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BOARD OF PERSONNEL APPEALS

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. 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,

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

It is further set forth in the Snyder affidavit that the "employees now represented by MPEA and Montana State Prison have a real interest in a financial stake in the outcome of said pending proceedings;"

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

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

Moreover, both the complainant and the defendant have objected, in part, to the motion on the ground that Public Employees were not a representative of the Prison employees at the time the charges and counter charges arose and that therefore the Public Employees have no first hand knowledge of the facts giving rise to these proceedings. In the absence of a strong showing that the rights of the employees of the State Prison are being adversely affected by representation being afforded to said employees by the present complainant, the Examiner is unwilling to prevent intervention for the reason that it would cause undue and untimely delay in bringing the pending proceeding to a

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final decision.

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

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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 -	FINAL ORDER
GOVERNOR, STATE OF MONTANA, Defendant.	

* *

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 30 day of April, 1982.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy
John Kelly Addy
Chairman

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 respectively 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

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 24 day of March, 1982.

John Kelly Addy
Chairman
Board of Personnel Appeals

BEFORE THE BOARD OF PERSONNEL APPEALS

STATE OF MONTANA

* * * * * * *

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

Complainant,

No. ULP 11-A-79

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

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

8. The counter charges made by the State against the Union have likewise been reduced by withdrawal. The remaining charges are set forth on Exhibit "A".

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

SPECIFIC FINDINGS

COUNT VII.

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

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

The Examiner finds that the evidence supports the Union's charge on this point. Mr. Donald Judge testified as to repeated calls made by him to Mr. Schramm prior to November, 1978. (Tr. 165) Mr. Schramm acknowledges these contacts and testified that he was unable to get definitive information from the Budget Director to enable him to come to a conclusion with respect to the State's position on economic issues. (Tr. 164)

Mr. George Bousliman, former Budget Director for the State of Montana, testified that his office was required by law to submit a preliminary budget to the Legislative Fiscal Analyst by November 15th and a final budget for the same office by December 1st of 1978. (Tr. 102)

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

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

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

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

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

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

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

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

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

COUNT IV

15. The thrust of Count IV is that the State, on two specified occasions, incidated to the Union or to the Mediator that it had "room to move" and suggested a bargaining session and that at each ensuing bargaining session the State insisted that the Union make the first move.

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

COUNT II

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

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

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

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

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

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

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

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

COUNT III

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

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

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

A. This was at the end of a long session, and I told 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 --

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

A With the conditions that I stated earlier, yes.

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

A I told her that I thought it would be inaccurate to characterize it as such because we still had 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 conversation went."

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

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

COUNT V AND THE TOTALITY CLAIM

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

COUNTER CHARGE NO. 5

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

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

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

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

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

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

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

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

GENERAL

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

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

CONCLUSIONS OF LAW AND OPINION

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

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

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

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

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

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

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

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

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

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

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

5. There is little case law on point. The Union cites N.L.R.B. v. Thompson, Inc., 78 L.R.R.M. 2593. There it was held that a reversal of position after a supposed agreement reached might be considered as evidence of lack of good faith in bargaining. See also N.L.R.B. v. Texas Coca-Cola Bottling Co., 365 F.2d 321. However, in Thompson, the employer went further in that he totally reneged on a prior agreement on one issue after all of the other issues had been settled. In Caroline Farms v. N.L.R.B., 481 F.2d 205, there was also a retreat from a previously agreed position by an employer. There, it was held that the change in position was not taken with the purpose of frustrating ultimate agreement and therefore was not an unfair labor practice.

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

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

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

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

The facts of the charge are sustained fully by the evidence. There is, however, no evidence that the State did in fact revert to a former offer. While the facts of the charge are sustained by the evidence, that does not establish that such conduct is an unfair labor practice. The federal case law cited by the State is most persuasive that either party may retract an offer not accepted and revert to a lower offer without being held guilty of bad faith bargaining. See N.L.R.B. v. Alva Allen Industries, 369 Fed. 2d 318; N.L.R.B. v. Tonco Communications, 567 F. 2d 871.

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

7. COUNTER CHARGE 5.

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

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

8. COUNTER CHARGE 10.

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

9. COUNTER CHARGE 11.

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

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

10. COUNTER CHARGE 12.

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

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

II. THE TOTALITY CHARGES.

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

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

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

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

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

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

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

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

which extended through February 4th.

The Examiner concludes that the State act with respect to the stipulations and conditions ended the moratorium on fixing the strike deadline. However, the Examiner cannot find substantial evidence in the record that the State's insistence on the stipulation triggered the strike. It appears from the record that the strike was imminent before the consession on fact finding and that concession only resulted in the moratorium. On January 29, 1979, Mr. Donald Judge wrote the State's negotiator and the Administrators of the various institutions and advised them of the strike deadline. (Complainant's Ex. 8) It is to be noted that Mr. Judge stated that the members felt the strike was necessary "in the face of the State's position regarding wage and benefit increase proposals for the 1980 - 1981 biennium." It is concluded from the total record that the strike was an economic strike and was not a strike proximately caused by the alleged unfair labor practice.

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

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

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

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

14. ATTORNEYS' FEES.

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

The Montana Supreme Court has long adhered to the rule that attorneys' fees may not be awarded to the successful party unless there is a contractual agreement or unless there is specific statutory authorization. See Nikels v. Barnes, 150 Mont. 113, 454 P.2d, 608; Veterans Rehabilitation Center, Inc. v. Birrer, 170 Mont. 182, 551 P.2d 1001; Wittner v. Jonal Corp., 169 Mont. 247, 545 P.2d 1094. It is the conclusion of the Examiner that under these cases an award could not be made in the absence of specific statutory authorization. Moreover, even if this board had the equity power of a District Court, the claims here are not of the type which would bring this case within Foy v. Anderson, 176 Mont. 587, 580 P.2d 114, an equitable exception to the general rule.

Dated January 13, 1982.

PATRICK F. HOOKS
HEARING EXAMINER

EXHIBIT "A"

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

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

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

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

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

COUNT II

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

COUNT III

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

COUNT IV

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

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 FPSCME 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.

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.

EXHIBIT "B"

Section 39-31-401 MCA provides that it is an unfair labor practice for an employer to:

> "(5) Refuse to bargain collectively in good faith with an exclusive representative."

39-31-402 MCA provides that it is an unfair labor practice for a labor organization or its agents to:

> "(2) Refuse to bargain collectively in good faith with a public employer if it has been designated as the exclusive representative of employees."

Section 39-31-305 MCA provides:

> "(1) The public employer and the exclusive representative through appropriate officials or their representatives, shall have the authority and the duty to bargain collectively. This duty extends to the obligation to bargain collectively in good faith as set forth in subsection (2) of this section.
>
> (2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or his designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession.
>
> (3) For purposes of state government only, the requirement of negotiating in good faith may be met by the submission of a negotiated settlement to the legislature in the executive budget or by bill or joint resolution. The failure to reach a negotiated settlement for submission is not, by itself, prima facie evidence of a failure to negotiate in good faith."

The Montana Supreme Court, in Board of Trustees v. State ex rel Board of Personnel Appeals, et al, 36 St. Rptr. 2311 (December, 1979), has noted the similiarity between the Montana Collective Bargaining Act and the National Labor Relations Act and suggested the appropriateness of considering federal case law in interpreting the Montana Act.

Bargaining in good faith under the Federal Act has been

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

> "A. Totality of Conduct. The duty to bargain in good faith is an 'obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement . . .' This implies both 'an open mind and a sincere effort . . . to reach a common ground.' The presence or absence of intent 'must be discerned from the record.' "
>
> (Morris, The Developing Labor Law, page 278.)

> "The courts have clarified this requirement by ruling that in order to fulfill their mutual good faith bargaining duty, both the employer and the employees' representative must: (1) enter into negotiations with an open mind, i.e., without a predetermined disposition not to bargain; and (2) make a sincere effort to reach an agreement on mutually acceptable terms."
>
> (4 Kheel, Labor Law Section 16.02(2).)

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

* * * *

ORDER AND DECISION

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

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

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

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

The Union brings fourteen counts of unfair labor practice

provisions of 39-31-401. The allegations are summarized in the amended charge as follows:

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

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

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

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

1. THE ACT. Section 39-31-401 M.C.A. sets forth those actions which will subject a public employer to a charge of unfair labor practice. The companion section, 39-31-402 specifies those acts on the part of a labor organization which are deemed to be unfair labor practices. 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

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

> "(1) The public employer and the exclusive representative, through appropriate officials or their representatives, shall have the authority and the duty to bargain collectively. This duty extends to the obligation to bargain collectively in good faith as set forth in subsection (2) of this section.
>
> (2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or his designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession.
>
> (3) For purposes of state government only, the requirement of negotiating in good faith may be met by the submission of a negotiated settlement to the legislature in the executive budget or by bill or joint resolution. The failure to reach a negotiated settlement for submission is not, by itself, prima facie evidence of a failure to negotiate in good faith."

Because the Montana Act has yet to reach its eighth birthday, 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,

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

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

> "Rule 56(c), M.R.Civ.P., states that summary judgment shall be rendered only if:
>
> ". . .the pleadings, depositions, answers to interrogatories, and admissions on file. . .show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."
>
> The question to be decided on a motion for summary judgment is whether there is a genuine issue of material fact and not how that issue should be determined; the hearing on the motion is not a trial. Fulton v. Clark (1975), 167 Mont. 399, 538 P.2d 1371; Matteucci's Super Save Drug v. Rustad Corporation (1971), 158 Mont. 311, 491 P.2d 785.
>
> The party moving for summary judgment has the burden of showing the complete absence of any genuine issues as to 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.
>
> In Rober v. Stewart (1966), 148 Mont. 117, 121, 417 P12d 476, this Court cited 6 Moore's Federal Practice, Sec. 56.15/1/:
>
> "'The Courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.

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

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

Section 39-31-105 requires both the public employer and the union to "bargain collectively in good faith". This duty has been defined as a "obligation--to participate actively in the deliberations so as if to indicate a present intention to find base of agreement—." This implies both "an open mind and a sincere desire to reach an agreement . . .". See Morris, A Developing Labor Law, ABA Edition. With the context of a motion for summary judgment which is to be denied if there is any question as to the existence of a material fact, this is a difficult standard to apply and one much like the duty of reasonable care in negligence actions. It is to be noted that the Courts have been reluctant to grant summary judgment in the usual negligence case except in the most compelling case. See Wright and Miller Federal Practice and Procedure, Section 2729.

Both the Union motions and the State's cross-motions have been well and extensively briefed and the Examiner has had the benefit of review of all of the authorities cited 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 biennium for any

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

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

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

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

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

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

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

"room to move charge." The Union alleges that the State called two bargaining sessions and represented the State had room to move. However, the State agent insisted that the Union make the first move. The State admits in pleading that it did call the sessions and that it did request the Union to make the first proposal because of the "unreasonably high demand of the complainant" and because the Union had heretofore referred to several of their offers as "last offers".

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

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

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

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

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

It must be first noted that the Union has failed completely to argue or present facts to the Examiner with respect to any statements to the media. With respect to the letter, the same has been presented to the Examiner as an attachment to State's affidavit. We do not find it to contain the statement of the "employer's philosphy" but rather, as alleged by the State, comparison of the offers.

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

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

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statute, it frankly leaves one in doubt as to what the charge actually is. The State's brief contains persuasive authority to the effect that disparity alone is obviously not per se an unfair labor charge but precious little factual background. We do not observe that the Union has treated factually of the matter either.

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

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

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

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

judgment and any consideration of this concept must await final hearing.

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

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

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

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

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:

DOUGLAS B. KELLEY
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