

1 STATE OF MONTANA
2 BEFORE THE BOARD OF PERSONNEL APPEALS
3 IN THE MATTER OF UNFAIR LABOR PRACTICE #30-78

3 Montana Public Employees Association,)
4 Complainant,)
5 vs.) FINAL ORDER
6 Office of Public Instruction,)
7 Defendant.)

8 * * * * *

9 The Findings of Fact, Conclusions of Law, and Recommended
10 Order were issued by Hearing Examiner, Linda Skaar.

11 Exceptions of Defendant were filed by Ross W. Cannon on
12 behalf of the Defendant.

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

15 1. IT IS ORDERED, that the Exceptions of Defendant to the
16 Findings of Fact, Conclusions of Law, and Recommended Order filed
17 by Mr. Ross W. Cannon are hereby denied.

18 2. IT IS ORDERED, that this Board therefore adopts the
19 Findings of Fact, Conclusions of Law, and Recommended Order of
20 Hearing Examiner, Linda Skaar, as the Final Order of this Board.

21 DATED this 20th day of July, 1979.

22 BOARD OF PERSONNEL APPEALS

23
24 By Brent Cromley
25 Brent Cromley, Chairman

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1 CERTIFICATE OF MAILING

2 I, Jennifer Jacobson, hereby certify and state that on
3 the 23 day of July, 1979, a true and correct copy of the
4 above captioned FINAL ORDER was mailed to the following:
5

6 Ross W. Cannon
7 CANNON & GILLESPIE
8 2031 Eleventh Avenue
9 Helena, MT 59601

10 David W. Stiteler
11 Department of Administration
12 Room 130 - Mitchell Building
13 Helena, MT 59601

14 Barry Hjort
15 Attorney at Law
16 3030 North Montana
17 Helena, MT 59601

18 Jennifer Jacobson

19 LEG3:j
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1 unit, of 21 individuals on the grounds that their positions were
2 "supervisory" (Joint Exhibit 1). This counter-petition was
3 subsequently amended deleting one position (February 1, 1978).
4 On February 16, 1978, all parties entered into a "Stipulation for
5 Certification Upon Consent Election" calling for an election to
6 be held February 22, 1978. The parties stipulated that:

7 Pursuant to Section 59-1606(1)(b), R.C.M. 1947,
8 the undersigned parties hereby waive the hearing upon
9 questions of representation and agree as follows:

10 10. Challenges of voters made in accordance with
11 ARM 24-3-8(18)-S8230(9) shall be ruled on by the Board
12 after the election is held. Such ruling shall deter-
13 mine whether any or all of the challenged voters should
14 be excluded from the appropriate unit. (Joint Exhibit 2).

15 In the election held on February 22, 1978, no party received
16 a majority of the votes cast. Consequently, a run-off election
17 between MPEA and No Representative (the two highest vote getters)
18 was scheduled for March 22, 1978. In preparation for this elec-
19 tion, MPEA and Jeff Minckler of the State Labor Relations Bureau
20 representing the Office of Superintendent of Public Instruction
21 entered into a second stipulation which contained provisions
22 identical to those quoted above. (Joint Exhibit 2A).

23 In the March 22 election, there were 144 employees eligible
24 to vote. One hundred eleven valid ballots were cast. Of these,
25 72 were cast in favor of representation by MPEA and 39 in favor
26 of No Representation. In addition, ten ballots were challenged
27 and not cast. The unit was certified (Joint Exhibit 3) on March 29,
28 1978, and the matter of the inclusions or exclusions of 20
29 positions in the unit was set for hearing.

30 At the pre-hearing conference, the employer's representative
31 orally motioned to amend the employer's counter petition to
32 include three education field representatives not previously
mentioned. MPEA resisted employer's motion (Joint Exhibit 4).
Hearing Examiner, Rick D'Hooge, denied employer's motion (Joint
Exhibit 5) and the State Labor Relations Bureau, acting on behalf
of the employer, appealed the decision to the Board of Personnel

1 Appeals (Joint Exhibit 6). On June 6, 1978, the Board upheld the
2 order of the Hearing Examiner (Joint Exhibit 7). On June 28,
3 1978, the State Labor Relations Bureau executed a "Memorandum of
4 Understanding" with Georgia Ruth Rice, Superintendent of Public
5 Instruction. By this memorandum, the Labor Relations Bureau
6 "transferred to the Superintendent of Public Instruction, res-
7 ponsibility for resolving the continuing dispute with the Montana
8 Public Employees Association over the exclusion of three educational
9 field representatives from MPEA's bargaining unit within O.P.I.
10 [Office of Public Instruction]." On June 29, 1978, Ross Cannon
11 of the law firm of Cannon & Gillespie, representing the Office of
12 Superintendent of Public Instruction, filed a motion with the
13 Board of Personnel Appeals requesting a re-hearing or a reasoned
14 decision in the matter (Joint Exhibit 8). Oral arguments were
15 heard on this motion on August 8, 1978; and on September 8, the
16 Board ordered that the "hearing examiner hear testimony on the
17 management status of the three education representatives' at the
18 post election unit determination hearing" (Joint Exhibit 9).
19 During this period of time, the unit determination hearing was
20 continued pending the Board's decision.

21 A unit determination hearing was scheduled for mid-November,
22 1978, but postponed until mid-December at the joint request of
23 both parties (Joint Exhibit 16, 17, 18). The December hearing
24 was recessed to a later time.

25 Jeff Minckler's Employment

26 By The Labor Relations Bureau

27 2. Mr. Minkler was employed by the State Labor Relations
28 Bureau for a period of 2½ years. During this period of time, he
29 held a number of positions including that of acting Chief from
30 the summer of 1977 until May, 1978. After May, 1978, his job
31 reverted to Labor Specialist II.

32 In early October, 1978, Minckler gave notice that he would be
terminating his employment and would become a staff representative

1 for MPEA. At the time he submitted his resignation, Minckler
2 asked not to be involved with any bureau discussions concerning
3 MPEA. After he gave notice of termination, Minckler made an
4 informal agreement with LeRoy Schramm, Chief, and David Stiteler,
5 Counsel for the Bureau, that he would not be involved in any
6 economic items in bargaining for any MPEA unit. They all agreed
7 that there was no conflict on non-economic items. At that time,
8 Minckler had some knowledge of the position the state would take
9 on economic items at the bargaining table. Just before he left
10 the bureau, he was told that the situation had changed and his
11 information was no longer applicable.

12 After the representation petition was filed for the Office
13 of Public Instruction unit, Jeff Minckler, as acting Chief of the
14 Labor Relations Bureau, assigned the responsibility of developing
15 management policies on negotiation strategy "and/or verbiage" to
16 Jean Moffatt, Labor Relations Specialist. He received briefings
17 from her as long as he was acting Chief -- until May 10, 1978.
18 After May 10, 1978, he had nothing to do with the Office of
19 Public Instruction unit. Mr. Minckler was acting Chief of the
20 Bureau during the period before the election and at the inception
21 of the dispute over the inclusion of certain positions within the
22 unit.

23 Bargaining

24 3. MPEA represented by Jeff Minckler and the State Labor
25 Relations Bureau representing the Office of Superintendent of
26 Public Instruction scheduled an initial contract negotiating
27 session for November 21, 1978 (Joint Exhibit 10). The Labor
28 Relations Bureau subsequently attempted to reschedule the
29 November 21 negotiating session, but on November 9, Jeff Minckler
30 of MPEA notified the Labor Relations Bureau that members of the
31 negotiating team "want very much to continue that date" (Joint
32 Exhibit 11).

1 In a November 13, letter to Georgia Ruth Rice, LeRoy Schramm,
2 Chief of the Labor Relations Bureau, delegated to the Superinten-
3 dent the authority to conduct labor relations between her office
4 and the MPEA. Mr. Schramm reasoned that "MPEA has now made
5 demands upon this Bureau and your office which make it impossible
6 for us to ignore the fact that we apparently hold very divergent
7 views on the proper way to conduct labor relations. Therefore,
8 in the spirit of comity and accommodation, I am hereby delegating
9" (Joint Exhibit 12).

10 On November 14, 1978, Jeff Minckler of MPEA requested the
11 Office of Superintendent of Public Instruction to bargain on
12 November 21 as previously arranged (Joint Exhibit 13).

13 Attorney, Ross Cannon, in a November 14, 1978, letter to
14 Jean Moffatt of the State Labor Relations Bureau stated that
15 "[Y]our unit has delegated full bargaining authority to OPI. It
16 is OPI's view that the status of these 24 positions must be
17 resolved before we begin contract negotiations with MPEA" [Emphasis
18 added]. "Moreover, we feel for reasons previously discussed with
19 representatives of the Labor Bureau and MPEA that it would be
20 more satisfactory if someone other than Mr. Minckler represented
21 MPEA with respect to all matters concerning OPI" (Joint Exhibit
22 14). At the hearing, Mr. Cannon stipulated that this remained
23 the position of OPI.

24 On November 16, in a letter to Ross Cannon, Jeff Minckler
25 again requested that OPI be at the bargaining session scheduled
26 for November 21. In answer to OPI's concern, he pointed out that
27 determination of those positions in question could be bargained
28 at the table. In regards to his involvement in the negotiations,
29 Minckler assured Cannon that "the only area in which I have any
30 specific knowledge of management's position is concerning economics.
31 I was involved in one session before I left the state in which a
32 dollar figure was discussed, but I have been told recently that
the situation has changed and that my information is no longer

1 operational. In any event, I will not be addressing economics in
2 connection with the Superintendent's office; either another staff
3 member will handle that portion or we will wait to even mention
4 the subject until the state has made a last, best, and final
5 offer to another unit" (Joint Exhibit 15).

6 On November 20, 1978, Ross Cannon on behalf of the Office of
7 Public Instruction reaffirmed his intent not to meet with MPEA at
8 the bargaining session previously scheduled. On November 21,
9 1978, MPEA charged Georgia Ruth Rice, Superintendent of Public
10 Instruction, with failure to bargain.

11 DISCUSSION

12 The Unit Determination

13 In general, the facts in this case are uncontested. Defendant
14 has admitted her refusal to bargain but claimed not to be in viola-
15 tion of 39-31-401(5) MCA (formerly 59-1605(1)(e) R.C.M. 1947)
16 because no determination had yet been made on the supervisory
17 status of some 20 positions which she sought to exclude from the
18 bargaining unit.

19 This situation is not unique to the Office of the Superinten-
20 dent of Public Instruction but has been ruled upon by the National
21 Labor Relations Board and the courts in numerous cases. The
22 courts have ruled:

23 Where the deviation between the unit requested by
24 the union and the unit believed appropriate by the
25 employer is unsubstantial and does not affect the
26 union's majority, it cannot justify the employer in
27 refusing to bargain. (cites) The proper course for
28 the employer in those circumstances is to refuse to
29 bargain with respect to those employees whose unit
status is disputed, not to wholly refuse to bargain.
(cites) It is hardly consistent with the good faith
enjoined by the Act for the employer to inflexibly deny
recognition when the differences between it and the
union are slight.

30 ¹NLRB v. Richman Brothers Co. et al, C.A., 7, 387 F2d 809, 67 LRRM
31 2051 (1967); also see Sakrete of Northern California v. NLRB, C.A., 9
32 332 F2d 902, 56 LRRM 2327 (1964); Sabine Vending Co. v. NLRB, C.A., 5,
355 F2d 932, 61 LRRM 2384 (1966).

1 The Richman Brothers case, of course, was an employer recog-
2 nized unit, but the same standard has been applied in Board
3 certified units. ¹

4 Applying this standard, the employer may refuse to bargain
5 only if those positions in question affect the union's majority
6 status. In the election held March 22, 1978, 72 votes were cast
7 in favor of representation by MPEA and 39 votes were cast in
8 favor of no representation. Even if we assume that all 26
9 employees in the contested positions were in favor of no represent-
10 ation and add these votes to the no representation side of the
11 equation, the union's majority status will not be affected.²
12 Superintendent of Public Instruction, Georgia Ruth Rice, was in
13 error in refusing to bargain--her recourse was to bargain for all
14 positions excluding those she contended were supervisory.

15 Jeff Minckler as Union Negotiator

16 The Montana Public Employees Collective Bargaining Act, which
17 is modeled closely on the National Labor Relations Act, is very
18 specific in giving public employees the right to bargain collec-
19 tively through representatives of their own choosing.³ In a
20 case almost as old as the National Labor Relations Act itself,
21 the U.S. Supreme Court styled employees' right to organize and
22 select representatives of their own choosing as a fundamental
23 right. The Court said, "that such collective action would be a
24 mockery if representation were made futile by interference with
25 freedom of choice. Hence the prohibition by Congress of inter-
26 ference with the selection of representatives for purposes of

27 ¹Landis Tool Co., Division of Litton Industries, Waynesboro, Pa.,
28 and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and
29 Helpers of American, Local No. 110, Case No. 6-CA-6176, June 1, 1973,
30 203 NLRB No. 143, 83 LRRM 1271.

31 ²Subsequent to this hearing, the Office of Public Instruction unit
32 was finally determined when the union conceded to the employer's insistence
that 26 positions are supervisory and must be excluded from the unit.

³The right to choose their own representative is also accorded to
public employers.

1 negotiation and conference between employers and employees."¹
2 As with all rules, there were exceptions "but they have been rare
3 and confined to situations so infected with ill-will, usually
4 personal, or conflict of interest as to make good faith bargaining
5 impractical."² The burden is on "the company" to show the presence
6 of the disputed representative on the negotiating committee
7 constitutes a clear and present danger to the bargaining process.²
8 Another court insisted that it must be demonstrated "that the
9 representative in the particular dispute has gained an unethical
10 or overreaching advantage by the misuse of specific confidential
11 information acquired by reason of his former tenure...."³

12 Defendant, offered no evidence that Jeff Minckler as repre-
13 sentative of the union had any confidential information which
14 would either make good faith bargaining impractical or constitute
15 a clear and present danger to the collective bargaining process.
16 He had agreed not to engage in economic bargaining on behalf of
17 the union and his information on the state's position vis à vis
18 money was outdated. In the spring of 1978 when Minckler was
19 acting Bureau Chief, the main concern was the election and the
20 unit determination. Labor Relations Specialist Moffatt was
21 assigned to the OPI unit. Even though Ms. Moffatt reported to
22 Minckler, it stretches the imagination to believe that one
23 employer's position on specific working conditions could have been
24 salient enough in his mind as to constitute a clear and present
25 danger to the collective bargaining process several months later.

26 Defendant, Superintendent of Public Instruction, may not use
27 Jeff Minckler's presence on the union side of the bargaining table
28 as an excuse not to bargain.

29 ¹*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 1 LRRM 703
30 (1937).

31 ²*General Electric v. NLRB*, C.A. 2, 412 F2d 510, 71 LRRM 2418 (1969).

32 ³*NLRB v. Teamsters, Local 70 (Kockos Bros., Inc.)* C.A. 9, 459 F2d
694, 80 LRRM 2464 (1972). In this case, the union was objecting to the
choice of a former union President as a management representative. The
principle is the same.

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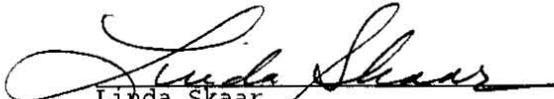
CONCLUSION OF LAW

The Office of Public Instruction violated 39-31-401 (5) MCA, failing to bargain in good faith with the Montana Public Employees Association, the exclusive representative of certain employees in the office.

RECOMMENDED ORDER

The Office of Public Instruction is ordered to bargain in good faith, at reasonable times and places, with the Montana Public Employees Association, the exclusive representative of certain employees in the office.

DATED this 8 day of May, 1979.


Linda Skaar
Hearing Examiner

CERTIFICATE OF MAILING

I, Elaine Schillinger, hereby certify and state that on the 8th day of May, 1979, a true and correct copy of the above captioned FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER was mailed to the following:

Ross W. Cannon
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Elaine Schillinger