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BOARD OF PERSONNEL APPEALS

No. 81-484

IN THE SUPREME COURT OF THE STATE OF MONTANA

1982

SAVAGE PUBLIC SCHOOLS, RICHLAND CO.
ELEMENTARY DISTRICT #7, and HIGH SCHOOL
DISTRICT #2,

MLP 30 79

Petitioners and Respondents,

vs.

SAVAGE EDUCATION ASSOCIATION, AFFILIATED
WITH MONTANA EDUCATION ASSOCIATION, and
MONTANA BOARD OF PERSONNEL APPEALS,

Appellants and Respondents.

Appeal from: District Court of the Seventh Judicial District,
In and for the County of Richland
Honorable L. C. Gulbrandson, Judge presiding.

Counsel of Record:

For Appellants:

Hilley & Loring, Great Falls, Montana
Emilie Loring argued, Great Falls, Montana
James Gardner argued, Helena, Montana

For Respondents:

R. W. Heineman argued, Wibaux, Montana
Gene Huntley, Baker, Montana

For Amicus Curiae:

Smith Law Firm, Helena, Montana
Chadwick Smith argued, (Montana School Boards Assoc.)
Helena, Montana

Submitted: May 14, 1982

Decided: July 6, 1982

Filed: JUL 6 - 1982

Thomas J. Kearney

Clerk

Mr. Chief Justice Frank I. Haswell delivered the Opinion of the Court.

The Savage Education Association (SEA) and the Board of Personnel Appeals (the Board) appeal from the decision of the Richland County District Court reversing the Board's order. The Board had found that the School District had committed an unfair labor practice in violation of section 39-31-401(5), MCA, by its refusal to submit a grievance to arbitration. The Board specifically stated that the School District enjoyed unfettered discretion in hiring decisions, but their failure to arbitrate the procedural conditions for nonrenewal of a nontenured teacher violated the collective bargaining agreement between the parties. In reversing the Board's order, the Richland County District Court went far beyond the narrow ruling of the BPA and held that all matters relating to hiring and nonrenewal of nontenured teachers were statutorily and contractually reserved to the sole discretion of the school district.

On appeal, the SEA and Board contend that the District Court abused its discretion by deciding issues not ruled upon by the administrative agency. We find that the District Court exceeded the proper scope of judicial review and reverse its judgment, reinstating the Board's final order. We hold that the refusal of the school district to arbitrate whether the procedural steps for nonrenewal were followed was a breach of the collective bargaining agreement and constituted an unfair labor practice. Because the question is not properly before us, we do not address the other issue raised by appellants: Whether a school district may agree to arbitrate the substantive basis of nonrenewal of a nontenured teacher.

As the exclusive representative for the teachers, the SEA entered into a collective bargaining agreement with the school district. Art. XVII of the agreement provides for a grievance procedure with final and binding arbitration as the final step. Art. XIII, § 2 of the agreement guaranteed certain procedural rights to nontenured teachers:

"Section 2: Notice of Termination (Nontenure):
Every nontenure teacher being terminated shall be entitled to the following:

"1. The teacher shall be notified in writing before the fifteenth (15) day of April.

"2. Within ten (10) days after receipt of such notice the teacher may request, in writing, a written statement declaring clearly and explicitly the specific reason(s), for the termination of his or her service. The school district will supply such statement within ten (10) days after the request.

"3. The teacher may, within ten (10) days after receipt of the statement of reasons, appeal the termination through the grievance procedure."

On March 29, 1979, the school district notified two nontenured teachers that their contracts would not be renewed for the following year. The teachers filed a timely grievance alleging violation of certain articles in the collective bargaining agreement. The matter went through the initial steps of the grievance procedure without satisfactory resolution. The SEA demanded arbitration, but the school board refused, and the matter was submitted to the Board.

The hearing examiner found that the parties had, under the collective bargaining agreement, agreed to allow a nontenured teacher to submit the matter or nonrenewal to arbitration, and had, therefore, refused to bargain in good faith by refusing to submit the issue of teacher nonrenewal to arbitration. The school district appealed the hearing examiners findings and conclusions to the Board.

On appeal, the Board found that the issue for arbitration was much narrower and concerned only whether the procedure

agreed to by the parties was properly used in termination of the teachers. The Board very specifically stated:

" . . . An arbitrator, therefore, merely has to determine whether or not the procedure agreed to by the parties was properly used in the termination of the nontenured teacher. The basis of the dismissal is not a subject of review by the arbitrator. That is, if the teacher was properly evaluated and the basis for the dismissal was discussed with the teacher, then the termination will be upheld. The basis of the termination could be for a good reason or a bad reason, so long as it was discussed with the teacher. As far as this Board can see, the school district has retained unfettered control over the reasons for dismissal of a nontenured teacher is just, this Board will reserve for a different hearing where that issue is presented to it."

The District Court did not address the very narrow interpretation of the Board. Rather, it adopted the arguments of the school district and held that the school district has the sole discretion not to renew the contracts of the two nontenured teachers; that the nonrenewal of their contracts was not a grievance under the collective bargaining agreement; and that the school district was without authority to bargain with the SEA regarding matters of inherent managerial prerogatives, including hiring and retention of employees.

Appellants, SEA and the Board, take exception to all of the District Court's findings and contend that the District Court did not decide the issue that was before it. The SEA and the Board claim that the District Court was limited in its review of the Board's order which required that the only issue to go to arbitration was whether the termination procedures of the bargaining agreement were followed. The District Court went on to decide the broader issue of whether the school district has to arbitrate the substantive basis of nontenured teacher nonrenewal.

The judgment of the District Court is very broad and does not address the specific ruling of the Board. Judicial

review of the Board is governed by section 39-31-409, MCA, and section 2-4-701, et seq., of the Montana Administrative and Procedure Act. A review of the Board's order, in conjunction with the judgment of the District Court clearly shows that the District Court exceeded the proper scope of judicial review. The Board recognized that the issue as to whether nonrenewal was for just cause was not before it. It was unnecessary for the District Court to address the issue.

The school district argues that it was the Board who failed to address the issue stipulated to it by the parties. The stipulated issue was: "whether the refusal of the school district to submit the matter of nonrenewal of a nontenured teacher to binding arbitration is a refusal to bargain in good faith . . ." The Board clearly considered this issue and narrowed it to fit the situation.

The procedures outlined in Art. XIII, § 2 of the Collective Bargaining Agreement merely grant nontenured teachers the right to notice and an explanation for their nonrenewal. These same procedures are already provided for by statute. See section 20-4-206, MCA. The provision of the collective bargaining agreement at issue here merely incorporates these statutory requirements and allows the nontenured teacher access to the grievance procedure for alleged noncompliance by the school district. This does not affect any of the statutorily or contractually reserved management rights of the school district. Such procedural steps for nonrenewal are clearly "conditions of employment" and are subject to collective bargaining. As we stated in *Wibaux Ed. Ass'n. v. Wibaux Cty. High School* (1978), 175 Mont. 331, 573 P.2d 1162:

"It is clear that arbitration [under the collective bargaining agreement] would be available on a limited basis if the 'grievance' was that the school officials or School Board failed to comply with either the evaluation or hearing procedures outlined in [the agreement]." 573 P.2d at 1164.

The refusal of the school district to submit this matter to arbitration violated Art. XIII, § 2 of the Collective Bargaining Agreement. This was a failure to bargain in good faith and constitutes an unfair labor practice as defined in section 39-31-401(5), MCA. See City of Livingston v. Montana Council No. 9, etc. (1977), 174 Mont. 421, 571 P.2d 374.

By deciding issues not properly before it, the District Court exceeded the proper scope of judicial review. Accordingly, we reverse the judgment of the District Court and reinstate the Board's final order.

Donald D. Haswell
Chief Justice

We Concur:

James S. Daly
John Conway Harrison

Mark E. Morrison Jr.
John C. Shesby
Paul R. Schenck
Justices

Mr. Justice Daniel J. Shea concurring:

I join in the majority opinion but also add that perhaps the trial court would not have been so broad in its rulings, that is, deciding issues not before it, if it had not adopted word for word the proposed findings and conclusions of the prevailing parties. A casual study of the respondents' proposed findings and conclusions would have demonstrated that they exceeded by far the issues which the trial court was called on to decide.


Justice

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 30-79:

SAVAGE EDUCATION ASSOCIATION,)
AFFILIATED WITH MONTANA EDUCATION)
ASSOCIATION,)
Complainant,)
- vs -)
SAVAGE PUBLIC SCHOOLS, RICHLAND)
COUNTY ELEMENTARY DISTRICT #7)
AND HIGH SCHOOL DISTRICT #2,)
Defendant.)

FINAL ORDER

* * * * *

Exceptions were filed to the Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order by Defendant Savage Public Schools. Defendant argues that the Recommended Order requiring Defendant to submit to arbitration the termination of two non-tenured teachers is in direct violation of the "sole discretion" of the school board under Section 20-3-324, MCA, to dismiss or employ a teacher, and the "inherent managerial prerogative" of management to rehire a non-tenure teacher as provided for in Section 39-31-303 MCA. The Montana School Boards Association submitted an amicus curiae brief in support of Defendant.

DECISION

This Board, on review of the record of the proceedings, does not find the issues as above stated by the Defendant, to be the issue of this proceeding. Article XVII of the contract in question is a grievance procedure which culminates in final and binding arbitration. Article XIII is the article which states how the school district shall terminate teacher contracts. Section 1 provides for proper evaluation in conformance with Article XII of the agreement. Section 1 of Article XIII also provides that a reason which "could possibly be cited as a

1 reason for termination of a teacher's services" be discussed
2 with the teacher. Section 2 of Article XIII merely writes
3 Section 20-4-206 MCA into the contract. An arbitrator, therefore,
4 merely has to determine whether or not the procedure agreed to by
5 the parties was properly used in the termination of the non-
6 tenured teacher. The basis of the dismissal is not a subject of
7 review by the arbitrator. That is, if the teacher was properly
8 evaluated and the basis for the dismissal was discussed with the
9 teacher, then the termination will be upheld. The basis of the
10 termination could be for a good reason or a bad reason, so long
11 as it was discussed with the teacher. As far as this Board can
12 see, the school district has retained unfettered control over
13 the reasons for dismissal of a non-tenured teacher.

14 Whether or not an arbitrator can decide the issue of
15 whether or not the dismissal of a non-tenured teacher is just,
16 this Board will reserve for a different hearing where that issue
17 is presented to it.

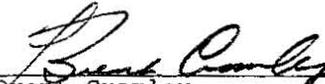
18 IT IS THEREFORE ORDERED:

19 1. The exceptions to the hearing examiner's Findings of
20 Fact, Conclusions of Law and Recommended Order are denied.

21 2. The Findings of Fact, Conclusions of Law, and Recommended
22 Order of the hearing examiner is adopted as the Final Order of
23 this Board.

24 DATED this 12 day of September, 1980.

25 BOARD OF PERSONNEL APPEALS

26
27 By 
28 Brent Cromley
29 Chairman
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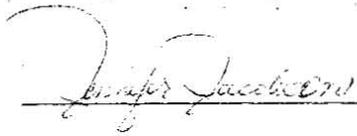
CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that I mailed a true and correct copy of the above FINAL ORDER to the following persons on the 15 day of September, 1980:

Emilie Loring
HILLEY & LORING, P.C.
Attorney for Complainant
1713 Tenth Avenue South
Great Falls, MT 59405

R. W. Heineman
Attorney for Defendant
P.O. Box 313
Wibaux, MT 59353

Gene Huntley
Attorney for Defendant
P.O. Box 897
Baker, MT 59313



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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE #30-79:

SAVAGE EDUCATION ASSOCIATION,)	
AFFILIATED WITH MONTANA EDUCATION)	
ASSOCIATION,)	FINDINGS OF FACT,
)	
Complainant,)	CONCLUSIONS OF LAW,
)	
-vs-)	AND
)	
SAVAGE PUBLIC SCHOOLS, RICHLAND)	RECOMMENDED ORDER
COUNTY ELEMENTARY DISTRICT #7)	
AND HIGH SCHOOL DISTRICT #2,)	
)	
Defendant.)	

On July 20, 1979, Complainant, in above captioned matter, filed an unfair labor practice charge with the Board of Personnel Appeals charging the Defendant with refusal to bargain in good faith, in violation of Section 39-31-401(5) MCA.

Defendant, on August 8, 1979, filed an ANSWER TO COMPLAINT with this Board and moved for dismissal of the unfair labor practice charge.

By NOTICE OF HEARING dated October 16, 1979, this Board denied Defendant's motion for dismissal and set date for formal hearing.

During the pre-hearing conference held in this matter on October 31, 1979, in the Courtroom, Dawson County Courthouse, Glendive, Montana, the Parties stipulated to waive the formal hearing and to submit the matter in briefs. The last brief submitted was received January 21, 1980.

The issue in this matter, as stipulated to by the parties, is as follows: Is the refusal of the School District, the Defendant, to submit the matter of the non-renewal of a nontenured teacher to binding arbitration an unfair labor practice in violation of Section 39-31-401(5) MCA?

After a thorough review of the record, including the briefs submitted by the Parties, I make the following:

1 FINDINGS OF FACT

- 2 1. The Savage Education Association affiliated with the Montana
3 Education Association, Complainant, is recognized by Savage
4 Public Schools, Richland County Elementary District #7 and
5 High School District #2, Defendant, as the exclusive repre-
6 sentative for teachers employed by the districts.
- 7 2. A collective bargaining agreement existed between the Com-
8 plainant and the Defendant from January 20, 1978, through
9 June 30, 1979. An existing collective bargaining agreement
10 became effective March 26, 1979, and shall remain effective
11 through July 1, 1981.
- 12 3. The two collective bargaining agreements (cited above) are
13 identical in the following relevant portions:

14 A. ARTICLE IV

15 SCHOOL DISTRICT RIGHTS

16 Section 1: Inherent Managerial Rights: The exclusive
17 representative recognizes that the school
18 district is not required to and is not per-
19 mitted to meet and negotiate on matters of
20 inherent managerial prerogatives, which
21 include but are not limited to the following:
22 directing employees, hiring, promoting,
23 transferring, assigning and retaining em-
24 ployees, relieving employees from duties
25 because of lack of work or funds or under
26 conditions where continuation of such work be
27 inefficient and nonproductive, maintaining
the efficiency of government operations,
determining the methods, means, job classifi-
cations, and personnel by which government
operations are to be conducted, taking what-
ever actions may be necessary to carry out
the missions of the school district in situa-
tions of emergency, and establishing the
methods and processes by which work is per-
formed. The exclusive representative further
agrees that all management rights as defined
by the law are reserved to the school district.

28 B. ARTICLE XIII

29 EMPLOYMENT STATUS OF TEACHERS

30 Section 2: Notice of Termination (Nontenure): Every
31 nontenure teacher being terminated shall be
entitled to the following:

- 32 1. The teacher shall be notified in writing
before the fifteenth (15) day of April.

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2. Within ten (10) days after receipt of such notice the teacher may request in writing, a written statement declaring clearly and explicitly the specific reason, (s) for the termination of his or her service. The school district will supply such statement within ten (10) days after the request.
3. The teacher may, within ten (10) days after receipt of the statement of reasons, appeal the termination through the grievance procedure.

C. ARTICLE XVII
GRIEVANCE PROCEDURE

- Section 1: Grievance Definition: A "grievance" shall mean an allegation by a teacher, a group of teachers, or the exclusive representative resulting in a dispute or disagreement between the teacher and the school district as to the interpretation or application of terms and conditions contained in this Agreement.
- Section 2: Representative: The teacher, a group of teachers, or the exclusive representative, administrator, or school district may be represented during any step of the procedure by any person or agent designated by such party to sit in his behalf.
- Section 3: Individual Rights: Nothing contained herein shall be construed as limiting the right of any teacher having a complaint to discuss the matter with the appropriate supervisor and to have the problem adjusted without the intervention of the Association. Exhaustion of the informal complaint procedure is not a requisite to invoking the formal grievance procedure.
- Section 4: Definitions and Interpretations:
Subd. 1. Extention: Time limits specified in this Agreement may be extended by mutual agreement.
Subd. 2. Days: Days shall mean teacher work days except as otherwise indicated in this Article.
Subd. 3. Computation of Time: In computing any period of time prescribed or allowed by procedures herein, the date of the act, event, or default for which the designated period of time begins to run shall not be included. The last day of the period so computed shall be counted unless it is a Saturday, a Sunday, or a legal holiday, in the event the period runs until the end of the next day which is not a Saturday, a Sunday, or legal holiday.
Subd. 4 Filing and Postmark: The filing or service of any notice or document herein shall be timely if it is personally served or if it bears a certificate postmark of the

1 United States Postal Service within the time
2 period.

3 Section 5: Time Limitation and Waiver: Grievance shall
4 not be valid for consideration unless the
5 grievance is submitted in writing to the
6 school district's designee, setting forth the
7 facts and the specific provision of the
8 Agreement allegedly violated and the particu-
9 lar relief sought within ten (10) days after
10 the date of the first event or knowledge of
11 the act giving rise to the grievance occurred.
12 Failure to file any grievance within such
13 period shall be deemed a waiver thereof.
14 Failure to appeal a grievance from one level
15 to another within the time periods hereafter
16 provided shall constitute a waiver of the
17 grievance. An effort shall first be made to
18 adjust an alleged grievance informally be-
19 tween the teacher and the school district's
20 designee.

21 Section 6: Adjustment of Grievance: The school district
22 and the teacher shall attempt to adjust all
23 grievances which may arise during the course
24 of employment of any teacher within the
25 school district in the following manner:
26 Subd. 1. Level I: If the grievance is not
27 resolved through informal discussions, the
28 school district designee shall give a written
29 decision on the grievance to the parties
30 involved with ten (10) days after receipt of
31 the written grievance.
32 Subd. 2 Level II: In the event the grievance
is not resolved in Level I, the decision
rendered may be appealed to the Superintendent
of Schools, or his designee, provided such
appeal is made in writing within five (5) days
after receipt of the decision in Level I. If
a grievance is properly appealed to the
Superintendent, the Superintendent or his
designee shall set a time to meet regarding
the grievance within ten (10) days after
receipt of the appeal. Within five (5) days
after the meeting, the Superintendent or his
designee shall issue a decision in writing to
the parties involved.
Subd. 3 Level III: If the grievance has not
been resolved at Level II, the grievance may
be presented to the Board Of Trustees for
consideration. The Board of Trustees reserves
the right to review or not to review the
grievance but must make that decision with
fifteen (15) days after receipt of the written
appeal. In the event the Board of Trustees
chooses to review the grievance, the Board or
a committee or representative(s) thereof
shall within fifteen (15) days, meet to hear
the grievance. After this meeting, the Board
shall have a maximum of fifteen (15) days in
which to decide the grievance in writing.
Subd. 4 Denial of Grievance: Failure by the
school district to issue a decision within
the time periods provided herein shall consti-

1 tute a denial of the grievance, and the
2 teacher may appeal it to the next level.
3 This shall not negate the obligation of
4 the school district to respond in writing
5 at each level of this procedure.

6 Subd. 5 Step Waiver: Provided both parties
7 agree in writing, any level of this
8 grievance procedure may be by-passed and
9 processed at a higher level.

10 Section 7: Arbitration:

11 Subd. 1. Procedure: In the event that the
12 parties are unable to resolve a grievance,
13 it may be submitted to arbitration as de-
14 fined herein, provided a notice of appeal
15 is filed in the office the the Superin-
16 tendent within ten (10) days of the receipt
17 of the decision of the school district in
18 Level III.

19 Subd. 2. Selection of Arbitrator: Upon
20 submission of a grievance to arbitration
21 under the terms of this procedure, the
22 parties shall, within five (5) days after
23 the request to arbitrate, attempt to agree
24 upon the selection of an arbitrator. If
25 no agreement on an arbitrator is reached
26 after five (5) days, either party may
27 request the Montana Board of Personnel
28 Appeals to submit, within ten (10) days to
29 both parties, a list of five (5) names.
30 Within five (5) days of receipt of the
31 list, the parties shall select an arbitrator
32 by striking two (2) names from the list of
alternate order, and the name so remaining
shall be the arbitrator. Failure to request
an arbitration list from the Montana Board
of Personnel Appeals within the time periods
provided herein shall constitute a waiver of
the grievance.

Subd. 3. Hearing: The grievance shall be
heard by a single arbitrator and the parties
shall have the right to a hearing at which
time both parties will have the opportunity
to submit evidence, offer testimony, present
witnesses and subpoena them and make oral or
written arguments relating to the issues
before the arbitrator.

Subd. 4. Decision: The decision by the
arbitrator shall be rendered within thirty
(30) days after the close of the hearing.
Decisions by the arbitrator in cases properly
before him shall be final and binding upon
the parties. [SIC]

Subd. 5. Expenses: Each party shall bear its
own costs of arbitration except that the fees
and charges of the arbitrator shall be shared
equally by the parties. However, the party
ordering a copy of the transcript shall pay
for such copy.

Subd. 6. Jurisdiction: The arbitrator shall
have jurisdiction over disputes or disagree-
ments relating to grievances properly before
the arbitrator pursuant to the terms of this
procedure. The jurisdiction of the arbitrator

1 shall not extend to proposed changes in terms
2 and conditions of employment as defined
3 herein and contained in this written agree-
4 ment; nor shall an arbitrator have jurisdic-
5 tion over any grievance which has not been
6 submitted to arbitration in compliance with
7 terms of the grievance and arbitration proce-
8 dure as outlined herein; nor shall the juris-
9 diction of the arbitrator extend to matters
10 of inherent managerial policy as defined in
11 Article IV of this Agreement. In considering
12 any issue in dispute, in its order, the arbi-
13 trator shall give due consideration to the
14 statutory rights and obligations of the school
15 district to efficiently manage and conduct
16 its operation rights in the operation of the
17 school district.

18 Subd. 7: No Reprisals: No reprisals of any
19 kind will be taken by the Board or the school
20 administration against any person because of
21 participation in this grievance procedure.

- 22 4. Dorothy Tone and Connie Udem were employed by the Defen-
23 dant, both were untenured teachers and both were covered
24 by the collective bargaining agreements (agreements des-
25 cribed in Findings of Fact #2).
- 26 5. Both Ms. Tone and Ms. Udem were given notice of the non-
27 renewal of their teaching contracts by the Defendant. Both
28 Ms. Tone and Ms. Udem implemented procedures outlined in
29 Findings of Fact #3-B and #3-C.
- 30 6. The non-renewal of both Ms. Tone and Ms. Udem, also cap-
31 tioned "grievances", were correctly processed through all
32 steps of the Grievance Procedure (see Findings of Fact #3-C)
preceding arbitration.
- 33 7. The Defendant refused to submit the matter of non-renewal
or, "grievances" of Ms. Tone and Ms. Udem to arbitration.

DISCUSSION

34 The ultimate question in this matter, as aforementioned, is:
35 Whether the refusal of the School District to submit the matter
36 of nonrenewal of nontenured teachers to binding arbitration is a
37 refusal to bargain in good faith in violation of Section
38 39-31-401(5) MCA? For purposes of discussion in this particular
39 case, the ultimate question can be divided into four parts:

1 1. What are the statutory rights, powers and duties of
2 the Trustees of School Districts to hire, dismiss or nonrenew
3 nontenured teachers?

4 2. Did the School District agree to arbitrate the non-
5 renewal of nontenured teachers?

6 3. If such an agreement was made to arbitrate the non-
7 renewal of nontenured teachers, did the School District have
8 authority to make such an agreement?

9 4. Did the negotiated collective bargaining agreement
10 change any of the rights, duties or powers delegated to the
11 School District?

12 In addition to the statutory rights reserved for public
13 employers as defined in the Collective Bargaining Act for
14 Public Employees;

15
16 39-31-303. Management rights of public employers.
17 Public employees and their representatives shall recognize
18 the prerogatives of public employers to operate and manage
19 their affairs in such areas as, but not limited to:
20 (1) direct employees;
21 (2) hire, promote, transfer, assign, and retain
22 employees;
23 (3) relieve employees from duties because of lack of
24 work or funds or under conditions where continuation of
25 such work be inefficient and nonproductive;
26 (4) maintain the efficiency of government operations;
27 (5) determine the methods, means, job classifications,
28 and personnel by which government operations are to be
29 conducted;
30 (6) take whatever actions may be necessary to carry
31 out the missions of the agency in situations of emergency;
32 (7) establish the methods and processes by which work
is performed.

26 The Defendant cited several other statutes to document the
27 rights, powers and duties it possesses:

28 20-3-324. Powers and duties. As prescribed elsewhere
29 in this title, the trustees of each district shall have the
30 power and it shall be their duty to perform the following
31 duties or acts:
32 (1) employ or dismiss a teacher, principal, or other
assistant upon the recommendation of the district
superintendent, the county high school principal, or
other principal as the board may deem necessary, accep-
ting or rejecting such recommendation as the trustees
shall in their sole discretion determine, in accordance
with the provisions of the school personnel part of
this title;

39-31-304. Negotiable items for school districts.
Nothing in this chapter shall require or allow boards of

1 trustees of school districts to bargain collectively upon
2 any matter other than matters specified in 39-31-305(2).

3 39-31-305. Duty to bargain collectively -- good faith.
4 (1) The public employer and the exclusive representative,
5 through appropriate officials or their representatives,
6 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.

7 (2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the
8 public employer or his designated representatives and the
9 representatives of the exclusive representative to meet at
10 reasonable times and negotiate in good faith with respect to
11 wages, hours, fringe benefits, and other conditions of
12 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.

13 20-4-201. Employment of teachers and specialists by
14 contract. (1) The trustees of any district shall have the
15 authority to employ any person as a teacher or specialist,
16 but only a person who holds a valid Montana teacher or specialist certificate or for whom an emergency authorization of employment has been issued that qualifies such person to perform the duties prescribed by the trustees for the position of employment. Each teacher or specialist shall be employed under written contract, and each contract of employment shall be authorized by a proper resolution of the trustees and shall be executed in duplicate by the chairman of the trustees and the clerk of the district in the name of the district and by the teacher or specialist.

17 20-4-203. Teacher tenure. Whenever a teacher has been
18 elected by the offer and acceptance of a contract for the
19 fourth consecutive year of employment by a district in a
20 position requiring teacher certification except as a district
21 superintendent or specialist, the teacher shall be deemed to
22 be reelected from year to year thereafter as a tenure teacher
23 at the same salary and in the same or a comparable position
24 of employment as that provided by the last executed contract
25 with such teacher, unless:

26 (1) the trustees resolve by majority vote of
27 their membership to terminate the services of
28 the teacher in accordance with the provisions
29 of 20-4-204;

30 20-4-206. Notification of nontenure teacher reelection -- acceptance -- termination and statement of reason.
31 (1) The trustees shall provide written notice by April 15
32 to all nontenure teachers who have been reelected. Any
nontenure teacher who does not receive notice of reelection or termination shall be automatically reelected for the ensuing school fiscal year.
(2) Any nontenure teacher who receives notification of his reelection for the ensuing school fiscal year shall provide the trustees with his written acceptance of the conditions of such reelection within 20 days after the receipt of the notice of reelection. Failure to so notify the trustees within 20 days may be considered nonacceptance of the tendered position.

1 (3) When the trustees notify a nontenure teacher of termina-
2 tion, the teacher may within 10 days after receipt of such
3 notice make written request of the trustees for a statement
4 in writing of the reasons for termination of employment.
5 Within 20 days after receipt of the request, the trustees
6 shall furnish such statement to the teacher.

(4) The provisions of this section shall not apply to cases
in which a nontenure teacher is terminated when the financial
condition of the school district requires a reduction in the
number of teachers employed and the reason for the termination
is to reduce the number of teachers employed.

7 Defendant argues these above cited rights, powers and duties are
8 preserved under terms of the negotiated collective bargaining
9 agreement. Article VI - SCHOOL DISTRICT RIGHTS, Section 1 -
10 Inherent Managerial Rights is cited (see Findings of Fact 3-A):

11 . . . inherent management prerogatives, which include, but
12 are not limited to the following: directing employees,
13 hiring, promoting, transferring, assigning and retaining
employees, . . .

14 Article XVII - GRIEVANCE PROCEDURE, Section 7 - Arbitration,
15 Subsection 6 - Jurisdiction, (see Findings of Fact #3-C) is also
16 cited:

17 . . . nor shall the jurisdiction of the arbitrator extend to
18 matters of inherent managerial policy as defined in Article
19 IV of this agreement.

20 Defendant argues that because of the above cited statutes and
21 portions of the negotiated collective bargaining agreement, the
22 powers, rights and duties it possesses relating to the retention
23 or nonrenewal of nontenured teachers cannot be delegated to an
24 arbitrator. Defendant maintains it has "sole discretion" to
25 employ or dismiss a teacher. The issue is not, however, a chal-
26 lenge to the Defendant's powers, rights or duties. The issue
27 concerns the exercise of said powers, rights and duties relating
28 to the renewal or dismissal of nontenured teachers.

29 The facts of School District v. Teachers' Association, 89
30 LRRM 2078 (Mich. Sup. Ct., 1975) are nearly identical if not
31 identical to the facts of the instant matter. In School Dis-
32 trict v. Teachers' a probationary or nontenured teacher who was
given notice of nonrenewal filed a grievance based upon a "just
cause" provision in accordance with the grievance procedure
contained in the collective bargaining agreement. The grievance

1 procedure contained final and binding arbitration. In addition
2 to the statutory rights of the school district, Article II -
3 Board Rights, of the collective bargaining agreement stated:

4 To hire all employees . . . to determine . . . the condi-
5 tions for their continued employment or their dismissal . .

6 And, as in instant matter, the jurisdiction of an arbitrator
7 could not usurp the rights of the school district. The school
8 district argued that the teacher's "claim [grievance] is nonarbi-
9 tratable under [the grievance procedure] where the board reserved
10 to itself without limitation all powers, rights and authority
11 conferred upon and vested in it by the laws of this state, includ-
12 ing the right to 'hire all employees' and to determine 'the
13 conditions for their continued employment or their dismissal or
14 demotion', the exercise of which powers, rights and authorities
15 'shall be limited only by the specific and express terms hereof'
16 in conformance with the Constitution and laws of this state and
17 the United States." The school district further contended that
18 the teacher's claim "on its face" was not governed by the collec-
19 tive bargaining agreement but governed by the Teachers' Tenure
20 Act. The aggrieved teacher and her representative contended that
21 "on its face" the grievance was "governed by the contract." The
22 Michigan Supreme Court cited a portion of the Steelworkers Trilogy;
23 United Steel workers of America v. American Manufacturing Co.,
24 363 U.S. 564, 568, 80 S.Ct. 1363, 4 L. Ed.2d 1403, 46 LRRM 2414
25 (1960) in addressing the question whether a dispute is arbitrati-
26 ble. While such question is for a court, the judicial inquiry
27 "is confined to ascertaining whether the party seeking arbitration
28 is making a claim which on its face is governed by the contract.
29 Whether the moving party is right or wrong is a question of con-
30 tract interpretation for the arbitrator." (Emphasis added).
31 The Michigan Supreme Court concluded that, because of the just
32 provision, the teacher's claim was based upon the collective bar-
gaining agreement. It is clear, in the instant matter, the

1 teachers' claims were based upon the collective bargaining agree-
2 ment because of Article XIII, Section 2 (see Findings of Fact #3-B).
3 The Michigan Supreme Court also adopted a rule promulgated by the
4 United States Supreme Court which puts the burden on the party who
5 would exclude a matter from a general arbitration clause to do so
6 expressly and explicitly. I also adopt such rule. The Defendant
7 in this matter did not show the matter of nonrenewal of nontenured
8 teachers was expressly excluded from arbitration. Conversely, the
9 matter is expressly included (see Findings of Fact #3-B).

10 The second question - Did the School District agree to
11 arbitrate the nonrenewal of nontenured teachers? - must now be
12 answered to apply the logic and principals of the foregoing
13 discussion. The language from the collective bargaining agree-
14 ment, Article XIII, Section 2, part 3 (see Finding of Fact # 3-B):

15 The teacher may, within ten (10) days after receipt of
16 the statement of reasons, appeal the termination through
the grievance procedure.

17 could not be more clear. The intent of the Parties to the col-
18 lective bargaining agreement surely must be to allow a nontenured
19 teacher to submit the matter of nonrenewal to arbitration. In
20 comparing Article XII, Section 2 (Findings of Fact #3-B) to
21 Section 20-4-206 MCA (see above), both of which relate to the
22 notification of nontenure teacher nonrenewal, one can readily
23 analyze that the collective bargaining agreement language is an
24 extension of the procedure outlined in the statute. In Milberry
25 v. Board of Education, 354 A.2d 559, 92 LRRM 2455 (1976), the
26 Supreme Court of Pennsylvania addressed such a situation. The
27 Court found that, "Thus the effect of the arbitration provision
28 is to interject, in a case where a grievance is asserted, an
29 additional step . . .", and concluded, "all the parties have done
30 is to afford the teacher a further procedural protection."

31 The third question is whether the School District had au-
32 thority to agree to arbitrate the nonrenewal of a nontenured
teacher. This question was addressed by the Vermont Supreme

1 Court in Danville Board of School Directors v. Fifield, Danville
2 Teachers Association, 315 A2d 473, 85 LRRM 2939 (1974). In
3 Danville the school board argued that because of Vermont's school
4 statutes which give school boards the sole power to hire and dis-
5 miss teachers, the question of the nonrenewal of a nontenured
6 teacher cannot be delegated to an arbitrator. The Danville con-
7 tract provided: "Nonrenewal of a teacher's contract may at the
8 teacher's option be submitted to the grievance procedures as set
9 forth in this agreement." The Court in Danville cited Board of
10 Education of Union Free School District No. 3 of the Town of
11 Huntington v. Associated Teachers of Huntington, Inc., 30 N.Y.2d
12 122, 282 N.E.2d 109, 114, 79 LRRM 2881, 2885:

13 It is hardly necessary to say that, if the Board asserts
14 a lack of power to agree to any particular term or condi-
15 tion of employment, it has the burden of demonstrating
the existence of a specific statutory provision which
circumscribes the exercise of such power.

16 Under the non-repealed Professional Negotiations Act for Teachers
17 which was in effect at time of Wilbaux Education Association vs.
18 Wilbaux County High School, 1978, 573 P.2d 1162, school boards
19 were expressly prohibited from negotiating on "selection of
20 teachers." However, in the instant case negotiable items for
21 school boards are limited only to wages, hours, fringe benefits,
22 and conditions of employment (see Section 39-31-304 MCA and
23 Section 39-31-305 (2) MCA - above). Discharge or nonrenewal has
24 long been recognized as a mandatory subject of bargaining under
25 the topic of "conditions of employment. The text published by
26 the American Bar Association and the Bureau of National Affairs
27 (BNA) states on page 133 of the 1977 Cumulative Supplement under
28 subtitle "Obvious Examples":

29 The Board and the courts continue to hold that the layoff
30 or termination of bargaining unit personnel is a mandatory
31 subject of bargaining. * * * See e.g., Marter Slack Corp.
32 230 NLRB No. 138, 96 LRRM 1309 (1977); W.R. Grace & Co.,
230 NLRB No. 76 95 LRRM 1459 (1977); and Caravelle Boat
Co., 227 NLRB No. 162, 95 LRRM 1003 (1977).

In this matter the Defendant did not show a specific statu-

1 tory provision that would prohibit it from agreeing to the arbi-
2 tration provision relating to the nonrenewal of nontenured
3 teachers. In using the reasoning of the Danville case, I find
4 the Defendant is not without authority to negotiate and agree to
5 such an arbitration provision. In fact, since "dismissal" or
6 "nonrenewal" are considered a mandatory subject of bargaining
7 under the topic of "conditons of employment", the Defendant had
8 specific authority to negotiate such an arbitration clause pur-
9 suant to Section 39-31-304 MCA and Section 39-31-305(2) MCA.

10 The fourth and last question to explore before the ultimate
11 question is: Did the negotiated collective bargaining agreement
12 change any of the rights, duties or powers delegated to the
13 School District? In Milberry, supra., the Court reasoned that the
14 arbitration provision, relating to the dismissal or nonrenewal of
15 nontenured teachers, was an additional step into the procedure -
16 a further scrutiny. The Court said, "The authority of the school
17 board to make the ultimate decision whether or not to suspend or
18 discharge a teacher is not abridged." The arbitration provision
19 "neither modifies nor creates an alternative to [the Codes]
20 dismissal procedure . . ." The Defendant's duties, powers and
21 rights have been left intact; "all the parties have done is to
22 afford the teacher a further procedural protection", (Milberry
23 supra). I agree with that reasoning. In this matter the Defen-
24 dant has retained the "sole discretion" to employ or dismiss
25 teachers. The arbitration provision provides a review process to
26 ensure that teacher dismissals are not arbitrary or capricious.

27 The Defendant has admitted it refused to submit the matter
28 of the nonrenewal of the nontenured teachers (Tone and Undem) to
29 arbitration (see Findings of Fact #7). The collective bargaining
30 agreement clearly states that such matters are subject to the
31 grievance procedure and that procedure provides for arbitration
32 (see Findings of Fact #3-B and #3-C and DISCUSSION). The Defend-
ant had authority to negotiate such an arbitration provision and

1 such provision did not usurp its powers, rights or duties (see
2 DISCUSSION). The City of Livingston et al., vs. Montana Council
3 No. 9, American Federation of State, County and Municipal Employ-
4 ees, et al., _____ Mont. _____, 571, P 2d 374 (1977), the Supreme
5 Court found that, "Under Montana's Collective Bargaining Act for
6 Public Employees or failure to hold a grievance hearing as pro-
7 vided in the contract is an unfair labor practice for failure to
8 bargain in good faith." The facts and issue of City of Livingston
9 are so very similar to this matter that I shall summarize this
10 discussion with a quote from City of Livingston:

11 The issue presented on appeal is whether the city's
12 failure to provide Dyer a dismissal hearing constituted an
unfair labor practice.

13 By failing to grant Dyer a grievance hearing; the city
14 breached its collective bargaining agreement, and thereby
committed an unfair labor practice in violation of section
59-1605(1)(a), R.C.M. 1947. That section provides in part:

15 "It is an unfair labor practice for a public employer
to:

16 "(a) interfere with, restrain, or coerce employees
in the exercise of the rights guaranteed in section
59-1603 of this act;"

17 Section 59-1603(1) provides:

18 "Public employees shall have * * * the right
* * * to bargain collectively * * *."

19 The phrase "to bargain collectively" is defined in
section 59-1605(3) as:

20 "* * * the performance of the mutual obligation of
the public employer * * * and the representatives
21 of the exclusive representative to * * * negotiate
in good faith with respect to * * * conditions of
22 employment, or the negotiation of an agreement, or
any question arising thereunder. * * *" (Emphasis
23 added.)

24 Thus, by statute, the duty to bargain "in good
faith" continues during the entire course of the
contract.

25 The Supreme Court has held that "Collective bar-
gaining is a continuing process. Among other things it
26 involves * * * protection of employee rights already
secured by contract." Conley v. Gibson, 355 U.S. 41, 2 L
27 Ed 2d 80, 85, 78 S. Ct. 99 (1957). The processing of
grievances in grievance hearings is collective bargaining.
28 Timkin Roller Bearing Co. v. National Labor Rel. Bd., 161
F.2d 949, 954 (6th Cir. 1947). In Ostrowsky v. United
29 Steelworkers of America, 171 F.Supp. 782, 790 (D. Md.
1959), aff'd., 273 F.2d 614 (4th Cir. 1960), cert. den.,
30 363 U.S. 849, 4 L Ed 2d 1732, 80 S.Ct. 1628, (1950), the
court stated: "* * * the employer had the same duty to
31 bargain collectively over grievances as over the terms of
the agreement."

32 Although the Court found a violation of 59-1605 (1) (a) R.C.M.
(now Section 39-31-401 (1)), the language issued by the court

1 found a failure to bargain in good faith which is the same viola-
2 tion charged in this matter.

3
4 CONCLUSIONS OF LAW

5 Defendant, Savage Public Schools, Richland County Elementary
6 District #7 and High School District #2, has engaged in an unfair
7 labor practice within the meaning of Section 39-31-401 (5) MCA by
8 its refusal to bargain collectively in good faith with the exclu-
9 sive representative, Savage Education Association, affiliated
10 with the Montana Education Association.

11
12 RECOMMENDED ORDER

13 It is hereby ordered that Savage Public Schools, Richland
14 County Elementary District #7 and High School District #2 shall:

- 15 1. Cease and desist from failing to bargain in good faith
16 with the Savage Education Association affiliated with
17 the Montana Education Association.
- 18 2. Immediately implement the arbitration proceedings
19 necessary to process the grievances of Dorothy Tone and
20 Connie Udem.
- 21 3. Post these FINDINGS OF FACT, CONCLUSIONS OF LAW AND
22 RECOMMENDED ORDER in the usual posting area(s) in a
23 conspicuous manner for a period of not less than thirty
24 (30) days.

25
26 NOTICE

27
28 Pursuant to Rule ARM 24.26.584, the above RECOMMENDED ORDER
29 shall become the FINAL ORDER of this Board unless written except-
30 ions are filed within 20 days after service of these FINDINGS OF
31 FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER upon the parties.
32

1 Dated this 10th day of April, 1980.

2
3 BOARD OF PERSONNEL APPEALS

4
5 By Stan Gerke
6 Stan Gerke
7 Hearing Examiner

8 CERTIFICATE OF MAILING

9 I, Joyce Carter do hereby certify and state that on
10 the 10th day of April 1980, I did mail a true and correct
11 copy of the above FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
12 RECOMMENDED ORDER to the following:
13

14
15
16 Rawlin Herigstad, Chairman
17 Board of Trustees
Savage, MT 59262

18 R.W. Heineman
19 Attorney for Defendent
P.O. Box 313
20 Wilbaux, MT 59353

21 Gene Huntley
22 Attorney for Defendant
P.O. Box 897
Baker, MT 59313

23 Joyce Carter
24 Savage, MT 59602

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26 Attorney for Complainant
1713 Tenth Avenue South
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30
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