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BEFORE THE BOARD OF PERSONNEL APPEALS

BOARD OF PERSONNEL APPEALS

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IN THE MATTER OF UNFAIR LABOR PRACTICE)
AMERICAN FEDERATION OF STATE, COUNTY)
AND MUNICIPAL EMPLOYEES, AFL-CIO,)
Complainant,)
vs.)
GOVERNOR, STATE OF MONTANA,)
Defendant.)

ULP 11-A-79
ORDER

On November 19, 1979, the Montana Public Employees Association, Inc., (hereafter Public Employees) filed a motion to intervene in the pending matter on the part of the plaintiff. The motion was filed pursuant to ARM 24.26.103 and 24.26.106. The affidavit of Thomas E. Snyder, Executive Director of Public Employees was filed in support of the motion.

Both the Governor and American Federation of State, County and Municipal Employees, AFL-CIO, the complainant and defendant, have filed written objections to the motion.

The undersigned Examiner, deeming the matter subject to determination on the basis of the written motion and written objections on file, and after fully considering the merits, now makes and enters the following

FINDINGS AND OPINION

1. The original complaint was filed herein by the complainant on February 12, 1979. The Governor promptly answered, various amendments to the pleadings have been allowed and filed, and extensive discovery has taken place including the depositions of various parties.

2. ARM 24.26.103 provides, in the opinion of the Examiner, that the right of intervention is discretionary and not mandatory or of right.

3. The basis for intervention by the Public Employees,

1 as set forth in the Snyder affidavit, is that the Public em-
2 ployees have been an exclusive representative of the two hun-
3 dred fifty-six persons bargaining unit at the Montana State
4 Prison since November 6, 1979. The Public Employees have
5 succeeded as representative to complainant named above.

6 It is further set forth in the Snyder affidavit that
7 the "employees now represented by MPEA and Montana State
8 Prison have a real interest in a financial stake in the out-
9 come of said pending proceedings;"

10 4. There can be no question that the employees at the
11 State Prison do have an interest and a financial stake in
12 the pending proceedings. However, that is not the question
13 presented. Here, the question presented is whether the new
14 exclusive representative should be permitted to intervene.

15 There is no allegation contained in the affidavit
16 or motion to the effect that the representation in pending
17 proceedings by AFSCME is in any way inadequate. Indeed, it
18 appears to the Examiner that the present representation of
19 the Prison employees by their former representative, AFSCME,
20 is vigorous and could not be deemed to be inadequate.

21 Moreover, both the complainant and the defendant
22 have objected, in part, to the motion on the ground that Pub-
23 lic employees were not a representative of the Prison employ-
24 ees at the time the charges and counter charges arose and
25 that therefore the Public Employees have no first hand know-
26 ledge of the facts giving rise to these proceedings. In the
27 absence of a strong showing that the rights of the employ-
28 ees of the State Prison are being adversely affected by
29 representation being afforded to said employees by the
30 present complainant, the Examiner is unwilling to prevent
31 intervention for the reason that it would cause undue and
32 untimely delay in bringing the pending proceeding to a

1 final decision.

2

ORDER

3 IT IS ORDERED that motion to intervene filed by Montana
4 Public Employees Association, Inc., is hereby denied.

5 Dated January 3, 1980.

6

Patrick F. Hooks

7

Hearings Examiner

8

9

10 CC: Mr. Barry Hjort
11 Scribner, Huss & Hjort
12 P.O. Box 514
Arcade Building
Helena, MT 59601

13 Mr. David W. Stiteler
14 State Personnel Division
Room 117, Mitchell Building
Helena, MT 59601

15 Mr. Robert R. Jensen, Administrator
16 Board of Personnel Appeals
35 South Last Chance Gulch
17 Helena, MT 59601

18 Mr. Douglas B. Kelley
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901 North Benton
20 Helena, MT 59601

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 11-A-79:

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO,

Complainant,

- vs -

GOVERNOR, STATE OF MONTANA,

Defendant.

FINAL ORDER

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Patrick F. Hooks on January 13, 1982.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Douglas B. Kelley, Attorney for Complainant, on February 2, 1982.

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

1. IT IS ORDERED, that the Exceptions of Complainant to the Findings of Fact, Conclusions of Law and Recommended Order 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 Patrick F. Hooks as the Final Order of this Board.

DATED this 3d day of April, 1982.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy
John Kelly Addy
Chairman

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CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy
of this document was mailed to the following on the 5th day
of April, 1982:

John Bobinski
Insurance & Legal Division
Department of Administration
Room 203 - Mitchell Building
Helena, MT 59620

Douglas B. Kelley
1330 LeGrande Cannon Blvd.
Helena, MT 59601



STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 11-A-79

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO
Complainant,
-vs-
GOVERNOR, STATE OF MONTANA,
Defendant,

DISSENTING OPINION

I respectfully dissent from the majority vote in this case and vote against the motion to sustain the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Examiner on Count II, that the State's withdrawal from factfinding was not an unfair labor practice. This dissent is based on the law, the evidence presented, and the oral arguments by the parties.

I concur with all the other Findings of Fact, Conclusions of Law, and Recommended Orders of the Hearing Examiner in this case.

Section 39-31-305 of the Montana Collective Bargaining Law for Public Employees obligates both the public employer and the exclusive representative to bargain collectively in good faith with respect to wages, hours, fringe benefits and other conditions of employment.

Section 39-31-308 of the same law sets up the process of fact-finding to resolve disputes and the mechanics of its implementation.

Section 39-31-401(5) of the law makes it an unfair labor practice to refuse to bargain collectively in good faith with an exclusive representative.

I believe that factfinding is part of the collective bargaining

process, by law, in Montana and the State's action in agreeing to go to factfinding without condition and then seeking to impose the no-strike stipulation is a violation by the State of the duty to bargain in good faith and thus is an unfair labor practice.

The argument by the State that there was no one-on-one meeting at the time factfinding was agreed upon is begging the question. By definition all mediation except the final meeting when an agreement has been reached is usually done while the parties are separated. To plead ignorance to the process of mediation by professional negotiators is indefensible. The lost newspaper article alleging the Union was planning to strike before factfinding was completed is still lost.

The evidence and oral argument show that the Union did not set a strike date until after the State demanded stipulations on the factfinding ten days after the process had begun.

In fact, if the Union had gone on strike before the factfinding had been completed, I believe the State could have filed an unfair labor practice against the Union.

The Hearing Examiner in his discussion on Count II admitted that his decision was an "extremely close" call. The decision not to find this charge an unfair labor practice, in my opinion, has weakened the process of factfinding in Montana.

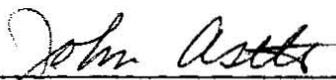
Factfinding and mediation were instituted to settle disputes when an impasse has been reached, in an attempt to avert strikes.

If a party, during the process of collective bargaining, misuses the statutory tools of dispute resolution, or uses them to gain an advantage, not only is it an unfair labor practice, but the processes

of factfinding and mediation will be severely weakened and will eventually become useless for dispute resolution, leaving only the strike or lockout as solutions.

We cannot afford to let this happen. The statutory process of factfinding must remain strong in order to maintain healthy labor-management relations in the public sector in Montana.

For the reasons set out above, I dissent from the majority opinion on the Order in Count II.



John Astle, Member
Board of Personnel Appeals

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE NO. 11-A-79:

AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL)
EMPLOYEES, AFL-CIO,)
Complainant,)
vs.)
GOVERNOR, STATE OF MONTANA,)
Defendant.)

ORDER

* * * * *

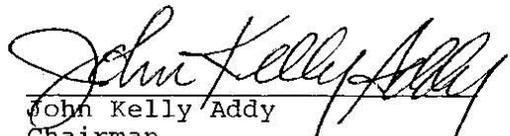
Oral argument was had in this matter on March 1, 1982. In order to further aid the Board in reaching a decision on this case, the Board requests that the parties to this action submit simultaneous briefs to this Board by March 17, 1982. The briefs are to address these two issues only:

(1) With regard to Count II, the state's withdrawal from fact finding, pages 14-16 of the hearing examiner's decision, whether the requirement of good faith bargaining (and its opposite, bad faith bargaining) require a finding of subjective or objective intent? Discuss especially the doctrines found in NLRB v. Thompson, 78 LRRM 2593 and supply additional case law, relative to the issue of type of intent necessary (subjective or objective) and how it is proven.

(2) What facts are in the record to support your position regarding intent?

Oral argument will be allowed at the Board's next meeting on April 1st, 1982.

DATED this 20 day of March, 1982.


John Kelly Addy
Chairman
Board of Personnel Appeals

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy
of this document was mailed to the following on the 2nd day
of March, 1982:

John Bobinski
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BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE)
AMERICAN FEDERATION OF STATE, COUNTY,)
AND MUNICIPAL EMPLOYEES, AFL-CIO,)
Complainant,)

vs.) ULP 11-A-79
GOVERNOR, STATE OF MONTANA,)
Defendant.)

ORDER

The Board of Personnel Appeals (Board) has adopted the Hearing Examiner's Findings of Fact, Conclusions of Law and Opinion, which have heretofore been served upon the parties pursuant to Section 39-31-406(6) MCA. Reference herein is expressly made to said Findings of Fact, Conclusions of Law and Opinion.

IT IS THEREFORE ORDERED:

1. The State of Montana is found guilty of unfair labor practice for the reasons set forth in Conclusion of Law No. 2.
2. The State of Montana is directed to cease and desist henceforth from similar conduct and is further ordered to take affirmative action to insure that contractual obligations with respect to convening pre-budget negotiations with public employees shall be undertaken in accordance with all such contractual obligations and executive order No. 9-77 issued by Governor Thomas L. Judge on July 18, 1977.
3. Counts II, III, IV and V of the unfair labor charges filed by AFSCME against the State of Montana are hereby dismissed.
4. Counter charges 5, 8, 10, 11 and 12 filed by the State of Montana against AFSCME are hereby dismissed.
5. The AFSCME claim for back pay during the period

1 of the strike to the public employees affected is denied.

2 6. The claim by AFSCME for an award of attorneys'
3 fees from this Board against the State of Montana is denied.

4 Dated _____, 1982.

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BOARD OF PERSONNEL APPEALS

BY _____

BEFORE THE BOARD OF PERSONNEL APPEALS

STATE OF MONTANA

* * * * *

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO,

No. ULP 11-A-79

Complainant,

vs.

GOVERNOR, STATE OF MONTANA,

Defendant.

* * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on before the undersigned Hearing Examiner for hearing on July 20, 1981. The complainant, American Federation of State, County and Municipal Employees, AFL-CIO (hereafter Union) filed fourteen unfair labor practice charges against defendant, Governor, State of Montana (State). The State filed a number of unfair labor practice charges against the Union. All of the charges arise out of the negotiating sessions carried on between the parties which formally commenced on December 4, 1978 and terminated on March 10, 1979.

At the hearing, the Union was represented by Douglas B. Kelly, Esq., and Gregory A. Jackson, Esq. The State was represented by John Bobinski, Esq. The hearing consumed two days and following preparation of the transcript, each side submitted proposed Findings of Fact and Conclusions of Law, together with supporting briefs. The Examiner, having heard the testimony, and being fully advised in the facts, hereby makes the following:

FINDINGS OF FACT

GENERAL

1. That at all times here relevant, the Union was the

1 remaining for decision include the introductory language of
2 the original claim and Counts II, III, IV, C, and VII.
3 These Counts are set forth on Exhibit "A".

4 8. The counter charges made by the State against the
5 Union have likewise been reduced by withdrawal. The remain-
6 ing charges are set forth on Exhibit "A".

7 9. Both the Union and the State categorically deny
8 all charges levied by the other.

9 SPECIFIC FINDINGS

10 COUNT VII.

11 10. Chronologically, the first Count to consider is
12 Count VII wherein the Union claims that the State failed to
13 reopen negotiations in accordance with the provisions of
14 the Collective Bargaining Agreement. In Article XV, Para-
15 graph D of this agreement (Claimant's Ex. 2), it is provided:

16 "In conjunction with this contract, it is hereby
17 agreed that the State will reopen negotiations on
18 applicable economic issues sufficiently in advance
of Executive Budget Submittal to insure time for
adequate negotiations to take place."

19 The Examiner finds that the evidence supports the
20 Union's charge on this point. Mr. Donald Judge testified as
21 to repeated calls made by him to Mr. Schramm prior to
22 November, 1978. (Tr. 165) Mr. Schramm acknowledges these
23 contacts and testified that he was unable to get definitive
24 information from the Budget Director to enable him to come
25 to a conclusion with respect to the State's position on
26 economic issues. (Tr. 364)

27 Mr. George Bousliman, former Budget Director for the
28 State of Montana, testified that his office was required by
29 law to submit a preliminary budget to the Legislative Fiscal
30 Analyst by November 15th and a final budget for the same
31 office by December 1st of 1978. (Tr. 302)

32 On November 3, 1978, Mr. Schramm and Mr. Judge agreed

1 to a first bargaining session to be held on December 4, 1978.
2 Judge testified that the various locals had made demands upon
3 the institutions at or shortly prior to that date and that
4 on November 3, 1978, he mailed to Schramm the Union's opening
5 proposals.

6 11. Subparagraph D of Article XV of the Collective
7 Bargaining Agreement (Ex. 2) refers specifically to the
8 reopening of negotiations in advance of "executive budget
9 submittal". Here, the evidence is uncontradicted that there
10 were no negotiations between the parties until December 4,
11 1978, three days after the "final" executive budget had to
12 be submitted to the Legislative Fiscal Analyst. The Examiner
13 finds that the State breached the contractual obligation
14 as set forth in Article XV, Paragraph D.

15 12. The State points out in its proposed Findings of
16 Fact that in Article XII, Paragraph F of the Collective
17 Bargaining Agreement, it is provided:

18 "The Union will present to each Administrator and the
19 Department of Institutions a copy of their salary
20 increase recommendations and other recommendations
21 which will affect the financial program of the
22 employer not later than the first of July on even-
23 numbered years."

24 While the State did not address the Union's failure or
25 alleged failure to comply with this provision of the contract
26 below, the evidence is that no proposals (recommendations)
27 were submitted by the Union to the Department of Institutions
28 or the State Bargaining Agent until shortly before November
29 3, 1978. (Tr. 165)

30 13. It is the finding of the Examiner that the parties
31 to the Collective Bargaining Agreement intended by the in-
32 clusion of the two paragraphs quoted above to lay the frame-
work for the Union's initial demands would be delivered to
the State in July preceding the legislative session and that

1 meaningful negotiations on economic issues would take place
2 prior to the date set for submission of the Governor's
3 Executive Budget. Neither took place.

4 14. In fact, the opposite seems to have occurred. Mr.
5 Schramm testified that between the negotiating meeting on
6 December 4, 1978 and the meeting on December 12, 1978, some-
7 body "leaked" to the newspaper the makeup of the executive
8 budget with respect to wage increases and indicated that the
9 State was projecting and budgeting for 5.5% per annum
10 increases. (Tr. 372, 373) That put Mr. Schramm in a quandry
11 because his plan had been to go up on a step-by-step basis
12 and the newspaper account revealed to the public, including
13 the Union negotiators, that the State was prepared to go to
14 5.5% per annum. This leak obviously occurred several days
15 after the due date of the submission of the final Executive
16 Budget to the Fiscal Analyst.

17 COUNT IV

18 15. The thrust of Count IV is that the State, on two
19 specified occasions, indicated to the Union or to the
20 Mediator that it had "room to move" and suggested a bargain-
21 ing session and that at each ensuing bargaining session the
22 State insisted that the Union make the first move.

23 The evidence at hearing is in conflict. The Union
24 insists, through its witnesses, that this in fact occurred
25 and Mr. Schramm testified that on both occasions the State
26 had made the last move at the prior bargaining session and
27 therefore it was the Union's turn to move. Because of the
28 Conclusions of Law reached by the Examiner on this point and
29 hereinafter set forth, the Examiner finds no need to pre-
30 cisely enumerate here the factual evidence in support and
31 in opposition to this charge or to attempt to find or
32 declare which side preponderates.

1 COUNT II

2 16. Count II of the Union's complaint against the
3 State charges that the Bargaining Agent for the State agreed
4 to enter into fact finding at the meeting of January 15,
5 1979. Subsequently, the State failed to follow through on
6 this agreement as originally agreed.

7 It is undisputed that the January 15, 1979 meeting was
8 conducted by the Mediator, Ms. Linda Skar. The Union
9 requested fact finding and it is admitted that the State,
10 acting through Mr. Schramm, consented. No conditions were
11 attached to the State's agreement at that time. See Gooch
12 Dep. 33; Moffett Testimony, 334; Schramm Testimony Tr. 37;
13 Donald Judge Testimony Tr. 193-194. On the following day,
14 January 16, 1979, Donald Judge, on behalf of the Union,
15 petitioned the Board of Personnel Appeals for initiation of
16 fact finding pursuant to Section 39-31-308(2) (Complainant's
17 Ex. 10).

18 17. On January 24, 1979, Mr. Judge testified that he
19 received a call from Mr. Schramm indicating that he had a
20 stipulation with respect to fact finding. This was the last
21 day on which the parties were to select a fact finder. (Tr.
22 196) Mr. Schramm generally agrees with this timetable.
23 (Tr. 37) The stipulation presented by Schramm to Judge on
24 January 24th is in evidence in two versions, the marked
25 version (Def. Ex. A) and an unmarked exhibit which immediately
26 precedes complainant's Ex. 11.

27 18. Mr. Judge testified (Tr. 196) that the stipulation
28 contained two significant conditions to fact finding, (1) it
29 limited the issues going to the fact finder to purely economic
30 issues, and (2) it compelled the Union to forego the right
31 to strike (concerted activities) until the fact finder had
32 made public his findings and recommendations.

1 As to the first so-called condition, the State offered
2 no evidence to rebut this testimony. As to the second
3 condition, it is the Schramm testimony that at a meeting
4 with Mr. Judge on January 25, 1979, he agreed to strike out
5 the language as per the unmarked exhibit which immediately
6 precedes complainant's Exhibit 11 in the transcript.

7 Mr. Schramm testified that he agreed to go to fact
8 finding on January 15, 1979 because he wanted to avert a
9 strike and because he did not think the State was in "too
10 bad a position". (381) He goes on to state that on the
11 23rd of January, he was in the Governor's office and he read
12 a newspaper article that the Union was reserving its right
13 to strike. (Tr. 384-386) On the 25th he presented the
14 stipulation to Mr. Judge. Mr. Judge told him that the
15 stipulation would not "sail" with his membership. Schramm
16 testified he agreed to strike out the language stricken in
17 the unmarked exhibit. The Examiner observes that with this
18 language stricken, the net effect is that fact finding would
19 be meaningless if the Union struck before the fact finder
20 rendered his final opinion.

21 19. The Union refused to sign the stipulation. Schramm
22 then wrote the Board, on January 26, 1979 withdrawing from
23 the "joint" petition for fact finding. (Complainant's
24 Ex. 3) Mr. Judge called a meeting of the members of his
25 bargaining team and the presidents of the local for the
26 25th of January and a strike vote ensued. The strike date
27 was 3:00 A.M. on March 5, 1979.

28 These facts are largely without dispute. The Examiner
29 can find no evidence introduced by the State in defense of
30 the conditions imposed by the Stipulation to limit the fact
31 finder to solely economic issues as opposed to the collateral
32 issues that were discussed in previous bargaining sessions.

1 COUNT III

2 20. The Union charges, in Count III, that on February
3 4, 1978, Mr. Schramm informed the Mediator that the offer
4 submitted was the State's "last, best and final offer, and
5 would be replaced by a lower offer" if the Union went on
6 strike. In the State's answer, it is admitted that the
7 Mediator was told that if the offer is rejected and the
8 Union went on strike, the State would "reserve the right to
9 revert to its former offer." The testimony is in accord
10 with the admission. The State denies in its answer that
11 the Mediator was told that the offer was the last "best and
12 final offer".

13 Called as an adverse witness, Mr. Schramm testified on
14 point:

15 "Q You told the mediator that she could use the
16 language, last, best and final offer to speak
 to your offer, is that correct?

17 A. This was at the end of a long session, and I told
18 her I don't believe there is any such thing or
 very rare such thing as a last, best and final
 offer that will not be changed and --

19 Q Mr. Schramm, I want you to just say yes or no.
20 Did you in fact say to her that she could
21 characterize your offer as last, best and
 final; yes or no?

22 A With the conditions that I stated earlier, yes.

23 Q Did you tell her to go in there and say--
24 to tell Mr. Judge, "This is our last, best and
 final offer, but we still have room to move"?

25 A I told her that I thought it would be inaccurate
26 to characterize it as such because we still had
27 room to move but if she chose to characterize it,
 I couldn't stop her; I don't know what she was
 saying, so that was exactly the way the conver-
 sation went."

28 Mr. Donald Judge testified that the Mediator told the Union
29 team that the offer conveyed was indeed the State's last,
30 best and final offer, and the offer would be removed if the
31 Union rejected and went to strike. No conditions were
32 attached. (Tr. 213, 214)

1 It is the finding of the Examiner, by a preponderance
2 of evidence that the State did in fact characterize the
3 offer as a "last, best and final offer" and it is admitted
4 that the State coupled this characterization with the
5 suggestion to the Mediator that the State reserve its right
6 to revert to a lower offer if the offer were not accepted if
7 the Union went on strike.

8 COUNT V AND THE TOTALITY CLAIM

9 21. The Examiner views Count V and the Totality Claim
10 as substantially similar. It is the belief of the Examiner
11 that specific findings on the Totality Claims are better
12 reserved for discussion under Conclusions of Law and Opinion
13 below.

14 COUNTER CHARGE NO. 5

15 22. In this charge, the State claims the Union evidenced
16 bad faith by walking out of the February 4th meeting while
17 the State was still willing to negotiate and still had
18 flexibility.

19 The evidence is clear that the Union left the meeting
20 after the Mediator had conveyed the State's "last, best and
21 final offer". There is no evidence that the Mediator told
22 the Union that the State believed it still had room to move.
23 This is conceded by the State in its proposed Finding of
24 Fact No. 59.

25 The testimony of the Union officials was that they took
26 the characterization of a last, best and final offer and
27 decided there was no point in remaining in the meeting. This,
28 of course, occurred within hours before the strike deadline
29 of 3:00 A.M. on February 5.

30 It is the finding of the Examiner that under these
31 circumstances the act of the Union in leaving the meeting
32 was justified.

1 agreement settling the strike (Exhibit D) were signed by
2 all parties. The question raised by the Examiner at the
3 hearing was whether the State's execution of these agree-
4 ments waived the right to file an unfair labor practice
5 charge because of the Union demands which are incorporated
6 in these agreements. The Examiner now finds that there is
7 language in the Return to Work Agreement (4th paragraph--
8 Exhibit 11) which reserves the right of either party to
9 file an unfair labor practice charge.

10 With respect to the Union's demand to ratify all pro-
11 visions of the contract for the ensuing biennium (including
12 non-economic issues), it is the Schramm testimony that the
13 sessions underway were economic sessions only and that,
14 historically, Montana had followed a two tiered bargaining
15 program. (Tr. 392) Mr. Donald Judge testified that it
16 was his understanding of the law that unless the entire
17 contract was settled for the ensuing biennium that the
18 agreement for pay increases would be meaningless for the
19 employees could not get the increases (commencing July 1,
20 1979) until the contract had been ratified. (Tr. 241) Mr.
21 Schramm disagreed with this interpretation of the law. As
22 authority for his position, Mr. Judge cited 59-921(2) RCM
23 1947 which became 2-18-307 MCA. This statute was repealed
24 by Section 17, Chapter 678 of the Session Laws of 1979.
25 Without belaboring the issue or rendering a legal opinion
26 on the validity of the Judge view of the law, it is the
27 finding of the Examiner that this section could reasonably
28 cause the concern felt by Mr. Judge, a non-lawyer.

29 The issue raised by the State's challenge of the Union's
30 demand that non-Union people be covered in the Return to
31 Work Agreement was largely ignored by both parties. Mr.
32 Schramm testified (Tr. 60) that ultimately they gave in on

1 that issue. There was no particular evidence introduced
2 to indicate how this demand evidenced bad faith on the
3 part of the Union and Mr. Judge as not extensively cross-
4 examined on the reasons for this demand. The Examiner
5 finds that the State has failed in its burden of proof on
6 this issue.

7 GENERAL

8 25. Both the State and the Union, in their Proposed
9 Findings of Fact, set forth at some length the
10 various offers and counter-offers made by the parties
11 throughout the negotiating sessions which are the subject
12 of these charges. Both the Union and the State testified
13 from reconstructed notes which chronologically set forth
14 the course of the negotiations on the wage issues. (See
15 Complainant's Ex. 18 and State's Ex. B)

16 By reason of the findings heretofore made and the
17 conclusions and opinion set forth hereinafter, the
18 Examiner does not deem it necessary to set forth specific
19 findings as to the progression of the negotiations.

20 CONCLUSIONS OF LAW AND OPINION

21 1. Reference is made to Exhibit B which is a summary
22 of the applicable statutes on good faith bargaining and a
23 general definition of good faith bargaining are the various
24 federal decisions and texts on the subject. In reaching
25 Conclusions of Law, recourse must necessarily be had to
26 these general statements and are set forth as an exhibit
27 in an attempt to afford understanding.

28 2. BREACH OF CONTRACT ISSUE. As set forth in
29 Findings 10-14, both sides breached the Collective Bargain-
30 ing Agreement. Additionally, the State here ignored totally
31 the provisions of paragraph 3 of Governor Judge's executive
32 order of July 18, 1977 (Ex. C) in that negotiations were

1 not concluded prior to the construction of the executive
2 budget. The Examiner would agree with the argument made by
3 the State that violation of a contractual provision is not
4 per se an unfair labor practice and it is to be noted that
5 the Montana statute does not provide such a provision as
6 does the State of Wisconsin.

7 Further, the Examiner would conclude that neither side
8 to a collective bargaining situation has any obligation to
9 disclose to the other its "bottom line" or "hole card" in
10 the ordinary situation at the risk of being held to be in
11 bad faith.

12 However, it is the Examiner's opinion that we are
13 here presented with a different situation. There were no
14 negotiations commenced until after the executive budget
15 was submitted to the fiscal analyst and until twenty some
16 days before the Legislature met. Obviously, the State not
17 only violated its contractual obligation but totally
18 ignored the public policy set forth in the Governor's
19 executive order. While the Union did not seek a Writ of
20 Mandate, it is clear from the testimony that Mr. Donald
21 Judge was attempting to avoid this very situation.

22 These problems, in the opinion of the Examiner, were
23 compounded when the State, after the first meeting, was
24 attempting to hide from the Union the details as to the
25 budget and felt compromised because those details were
26 "leaked" to the press. At that time, December 4-12, 1978,
27 the executive budget was finalized; the Governor's executive
28 order either meant something or it didn't. By its conduct,
29 the State was attempting to take advantage of its own
30 wrong to the detriment of the public employees. It is the
31 conclusion of the Examiner that this conduct cannot be
32 characterized as good faith bargaining and that the Union's
charge is proven by a preponderance of the evidence.

1 3. COUNT IV - WHO GOES FIRST? Even if the record
2 below established the Union's claim by a preponderance of
3 the evidence, which it doesn't, it is the conclusion of
4 the Examiner that the refusal of the State to make the
5 first move would not necessarily evidence bad faith. The
6 federal case law reflects the common sense view that
7 bargaining is bargaining. No where in Montana statute or
8 in the rules and regulations of the Board of Personnel
9 Appeals do I find any requirement that participants to
10 collective bargaining must act like those around a bridge
11 table or a poker table and follow a pre-ordained course of
12 bidding or betting. The record here reflects hard bargain-
13 ing on each side, some disagreements and personality
14 differences but bargaining with some dedication on both
15 sides in an effort to reach settlement. The Union's charge
16 on this issue is dismissed.

17 4. COUNT II. THE STATE'S WITHDRAWAL FROM FACTFINDING.

18 This is an extremely close issue on the evidence.
19 As noted in Findings 16-19, the State did agree to fact-
20 finding without condition and then sought to impose the
21 no-strike stipulation. The stipulation was rejected. The
22 question posed is whether this act on the part of the State
23 was bad faith bargaining and therefore an unfair labor
24 practice.

25 The Union urges that it was. The testimony of the
26 Union bargaining team is that they averted an earlier
27 strike, particularly with the personnel at Deer Lodge, by
28 stating that the State had agreed to factfinding, When the
29 stipulation providing for "no strike" during factfinding
30 or, alternatively, factfinding goes out the window if there
31 is a strike, was presented, it was the straw that broke the
32 camel's back.

1 The State, in defense, argues that there was no one-on-
2 one meeting at the time factfinding was agreed upon and
3 the agreement was reached, in separate rooms, through the
4 Mediator. Moreover, Mr. Schramm testifies that the
5 stipulation came into being when he was sitting in the
6 Governor's office and read a newspaper article that in-
7 dicated the Union had a strike date. (This newspaper
8 article was not produced in evidence although both parties
9 obviously asserted every effort to find the same.)

10 5. There is little case law on point. The Union
11 cites N.L.R.B. v. Thompson, Inc., 78 L.R.R.M. 2593. There
12 it was held that a reversal of position after a supposed
13 agreement reached might be considered as evidence of lack
14 of good faith in bargaining. See also N.L.R.B. v. Texas
15 Coca-Cola Bottling Co., 365 F.2d 321. However, in
16 Thompson, the employer went further in that he totally
17 reneged on a prior agreement on one issue after all of the
18 other issues had been settled. In Caroline Farms v. N.L.R.B.,
19 401 F.2d 205, there was also a retreat from a previously
20 agreed position by an employer. There, it was held that
21 the change in position was not taken with the purpose of
22 frustrating ultimate agreement and therefore was not an
23 unfair labor practice.

24 The ultimate question of whether the State's insistence
25 on the stipulation as a condition to factfinding amounted to
26 bad faith is a subjective call and involves "finding of
27 motive or state of mind which can only be inferred from
28 circumstantial evidence." (See Thompson, supra) Hindsight
29 might well compel a conclusion that the State's bargaining
30 agent made a mistake. However, in the light of the fact
31 that there was no face-to-face agreement with respect to
32 the factfinding with opportunity to discuss conditions, and

1 in the light of the testimony that the stipulation came
2 into being because of supposed newspaper accounts re an
3 imminent strike, I am not persuaded that the demand for
4 stipulation was for the purpose of frustrating the ultimate
5 agreement. It is therefore the Examiner's conclusion that
6 the charge, although extremely close, has not been proven by
7 a preponderance of the evidence and that this charge be
8 dismissed.

9 6. COUNT III "LAST, BEST AND FINAL OFFER"

10 This charge involves a claim that at the February 4th
11 meeting, the State made a last, best and final offer through
12 the Mediator and indicated it reserved the right to revert
13 to its former offer if the Union went on strike. See
14 Finding of Fact No. 20.

15 The facts of the charge are sustained fully by the
16 evidence. There is, however, no evidence that the State did
17 in fact revert to a former offer. While the facts of the
18 charge are sustained by the evidence, that does not es-
19 tablish that such conduct is an unfair labor practice. The
20 federal case law cited by the State is most persuasive that
21 either party may retract an offer not accepted and revert to
22 a lower offer without being held guilty of bad faith
23 bargaining. See N.L.R.B. v. Alva Allen Industries, 369
24 Fed. 2d 310; N.L.R.B. v. Tomco Communications, 567 F. 2d
25 871.

26 On the basis of these holdings, it is the conclusion of
27 the Examiner that the charge be dismissed.

28 7. COUNTER CHARGE 5.

29 This involves a claim of bad faith by the State because
30 the Union walked out of the February 4th meeting. (See
31 Finding of Fact No. 5.) The Union was fully entitled to
32 believe that it was the last, best and final offer at that

1 time. There was no bad faith, under these circumstances, in
2 going home and preparing for the strike. This charge is
3 dismissed.

4 8. COUNTER CHARGE 10.

5 Here, the State claims that the Union was guilty of bad
6 faith bargaining when, on March 7-8, it withdrew a Union
7 offer made at a prior hearing after the State had accepted.
8 For the reasons set forth in Finding 23, this charge is
9 dismissed.

10 9. COUNTER CHARGE 11.

11 This charge has to do with the claim that the Union was
12 guilty of bad faith in insisting that ratification of the
13 entire contract for the two years in the next biennium be
14 accomplished as a condition of settling the strike.

15 The Examiner concludes that in the face of the legal
16 authority relied upon by Mr. Donald Judge, that the Union's
17 position is totally justified. The public employees had
18 been on strike for in excess of a month, the economic issues
19 were settled. It seems to the Examiner that if the Union
20 officials had failed to insure that the employees would
21 receive the economic benefits of this struggle that the
22 officials would be justly subject to a great deal of
23 criticism. Legislative Acts are not always drafted and
24 enacted with the clarity or precision of the Ten
25 Commandments. It is therefore concluded that there was no
26 bad faith evidenced by this demand and the counter charge
27 is dismissed.

28 10. COUNTER CHARGE 12.

29 This charge is dismissed for failure to sustain the
30 charge by a preponderance of the evidence. The Examiner can
31 find nothing of substance in the record in support of the
32 charge or in defense thereof. Even if there were evidence,

1 there would remain a question of whether a "loose end" like
2 this would sustain the charge of bad faith bargaining when
3 the substantial bargaining had been concluded.

4 11. THE TOTALITY CHARGES.

5 Each of the parties has alleged that the other, "by the
6 totality of its conduct in the negotiations" was guilty
7 of bad faith bargaining. In the Examiner's view, the
8 Union's Count V is but a variation of the totality charge.

9 It is the conclusion of the Examiner that all of these
10 charges should be dismissed for failure to sustain the
11 burden of proof imposed upon the respective parties.

12 Once the negotiations started they proceeded at a pace
13 that appears to have been acquiesced in by the parties. The
14 testimony and the minutes or notes kept by the respective
15 parties suggest some movement at nearly every session.
16 While the evidence reflects clearly that the Union moved
17 further from its original position than did the State, that
18 is not viewed as determinative. In any bargaining pro-
19 cedure, the degree of movement from original position
20 depends, in large measure, on where one starts. The ne-
21 gotiations were rendered more difficult by the fact that the
22 State had elected to depart from the concept of "across-the-
23 board" and insisted on percentage increases. However, this
24 was the State's right.

25 With the exception noted in Conclusion of Law No.
26 2, the Examiner concludes that neither side has established
27 by a preponderance of the evidence that the other entered
28 into the negotiations with a disposition not to bargain or
29 that the other did not make a sincere attempt to reach an
30 agreement. Both totality claims and Count V are therefore
31 dismissed.

32

1 12. QUESTION OF WHETHER THE STRIKE WAS AN UNFAIR
2 LABOR PRACTICE STRIKE - BACK PAY ISSUES.

3 The proposed order submitted as part of the Union's
4 proposed Findings of Fact and Conclusions of Law proposes
5 that all of the striking employees be paid all back pay,
6 together with all benefits attendant to said employment.
7 At hearing, it was the contention of the Union that the
8 strike was an unfair labor practice strike. The Union
9 contended that the strike was precipitated by the State's
10 insistence on the execution of the stipulation before fact
11 finding could commence. While the Examiner has held the
12 State's actions did not constitute an unfair labor practice,
13 the demand for back pay requires discussion.

14 An unfair labor practice strike is an activity initiated
15 in whole or in part in response to unfair labor practices
16 committed by the employer. An economic strike is one that
17 is neither caused nor prolonged by an unfair labor practice
18 on the part of the employer. See Morris, The Developing
19 Labor Law, page 524. In a very recent decision, the First
20 Circuit Court of Appeals held the pivotal question is
21 whether the unfair labor practice is a proximate cause of
22 the strike. Soule Glass & Glazing Co. v. N.L.R.B., 107
23 LRRM, 2781, 2791. (1981)

24 Here, the thrust of the testimony is that the public
25 employees were very upset about the State's position on
26 economic issues and that, at least, the Deer Lodge Local
27 was prepared to go on strike. The agreement on the part of
28 the State for fact finding was accepted as a good sign and
29 strike plans were put aside for the moment. The presentation
30 of the stipulation on or about January 25th resulted in
31 the setting of the strike deadline. Admittedly, the parties
32 went back to the bargaining table for further negotiations

1 which extended through February 4th.

2 The Examiner concludes that the State act with
3 respect to the stipulations and conditions ended the mora-
4 torium on fixing the strike deadline. However, the
5 Examiner cannot find substantial evidence in the record
6 that the State's insistence on the stipulation triggered
7 the strike. It appears from the record that the strike
8 was imminent before the concession on fact finding and
9 that concession only resulted in the moratorium. On
10 January 29, 1979, Mr. Donald Judge wrote the State's
11 negotiator and the Administrators of the various institut-
12 ions and advised them of the strike deadline. (Complainant's
13 Ex. 8) It is to be noted that Mr. Judge stated that the
14 members felt the strike was necessary "in the face of the
15 State's position regarding wage and benefit increase pro-
16 posals for the 1980 - 1981 biennium." It is concluded from
17 the total record that the strike was an economic strike
18 and was not a strike proximately caused by the alleged
19 unfair labor practice.

20 13. The claim for back pay is based on Section
21 39-31-406(4) MCA. Here, the Examiner has concluded that
22 the State's insistence on the stipulation as a condition
23 to fact finding did not constitute an unfair labor practice
24 so this statute does not come into play. There has never
25 been the remotest suggestion that the unfair labor practice
26 claimed, and found, against the State for failing to
27 convene the bargaining sessions as contractually agreed
28 had any part in the resulting strike.

29 On the federal level, the National Labor Relations
30 Board has consistently held that those involved in an
31 admitted unfair labor practice strike are not entitled to
32 back pay. See Comfort, Inc., 152 N.L.R.B. 1080:

1 "Even if the sole cause of the strike is
2 unfair labor practice - - -the board's
3 machinery should be used to remedy the
4 underlying unfair labor practice without
underwriting the strikers' withholding
of their labor to effectuate that result."

5 In International u of Elec. Radio & Machine Workers v.
6 N.L.R.B., 604 Fed. 2d 689 (1979), the Circuit Court of
7 Appeals of the District of Columbia held that this board
8 policy was not arbitrary nor did it frustrate the purposes
9 of the act. This decision was cited with approval
10 recently in Warehouse Union v. N.L.R.B., 652 P.2d 1022, 1025
11 (Fifth Circuit - April, 1981).

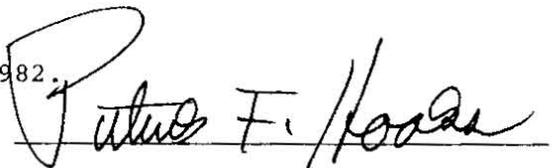
12 14. ATTORNEYS' FEES.

13 The Union requests in its proposed Order and in brief
14 an award of attorneys' fees under the provisions of
15 Section 39-31-406(4) MCA. It is conceded in brief by the
16 Union that the attorneys' fees are not specifically pro-
17 vided in that section and it is urged that an award is
18 implied by the language in the statute.

19 The Montana Supreme Court has long adhered to the rule
20 that attorneys' fees may not be awarded to the successful
21 party unless there is a contractual agreement or unless
22 there is specific statutory authorization. See Nikels v.
23 Barnes, 150 Mont. 113, 454 P.2d, 608; Veterans Rehabilitation
24 Center, Inc. v. Birrer, 170 Mont. 182, 551 P.2d 1001;
25 Wittner v. Jonal Corp., 169 Mont. 247, 545 P.2d 1094. It
26 is the conclusion of the Examiner that under these
27 cases an award could not be made in the absence of specific
28 statutory authorization. Moreover, even if this board had
29 the equity power of a District Court, the claims here are
30 not of the type which would bring this case within Foy v.
31 Anderson, 176 Mont. 507, 580 P.2d 114, an equitable exception
32 to the general rule.

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Dated January 13, 1982.



PATRICK F. HOOKS
HEARING EXAMINER

EXHIBIT "A"

1
2 "At all times, material to this Unfair Labor Practice
3 Complaint, the State of Montana, represented by the Governor
4 and his agents, was a public employer, and AFSCME was an
5 exclusive representative of certain public employees. Said
6 public employer (hereinafter referred to as Governor's
7 Bargaining Agent) and exclusive representative (hereinafter
8 referred to as AFSCME), were at all times subject to the
9 Collective Bargaining Act for Public Employees Law,
10 39-31-401, et. seq., M.C.A., and were engaged in collective
11 bargaining as set forth in 39-31-305 M.C.A.

12 The Governor, through his bargaining agents, has
13 refused to bargain collectively in good faith with AFSCME,
14 the exclusive representative of certain public employees,
15 which is in violation of 39-31-401(5) M.C.A.

16 The Governor, through his bargaining agents and super-
17 visory help, has restrained, interfered with, and/or coerced
18 employees in the exercise of their rights guaranteed under
19 Section 39-31-21, et. seq., M.C.A.

20 The bargaining agent's failure to negotiate in good
21 faith was the cause of, and resulted in, in whole or in
22 part, the February 1979, strike.

23 The Unfair Labor Practices alleged above are more
24 specifically set forth by way of enumeration and not
25 exhaustion in Counts I - X as follows: "

26 COUNT II

27 That the Governor's duly authorized bargaining agent
28 agreed to a joint petition for factfinding at the
29 January 15, 1979, bargaining/mediation session.
30 Subsequently the Bargaining Agent failed to enter
31 into the process of factfinding as originally agreed.

32 COUNT III

33 That on February 4, 1979, the Governor's Bargaining
34 Agent said that the public employer's "last, best
35 and final offer" would be replaced by a lower offer
36 if AFSCME went on strike.

37 COUNT IV

38 That the Bargaining Agent called for two bargaining
39 sessions, one on January 11, 1979, and the other on
40 February 3, 1979. In calling each of said sessions,
41 Bargaining Agent represented to AFSCME that the State
42 had "room to move". However, upon commencement of
43 each of said sessions, Bargaining Agent insisted that
44 AFSCME make the first move. In the January 11, 1979
45 session AFSCME was compelled to counter its own prior
46 proposal. Bargaining Agent's unwillingness to make
47 concessions, dilatory tactics, conditional negotiations,
48 and refusal to make proposals or demands, constitutes
49 a failure to bargain in good faith. Said instances
50 include but are not limited to the above-mentioned
51 meetings. Whereas AFSCME, at all times mentioned
52 herein, bargained in good faith.

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COUNT V

That throughout the entire course of negotiations, the Governor's Bargaining Agent has bargained conditionally, speculatively and with misrepresentation of authority. The Governor's Bargaining Agent threatened AFSCME with legislative disapproval and retaliation. While, in fact, the Bargaining Agent had no authority to make such a threat or representation. The Bargaining Agent stated that AFSCME was setting wages for all other state employees when the Bargaining Agent's statutory duty was to bargain only with the employees' exclusive representative, i.e., AFSCME.

COUNT VII

That the public employer failed to reopen negotiations on applicable economic issues sufficiently in advance of the Executive Budget submitted to insure time for adequate negotiations to take place.

STATE'S COUNTER CHARGES

5. That AFSCME evidenced bad faith by walking out of the mediation session on February 4th while the public employer was still willing to negotiate and still had flexibility.

8. That AFSCME has, by the totality of its conduct in the negotiations, failed to negotiate in good faith and has violated the Collective Bargaining Act.

10. That during the negotiating session on March 7-8, 1979, the public employer agreed to the previous AFSCME demand of \$40.00 and 2.75%. However after the employer had accepted this demand AFSCME withdrew it and instituted a new demand for a higher amount. This regressive bargaining on AFSCME's part is a clear indication of their failure to bargain in good faith and intention not to reach agreement.

11. That during the entire impasse between the parties, the issues involved have been economic issues and that the FFSCME contract is only open for the limited purpose of discussing economic issues. (see attached exhibit "A") Nevertheless, in order to frustrate agreement, AFSCME insisted during the March 7-8th session that a non-economic issue (continuation of the contract unchanged for the next biennium) become part of the settlement. This issue had never been raised prior to this negotiating session. The institution of new demands after impasse has been reached is further indication of AFSCME's bad faith. In addition, AFSCME is now striking for a non-economic issue in violation of the contract provision cited above. Since the contract is not open except for economic subjects, this violation of the explicit terms of the agreement compounds AFSCME's bad faith of putting new demands on the table at this late time.

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12. Than AFSCME refused to sign any return to work agreement unless it contained a provision providing reinstatement of "all employees" at the effected work sites, not just those under the jurisdiction of AFSCME. Such a clause was included in the eventual Return to Work Agreement (Exhibit "B" attached). Insistence on bargaining over the rights of employees not under their jurisdiction or under this collective bargaining agreement is a further indication of AFSCME's bad faith and intention to frustrate agreement.

1 variously defined in the decisions and the texts. A few
2 examples are:

3 "A. Totality of Conduct. The duty to bargain in
4 good faith is an 'obligation . . . to participate
5 actively in the deliberations so as to indicate a
6 present intention to find a basis for agreement
7 . . .'. This implies both 'an open mind and a sin-
8 cere effort . . . to reach a common ground.' The
9 presence or absence of intent 'must be discerned
10 from the record.' "

11 (Morris, The Developing Labor Law, page 278.)

12 "The courts have clarified this requirement by
13 ruling that in order to fulfill their mutual good
14 faith bargaining duty, both the employer and the
15 employees' representative must: (1) enter into
16 negotiations with an open mind, i.e., without a
17 predetermined disposition not to bargain; and
18 (2) make a sincere effort to reach an agreement
19 on mutually acceptable terms."

20 (4 Kheel, Labor Law Section 16.02(2).)

1 IN THE MATTER OF UNFAIR LABOR PRACTICE)
 2 AMERICAN FEDERATION OF STATE, COUNTY)
 AND MUNICIPAL EMPLOYEES, AFL-CIO,) ULP 11-A-79
 3)
 4 Complainant,)
 5)
 -vs-)
 6)
 GOVERNOR, STATE OF MONTANA,)
 7)
 Defendant.)

* * * *

ORDER AND DECISION

10 In this proceeding, the American Federation of State,
 11 County and Municipal Employees, AFL-CIO, (hereafter Union)
 12 brings fourteen separate charges of unfair labor practice
 13 against the State of Montana (hereafter State) under and
 14 pursuant to the Collective Bargaining For State Employees
 15 Act, Sections 39-31-101 through 39-31-409 MCA.

16 Presenting pending before the undersigned Examiner is
 17 the Union's Motion for partial Summary Judgment (liability)
 18 on Counts I, II, III, IV, VI, VIII and XIV. The State has
 19 countered with cross-motions for Summary Judgment on each
 20 of the enumerated Union counts. Additionally, the State
 21 has moved for Partial Summary Judgment, liability, on Union
 22 Count X and asks for Summary Judgment to the effect that
 23 the Union, i.e., the employees, may not receive retro-
 24 active back pay even if one of the unfair labor charges is
 25 proven and that the Union may not recover attorney's fees
 26 and costs.

27 Union Counts V, VII, IX, XI, XII and XIII are not
 28 subject to Motion for Summary Judgment by either party.

29 At all times here material (1979) the Union was the
 30 exclusive representative of the Employees at various state
 31 institutions.

32 The Union brings fourteen counts of unfair labor practice

1 against the State alleging violation of one or more of the
2 provisions of 39-31-401. The allegations are summarized
3 in the amended charge as follows:

4 "The Governor, through his bargaining agents, has refused
5 to bargain collectively in good faith with AFSCME, the
6 exclusive representative of certain public employees, which
7 is in violation of 39-31-401(5) M.C.A.

8 The Governor, through his bargaining agents and super-
9 visory help, has restrained, interfered with, and/or coerced
10 employees in the exercise of their rights guaranteed under
11 Section 39-31-21, et. seq., M.C.A.

12 The bargaining agents' failure to negotiate in good
13 faith was the cause of, and resulted in, in whole or in part,
14 the February 1979, strike."

15 The State has filed an answer which denies that any of
16 the enumerated fourteen counts represents an unfair labor
17 practice on the part of the State. Additionally, the State
18 has filed eight counter-charges of unfair labor practice
19 against the Union. Six of these counter-charges have been
20 withdrawn by subsequent pleading. In summary, six of the
21 Union's specific counts or charges are not the subject of
22 either a motion for summary judgment or a cross-motion for
23 summary judgment by the State. Similarly, two of the State's
24 counter-charges are likewise immune from dispositive ruling
25 by the Examiner at this time, thus, there will be a hearing
26 in any event.

27 1. THE ACT. Section 39-31-401 M.C.A. sets forth
28 those actions which will subject a public employer to a
29 charge of unfair labor practice. The companion section,
30 39-31-402 specifies those acts on the part of a labor organi-
31 zation which are deemed to be unfair labor practices.
32 Violations of either section are subject to the jurisdiction
of this Board. Section 39-31-403. Section 39-31-405 and
Section 39-31-406 provide for filing of complaint and cross-
complaints and for hearing before the Board or an Examiner.
From 39-31-406, as well as administrative rules adopted by
the Board, the proceedings are less formal, both in pleading

1 and at hearing, than a trial in the District Court.

2 The vast majority of the Union charges against the
3 State and both of the remaining cross-charges of the State
4 allege a failure to engage in the collective bargaining
5 process in good faith. The applicable statute is 39-31-305
6 M.C.A. which provides, in its entirety, as follows:

7 "(1) The public employer and the exclusive represen-
8 tative, through appropriate officials or their rep-
9 resentatives, shall have the authority and the duty to
10 bargain collectively. This duty extends to the obli-
11 gation to bargain collectively in good faith as set
12 forth in subsection (2) of this section.

13 (2) For the purpose of this chapter, to bargain
14 collectively is the performance of the mutual obli-
15 gation of the public employer or his designated
16 representatives and the representatives of the exclusive
17 representative to meet at reasonable times and negotiate
18 in good faith with respect to wages, hours, fringe
19 benefits, and other conditions of employment or the
20 negotiation of an agreement or any question arising
21 thereunder and the execution of a written contract
22 incorporating any agreement reached. Such obligation
23 does not compel either party to agree to a proposal or
24 require the making of a concession.

25 (3) For purposes of state government only, the require-
26 ment of negotiating in good faith may be met by the
27 submission of a negotiated settlement to the legis-
28 lature in the executive budget or by bill or joint
29 resolution. The failure to reach a negotiated settle-
30 ment for submission is not, by itself, prima facie
31 evidence of a failure to negotiate in good faith."

32 Because the Montana Act has yet to reach its eighth birth-
day, there is an understandable lack of precedent from our
Montana Supreme Court. It is however, acknowledged that the
Montana Act is patterned closely on the Federal Act and it
is further acknowledged that our Court has turned to Federal
cases for interpretation as we do here reviewing the
authorities cited. See Board of Trustees v. State ex rel
Board of Personnel Appeals, et al, 36 St. Rptr. 2311
(decided December, 1979). One significant difference noted
between the Federal Act and the Montana Act is with respect
to the prosecution of unfair labor practice charges. Under
the federal procedure, a union or employee files a complaint,

1 the National Labor Relations Board investigates and, in its
2 discretion, then files a complaint which is prosecuted by
3 the NLRB. Here, the initial complainant in case of a union
4 or an employee retains both control and responsibility for
5 the prosecution of the action before the Board & has the burden
6 of sustaining its case by "a preponderance of the evidence."
7 See generally Loring, Labor Relations Law, 39 Montana Law
8 Review 33, at page 45.

9 2. SUMMARY JUDGMENT. The Union's motions and the
10 State's cross-motions are brought under the provisions of
11 Rule 56 M.R.Civ.P. which are applicable here under the
12 provisions of Montana Administrative Code. In Anaconda Co.
13 v. General Accident Fire & Life Assurance Corp., et al, 37
14 St. Rptr. 1589, our Court summarized prior rulings as to
15 when a Motion for Summary Judgment should be granted:

16 "Rule 56(c), M.R.Civ.P., states that summary judgment
17 shall be rendered only if:

18 ". . .the pleadings, depositions, answers to interro-
19 gatories, and admissions on file. . .show that there
20 is no genuine issue as to any material fact and
21 that the moving party is entitled to a judgment as
22 a matter of law."

23 The question to be decided on a motion for summary
24 judgment is whether there is a genuine issue of
25 material fact and not how that issue should be
26 determined; the hearing on the motion is not a trial.
27 Fulton v. Clark (1975), 167 Mont. 399, 538 P.2d 1371;
28 Matteucci's Super Save Drug v. Mustad Corporation
29 (1971), 158 Mont. 311, 491 P.2d 705.

30 The party moving for summary judgment has the burden of
31 showing the complete absence of any genuine issues as to
32 all facts which are deemed material in light of those
substantive principles which entitled him to a judgment
as a matter of law. Harland v. Anderson (1976), 169
Mont. 447, 548 P.2d 613.

33 In Kober v. Stewart (1966), 148 Mont. 117, 121, 417
P12d 476, this Court cited 6 Moore's Federal Practice,
Sec. 56.15/3/:

34 "The Courts hold the movant to a strict standard. To
35 satisfy his burden the movant must make a showing that
36 is quite clear what the truth is, and that excludes any
37 real doubt as to the existence of any genuine issue of
38 material fact.

1 "Since it is not the function of the trial court to
2 adjudicate genuine factual issues at the hearing on
3 the motion for summary judgment, in ruling on the
4 motion all inferences of fact from the proofs proffered
5 at the hearing must be drawn against the movant and in
6 favor of the party opposing the motion. And the papers
7 supporting movant's position are closely scrutinized,
8 while the opposing papers are indulgently treated, in
9 determining whether the movant has satisfied his
10 burden.'

11 ". . . If there is any doubt as to the propriety of a
12 motion, courts should, without hesitancy, deny the
13 same.'" Kober v. Stewart, 148 Mont. at 122."

14 SEction 39-31-305 requires both the public employer and
15 the union to "bargain collectively in good faith". This
16 duty has been defined as a "obligation--to participate
17 actively in the deliberations so as if to indicate a present
18 intention to find base of agreement--." This implies both
19 "an open mind and a sincere desire to reach an agreement
20 . . .". See Morris, A Developing Labor Law, ABA Edition.
21 With the context of a motion for summary judgment which is
22 to be denied if there is any question as to the existence of
23 a material fact, this is a difficult standard to apply and
24 one much like the duty of reasonable care in negligence
25 actions. It is to be noted that the Courts have been
26 reluctant to grant summary judgment in the usual negligence
27 case except in the most compelling case. See Wright and
28 Miller Federal Practice and Procedure, Section 2729.

29 Both the Union motions and the State's cross-motions
30 have been well and extensively briefed and the Examiner has
31 had the benefit of review of all of the authorities cited
32 as well as the discovery performed.

With that background we now turn to the individual
motions and cross-motions.

3. UNION COUNT I. The Union charges, in Count I,
that on February 4, 1979, during negotiations, the Governor's
bargaining agent placed an "arbitrary limitation of 14%
increase in total compensation for the bienium for any

1 employee. . .". The State replies that they put a "cap of
2 14%" on the employer's offer at a February 3 negotiation and
3 denies that this was an unfair labor practice.

4 The Union's brief on this particular Count is not
5 helpful for no case law is cited to the effect that this
6 act or statement, standing alone, represented bad faith.
7 Rather, the argument digresses as to the Governor's desire
8 to provide Homestead Tax Relief and a claim in brief that
9 the Governor's representative was implying that the Legis-
10 lature would not accept anything more than 14%. Whether
11 the statement was made in the context of a cap or an arbi-
12 trary limitation, the Examiner is not persuaded that such
13 a statement was an unfair labor practice. The State's
14 cross-motion is granted as to Count I.

15 4. UNION COUNT II. The thrust of the Union's Count
16 II is that the bargaining agent for the State did on
17 January 15, 1979, agree to a joint petition for factfinding
18 That thereafter the State backed out. The State admits to
19 an oral agreement to factfinding, denies signing a request
20 for factfinding and alleges that before a factfinder was
21 chosen, the Union issued notice of intention to strike on
22 February 5. The State pleads that a strike would clearly
23 subvert the impartiality of the factfinding process and
24 that it therefore withdrew. The State's position is
25 buttressed by the affidavit that Mr. Schram, counsel for
26 the State Personnel Division, to which is attached a letter
27 to Robert Jensen, Administrator of this Board, dated January
28 25, 1979, from Mr. Schram. In this letter the State urges
29 that it was the public notice of the Union to strike which
30 caused it to renege on the agreement for a factfinder. The
31 Union counters, page 10 of its brief, that the State reneged
32 and that "this bad faith action by the Governor's bargaining

1 agent caused the strike. . ." The charges and counter-
2 charges of the parties in briefs and the letter to Jensen
3 compel the inevitable conclusion that there exists material
4 questions of fact which require hearing. Therefore, both
5 motions as to Union Count II are denied.

6 5. UNION COUNT III. The Union charges that on
7 February 4, 1979, the Governor's bargaining agent said that
8 the public employer's "last, best and final offer" would
9 be replaced by a lower offer if the Union went on strike.
10 The State admits that it told the Union that if its offer
11 were rejected and the Union went on strike, the State would
12 reserve the right to revert to its former offer. It is
13 denied that the same is an unfair labor practice.

14 The Union urges in brief (page 4) that the testimony
15 of Thomas Gooch supports its charge. However, Mr. Gooch
16 does not go as far as the State's answer. No where does he
17 testify that the State would revert to its prior offer if
18 a strike were called.

19 The authority cited on point by the State, pages 11
20 and 12 are persuasive in that the employer may in fact
21 withdraw an offer not accepted. However, the Examiner is
22 aware that both sides urge that the "totality" of the other
23 party's conduct entitle them to victory. This argument is
24 particularly stressed by the union. As we note hereinafter,
25 the Examiner finds it impossible to deal with the totality
26 argument in the absence of the various counts which the
27 parties themselves deem not ripe for summary judgment.
28 Because of the paucity of facts presented in support of the
29 respective motions on this Count as to what actually was
30 said, how it was said and interpreted, and because it may
31 have bearing on the totality concept which apparently will
32 be urged by the Union, we deny each party's motions on this
Count.

1 6. UNION COUNT IV. This Count involves the so-called
2 "room to move charge." The Union alleges that the State
3 called two bargaining sessions and represented the State
4 had room to move. However, the State agent insisted that
5 the Union make the first move. The State admits in pleading
6 that it did call the sessions and that it did request the
7 Union to make the first proposal because of the "unreason-
8 ably high demand of the complainant" and because the Union
9 had heretofore referred to several of their offers as
10 "last offers".

11 In brief, the Union urges that the State was merely
12 engaged in "surface bargaining" which the Examiner interprets
13 as putting up a front of bargaining without really intending
14 to bargain in good faith. Neither side suggests reference
15 to any specific discovery which would enlighten the Examiner
16 as to what was actually said; whether anybody made a move
17 and what was accomplished, if anything, at these bargaining
18 sessions. I find no authority submitted by the Union which
19 indicates that one calling a bargaining session must indeed
20 make a new offer different from that prior offer. Indeed,
21 the contrary appears to be true from the authority cited
22 by the State in brief. However, we deem the charge that
23 the State was engaged in surface bargaining sufficiently
24 serious to deny both motions so that the facts may be more
25 fully developed at hearing.

26 7. UNION COUNT VI. In this Count the Union alleged
27 that the State said, on February 4, 1979, that they would
28 take a strike before authorizing an across-the-board
29 increase in wages. The State admits the allegation and
30 denies that it is an unfair labor practice. The State urges
31 that the Union was for an across-the-board dollar increase
32 and the State was urging percentage increases for everyone.

1 The State goes on to urge that the refusal to yield to the
2 Union's demand, i.e., across-the-board dollar increase,
3 in the face of a strike was not an unfair labor practice.
4 It is the opinion of the Examiner that the Union's Motion
5 must be denied because of the plain language contained in
6 the last sentence of subparagraph 2 of Section 39-31-305
7 to the effect that "such obligation does not compel either
8 party to agree to a proposal or require the making of a
9 concession." Were the factual material set forth in the
10 State's brief on point incorporated in an Affidavit or,
11 perhaps, if no hearing need be had on any other Count, the
12 Examiner would be inclined to grant the State's Cross-Motion.
13 However, without factual materials presented in the record,
14 the Examiner feels compelled under Rule 56 (c) to deny the
15 State's Cross-Motion also.

16 8. UNION COUNT VIII. The Union complains in this
17 Count that the State refused to mediate with local Union
18 1064. In response the State denies that it refused to
19 mediate but suggested that in view of the Union's position
20 it would be fruitless. Both the issue raised by the
21 pleadings and the arguments advanced in brief indicate the
22 clear presence of questions of material fact as to what
23 was said, how it was said and with what intent and both
24 motions are denied.

25 9. UNION COUNT XIV. In this count the Union charges
26 that the State bargained in bad faith and/or interfered
27 with, restrained or coerced employees in the exercise of
28 their rights guaranteed (under the Act) by statements to
29 the media generally and by mailing employer's philosophy
30 of the collective bargaining contract directly to each
31 Union member. The State admits that it mailed to each Union
32 member a letter containing a comparison of the various offers

1 and alleges this was done with the exclusive representative.
2 It must be first noted that the Union has failed
3 completely to argue or present facts to the Examiner with
4 respect to any statements to the media. With respect to the
5 letter, the same has been presented to the Examiner as an
6 attachment to State's affidavit. We do not find it to
7 contain the statement of the "employer's philosophy" but
8 rather, as alleged by the State, comparison of the offers.

9 The Examiner finds that the letter sent by the State to
10 each Union member was not an unfair labor practice and the
11 Union's Motion is denied. In Board of Trustees v. State
12 ex rel Board of Personnel Appeals, 36 St. Rptr. 2311, our
13 Supreme Court recognized that an employer has the right to
14 inform striking employees of the employer's intent to
15 permanently replace non-returning workers after a specified
16 date. In this Examiner's mind, that is a far more serious
17 step than the letter presented. In Board of Trustees, the
18 Billings School District went much further and our Court
19 recognized a statement of the Chairman of the Board that
20 the letter was not, in effect, a legitimate notification of
21 exercise of an employer's right but rather a means to break
22 the strike. That was coercive. Here, there is nothing
23 contained in the letter which could be deemed, as a matter
24 of fact, coercive. Accordingly, the State's Motion on this
25 Count is granted.

26 10. UNION COUNT X. The Union did not move for
27 summary judgment on Count X. The State filed a cross-motion.
28 Count X alleges "That the Governor's bargaining agent, due
29 to the disparate bargaining positions of the parties, has
30 inherently restrained, interfered with, and/or coerced
31 employees in the exercise of their rights guaranteed under
32 39-31-201, et. seq. M.C.A."

1 While this is notice pleading permitted by the
2 statute, it frankly leaves one in doubt as to what the
3 charge actually is. The State's brief contains persuasive
4 authority to the effect that disparity alone is obviously
5 not per se an unfair labor charge but precious little factual
6 background. We do not observe that the Union has treated
7 factually of the matter either.

8 Mindful of the command of our Court in the Anaconda
9 decision that when in doubt, deny, and also mindful of the
10 fact that a hearing must be had in any event, the State's
11 Motion is denied.

12 11. STATE'S COUNTER-CHARGE 12. The State charges
13 the Union with an unfair labor practice charge in that the
14 Union refused to sign a back to work agreement unless the
15 State agreed to reinstate all institutional employees
16 including those not in the union bargaining unit. The Union
17 generally justifies this by alleging it incorporates exist-
18 ing law into the contract.

19 I will not prolong this opinion by extended discussion
20 of this charge for the reason that neither side again has
21 directed the Examiner to facts in the record upon which I
22 can reach any intelligent decision. While the briefs would
23 be perfectly appropriate to a hearing or post-hearing
24 brief, they do not touch side or bottom of the existence or
25 non-existence of material facts so as to compel summary
26 judgment. The State's Motion is denied.

27 12. THE TOTALITY ARGUMENT. The Union, in the conclusion
28 to its brief urges that the "totality" of the employer's
29 conduct showed it was merely engaging in surface bargaining
30 without intention to reach agreement. It is urged that
31 the specific and cumulative acts of the defendant constituted
32 such unfair labor practice as to entitle complainant to
summary judgment. This is denied for the reasons above stated

1 i.e., there remain material counts not ripe for summary
2 judgment and any consideration of this concept must await
3 final hearing.

4 13. BACK PAY - ATTORNEY'S FEES. That State urges that
5 even if an unfair labor practice is proven against the State,
6 the employees are not entitled to back pay. They further
7 urge that no attorney's fees may be allowed to the Union.

8 The Examiner declines to rule on either issue at this
9 time for several reasons. First, a claim for back pay and
10 attorney's fees is contained in the so-called "Prayer" of
11 the informal complaint of the Union. The Examiner is not
12 persuaded that summary judgment can be granted against the
13 prayer which is not truly a part of the complaint.

14 More significantly, it is the opinion of the Examiner
15 that a decision on these matters would be totally premature
16 at this time and should await the hearing and Findings of
17 Fact contemplated by Section 39-31-406. It is to be noted
18 that in subparagraph 4 of 39-31-406 it is provided that
19 if, "a preponderance of the evidence taken, the Board (i.e.
20 Examiner) is of the opinion that any person named in the
21 complaint has engaged in . . .an unfair labor practice, it
22 shall state its findings of fact and shall . . .take such
23 affirmative action, including reinstatement of employees
24 with or without back pay, as will effectuate the policies
25 of this chapter. . .".

26 The Examiner does not deem it appropriate or practical
27 to attempt to deal with these important issues in this
28 piecemeal fashion on motions and cross-motions for summary
29 judgment. Therefore, the State's Motions on point are denied.

30 Dated this 11 day of March, 1981.

PATRICK F. HOOKS
HEARING EXAMINER

CERTIFICATE OF SERVICE

I, PATRICK F. HOOKS, hereby certify that I did, on
the 11th day of March, 1981, mail a true and correct copy
of the above ORDER AND DECISION to the following persons
at their last known address:

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Helena, MT 59601

LeROY H. SCHRAMM
State Personnel Division
Department of Administration
Room 130, Mitchell Building
Helena, MT 59601

Patrick F. Hooks

PATRICK F. HOOKS

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IN THE MATTER OF UNFAIR LABOR PRACTICE)
AMERICAN FEDERATION OF STATE, COUNTY)
AND MUNICIPAL EMPLOYEES, AFL-CIO,)
Complainant,)
vs.)
GOVERNOR, STATE OF MONTANA,)
Defendant.)

ULP 11-A-79
ORDER

On November 19, 1979, the Montana Public Employees Association, Inc., (hereafter Public Employees) filed a motion to intervene in the pending matter on the part of the plaintiff. The motion was filed pursuant to ARM 24.26.103 and 24.26.106. The affidavit of Thomas E. Snyder, Executive Director of Public Employees was filed in support of the motion.

Both the Governor and American Federation of State, County and Municipal Employees, AFL-CIO, the complainant and defendant, have filed written objections to the motion.

The undersigned Examiner, deeming the matter subject to determination on the basis of the written motion and written objections on file, and after fully considering the merits, now makes and enters the following

FINDINGS AND OPINION

1. The original complaint was filed herein by the complainant on February 12, 1979. The Governor promptly answered, various amendments to the pleadings have been allowed and filed, and extensive discovery has taken place including the depositions of various parties.

2. ARM 24.26.103 provides, in the opinion of the Examiner, that the right of intervention is discretionary and not mandatory or of right.

3. The basis for intervention by the Public Employees,

1 as set forth in the Snyder affidavit, is that the Public Em-
2 ployees have been an exclusive representative of the two hun-
3 dred fifty-six persons bargaining unit at the Montana State
4 Prison since November 6, 1979. The Public Employees have
5 succeeded as representative to complainant named above.

6 It is further set forth in the Snyder affidavit that
7 the "employees now represented by MPEA and Montana State
8 Prison have a real interest in a financial stake in the out-
9 come of said pending proceedings;"

10 4. There can be no question that the employees at the
11 State Prison do have an interest and a financial stake in
12 the pending proceedings. However, that is not the question
13 presented. Here, the question presented is whether the new
14 exclusive representative should be permitted to intervene.

15 There is no allegation contained in the affidavit
16 or motion to the effect that the representation in pending
17 proceedings by AFSCME is in any way inadequate. Indeed, it
18 appears to the Examiner that the present representation of
19 the Prison employees by their former representative, AFSCME,
20 is vigorous and could not be deemed to be inadequate.

21 Moreover, both the complainant and the defendant
22 have objected, in part, to the motion on the ground that Pub-
23 lic Employees were not a representative of the Prison employ-
24 ees at the time the charges and counter charges arose and
25 that therefore the Public Employees have no first hand know-
26 ledge of the facts giving rise to these proceedings. In the
27 absence of a strong showing that the rights of the employ-
28 ees of the State Prison are being adversely affected by
29 representation being afforded to said employees by the
30 present complainant, the Examiner is unwilling to prevent
31 intervention for the reason that it would cause undue and
32 untimely delay in bringing the pending proceeding to a

1 final decision.

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ORDER

IT IS ORDERED that motion to intervene filed by Montana Public Employees Association, Inc., is hereby denied.

Dated January 3, 1980.

Patrick F. Hooks

Hearings Examiner

- CC: Mr. Barry Hjort
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