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BOARD OF PERSONNEL APPEALS

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 47-79

LABOR RELATIONS BUREAU, A DIVISION)	
OF THE DEPARTMENT OF ADMINISTRATION)	
OF THE STATE OF MONTANA,)	Cause No. 47202
)	
Petitioner,)	STIPULATION
)	
- vs -)	FOR
)	
BOARD OF PERSONNEL APPEALS, A DIVISION)	DISMISSAL WITHOUT
OF THE DEPARTMENT OF LABOR AND INDUSTRY)	
OF THE STATE OF MONTANA; AND MONTANA)	PREJUDICE
PUBLIC EMPLOYEES ASSOCIATION,)	
)	
Respondents.)	

* * * * *

It is hereby stipulated, by and between the parties above-named, through their undersigned Counsel of record, that this Cause may be dismissed, without prejudice. Each party is to pay their own costs and attorneys' fees.

Date: April 12 1984

Jayne Mitchell
 Jayne Mitchell
 Attorney for Petitioner
 Room 130, Mitchell Building
 Helena, Montana 59620

Barry Hjort
 Barry Hjort
 Hjort, Lopach, and Tippy
 Box 514
 Helena, Montana 59624

James S. Gardner
 James Gardner
 Attorney for Respondent
 Board of Personnel Appeals
 Capitol Station
 Helena, Montana 59620

* * * * *

ORDER

Pursuant to the foregoing stipulation, and good cause appearing therefore, it is hereby ordered that the foregoing cause be, and the same is, dismissed without prejudice, with the parties to pay their own costs and attorneys' fees.

Dated FILED this 13th day of April, 1984.

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 CLARA GILREATH
 CLERK OF DISTRICT COURT
 BY NANCY JONES

[Signature]
 District Judge

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 47, 48, 49-79:

STATE OF MONTANA,)
LABOR RELATIONS BUREAU,)
)
Complainant in No. 47-79)
Defendant in Nos. 48 & 49-79,)
)
- vs -)
)
MONTANA PUBLIC EMPLOYEES)
ASSOCIATION,)
)
Defendant in No. 47-79)
Complainant in Nos. 48 & 49-79)

FINAL ORDER

* * * * *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on June 16, 1980.

By an Order of this Board dated October 30, 1980, the cause was "remanded back to the Hearing Examiner to rule on the charge raised in ULP 47-79, and the Hearing Examiner was further instructed to review his decision in ULP Nos. 48 and 49-79 in light of his ruling in ULP 47-79 and the oral arguments presented to the Board by the parties."

On March 2, 1981, Hearing Examiner Jack H. Calhoun issued Amended Findings of Fact, Conclusions of Law and Recommended Order.

Exceptions to the amended decision were filed by the Montana Public Employees Association on March 25, 1981.

On July 24, 1981, oral argument was heard before the Board.

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

- 1. IT IS ORDERED, that the Hearing Examiner's Findings of Fact and Conclusion of Law holding that the state did not violate 39-31-401 (1) or (5) MCA by changing its vacation leave policy, be and hereby is affirmed

1 2. IT IS ORDERED, that the Hearing Examiner's Findings of
2 Fact, and Conclusion of Law, holding that the union insisted to
3 impasse on bargaining on a non-mandatory subject, be and hereby
4 is overruled.

5 The basis for the Board's holding on this issue is as
6 follows:

7 Prior to July 1, 1979, state law (59-907 (4), R.C.M., 1947)
8 provided that,

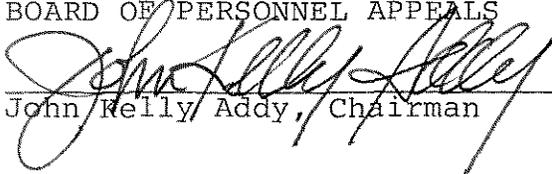
9 "(4) Anything relevant to the determination of
10 reasonable classifications and grade levels for state
11 employees shall be a negotiable item appropriate for
12 the consideration of the state and exclusive represen-
13 tatives under the provisions of Title 59, Chapter 16."

14 Pursuant to the authority of 59-907 (4), and after the
15 proper administrative process before this Board, this Board
16 ordered the state to bargain with Montana Public Employees
17 Association regarding the classification of computer data entry
18 personnel who were represented by Montana Public Employees
19 Association. The date of the Order was January 17, 1979.

20 The 1979 Montana Legislature repealed Section 59-907 (4),
21 R.C.M., 1947, effective July 1, 1979. This Board is of the
22 opinion that its Order of January 17, 1979, created an obligation
23 on the part of the state and Montana Public Employees Association
24 to bargain regarding the classification of that group of public
25 employees, which could not subsequently be repealed by the
26 Legislature. The right to bargain on that subject became a
27 vested right which could not be taken away by a subsequent
28 legislative repeal.

29 DATED this 28th day of August, 1981.

30 BOARD OF PERSONNEL APPEALS

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32 John Kelly Addy, Chairman

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CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 31 day of August, 1981:

Sue Romney
Labor Relations Bureau
Department of Administration
Room 130 - Mitchell Building
Helena, MT 59620

Barry L. Hjort
SCRIBNER, HUSS & HJORT
P.O. Box 514
Helena, MT 59624



STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 47, 48, & 49-79:

3	STATE OF MONTANA,)	
4	LABOR RELATIONS BUREAU,)	
)	
5	Complainant in No. 47-79)	
	Defendant in Nos. 48)	
6	& 49-79,)	AMENDED FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
7	-vs-)	AND RECOMMENDED ORDER
)	
8	MONTANA PUBLIC EMPLOYEES)	
	ASSOCIATION, INC.,)	
)	
9	Defendant in No. 47-79)	
10	Complainant in Nos. 48)	
	& 49-79)	
11)	

* * * * *

The Findings of Fact, Conclusion of Law and Recommended Order issued on June 16, 1980 are, as ordered by the Board of Personnel Appeals, amended as indicated below.

With respect to ULP 47-79, the Board ordered that the hearing examiner rule on the charge raised. The prime question was whether the state had a continuing obligation to bargain under the order issued on January 17, 1979 by the Board after the legislature removed the requirement from the Act that "the state negotiate anything relevant to the determination of reasonable classifications and grade level..."

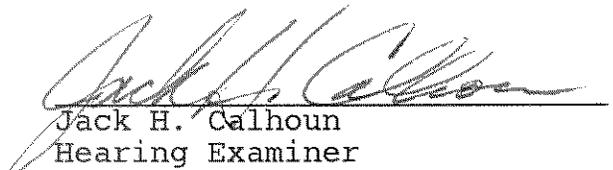
It seems clear that when the legislature repealed that part of the act it automatically changed it from a mandatory subject of bargaining to a permissive subject. However, MPEA contends that there still existed a duty to bargain under the old order because a right had vested from the first issuance of the order. I can find no support for their position. It would be unreasonable to hold that the legislature could not take away a right it has previously bestowed. As the state points out in its brief, the right

1 to bargain over classifications was a labor law right and,
2 as such, one which the lawmakers could repeal at will. The
3 union insisted to impasse on bargaining on a non-mandatory
4 subject. There was no obligation on the part of the employer
5 to bargain further once the repeal was effective. The state
6 could bargain or not bargain on the subject as it saw fit.

7 The Board further ordered that I review my decision in
8 ULP 48 and 49-79 in light of my ruling in ULP 47-79 and the
9 oral arguments presented to the Board on September 30, 1980.
10 I have reviewed the tapes of the arguments made and have, as
11 I have noted above, ruled on ULP 47-79. I can only conclude
12 that the strike was illegal and that the state acted within
13 its rights. The change in vacation leave was not an unfair
14 labor practice for the reasons discussed in my first recom-
15 mended order.

16 A review of the whole record, including the tapes of
17 the hearing does, however, raise some doubt about Finding of
18 Fact No. 7. It was holiday pay which required that employ-
19 ees work the day before and the day after to be eligible for
20 pay. In any case, the Finding in No. 7 is not essential to
21 the conclusion drawn. It can be eliminated without affect-
22 ing the outcome.

23 Dated this 2nd day of March, 1981.

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27 Jack H. Calhoun
28 Hearing Examiner
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CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 2nd day of March, 1981:

Barry Hjort
SCRIBNER HUSS & HJORT
Arcade Building
P.O. Box 514
Helena, MT 59601

LeRoy Schramm, Chief
Labor Relations Bureau
Personnel Division
Department of Administration
Room 130, Mitchell Building
Helena, MT 59601



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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 47, 48, & 49-79:

STATE OF MONTANA,)
LABOR RELATIONS BUREAU,)

Complainant in No. 47-79)
Defendant in Nos. 48 & 49-79,)

- vs -)

MONTANA PUBLIC EMPLOYEES)
ASSOCIATION, INC.,)

Defendant in No. 47-79)
Complainant in Nos. 48 & 49-79.)

ORDER

* * * * *

On June 16, 1980, the Hearing Examiner in this matter issued his Findings of Fact, Conclusions of Law and Recommended Order. The Hearing Examiner refused to rule on ULP 47-79 because it was moot. The Hearing Examiner dismissed ULP Nos. 48 and 49-79, finding that the State did not violate MCA 39-31-401(1) and (5) by changing its vacation leave policy. Exceptions were filed by both the State and Montana Public Employees Association, Inc. The State took exception to the dismissal of ULP 47-79 on the basis it was moot. At the oral argument it was disclosed that a pending arbitration between the parties could be affected by the decision on the issue in ULP #47-79. Montana Public Employees Association was in support of the Hearing Examiner deciding the issue raised in ULP 47-79.

IT IS THEREFORE ORDERED that this matter is remanded back to the Hearing Examiner to rule on the charge raised in ULP 47-79. The Hearing Examiner is further instructed to review his decision in ULP Nos. 48 and 49-79 in light of his ruling in ULP 47-79 and the oral arguments presented to this Board by the parties.

DATED this 30 day of October, 1980.

BOARD OF PERSONNEL APPEALS

By Brent Crowley
Brent Crowley, 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 ORDER to the following persons on the 31 day of October, 1980:

Barry L. Hjort
SCRIBNER, HUSS & HJORT
P.O. Box 514
Arcade Building
Helena, rT 59601

LeRoy Schramm, Chief
Labor Relations Bureau
Personnel Division
Department of Administration
Room 130 - Mitchell Building
Helena, MT 59601



1 STATE OF MONTANA
2 BEFORE THE BOARD OF PERSONNEL APPEALS
3 IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 47, 48 and 49-79:

3 STATE OF MONTANA,)
4 LABOR RELATIONS BUREAU,)
5 Complainant in No. 47-79,)
6 Defendant in Nos. 48 & 49-79,) FINDINGS OF FACT,
7) CONCLUSION OF LAW
8) AND RECOMMENDED ORDER
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11 I. INTRODUCTION

12 On December 19, 1979 the State filed an unfair labor practice
13 charge alleging the Montana Public Employees Association violated
14 39-31-402(2) MCA by refusing to bargain collectively in good faith
15 with the State. The Association filed charges against the State
16 on December 19 and on December 20, 1979 alleging violations of
17 39-31-401(1) and (5) MCA. A hearing was conducted on March 11,
18 1980, under authority of 39-31-405 et seq. MCA, at which the State
19 was represented by Mr. David Stiteler, the Association was repre-
20 sented by Mr. Barry Hjort.

21 II. ISSUES

22 1. Did the Association insist to impasse on bargaining on a
23 permissive subject? Or, stated conversely, was the subject of
24 classification for keypunch personnel a mandatory subject of
25 bargaining after July 1, 1980?

26 2. Did the State commit an unfair labor practice when it
27 changed its vacation leave policy during the course of a strike by
28 the Association?

29 All sub-issues hinge on the answer to the above questions and
30 are subordinate to those prime issues.

31 III. FINDINGS OF FACT

32 Based on the evidence on the record, the sworn testimony

1 of witnesses and the briefs submitted by counsel I find as follows.

2 1. On June 23, 1978 the Association filed unfair labor
3 charges against the state alleging it had made certain unilateral
4 changes in the classification system, which affected some of the
5 employees represented by the Association, in controvention of the
6 collective bargaining act. In Findings of Fact, Conclusion of Law
7 and Recommended Order issued November 24, 1978 the hearing examiner
8 found a violation and recommended an order requiring the State to
9 cease and desist from refusing to bargain with the Association on
10 the subject of classification for the affected employees. By its
11 order on January 17, 1979 the Board of Personnel Appeals adopted
12 the recommended order as its final order.

13 2. Prior to July, 1979 the Wage and Classification Act,
14 Title 59, Chapter 9, RCM 1947, required the State to negotiate
15 "anything relevant to the determination of reasonable classifi-
16 cations and grade levels for state employees..." During the 1979
17 session the Legislature deleted that requirement from the act
18 affective July 1, 1979.

19 3. The parties met and negotiated approximately eight
20 times. The first meeting was held in August, 1979. The last in
21 October of that year. During the course of negotiations a tenta-
22 tive agreement was reached on some items, one being promotions;
23 however, at the time impasse occurred five items were still on the
24 table. They were: (1) grade assignments, (2) class specifications,
25 (3) a committee to formulate documents, (4) training programs, and
26 (5) rest breaks.

27 4. The State made no counter proposals on items 3, 4 or 5.
28 The State negotiator indicated a possibility of fruitful discussion
29 on them, if agreement could be reached on the first two items. At
30 impasse the State negotiator told the negotiator for the Association
31 the items were permissive subjects. The Association later filed a
32 unilateral request for mediation listing the five items as unresolved

1 issues.

2 5. The unit represented by the Association (data entry
3 operators, in the Departments of Highways, Social and Rehabilita-
4 tion Services and the Employment Security Division) went on strike
5 December 19, 1979. The parties had met several times with a
6 mediator prior to the strike. Listed on the request for mediation
7 were the five items in No. 3 above.

8 6. In a memorandum from the State Labor Relations Bureau to
9 all employees of the affected agencies dated December 18, 1979 the
10 State urged the employees not to strike, said it believed a strike
11 would be illegal and informed them that vacation leave could not
12 be used during a strike unless it was authorized prior to the
13 start of the strike.

14 7. On about December 20, 1979 the State's Labor Relations
15 Bureau Chief announced a new vacation leave policy for the strik-
16 ing employees. Such policy required employees who had vacation
17 leave approved prior to the commencement of the strike to work the
18 day before and the day after the approved leave to qualify for the
19 leave. The State did not negotiate the change in policy with the
20 Association.

21 8. The above policy was not applied to striking employees
22 in SRS or Highways because the impact of the strike on those two
23 departments was slight. However, it was applied to ESD because
24 the strike had a more adverse effect there. Employment Security
25 Division was having trouble getting its unemployment checks out on
26 time.

27 9. The parties stipulated that MPEA would withdraw the
28 vacation policy change grievance of Virginia Helfert, Thelma
29 Flemming, Pat Wert and Nita Rasmussen and that the hearing examiner's
30 decision in this matter will resolve the situation as it pertains
31 to those individuals. They further agreed the hearing examiner
32 had the authority to issue an appropriate remedy regarding the

1 changed policy including an order to make the four persons whole.

2 10. The changed vacation policy had an adverse impact on the
3 striking employees. Some wanted to return to work.

4 11. The parties' contract, affective July 1, 1979 through
5 June 30, 1980, provides that employees may take annual leave, with
6 approval, at their discretion, if it does not cause an undue
7 burden on the employer.

8 12. The parties entered into an agreement to submit the
9 question of the proper classification and grade level of data
10 entry personnel to an arbitrator for a decision which was to be
11 final and binding. They did submit the matter and have received
12 his decision.

13
14 IV. OPINION

15 In unfair labor practice No. 47-79 the State charged the
16 Association with a violation of 39-31-402(2) MCA, failure to
17 bargain in good faith. All three charges are inextricably con-
18 nected with the bargaining order issued by this board in ULP
19 17-78, which required the State to bargain on classifications of
20 keypunch (data entry) operators. The facts show that the parties
21 have entered into an agreement to submit the question of classifi-
22 cation to an arbitrator and that they have received the arbitrator's
23 final and binding decision. Further, they have a negotiated
24 collective bargaining agreement which is in effect. There is no
25 chance that this question can reoccur or that the same incidents
26 will be repeated. The traditional remedial orders issued in this
27 type of situation would be meaningless and would provide no relief
28 to the charging party, if the charge were found to be valid. For
29 those reasons the question raised in ULP 47-79 is moot and will
30 not be ruled on here.

31 The questions raised by MPEA in its charges against the State
32 are not moot, however. The essential issue there was whether the

1 change in vacation leave policy made by the State during the
2 strike was an unfair labor practice in violation of the Act, i.e.,
3 was there a unilateral change in wages, hours, fringe benefits or
4 other conditions of employment which was not justified by business
5 necessity.

6 The facts do not support a finding of a valid charge. The
7 State admitted readily that it unilaterally postponed vacation
8 leaves for some of the employees during the strike. It goes on,
9 however, to contend that the change in policy was warranted by a
10 business justification. I agree with that contention. The evi-
11 dence shows that the postponing of vacations was related to a
12 desire by the State to get unemployment checks out on time. The
13 State's ability to function was impaired only in ESD and only in
14 ESD did it implement the change. Vacations were not postponed in
15 SRS or Highways. The collective bargaining agreement deals with
16 the subject of annual leave and states it may be taken upon approv-
17 al if it does not cause an undue burden on the State. On the
18 basis of the language of the contract itself then, I find the
19 postponement of leave by the State justified.

20 The remaining question, relative to the State's conduct in
21 changing the leave policy, raised by the Association is whether
22 such action was a violation of 39-31-401(1) MCA. Did the State's
23 action amount to interference, restraint or coercion of the af-
24 fected employees in their exercise of rights protected by 39-31-201
25 MCA? I am convinced it did not. Applying the facts in this case
26 to the principle laid down in NLRB v. Great Dane Trailers, Inc.,
27 388 U.S. 26, 65 LRRM 2465 where the Court said:

28 From this review of our recent decisions, several principles
29 of controlling importance here can be distilled. First, if it
30 can reasonably be concluded that the employer's discriminatory
31 conduct was "inherently destructive" of important employee
32 rights, no proof of an antiunion motivation is needed and the
Board can find an unfair labor practice even if the employer
introduces evidence that the conduct was motivated by business
considerations. Second, if the adverse effect of the discrimi-
natory conduct on employee rights is "comparatively slight" an
antiunion motivation must be proved to sustain the charge if
the employer has come forward with evidence of legitimate and

1 substantial business justifications for the conduct. Thus, in
2 either situation, once it has been proved that the employer
3 engaged in discriminatory conduct which would have adversely
4 affected employee rights to some extent, the burden is upon
5 the employer to establish that it was motivated by legitimate
6 objectives since proof of motivation is most accessible to
7 him.

8 In Great Dane the company offered no evidence to support a
9 legitimate motive finding and its denial of vacation payments to
10 strikers was found to be discriminatory. Here the State did
11 support, by evidence, its motive which was to get unemployment
12 checks out to recipients on time. The change in policy was "moti-
13 vated by legitimate objectives."

14 In NLRB v. Borden, 101 LRRM 2727 (1979) the 1st Circuit Court
15 of Appeals reviewed the holding in Great Dane and went on to say:

16 According to the teaching of Great Dane, where the employer's
17 conduct is "inherently destructive" of employee rights, the
18 Board can find an unfair labor practice, even in the face of
19 an employer's evidence that it was motivated by business
20 considerations and absent a showing of antiunion motivation.
21 However, where the effect of the employer's discriminatory
22 conduct is "comparatively slight," and where the employer
23 offers legitimate and substantial business justifications for
24 the conduct, then the Board must prove antiunion motivation.
25 In Great Dane, the court, quoting NLRB v. Erie Resistor Corp.,
26 supra, 373 U.S. at 228, 231, stated that conduct is inherently
27 destructive if it "carries with it 'unavoidable consequences
28 which the employer not only foresaw but which he must have
29 intended' and thus bears 'its own indicia of intent.'" Id. at
30 33. The court did not reach a determination of whether the
31 employer's discriminatory treatment of strikers was inherently
32 destructive or comparatively slight because the employer
33 offered no justification for its behavior. Where such a
34 determination has been necessary, as for example in Portland
35 Willamette Co. v. NLRB, 534 F.2d 1331, 92 LRRM 2113 (9th Cir.
36 1976), the Court looked to see whether the conduct had far
37 reaching effects which could hinder future bargaining or
38 whether the conduct discriminated solely upon the basis of
39 participation in strikes or union activity. Id. at 1334. We
40 do not view Borden's delayed payment of vacation benefits as
41 conduct which bears its own indicia of intent carrying with it
42 unavoidable consequences which the employer must have intended.
43 This was, after all, a delay in vacation payments, not a
44 refusal to pay at all.

45 The Court went on to remand the case to the Board so it could
46 decide whether Borden had a legitimate and substantial business
47 justification for its conduct and, if so, whether the purported
48 justification was pretextual.

49 I must conclude that even in the absence of specific contract

1 language which, it appears, allowed it to take the action it took,
2 the State's changed leave policy had only a slight impact on the
3 employees' rights under the Act; and that, in any case, the action
4 had a legitimate and substantial business reason, as proved during
5 the hearing.

6 V. CONCLUSION OF LAW

7 1. The question raised in ULP 47-79 regarding the alle-
8 gation that MPEA insisted to impasse on bargaining on a permissive
9 subject and therefore violated 39-31-402(2) MCA is moot and will
10 not be answered by this Board.

11 2. The State did not violate 39-31-401(1) or (5) MCA by
12 changing its vacation leave policy.

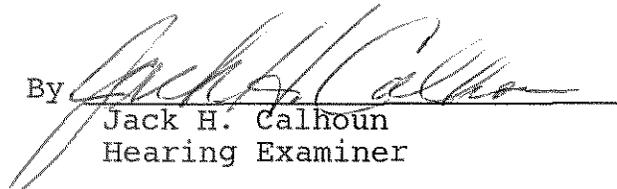
13 VI. RECOMMENDED ORDER

14 That all charges in ULP 47, 48 and 49-79 be dismissed.

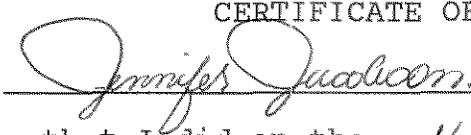
15 VIII. NOTICE

16 Exceptions to these Findings of Fact, Conclusions of Law
17 and Recommended Order may be filed within twenty days of service
18 thereof. If no exceptions are filed with the Board of Personnel
19 Appeals within that time, this Recommended Order shall become
20 the Final Order of the Board. Exceptions shall be addressed to
21 the Board of Personnel Appeals, Capitol Station, Helena, Montana
22 59601.

23
24 BOARD OF PERSONNEL APPEALS

25
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27 By 
28 Jack H. Calhoun
29 Hearing Examiner

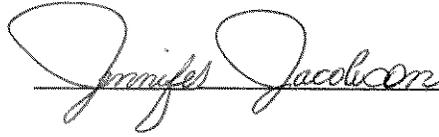
30 CERTIFICATE OF MAILING

31 I, , do hereby certify
32 and state that I did on the 16 day of June, 1980, mail a

1 true and correct copy of the above Findings of Fact, Conclusions
2 of Law, and Recommended Order to the following:

3
4 Barry Hjort
5 SCRIBNER HUSS & HJORT
6 Arcade Building
7 P.O. Box 514
8 Helena, MT. 59601

9 LeRoy Schramm, Chief
10 Labor Relations Bureau
11 Personnel Division
12 Department of Administration
13 Room 130, Mitchell Building
14 Helena, MT. 59601

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