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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 33-81:

MOUNTAIN VIEW AND PINE HILLS )  
EDUCATION ASSOCIATION, MEA, )  
Complainant, )  
- vs - )  
STATE OF MONTANA, )  
PERSONNEL DIVISION, )  
Defendant. )

FINAL ORDER

\*\*\*\*\*

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Linda Skaar on December 15, 1982.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Patricia J. Schaeffer, Counsel for the Personnel Division, Department of Administration, on January 7, 1983.

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

1. IT IS ORDERED, that the Exceptions of Defendant 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 Linda Skaar as the Final Order of this Board.

DATED this 9<sup>th</sup> day of March, 1983.

BOARD OF PERSONNEL APPEALS

By Joan A. Uda  
Joan A. Uda  
Alternate 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 9th day of March, 1983:

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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 33-81:

MOUNTAIN VIEW AND PINE HILLS	)	
EDUCATION ASSOCIATION, MEA,	)	
	)	
Complainant,	)	FINDINGS OF FACT
	)	CONCLUSIONS OF LAW
-vs-	)	RECOMMENDED ORDER
	)	
STATE OF MONTANA	)	
PERSONNEL DIVISION,	)	
	)	
Defendant.	)	

\* \* \* \* \*

On August 20, 1981, the Board of Personnel Appeals received a complaint from the Mountain View and Pine Hills Education Association. It alleged that the State of Montana was in violation of 39-31-401(1) and (5) MCA for failure to negotiate the pay matrix for the teachers at Mountain View and Pine Hills schools.

A hearing was held in this matter on July 15, 1982. The State of Montana was represented by Patricia Schaeffer of the Legal Division of the Department of Administration. The Mountain View and Pine Hills Education Association was represented by Jerry L. Painter.

After careful review of the record including sworn testimony and evidence these are my findings of fact.

FINDINGS OF FACT

1. Bargaining between the State of Montana and the Mountain View and Pine Hills Units of the Montana Education Association began in November, 1980, for a contract which would be effective for the 1981-1983 biennium. Sean Mathews, UniServ Director for the MEA represented the teachers and Jean Moffatt of the State Labor Relations Bureau was chief spokesperson for the State of Montana. Tom Gooch of the Department of Institutions was advisor to Ms. Moffatt.



1 Bargaining began in mid-November. From the beginning  
2 the bargaining was characterized as "hard-nosed". Although  
3 bargaining was slow, concessions were made by both sides.  
4 Difficulties were encountered and mediation was requested  
5 after the third session. An initial mediation session was  
6 held on February 2, 1981. At this session the state offered  
7 the teachers a pay matrix which was eventually incorporated  
8 into HB 840 and the subsequent executive order issued by the  
9 Governor (Ex. Order 7-81).

10 On February 12, 1982, the parties jointly requested  
11 fact finding. They stipulated that the fact finder was to  
12 "make a single finding only that shall be either that the  
13 MEA's wage demand or the state's wage offer is the more fair  
14 and reasonable... ". On April 3, 1981 the fact finder  
15 issued his finding that the state's offer was the more fair  
16 and reasonable.

17 2. During the period of time from February to April a  
18 legislative committee was considering HB 840 which contained  
19 the wage amounts the state Labor Relations Bureau had negoti-  
20 ated with unions representing state employees. In addition,  
21 it contained a pay matrix for the teachers at Mountain View  
22 and Pine Hills schools. This pay matrix was based on the  
23 state's last offer to these units. There was considerable  
24 controversy between the executive branch and the legislature  
25 over the total amount of money needed to fund HB 840. The  
26 legislature finally adjourned appropriating \$48 million and  
27 allowing the Governor to distribute the money among state  
28 employees as he saw fit. During the legislative session the  
29 MEA testified before the legislative committee and lobbied  
30 on behalf of the Mountain View and Pine Hills bargaining  
31 units.  
32

1           3. Pursuant to an amended HB 840, the Governor issued  
2 Executive Order 7-81 on May 7, 1981. This executive order  
3 contained a pay matrix for the teachers at Pine Hills and  
4 Mountain View schools even though negotiations had not been  
5 completed. The pay matrices in the Executive Order were the  
6 same as those in the original HB 840. LeRoy Schramm, then  
7 Bureau Chief of the State Labor Relations Bureau was involved  
8 in "the drafting and drawing up of the Executive Order."

9           4. On May 12, 1981 the parties again met in bargaining  
10 session. The teachers presented a new pay proposal computer  
11 designed to meet the intent of the legislature in that it  
12 provided for an increase of 12% in cost to the state. This  
13 meeting lasted nine minutes and ended with the state rejecting  
14 the teachers' proposal because, in Ms. Moffatt's words, "it  
15 was unreasonable."

16           The two sides did not meet again until July 29. At  
17 this meeting the state refused to vary its salary offer from  
18 the matrix included in Executive Order 7-81. In doing so,  
19 Ms. Moffatt asserted that salaries were set by executive  
20 order. Sean Mathews testified to this effect and Tom Gooch,  
21 reading from his notes, confirmed Mr. Mathews assertion.  
22 Ms. Moffatt did not recall having made such a statement.

23           5. Ms. Moffatt testified that after the Governor  
24 issued the executive order on May 7, she was unsure how much  
25 authority she had at the bargaining table. However, she  
26 testified the reason that she rejected the teacher pay  
27 proposal was not because she did not have the authority to  
28 accept it, but because it was unreasonable and/or in excess  
29 of the allocation of funds to the department. She further  
30 testified that had the teachers made a proposal she liked,  
31 she would have, at that point, faced the problem of whether  
32 she had the authority to vary the state's offer of the pay

1 matrix in the executive order. She believed that the state's  
2 offer of the pay matrix in the executive order was a good,  
3 fair reasonable offer.

4 DISCUSSION

5 The question to be answered in this case is whether the  
6 State of Montana failed to bargain in good faith over salary  
7 schedules for teachers at the Mountain View and Pine Hills  
8 schools in the Department of Institutions. Did the State,  
9 in fact, refuse to bargain wages and by this refusal violate  
10 39-31-401(5) MCA?

11 "The duty to bargain in good faith is an 'obligation...  
12 to participate actively in the deliberation so as to indicate  
13 a present intention to find a basis for agreement...'. This  
14 implied both 'an open mind and a sincere desire to reach an  
15 agreement' as well as 'a sincere effort...to reach common  
16 ground.' The presence or absence of intent 'must be discerned  
17 from the record.' Except in the cases where the conduct  
18 fails to meet the minimum obligation imposed by law or  
19 constitutes an outright refusal to bargain, all the relevant  
20 facts of a case are studied in determining whether the  
21 employer or the union is bargaining in good or bad faith,  
22 i.e., the 'totality of conduct' is the standard through  
23 which the 'quality' of negotiations is tested."<sup>1</sup>

24 A refusal to bargain a mandatory subject of bargaining  
25 such as wages is generally considered a per se violation of  
26 the Act.<sup>2</sup> Common sense precludes taking the time and space  
27 in a long discussion of the fact that wages (salary schedules  
28 in this case) are a mandatory subject of bargaining. Wages  
29 are set forth in 39-31-305 MCA as a subject upon which the  
30 employer must bargain.

31  
32 <sup>1</sup> The Developing Labor Law, Bureau of National Affairs, 1971,  
p. 278 (cites omitted).

<sup>2</sup> NLRB v. Katz, 369 US 736, 50 LRRM 2177 (1962).

1           The facts in this case are subject to analysis either  
2 under the per se violation standard or under the good faith/bad  
3 faith bargaining/totality of conduct standard. In evaluating  
4 totality of conduct and making a determination of good or  
5 bad faith the NLRB and the courts evaluate the entire course  
6 of the parties bargaining conduct rather than a single  
7 element. In upholding the NLRB finding of bad faith because  
8 of the employer's total conduct, the Court of Appeals said,

9           "Certain specific conduct, such as the Company's unila-  
10 teral changing of working conditions during bargaining,  
11 may constitute per se violations of the duty to bargain  
12 in good faith since they in effect constitute a "refusal  
13 to negotiate in fact", NLRB v. Katz [cite omitted].  
14 Absent such evidence, however, the determination of  
15 intent must be founded upon the party's overall conduct  
16 and on the totality of the circumstances, as disting-  
17 uished from the individual pieces forming part of the  
18 mosaic. NLRB v. General Electric [cite omitted].  
19 Specific conduct, while it may not, standing alone  
20 amount to a per se failure to bargain in good faith,  
21 may when considered with all other evidence, support an  
22 inference of bad faith."<sup>3</sup>

23           In early negotiation sessions the state and the teachers  
24 engaged in hard bargaining over wages and other subjects.  
25 During the third session bargaining became more difficult  
26 and mediation was requested. At the mediation session held  
27 in early February the state's negotiator made an offer of a  
28 pay matrix which the Labor Relations Bureau later incorpor-  
29 ated into a bill introduced to the legislature (HB 840).  
30 After the legislature adjourned without adopting a pay  
31 matrix the Chief of the Labor Relations Bureau helped draft  
32 an executive order which imposed the very same matrix on the  
bargaining teachers. In bargaining sessions held after the  
executive order was issued the state's negotiator stated that  
wages were set by the executive order. The state appears to  
have determined the pay matrix it wished the teachers to

<sup>3</sup> Continental Insurance Co. vs. NLRB, 495 F 2d 44, 86 LRRM 2003,  
CA 2, 1974, enf. 204 NLRB 1013, 83 LRRM 1406 (1973).

1 have and unilaterally imposed it on the teachers who were  
2 attempting to bargain.

3 In defense of its action the state argues that good faith  
4 does not require fruitless marathon discussions at the expense  
5 of frank statement and support of one's position,<sup>4</sup> that the  
6 employer does not have to listen to argument endlessly if  
7 his insistence on a bargaining position is sincerely and  
8 genuinely held.<sup>5</sup> However, in this case the facts do not  
9 show endless marathon sessions. On February 2 the state  
10 made its initial offer of the pay matrix eventually adopted.  
11 The executive order containing this matrix was drafted and  
12 adopted before another bargaining session was held. It is  
13 true that fact finding intervened and the legislative session  
14 concluded in the interim but the parties did not return to  
15 the bargaining table until after the executive order was  
16 issued by the Governor. Clearly, the parties were not  
17 involved in endless marathon discussions nor were they at  
18 impasse. At the bargaining session held just five days  
19 after the executive order was issued the teachers presented  
20 a substantially different pay matrix -- one which they  
21 believed would meet the state's criteria. This meeting  
22 lasted only nine minutes and ended with the state's  
23 negotiator rejecting the teacher proposal because it was  
24 unreasonable. In nine minutes it may be possible to deter-  
25 mine whether a simple across the board hourly wage demand is  
26 unreasonable but it is hard to believe that anyone could  
27 analyze the complexities of a teacher pay matrix in such a  
28 period determining reasonableness or unreasonableness. The  
29 fact that the state's negotiator believed that the pay  
30 matrix was established by the Governor's executive order  
31

32 <sup>4</sup> NLRB v. American Insurance Co., (1952), 343 U.S. 395, 30 LRRM 2147.

<sup>5</sup> Philip Carey Mfg. Co. (NLRB 1963), 52 LRRM 1185; enf. in part 331  
F 2d 720, cert. denied 379 U.S. 888.

1 seems a more likely explanation of why the teacher offer was  
2 rejected out of hand.

3 Lack of authority on the part of the management negoti-  
4 ator is not considered a per se violation.<sup>6</sup> In this case,  
5 the state negotiator's questionable authority combined with  
6 the facts surrounding the unilateral imposition of the  
7 matrix on the teachers leads to the conclusion that the  
8 State of Montana bargained in bad faith with the teachers at  
9 Pine Hills and Mountain View schools.

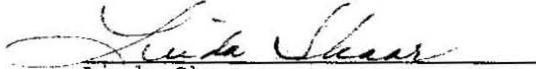
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12 CONCLUSION OF LAW

13 The State of Montana, Personnel Division has bargained  
14 in bad faith with the Pine Hills and Mountain View units of  
15 the Montana Education Association and are in violation of  
16 39-31-401(5) and by doing so are in violation of 39-31-401(1).

17  
18 RECOMMENDED ORDER

19 Cease and desist the unilateral imposition of wages on  
20 members of bargaining units protected by the Montana Collective  
21 Bargaining Act for Public Employees.

22 Dated this 15<sup>th</sup> day of December, 1982.

23  
24  
25   
26 Linda Skaar  
27 Hearing Examiner

28 NOTICE

29 This Recommended Order will become the Final Order of  
30 the Board unless written exceptions are filed within 20 days  
31 after service of the Recommended Order.

32 <sup>6</sup> Fry Roofing Co. v. NLRB, CA 9, (1954), 35 LRRM 2009

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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  
15<sup>th</sup> day of December, 1982:

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