated 8 (a) (1) and (2)
29 by recognizing and contracting with UTE (Union of Transpor-
30 tation Employees) at a time when there was a real question
31 of representation between UTE and a rival union, the Team-
32 sters, who also were engaged in an effort to organize the
company. In such a situation, the employer has a duty of
strict neutrality. He may not determine for his employees
the question of representation, thereby avoiding the orderly
procedures required for determination of that question. In
NLRB v. Signal Oil & Gas Co., 303 F.2d 785, 50 LRRM 2505
(5th Cir. 1962), this Circuit has discussed at length the
obligation of the employer where there are competing unions
and the situation [has] not crystallized," not to exert
influence thereby tipping the scales and "depriving the

1 employees of their right to select their representative in a
2 free contest between the rival organizations." Id. at 787;
3 see also Midwest Piping & Supply Co., 63 NLRB 1060, 17 LRRM
40 (1945).

4 When the company negotiated with UTE, it was proffered
5 50 cards from a unit of 80. The president rejected one card
6 and found the other 49 valid on the basis of personal recol-
7 lection of signatures. Ultimately it developed that six of
8 the 49 cards were signed by employees who signed Teamster
9 cards after signing UTE cards. The Board declined to rest
10 its decision of premature recognition on the finding of the
11 Trial Examiner that UTE did not represent an uncoerced
12 majority. The Board was not required, as a prerequisite to
13 existence of a real question of representation, to conclude
14 that UTE was in a minority status. Moreover, the issue of
15 whether there is a real question of representation may not
16 be resolved by application of only a mathematical approach,
17 NLRB v. Clement Bros. Co., 407 F.2d 1027, 70 LRRM 2721 (5th
18 Cir. 1969), although, of course, the existence or nonexis-
19 tence, and the size of, an uncoerced majority [emphasis
20 added] are relevant considerations in determining if there
21 was a substantial question of representation as between the
22 two unions. Considering all the evidence, we are unable to
23 say that there is not substantial evidence supporting the
24 Board's conclusion.

25 By withholding recognition and negotiation from two competing
26 unions, the employer is also in compliance with Garment Worker's
27 Union vs. NLRB (1961) 366 U.S. 731, 48 LRRM 2251. The above
28 cases do not mean the employer must stop negotiating with the
29 recognized union because a rival union or group of employees
30 files a decertification petition which does not infer a good
31 faith doubt of majority status.

32 A teacher requested to sign a decertification petition may
feel considerable peer pressure. Because of this pressure, the
teacher may sign the petition although he would vote differently
in a secret ballot election. The possibility of this happening
is so paramount that the employer should not negotiate with the
challenging union.

If the School District would have remained neutral, the
School District would have not violated the above guidelines.

3. CONCLUSIONS OF LAW

The School District violated Section 39-31-401 (1) and (2)
MCA by recognizing and negotiating with the BTA when there was a
real question of majority status, by interfering, and restraining

1 the Big Fork teachers in the selection of their collective bar-
2 gaining representative and by dominating, and assisting in the
3 formation of a labor organization, the BTA.

4
5 G. ULP #33-78

6 Unilateral Changes in Working Conditions

7 1. The charge (not heard at the hearing but stipulated into the
8 discussion):

9 Employer has instituted unilateral changes in working
10 conditions, although the parties are still in negotiations
11 for a contract for 1978-79 and impasse has not been reached.
12 The expired contract provided that elementary teachers would
13 have a 45 minute period lunch period. Past practice estab-
14 lished that this meant an uninterrupted continuous period of
15 45 minutes. Effective December 4, 1978 the Defendant's
16 administration announced it would require all elementary
17 teachers to spend 15 minutes supervising the playground
18 during the lunch period. In past years teachers have been
19 paid an additional stipend for noontime playground duty.
20 This year no extra duty pay is provided for this additional
21 work. These are unilateral changes in working conditions
22 constituting per se violations of the statutory duty to
23 bargain in good faith in violation of Section 59-1605 (1)
24 (a) and (e), R.C.M. 1947 [Section 39-31-401 (1) and (5)].

25 2. DISCUSSION

26 The School District declared an impasse on August 24 after
27 calling a halt to negotiations early on August 23. (FF34, 30).
28 Mr. York advised the School District to implement the third full
29 and final offer. (FF33). On August 30th the School District
30 ordered the implementation of the third full and final offer
31 which contained unsettled points of negotiations. (FF41). The
32 third full and final offer was passed out to the teachers and the
33 teachers were informed that they would be working under the
34 conditions in the offer. (FF42).

35 I found no impasse as declared by the School District in ULP
36 #22-78 count II.

37 The School District made unilateral changes in working
38 conditions that were items for negotiation and before impasse was
39 reached, thereby, violating Section 39-31-401(5) MCA. NLRB vs.
40 Katz (1962) 369 U.S. 736, 50 LRRM 2177. In the charge the BAEA
41 appears to be alleging that the School District increased the

1 teachers duties to the full requirements of the third full and
2 final offer on or about December 12. In Aztec Ceramics Co.
3 (1962) 138 NLRB 1178, 51 LRRM 1226; Carter Lake Machinery Co.
4 (1961) 131 NLRB 1106, 48 LRRM 1211; Yale Upholstering Co. (1960)
5 127 NLRB 440, 46 LRRM 1031, the NLRB has held this action to be a
6 violation of the NLRA.

7 3. CONCLUSION OF LAW

8 The School District did violate Section 39-31-401(5) MCA by
9 implementing unilateral changes in working conditions that were
10 unsettled points in negotiations and before impasse was reached.

11 V. Remedy

12 1. The remedy authority of the Board of Personnel Appeals.

13 Section 39-31-406 (4) MCA set forth the remedy authority of
14 the Board of Personnel Appeals as follows:

15 If, upon the preponderance of the testimony taken, the
16 board is of the opinion that any person named in the complaint
17 has engaged in or is engaging in an unfair labor practice,
18 it shall state its findings of fact and shall issue and
19 cause to be served on the person an order requiring him to
20 cease and desist from the unfair labor practice and to take
21 such affirmative action, including reinstatement of employees
22 with or without back pay, as will effectuate the policies of
23 this chapter. The order may further require the person to
24 make reports from time to time showing the extent to which
25 he has complied with the order. No order of the board shall
26 require the reinstatement of any individual as an employee
27 who has been suspended or discharged or the payment to him
28 of any back pay if it is found that the individual was
29 suspended or discharged for cause.

30 The NLRB's remedy authority is setforth in Section 10(c)
31 NLRA, 29 U.S.C.A. Sec. 160 (2) as follows in part:

32 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 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 re-
quiring 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, as will
effectuate the policies of this Act: Provided, that where
an order directs reinstatement of an employee, back pay may
be required of the employer or labor organization, as the
case may be, responsible for the discrimination suffered by
him...

From the above, I judge that the NLRB and the Board of

1 Personnel Appeals have equivalent remedy authority.

2 2. Remedy for ULP #33-78, Unilateral changes in working condi-
3 tions.

4 Because I have no record of what or when the unilateral
5 changes were made I can only ask the parties to meet as required
6 by the Board Order of February 1979 and attempt to fashion an
7 agreeable remedy. At the end of 30 days, if the parties have not
8 agreed on a remedy, they are each to submit their respective
9 positions along with appropriate case law for further processing
10 by the Board. If the parties are able to reach an agreement on
11 remedy, they are to jointly report the remedy to the Board of
12 Personnel Appeals.

13 3. Remedy for ULP #26-78, bargaining with the BTA.

14 In Western Commercial Transport (1973) 201 NLRB No. 10, 82
15 LRRM 1366 (Enforced, supra), the NLRB states:

16 Order: Cease and desist from recognizing, bargaining
17 with, or enforcing or maintaining contract with Tank Line
18 Union [rival union] unless and until certified; in any like
19 or related manner interfering with employees' LMRA [NLRA]
20 rights. Withdraw and withhold recognition from Tank Line
21 Union unless and until certified; set aside existing contract
22 with Tank Line Union; post notice. (at 82 LRRM 1368).

23 The NLRB ordered approximately the same remedy in Oil Trans-
24 port Co. (1970) 182 NLRB No. 148, 74 LRRM 1259 (enforced, supra).

25 4. Remedy for ULP #25-78, withdrawal of recognition.

26 In NLRB vs. A.W. Thompson, Inc., supra, the Fifth Circuit
27 Court states, "A bargaining order is appropriate even in the
28 absence of proof that the union's loss of majority was attribut-
29 able to the unfair labor practices which had been perpetrated by
30 the company. [at 78 LRRM 2596]". The U.S. Supreme Court in
31 Franks Bros. Company vs. NLRB supra, approved bargaining orders
32 and stated:

Out of its wide experience, the Board has many times
expressed the view that the unlawful refusal of an employer
to bargain collectively with its employees' chosen represen-
tatives disrupts the employees' morale, deters their organi-
zational activities, and discourages their membership in
unions. The Board's study of this problem has led it to
conclude that, for these reasons, a requirement that union

1 membership be kept intact during delays incident to hearings
2 would result in permitting employers to profit from their
own wrongful refusal to bargain...

3 That determination the Board has made in this case and
4 in similar cases by adopting a form of remedy which requires
5 that an employer bargain exclusively with the particular
6 union which represented a majority of the employees at the
7 time of the wrongful refusal to bargain despite that union's
8 subsequent failure to retain its majority. The Board might
9 well think that, were it not to adopt this type of remedy,
10 but instead order elections upon every claim that a shift in
11 union membership had occurred during proceedings occasioned
12 by an employer's wrongful refusal to bargain, recalcitrant
13 employers might be able by continued opposition to union
14 membership indefinitely to postpone performance of their
statutory obligation. In the Board's view procedural delays
15 necessary fairly to determine charges of unfair labor prac-
16 tices might in this way be made the occasion for further
17 procedural delays in connection with repeated requests for
18 elections, thus providing employers a chance to profit from
19 a stubborn refusal to abide by the law. That the Board was
20 within its statutory authority in adopting the remedy which
21 it has adopted to foreclose the probability of such frustra-
22 tions of the Act seems too plain for anything but statement.
23 See 29 U.S.C. 160(a) and (c). (At 14 LRRM 592-593).

24 The above case was referenced by the U.S. Supreme Court in
25 Medo Photo Supply Corporation vs. NLRB, supra, as controlling
26 where an employer had induced unfair labor practices and the
27 union no longer had majority support. The NLRB ordered bargaining
28 with the union with minority support.

29 The BTA's petition for decertification should be dismissed.
30 This is based on Bishop vs. NLRB (1974) 502 F2d 1024, 87 LRRM
31 2524 in which the Fifth Circuit Court set forth the following
32 theory:

33 If the employer has in fact committed unfair labor
34 practices and has thereby succeeded in undermining union
35 sentiment, it would surely controvert the spirit of the Act
36 to allow the employer to profit by his own wrongdoing. In
37 the absence of the "blocking charge" rule, many of the
38 NLRB's sanctions against employers who are guilty of miscon-
39 duct would lose all meaning. Nothing would be more pitiful
40 than a bargaining order where there is no longer a union
41 with which to bargain.

42 Nor is the situation necessarily different where the
43 decertification petition is submitted by employees instead
44 of the employer or a rival union. Where a majority of the
45 employees in a unit genuinely desire to rid themselves of
46 the certified union, this desire may well be the result of
47 the employer's unfair labor practices. In such a case, the
48 employer's conduct may have so affected employees attitudes
49 as to make a fair election impossible. NLRB v. Kaiser Agri-
50 cultural Chemicals, 5 Cir. 1973, 473 F.2d 374, 82 LRRM 3455.

1 If the employees' dissatisfaction with the certified
2 union should continue even after the union has had an oppor-
3 tunity to operate free from the employer's unfair labor
4 practices, the employees may at that later date submit
another decertification petition. The Supreme Court stressed
in Gissel, supra, that:

5 There is...nothing permanent in a bargaining order, and
6 if, after the effects of the employer's acts have worn off,
7 the employees clearly desire to disavow the union, they can
8 do so... [There is in such a case] no 'injustice to employees
9 who may wish to substitute for the particular union some
10 other...arrangement' [but] a bargaining relationship 'once
11 rightfully established must be permitted to exist and func-
12 tion for a reasonable period in which it can be given a fair
13 chance to succeed', after which the 'Board may,...upon a
14 proper showing take steps in recognition of changed situa-
15 tions which might make appropriate changes in bargaining
16 relationships.' Franks Bros. v. N.L.R.B., 1944, 321 U.S.
17 702, 705-706, 64 S.Ct. 817, 88 L.Ed.2d 1020, 1023, 14 LRRM
18 591. (at 87 LRRM 2527 & 2528).

12 I adopted the above theory and order the School District to
13 bargain in good faith with the BAEA upon reasonable demand.

14 VI. Recommended Order

15 The School District is ORDERED to cease and desist in vio-
16 lating Sections 39-31-401 (1), (2) and (5) MCA and from inter-
17 ferring, restraining, and coercing the Bigfork teachers in the
18 exercise of their rights guaranteed under Section 39-31-201 MCA
19 by:

- 20 1. Issuing individual teaching contracts that were not governed
21 by and secondary to the master labor agreement in the areas of
22 wages, hours, fringe benefits, and other conditions of employment,
- 23 2. Issuing individual teaching contracts that interfered with
24 the collective bargaining process,
- 25 3. Refusing to negotiate with the BAEA on the conditions that
26 the BAEA must first propose an offer that is, in the School
27 District's judgement, sincere or profitable before the School
28 District will consider negotiating,
- 29 4. Calling an impasse in negotiations when no impasse existed,
- 30 5. Withdrawing recognition and refusing to bargain with the
31 BAEA,
- 32 6. Recognizing and negotiating with the BTA, and,

1 7. Making unilateral changes in working conditions that were
2 items of negotiations before impasse existed.

3 The School District is ORDERED to take the following affir-
4 mative actions:

- 5 1. Attach the following statement to all bargaining unit indi-
6 vidual teaching contracts signed during the 1978-79 school year.
7 "This individual teaching contract is governed by and secondary
8 to the master labor agreement in the areas of wages, hours,
9 fringe benefits, and other conditions of employment. If any
10 section of this individual teaching contract is inconsistent with
11 the master labor agreement the master labor agreement is control-
12 ling." The School District is to allow at the reasonable times,
13 any teacher or BAEA representative to inspect any or all indivi-
14 dual teacher contracts.
- 15 2. Bargain with the BAEA in good faith upon reasonable demand,
- 16 3. Withdraw recognition from the BTA, set aside existing labor
17 contract with the BTA and stop enforcing or maintaining the labor
18 contract with the BTA, and,
- 19 4. Meet with the BAEA and attempt to fashion a remedy as required
20 by the Board of Personnel Appeals order of February, 1979, and
21 set forth in remedy section 2.

22 It is further ORDERED that all charges and motions not
23 addressed in this recommended order are hereby dismissed.

24 Dated this 30th day of April, 1979.

26 Board of Personnel Appeals

27
28 By 
29 Rick D. Hooze
Hearing Examiner

30
31 NOTE: As stated in Board of Personnel Appeals rule 24.26.584 ARM
32 Exceptions the parties shall have 20 days to file exceptions to
this recommended order. If no exceptions are filed, this recom-
mended order will become a FULL and FINAL ORDER of the Board of
Personnel Appeals.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

CERTIFICATE OF MAILING

I, Maurice McCarthy, do hereby certify and state that I did on the 30th day of April, 1979 mail a true and correct copy of the above RECOMMENDED ORDER to the following:

Mr. William Pederson
Board of Trustees
School District #38
Bigfork, Montana 59911

Mr. Leonard York
Board of Trade Bldg.
Suite 421, 310 S.W. 4th
Portland, Oregon 97204

Mr. Mike Keedy,
Director, UNISERV, Region 1
Montana Education Association
P.O. Box 1154
Kalispell, Montana 59901

Hilley & Loring
Attorneys at Law
1713 Tenth Avenue
Great Falls, Montana 59403

Maurice McCarthy