

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 31-82:

MONTANA PUBLIC EMPLOYEES)
ASSOCIATION,)
Complainant,)
- vs -)
LEWIS AND CLARK COUNTY)
BOARD OF COMMISSIONERS,)
Defendant.)

FINAL ORDER

No exceptions having been filed, pursuant to ARM 24.26.215,
to the Findings of Fact, Conclusions of Law and Recommended
Order issued on April 29, 1983, by Hearing Examiner Rick D'Hooge;
THEREFORE, this Board adopts that Recommended Order in this
matter as its FINAL ORDER.

DATED this 29th day of July, 1983.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn
Alan L. Joscelyn
Chairman

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
July, 1983:

August
Duane Johnson
MANAGEMENT ASSOCIATES
P.O. Box 781
Helena, MT 59624

Montana Public Employees Association
P.O. Box 5600
Helena, MT 59604

Jennifer Jacobson



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE 31-82

MONTANA PUBLIC EMPLOYEES ASSOCIATION,)
)
 Complainant,)
)
 vs.)
)
 LEWIS AND CLARK COUNTY)
 BOARD OF COMMISSIONERS,)
)
 Defendant.)

* * * * *

FINDINGS OF FACT
CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER

* * * * *

On September 9, 1982, the Complainant filed the following
unfair labor practice charges:

The defendant has violated 39-31-401(5) by deliberately misrepresenting certain facts at the bargaining table, which misrepresentations materially affected the bargaining position of the Complainant. Their misrepresentations were put forth on several occasions by the chief spokesman for Defendant, Duane Johnson, and by the Assistant to the Defendant, Greg Jackson. The misrepresentations dealt with salary increases for certain management officials, including Mr. Jackson. Based on the misrepresentations that these officials were receiving no salary increase, the Complainant modified its position in bargaining. After the Complainant had ratified a tentative agreement, it was discovered that the Defendants' spokesman had deliberately misrepresented salary information pertaining to these management officials. Absent such misrepresentations the Complaint would not have entered into and ratified the tentative agreement it did. Complainant seeks an Order from the Board condemning such deliberate misrepresentations, Ordering the Defendant to cease and desist from any such conduct in future negotiations, and requiring the Defendant to post a notice of apology to its employees regarding its unlawful and deceitful behavior.

On September 22, 1982, the Defendant answered the charges. The Defendant denied any violation of Section 39-31-401(5), MCA and the Defendant denied that its representative deliberately misrepresented any facts at the bargaining table.

1 On December 6, 1982, a hearing was held under the
2 authority of Section 39-31-406, MCA and the Administrative
3 Procedure Act (Title 2, Chapter 4 MCA). At the hearing, the
4 parties stipulated that the Defendant is a public employer
5 as defined by the Collective Bargaining for Public Employees
6 Act, Section 39-31-101, MCA seq; that the Complainant is a
7 labor organization as defined by the Collective Bargaining
8 for Public Employees Act; and that the parties have no
9 question concerning the jurisdiction of the Board of Personnel
10 Appeals.

11 I. FINDINGS OF FACT

12 After a thorough review of the transcript, exhibit, and
13 post hearing briefs, I make the following findings of fact:

14 1. The parties were engaged in mid-contract economic
15 negotiations of a two year labor agreement. (tr. 10). The
16 members of the management negotiating team were Duane Johnson,
17 chief spokesman and a contracted labor negotiator from the
18 firm Management Associates, Greg Jackson, assistant to the
19 County Commissioners, and Paula Stoll, personnel specialist
20 for Lewis and Clark County. (tr. 4, 46, 51, 57). Some of
21 the members of the Union negotiating team were Mel Wojcik,
22 chief spokesman and field representative for Montana Public
23 Employees Association (MPEA) and Nancy Jones, employee of
24 Lewis and Clark County and the Lewis and Clark county chapter
25 president for MPEA. (tr. 4, 32, 33).

26 2. Sometime before the first negotiations between the
27 parties, Mr. Duane Johnson met three or four times with the
28 County Commissioners to formulate a general negotiating
29 policy including a policy on economic items. During the
30 negotiations between the parties Mr. Duane Johnson met a
31 couple of times with the County Commissioners to update them
32

1 concerning the negotiations process. Duane Johnson was also
2 the spokesman for the county in collective bargaining nego-
3 tiations with other unions that were representing other
4 county employees. At the time of negotiations between the
5 parties, Mr. Duane Johnson was aware of the county's collective
6 bargaining position with the other unions. (tr. 54, 55).

7 3. During the five or six bargaining sessions starting
8 at the end of May or the first part of June 1982, the parties
9 discussed such things as the change in Montana's statute
10 requiring that elected officials receive a 7.28 percentage
11 increase in salary and management's plea that the county was
12 short of money. (tr. 5, 9, 10, 11, 28, 33, 36).

13 4. Because of management's plea of poverty, the Union
14 asked what sort of belt tightening management would be
15 taking. The Union asked management's position relative to
16 other bargaining units that were at the bargaining table.
17 The Union questioned whether the mill value was going to be
18 devalued. The Union questioned management relative to
19 management salary increases on a percentage basis and on a
20 flat dollar basis versus the percentage salary increase
21 offered the union membership. (tr. 5, 15, 25, 26, 27, 28,
22 29, 56,).

23 5. Because of the importance of the above questions,
24 because of the limited money and because he wanted some
25 assurances that the Union was not going to be singled out
26 for low wage increases, Duane Johnson questioned Greg Jackson
27 who directly represents the County Commissioners. Mr.
28 Jackson gave Mr. Johnson a list of events that were scheduled
29 to occur because of the money shortage.

30 6. During several negotiation meetings, Duane Johnson
31 indicated, among other things, that the county was tightening
32

1 belts all the way around even in administrative salaries;
2 that Greg Jackson would not be receiving any sort of pay
3 increase in the upcoming fiscal year; that Paula Stoll's
4 position would be cut from full-time to three-fifths time;
5 that the county was going to be stingy with the other bargain-
6 ing unions and non-organized employees; that the county had
7 laid off other employees; and that the Justice of the Peace
8 would not be getting any raise. (tr. 5, 6, 15, 16, 26, 31,
9 33, 34, 57). The above items were among about ten or twelve
10 items that Duane Johnson received from the county. The
11 above items were given to the union to assure them that they
12 would not be singled out to bear the brunt of a budget
13 shortage.

14 7. Mr. Mel Wojcik was unable to attend negotiation
15 meeting of June 28, 1982. The Union's spokesman was Mr. Jim
16 Adams, Director of field operations, MPEA. During this
17 meeting the parties shared certain information and agreed
18 that retroactivity, in the short run, would be no problem.
19 (tr. 11, 25, 27).

20 Duane Johnson produced some prepared information on
21 mill levy and the mill value for the last several years.
22 The Union wished to wait for information about the future
23 mill value. At this meeting, Duane Johnson could only
24 anticipate future mill value. (tr. 25, 26, 27,).

25 8. At the June 15th meeting, the parties reached a
26 point where they requested the assistance of a labor mediator.
27 About 15 MPEA members and employees of the county were in
28 attendance at this meeting. (tr. 11, 12).

29 9. On June 26th, labor mediator Jack Calhoun joined
30 the negotiations. Management made their last, best and
31 final offer with two options. (tr. 7, 11, 52).
32

1 10. On June 29, 1982, the Union held a ratification
2 vote. The ratification vote was close with about five votes
3 difference. (tr. 5, 11, 13, 35,).

4 Mr. Mel Wojcik is of the opinion that the union member-
5 ship would have not ratified the proposed collective bargaining
6 agreement if they had known of the large wage increase to be
7 given Greg Jackson. Nancy Jones is of the opinion that
8 management's representation that Greg Jackson would not get
9 any wage increase probably played a major part in at least
10 her decision to vote for the proposed collective bargaining
11 agreement. (tr. 12, 34,).

12 11. On August 3, the Union sent written notice to
13 Duane Johnson stating that the union had ratified management's
14 last, best and final offer option #2. (tr. 9, 11).

15 12. A week or ten days before August 9, 1982, Mr. Ed
16 Blackman, the county bookkeeper, approached the County
17 Commissioners and explained that he had a job offer from
18 School District #1. The school district offered him a
19 salary of about \$26,000. The county was paying Mr. Blackman
20 about \$20,000. Mr. Blackman also told the County Commis-
21 sioners that the school districts offer was attractive but
22 he would prefer to work for the county. Mr. Blackman asked
23 to be informed of the county's response so that he could
24 accept or reject the school district's offer. Not wishing
25 to lose a valuable employee, the County Commissioners met
26 and discussed the possibility of giving Mr. Ed Blackman a
27 raise. Because historically Greg Jackson has always been
28 paid slightly more than Mr. Blackman, the County Commissioners
29 realized that if they gave a raise to Mr. Blackman, they
30 would have to consider a raise for Greg Jackson. The County
31 Commissioners asked Mr. Jackson to do a quick wage survey of
32

1 the other large counties. The wage survey covered Greg
2 Jackson's position, Ed Blackman's position, the Deputy
3 County Attorney's position, and other county staff positions.
4 The wage survey results indicated an upgrade was in order
5 for Greg Jackson and Ed Blackman's positions. (tr. 68, 69,
6 71).

7 The County Commissioners did not discuss that if the
8 County Commissioners gave Greg Jackson and Ed Blackman a
9 raise, the County Commissioners would be irritating all the
10 people the County Commissioners had been telling they were
11 short of money. In the mind of one County Commissioner,
12 there was no connection at all between the collective bargaining
13 and the issue of whether Greg Jackson and Ed Blackman should
14 be given a raise. (tr. 72, 61,).

15 13. Paula Stoll first heard hints about a salary
16 increase for Greg Jackson about three or four days before
17 August 9, 1982. (tr. 49, 50).

18 Paula Stoll informed Duane Johnson that the County
19 Commissioners were considering a raise for Greg Jackson on
20 or about August 6 or 7, 1982. Duane Johnson's reaction was
21 "Jesus, the timing on this is not very good... this can
22 make... me look bad". Duane Johnson does not know when the
23 County Commissioners first started considering a raise for
24 Greg Jackson. (tr. 59).

25 14. On August 9, 1982 the County Commissioners instituted
26 the following paper work:
27
28
29
30
31
32

LEWIS AND CLARK COUNTY
Employee Change of Status Form

EMPLOYEE NAME: Jackson, Greg EMPLOYEE NUMBER: 780
DEPARTMENT: Asst. to the Commissioner EFFECTIVE DATE OF CHANGE August 15, 1982
THE CHANGE(S):

CHECK ALL APPLICABLE BOXES	FROM	TO
Department		
Job/Position		
Rate of Pay (Monthly & Hourly)	\$1,847/month (25D)	\$1,996/month (27C)
Other		

REASON FOR CHANGE(S):

Probationary Period Completed	<input checked="" type="checkbox"/> Promotion	Transfer
Anniversary Increase	Demotion	Termination
Longevity Increase	Reclassification	

Other (explain): Promotional increase per commission action on August 9, 1982.

CHANGE AUTHORIZED BY: Paula Stoll DATE: August 10, 1982
CHANGE APPROVED BY: _____ DATE: _____

(Management Exhibit A).

15. On August 9, 1982, the County Commissioners adopted the final budget for the county. (tr. 67).

16. Between August 9, 1982 and August 24, 1982, Duane Johnson met with the County Commissioners to question why they increased Greg Jackson's wages. Duane Johnson was concerned that he had told the Union one thing at the collective bargaining table and the employer had done another thing. Mr. Duane Johnson was of the opinion that the County Commissioners did not fully appreciate the problem they had created; and that the County Commissioners sort of overlooked the fact that Duane Johnson told the Union during negotiations that Greg Jackson was not anticipating a salary increase. At this meeting, Duane Johnson suggested the County Commissioners withdraw or change their action on Greg Jackson and Ed Blackman's salary. The County Commissioners rejected the suggestion because they had not deliberately lied to Duane

1 Johnson. But, the County Commissioners realized how important
2 it is for the negotiator to deal honestly with the unions.
3 Duane Johnson states that when the statement about Greg
4 Jackson's raise was made, the county did not anticipate a
5 wage increase for Greg Jackson or any other management
6 employee. (tr. 60, 61, 62, 70, 71).

7 17. From the time the Union first became knowledgeable
8 of Greg Jackson's salary increase until August 24, Mel
9 Wojcik did not discuss the salary increase with any county
10 official.

11 Mel Wojcik did attempt to contact Duane Johnson during
12 this time. (tr. 10, 14).

13 18. On August 24, 1982, the parties signed a new
14 collective bargaining agreement. The Union knew that Greg
15 Jackson had received about a fifteen percent increase in
16 wages before signing the new collective bargaining agreement.
17 (tr. 12, 13 52).

18 19. Mel Wojcik testified that he is familiar with the
19 classification plan for county employees; that MPEA represents
20 employees covered by the classification plan; that MPEA had
21 a large role in negotiating the classification plan; that
22 reclassification of county employees is done by Paula Stoll
23 and Greg Jackson's office with no input from the Union; that
24 MPEA has been notified of reclassifications; that MPEA never
25 complained about reclassification; and that reclassifications
26 had been both upward and downward. (tr. 23, 24,).

27 20. Duane Johnson testified that he had not played
28 either an active or passive role in the promotion or reclassi-
29 fication of any county personnel; that he absolutely did not
30 deliberately misrepresent any facts at the collective bargaining
31 table; that he absolutely did not lie in presenting any
32

1 justification for a formal proposal at the collective bargaining
2 table; and that he did not have any knowledge of the salary
3 promotions or reclassification of the management employee
4 when he made the statement about Greg Jackson's raise at the
5 collective bargaining table. (tr. 53, 64, 65, 71).

6 21. The following portion of the transcript from the
7 hearing contains no direct questions concerning whether
8 Duane Johnson was directly or indirectly authorized to tell
9 the Union that Greg Jackson was not going to get a raise.

10 The transcript states in part:

11 STITELER: When you made that statement [about Greg
12 Jackson's wage increase], had you been told,
13 by the County Commissioners, that that was
14 the position that they were going to take, or
15 were you just 'hip shooting' here?

16 JOHNSON: Ah, let me, let me explain how that happened.
17 Okay, on, and at the, well, first of all it
18 was the concern of the Union on, during the
19 several meetings that we had, I think beginning
20 with the first meeting, that, ah, obviously
21 our position, or the County's proposals with
22 regard to economic issues, was very low, in
23 fact, starting out at zero. (tr. 55-56).

24
25 It was at that point, when they first pursued
26 that ah, that thinking that I felt that it
27 was important that I ought to discuss their
28 concerns with the County officials, including
29 the, the County Commissioners, and I did. I
30 expressed, to the Commissioners, that MPEA
31 felt that there was a possibility that they
32 were in line for some punishment that others
weren't going to get and, and I wanted some
assurances myself, in fact, that that was not
the case so that I could comfortably pursue
what was a pretty limited position in money
at the table. Ah, at that time I was told
ah, well, I first expressed these things to
Mr. Jackson, who directly represents the
County Commissioners. And, Mr. Jackson
indicated a number of areas outside of, of
the MPEA unit that were earmarked for a sev,
pretty severe austerity. . . . There was whole
list of things that were given to me by ah,
Mr. Jackson and, and ah, I think, in the
presence at one time or another of at least
one or more of the County Commissioners, of
things that ah, that were going to happen.
Ah, now, ah, probably, let me tell you the
way it was stated to me, okay, maybe this
will help. Ah, Mr. Jackson, himself, told me

1 that ah, that he was going to not ask for a
2 salary increase. That, that he didn't think
3 that he would get one anyway and that therefore,
4 ah, he, he just felt that things were so
5 tight that he probably wouldn't get a salary
6 increase and he was going to simply suggest
7 that, that his position be overlooked for a
8 salary increase, which he did and I heard him
9 personally do that. (tr. 56-58).

10 STITELER: So, if, in fact, the Board of County Commis-
11 sioners had been considering since you began
12 negotiations with MPEA ah, that they were
13 ultimately going to give Greg Jackson's
14 position a, an increase along with several
15 other positions. You wouldn't have had any
16 way of knowing that, but it's possible that
17 they may have been considering that?

18 JOHNSON: Well, I, if you want, I can only give you an
19 opinion.

20 STITELER: Okay.

21 JOHNSON: Because I can't give you an honest to God ah,
22 answer. My opinion is that no, they weren't
23 considering because I doubt very much that
24 they would have sat there and lied to me
25 realizing how important it was that I tell
26 the Union the truth. Ah, they never made a
27 big deal out of it ah, it was just one of the
28 things that was ticked off to me. I think it
29 was, they were sincerely ah, considering
30 less. (tr. 59-60) (Also see tr. 61, 62 and
31 Finding #16.).

32 Not only from the above sections of the transcript but
also from my judgment of the demeanor of the witnesses at
the hearing, this hearing examiner believes that Duane
Johnson did have authority from the County Commissioners to
make the statement about Greg Jackson's salary increase.

22. Paula Stoll's position, Personnel Specialist, was
vacant at the time of the hearing. The position was being
recruited as a half-time position. (tr. 46, 47).

II. DISCUSSION

In reviewing the transcript, Exhibit and posthearing
briefs to produce the above detailed Findings of Facts, this
Hearing Examiner is of the opinion there is no disagreement
over the facts in this case and no need for a credibility

1 resolution. The charges, transcript, Exhibit and posthearing
2 briefs produced the following questions that must be addressed:

- 3 1. Whether Greg Jackson's wage increase was due
4 to reclassification?
- 5 2. Did MPEA waive the rights to file this unfair
6 labor practice charge because MPEA did not
7 object to Greg Jackson's salary increase
8 before signing the new Collective Bargaining
9 Agreement on August 24, 1982?
- 10 3. Is the word "deliberate" critical to the
11 charge?
- 12 4. Did Duane Johnson independently misrepresent
13 any facts at the collective bargaining table?
- 14 5. Did the County misrepresent any facts at the
15 collective bargaining table?
- 16 6. Did the misrepresentation of facts at the
17 collective bargaining table constitute a
18 violation of Section 39-31-401(5), MCA?

19 1. Whether Greg Jackson's wage increase was due to
20 reclassification?

21 The Defendant argues that the action of increasing Greg
22 Jackson's wages by the County Commissioners was a solution
23 to a classification problem. The Defendant's Brief states
24 that "the Complainant should realize better than anyone that
25 management must be free to act when circumstances dictate a
26 review of classification and pay." Looking at Finding
27 Number 14, Management's Exhibit A, I find the Exhibit shows
28 the reason for the change of Greg Jackson's salary from
29 \$1,847 per month to \$1,996 per month was marked "promotion"
30 not "reclassification". The Exhibit also explains the
31 reason for the change as "promotional increase". If the
32 action by the County Commissioners was for a classification
reason why was promotion marked and not reclassification?

If this Hearing Examiner was to agree with the Defendant's
arguments, the Defendant could make broad base changes in
all employees' pay for "classification reasons". This
argument would make negotiations of wages under Montana's
Collective Bargaining for Public Employees Act useless. The
employer is allowed to make unilateral changes in wages

1 provided the changes are within the understandings between
2 the parties. (C & C Plywood, 385 US 421, 64 LRRM 2065, 1967
3 and Katz, 369 US 736, 50 LRRM 2177, 1962). By looking at
4 Findings Number 6, 10, 12, 13, 16, 17, 18 and 21, this
5 Hearing Examiner believes that the parties had an under-
6 standing that Greg Jackson was not going to get a raise. By
7 looking at Finding Number 19, this Hearing Examiner believes
8 the County and MPEA had an understanding that the County had
9 certain flexibility in reclassifying employees provided the
10 County notified MPEA. The understanding between the parties
11 about reclassification is a general understanding. The
12 understanding between the parties about Greg Jackson's raise
13 was a specific understanding. A specific understanding has
14 control over a general understanding. For the reasons set
15 forth above, I give no weight to the argument that the
16 County was free to increase Greg Jackson's wages for "a
17 classification reason".

18 2. Did MPEA waive their rights to file this unfair
19 labor practice charge because MPEA did not object to Greg
20 Jackson's salary increase before signing the new Collective
21 Bargaining Agreement on August 24, 1982?

22 The Defendant's Brief states:

23 The chronological events of this matter which are
24 documented on the record show that Complainant
25 rested on its rights for a period from August 9,
26 1982, until August 24, 1982, when the parties
27 formally executed the extant labor agreement
28 between the parties. Testimony taken at the
29 hearing by Complainant's witnesses shows no contact
30 or complaint to Defendant about this matter prior
31 to August 24, 1982. No attempt was made to seek
32 an explanation of this matter. No opportunity was
provided the Defendant to give an explanation.
Complainant's explanation that "they had made a
tentative agreement and intended to stick to it"
has a hollow ring. It is clear that Complainant
is attempting to use the Board of Personnel Appeals
to take care of something that they should have
attempted to take care of themselves. At the very
least, Complainant was obligated to convey these

1 concerns and seek remedy from the only party that
2 could properly address the matter - the Lewis and
3 Clark County Commission. Instead, Complainant
4 stood mute and therefore by their silence waived
5 their right to complain about this matter. This
6 charge represents nothing more than after the fact
7 harassment, vexatious litigation and an unfair
8 burden upon the taxpayers of Lewis and Clark
9 County.

10 The Second Circuit Court of Appeals in Local 743,
11 International Association of Machinists, AFL-CIO v. United
12 Aircraft Corporation, 337 F.2d 5, 57 LRRM 2245, 1964, set
13 forth the following lesson on waivers:

14 The standard rule in cases such as this, enunciated
15 in numerous decisions of the Supreme Court, this
16 court, and the courts of other circuits, is that
17 the right to resort to the Board [NLRB] for relief
18 against unfair labor practices cannot be foreclosed
19 by private contract. For example, see J. I. Case
20 Co. v. NLRB, 321 U.S. 332, 336-39, 14 LRRM 501
21 (1944); National Licorice Co. v. NLRB, 309, U.S.
22 350, 359-61, 6 LRRM 2103 (s Cir. 1952), aff'd, 347
23 U.S. 17, 33 LRRM 2417 (1954); NLRB v. E. A. Labora-
24 tories, Inc., 188 F.2d 885, 887 28 LRRM 2043 (2
25 Cir. 1951), cert. denied. 342 U.S. 871 29 LRRM
26 2022 (1951); International Union of Elc. Workers
27 v. NLRB, 328 F.2d 723, 727, 55 LRRM 2659 (3 Cir.
28 1964); NLRB v. Threads, Inc., 308 F.2d 1, 8, 51
29 LRRM 2074 (4 Cir. 1962). Nor is an arbitration
30 award of any greater effect in this respect. NLRB
31 v. bell Aircraft Corp., 206 F.2d 235, 237, 32 LRRM
32 2550 (2 Cir. 1953); NLRB v. Hershey Chocolate
Corp., 297 F.2d 286, 293, 49 LRRM 2173 (3 Cir.
1961); NLRB v. International Union, UAW, 194 F.2d
698, 702, 29 LRRM 2433 (7 Cir. 1952).

These decisions are based on the express language
of Section 10(a) of the National Labor Relations
Act [NLRA], 29 U.S.C. Section 160(a), which provides
in part:

"The Board is empowered . . . to prevent any
person from engaging in any unfair labor practice
. . . affecting commerce. This power shall not be
affected by any other means of adjustment or
prevention that has been or may be established by
agreement, law, or otherwise: . . ."

This express statutory mandate, in turn, reflects
the theory enunciated by the Supreme Court in
National Licorice Co. v. NLRB: "The Board asserts
a public right vested in it as a public body,
charged in the public interest with the duty of
preventing unfair labor practices." 309 U.S. at
364, 6 LRRM 674. This public interest in preventing
unfair labor practices cannot be entirely foreclosed
by a purely private arrangement, no matter how

1 attractive the arrangement may appear to be to the
2 individual participants. Moreover, as the court
3 below pointed out, "The Board was designed to
4 prevent any unfair economic pressure or expedient
5 arrangements condoning unfair labor practices."
6 220 F.Supp. at 24. The aim of the act to give
7 special protection to the economically vulnerable
8 would be defeated if contracts entered into because
9 of that very vulnerability were enough to preclude
10 enforcement of the act. (57 LRRM at 2247 emphasis
11 added).

12 The above case fails to meet the facts of the case at
13 hand because the case at hand contains no written waiver but
14 an allegation of waiver by inaction and because the Collective
15 Bargaining for Public Employees Act has no equivalent section
16 to compare with the limitations on private agreements contained
17 in Section 10(a) of the NLRA.

18 But, the Montana Supreme Court in State of Montana Ex
19 rel, Neiss v. District Court of the Thirteenth Judicial
20 District, 511 P.2d 979, 1973 states:

21

22 However, since we are dealing with a public right,
23 public policy demands the minimum wage shall be
24 paid. Minimum wage provisions exist for the
25 benefit of the whole public and a claimant of his
26 own accord may not bargain away his statutory
27 minimum wage. It is elementary that a law estab-
28 lished for a public reason cannot be compromised
29 by private agreement. Section 49-105, R.C.M. 1947
30 [Section 1-3-204 MCA].

31 Because the court in Local 743, supra, states public
32 interest prevents the waiver of unfair labor practice charges
33 and because the court in Neiss, supra, states law established
34 for a public reason cannot be compromised, I cannot see why
35 the Board of Personnel Appeals should not adopt the teachings
36 of the court in Local 743, supra, when addressing a written
37 unfair labor practice waiver. Then, it should follow that
38 if the Board of Personnel Appeals applies the above standard
39 to a written waiver, the Board of Personnel Appeals should
40 have a standard that a waiver by inaction is also useless.

1 The inaction of a party is not limitless. The Complainant
2 must comply with the six (6) months limitation as set forth
3 in Section 39-31-404 MCA. The application of Section 39-31-404
4 MCA was explained in Plumbers and IBEW v. City of Great
5 Falls, ULP#26, 27-1979 which adopted the rationale of Local
6 Lodge #1424 (Bryan and Mfg. Co.), 362 U.S. 411, 45 LRRM
7 2312, 1960 and Auto Warehouse Inc., 571 F.2d 860, 98 LRRM
8 2230, 1978.

9 Because a party cannot waive the filing of an unfair
10 labor practice charge and because the Complainant's unfair
11 labor practice charge was filed timely, I do not believe
12 that MPEA waived their right to file this unfair labor
13 practice charge.

14 3. Is the word "deliberate" critical to the charge?

15 A careful examination of the charge produces a verdict
16 that variations of "deliberate misrepresentation" was used
17 three times in the charge while variations of "misrepresenta-
18 tion" was used five times in the charge.

19 MPEA's Brief sets forth the following argument:

20 At the outset it should be noted that the Defendant's
21 representative, Mr. Johnson, made much at the
22 hearing of the use of the word "deliberate" in
23 conjunction with "misrepresentation" in the unfair
24 labor practice charge. It is the position of MPEA
25 that the word "deliberate" is not the key or operative
26 word. The key word is "misrepresentation." A
27 brief discussion of the definitions will demonstrate
28 this point.

29 "Deliberate" is defined as "characterized by or
30 resulting from careful or thorough consideration"
31 or "willful". Webster's Seventh New Collegiate
32 Dictionary, 1965. It is further defined as "well
advised"; carefully considered' not sudden or
rash; circumspect". Black's Law Dictionary, 4th
ed., 1951. The thrust of the word is that a
deliberate action is one which is well-thought out
and not rashly undertaken.

 The word "misrepresentation", however, speaks to a
wholly different thing. "Misrepresentation" is
defined by Webster's as "to give false or misleading
representation of". It is defined by Black's as
"any manifestation by words or other conduct by

1 one person to another that, under the circumstances,
2 amounts to an assertion not in accordance with the
3 facts." The plain, clear and simple meaning of
4 the unfair labor practice charge, taken in conjunction
5 with these definitions, is that, assertions were
6 made which were not in accordance with the facts.
7 The key to the charges is that misrepresentations
8 were made, and that they had a material effect on
9 the bargaining position of MPEA. Whether or not
10 these misrepresentations were "deliberate" is
11 immaterial; the end result of the misrepresentations
12 is material.

13 In further support of the proposition that "deliberate"
14 is not the operative word, one merely has to
15 examine how and where the word is used. The word
16 "deliberate" is used as a modifier for emphasis in
17 several locations. It is not used in conjunction
18 with "misrepresentations" throughout.

19 Arguing from the premise that the Defendant does not
20 have the pleasure of drafting the charge, the Defendant
21 states that the Complainant did not prove that "deliberate
22 misrepresentation" as charged.

23 I believe the word "deliberate" is a modifier and not
24 critical to the charge.

25 4. Did Duane Johnson independently misrepresent any
26 facts at the collective bargaining table?

27 By looking at Findings Numbers 6, 16, 21 and 22, a
28 verdict that Duane Johnson was only relaying or quoting the
29 information he had received from the County is in order.
30 The record in this case does not contain any evidence that
31 Duane Johnson acted outside the County's negotiating policies.

32 5. Did the County misrepresent any facts at the
collective bargaining table.

Looking at Findings Numbers 12, 13, 14, 20 and 21, this
Hearing Examiner is of the opinion that the County did not
deliberately misrepresent any facts at the collective bargaining
table. This opinion is based on the fact that Mr. Blackman
first talked to the County Commissioners about a week or ten
(10) days before August 9, 1982; that Paula Stoll and Duane

1 Johnson first heard about Greg Jackson's salary increase on
2 or about August 6, 1982; and that the record lacks any
3 evidence that the County Commissioners were contemplating a
4 raise for Greg Jackson while stating the opposite at the
5 collective bargaining table. Looking at Findings Numbers 6,
6 10, 12, 13, 16, 17, 18 and 21 a verdict that the County
7 Commissioners told MPEA that Greg Jackson was not going to
8 get a raise is in order. Looking at the same findings, we
9 can also conclude that the County's statements about Greg
10 Jackson's salary increase was true at the time but later,
11 turned out to be false.

12 6. Did the misrepresentation of facts at the collective
13 bargaining table constitute a violation of Section 39-31-401(5)
14 MCA?

15 The facts of the case at hand are:

16 a. The county, in answer to the union's questions
17 and to support a low wage offer, stated Greg Jackson, a
18 non-bargaining unit employee, would not get a raise.

19 b. At the time the above statement was made, the
20 statement was true.

21 c. The union ratified the counties' last, best
22 and final offer.

23 d. Later, Greg Jackson received a raise.

24 The thrust of the arguments in MPEA's Brief is the
25 doctrine established in NLRB V. Truitt Manufacturing Co.,
26 351 U.S. 149, 38 LRM 2042, 1956, and like cases. In Truitt,
27 supra, and like cases, the courts have held the employer
28 must provide the union with some information. In addition,
29 the court in Truitt, supra, also states:

30 Good-faith bargaining necessarily requires that
31 claims made by either bargainer should be honest
32 claims. This is true about an asserted inability to
pay an increase in wages. If such an argument is
important enough to present in the give and take of

1 bargaining, it is important enough to require some
2 sort of proof of its accuracy. And it would cert-
3 ainly not be farfetched for a trier of fact to reach
4 the conclusion that bargaining lacks good faith when
5 an employer mechanically repeats a claim of inabil-
6 ity to pay without making the slightest effort to
7 substantiate the claim. Such has been the holding
8 of the Labor Board since shortly after the passage
9 of the Wagner Act. (38 LRRM at 2043).

6 Based on the above, the union would like this hearing
7 examiner to believe that all of Management's statements or
8 claims about the future must be true. The District of
9 Columbia Circuit Court of Appeals in Steelworkers vs NLRB,
10 390 F. 2d 846, 67 LRRM 2450, 1967, setforth the following
11 application of Truitt:

12 Here there was a finding that the complete
13 rejection of the Union's request for a checkoff or
14 other dues collection assistance was not a bar-
15 gaining in good faith. The Board's crucial findings
16 negating good faith was amply supported by the
17 evidence: the 1964 campaign literature wherein the
18 company itself identified refusal of checkoff with
19 undermining this union's position; the 1961 action
20 wherein the Company granted the checkoff to the more
21 favored local union; the lack of reliance on inconve-
22 nience or other business purpose; and the blanket
23 refusal to consider alternatives-all in a context of
24 vigorous anti-union animus.

19 The Company put forward on argument the possibil-
20 ity that a company may hold back a checkoff for
21 trading purposes. Assuming that the disclosure of
22 such business purpose would have enabled the Company
23 to avoid the condemnation of bad faith. The simple
24 fact is that in the case before us no such point was
25 put forward to the Union in the bargaining sessions.
26 Instead the Company hardened on an alleged point of
27 principle-a claim at odds with both its conduct,
including the checkoff granted in 1961 to another
union, and its concession that checkoff is a mandatory
subject of bargaining. An employer disingenuous in
its bargaining sessions must take the risk of being
taken at face value and being held to have violated
its duty, for good-faith bargaining requires "honest
claims." NLRB v. Truitt Mfg. Co., supra, 351 U.S. at
152. (67 LRRM at 2453-54).

28 The above case involves mandatory subject of bargaining and
29 a comparison between past actions and present actions. Also
30 see Queen Mary Restaurants vs NLRB, 560 F. 2d 403, 96 LRRM
31 2456, CA9, 1977. The Ninth Circuit Court of Appeals in NLRB
32 vs MacMillan Ring-Free Oil Co., 394 F. 2d 26, 68 LRRM 2004,
1968, set forth the following application of Truitt:

1 Third, the company's negotiators were found to
2 be to some extent contradictory and evasive when
3 responding to questions concerning the reasons for
4 some of their more severe proposals. This reaction
5 was taken by the trial examiner as at least some
6 indication that MacMillan's motives in making certain
7 of those proposals were consistent with the attitude
8 required by section 8(a)(5). "Good-faith bargaining
9 necessarily requires that claims made by either
10 bargainer should be honest claims." NLRB v. Truitt
11 Mfg. Co. 351 U.S. 149, 152, 38 LRRM 2042 (1956) (68
12 LRRM at 2008).

13 The above case involves a question of the present actions of
14 the employer. Also see NLRB vs Arkansas Rice Growers, 400
15 F. 2d 565 69 LRRM 2119, CA 8, 1968.

16 The Defendant's Brief states:

17 The duty to furnish information is not present in
18 the instant case nor was it an issue raised in the
19 hearing. No claim of financial inability was
20 raised by the employer during the negotiations
21 process. The union did not request information.
22 It is clear from the record that the employer
23 voluntarily submit their intentions for austerity.
24 The Second Circuit in NLRB v. Jacobs Mfg. Co. [196
25 F 2d 680, 30 LRRM 2098] (1952) stated that compliance
26 with the statute does not require that an employer
27 produce proof that its business decision as to
28 what it can afford to do is correct, but only that
29 it produce whatever relevant information it has
30 "to indicate whether it can or cannot afford" to
31 meet union demands. Information supplied voluntarily
32 in this case was not to show that the employer
33 could not meet the union's demands. The employer
34 made no refusal to provide information and the
35 union did not request information.

36 A union is not entitled to information for the
37 purpose of arguing with an employer over whether
38 or not its expenditures are justified (see Metlox
39 Mfg. Co., 153 NLRB 1388 (1965) enforced, 378 F 2d
40 728, 65 LRRM 2637 (CA 9, 1967) cert. denied, 389
41 U.S. 1037, 67 LRRM 2231 (1967).

42 Looking at findings #3, 4, 6, 13 and 14, we find that
43 the employer said that the county was short of money; that
44 the union, among other things, asked about management belt
45 tightening; that the county, among other things, stated that
46 Greg Jackson would not get a raise; and that Greg Jackson
47 did get a raise. Parts of the Defendant's Brief, above, are
48 in conflict with the above findings and transcript. The

1 findings and transcript are controlling. There is no question
2 that the employer did provide informaton to the union in
3 response to the union's questions. The question is about
4 the honesty of the county information concerning future
5 events.

6 The Board of Personnel Appeals first addressed misrep-
7 resentation at the collective bargaining table in Bigfork
8 Area Education Association v. Flathead and Lake County
9 School District #38, ULP #20, 22, 25, 26 and 33-1978. In
10 Bigfork, supra, the Board of Personnel Appeals with District
11 Court approval took a very dim view of the Defendant's
12 actions. The Defendant told the Complainant such things as
13 they had the ability to pay a base salary of \$9,227.00
14 without another mill levy but at the next meeting the Defendant
15 told the Complainant the opposite. (Recommended Order P.57,
16 58). The Board of Personnel Appeals also addressed misrep-
17 resentation and concealment of facts in AfSCME v. Havre
18 School District, ULP #30-1981. In Havre Schools, supra, the
19 Board of Personnel Appeals relied on the teachings of NLRB
20 v. My Store, Inc., 345 F.2d 494, 58 LRRM 2775, CA 7, 1965,
21 NLRB v. Mayes Bros. Inc., 383 F.2d 242, 66 LRRM 2031, CA 5,
22 1967, and Mount Hope Finishing Co. v. NLRB, 211 F.2d 365, 33
23 LRRM 2742, CA 4, 1954. The Seventh Circuit Court of Appeals
24 in My Store, supra, noting Truitt, supra, found the employer
25 violated Section 8(a)(5) of the NLRA by refusing to bargain
26 on wages based on a job classification on the grounds that
27 there was none when the respondent's records showed otherwise.
28 The Fifth Circuit Court of Appeals in Mayes Bros., supra,
29 modified and enforced a finding that the employer violated
30 Section 8(a)(5) of the NLRA by misleading the union into
31 believing that the complete terms of a collective bargaining
32

1 contract had been agreed upon. In Mount Hope Finishing Co.,
2 supra, the Fourth Circuit Court of Appeals denied enforcement
3 of an NLRB order on the grounds that the NLRB order lacked
4 substantial evidence. The NLRB order had found that the
5 employer violated Section 8(a)(5) of the NLRA by misleading
6 the union into believing that the plant shut down was temporary
7 rather than permanent. All the above cases involve mandatory
8 subjects of bargaining and a comparison of past and/or
9 present actions, not future intentions.

10 Neither the union's arguments, management arguments,
11 nor the Board of Personnel Appeals past rulings apply to the
12 case at hand. None of the arguments or cases cited by the
13 parties addressed the question of the employer's statement
14 about future raises for non-bargaining unit employees. From
15 the above and other NLRB cases, this hearing examiner under-
16 stands that it is an unfair labor practice for an employer
17 to knowingly misrepresent any facts about a mandatory subject
18 of bargaining. The employer also has an obligation to correct
19 any facts about a mandatory subject of bargaining which the
20 employer later finds incorrect.

21 Looking at other state jurisdictions for guidance, we
22 find the Massachusetts Labor Relations Commission in City of
23 Springfield and Massachusetts Nurses Association MUP-3720, 3
24 NPER 22-12059, 1981, set forth the following:

25 On September 28, 1979 emergency legislation to
26 provide for the observance of the visit of the Pope
27 on October 1, 1979 was signed into law by Governor
28 King. Following notification of this enactment on
29 September 28, 1979, Springfield Municipal Hospital
30 Director George H. Lane issued the following memorandum
31 to all department heads:

32 "as of 12:15 p.m., September 28, 1979 the Mayor
of Springfield has indicated that October 1,
1979 will be a paid holiday.

Please schedule your department's [sic] on a
holiday schedule or because of the short notice
to meet the scheduled commitments of your
department.

1 The October 1, 1979 holiday is to be treated
2 the same as the holidays listed in the contracts."

3 The city did not confer with the Association
4 prior to issuing the above-mentioned memorandum.
5 Anticipating financial advantages which would accrue
6 to bargaining unit members, the Association chose
7 not to discuss the mandate imposed by the City.

8 On October 1, 1979 thirty-four registered
9 nurses worked at the hospital in reliance upon
10 Lane's memorandum. All non-essential employees of
11 the City were granted the day off with pay.

12 On October 11, 1979, the nurses received their
13 first paychecks which would have reflected holiday
14 compensation from October 1, 1979. The paychecks
15 did not contain wages at time and one-half for
16 October 1, 1979. The nurses immediately complained
17 to the Association regarding this matter.

18 On October 12, 1979, at a collective bargaining
19 session regarding a successor agreement, the Ass-
20 ociation representatives asked the City why it
21 failed to abide by its announced intention to pay
22 registered nurses for holiday benefits for working
23 on October 1, 1979. The City's negotiator, James
24 Dowd, responded that due to the approximately one-
25 quarter of a million dollar cost for all units of
26 City employees there was a funding problem. Dowd
27 said that the Mayor was going to wait and see what
28 action the unions in the City would take.

19 The hearing officer determined that the totality
20 of the City's conduct regarding the Papal Holiday
21 constituted a refusal to bargain in good faith. We
22 agree. There was an existing collective bargaining
23 agreement between the parties. The City failed to
24 confer with the Association before making the
25 September 28 announcement which changed the terms of
26 that agreement. See, Boston School Committee, 4 MLC
27 1912 (1978). Moreover, the City demonstrated bad
28 faith when, in the midst of negotiations concerning
29 a successor agreement, it reneged on its announced
30 intention to treat the October 1, 1979 holiday as a
31 paid holiday. See, NLRB v. Katz, 369 U.S. 736
32 (1962). In addition, the City's position that it
would wait and see what the Association would do in
response to its failure to pay the employees' holiday
benefits demonstrates that the City did not intend
to bargain in good faith. We therefore conclude that
the totality of the City's conduct constitutes bad
faith bargaining over compensation for the Papal
Holiday.

29 In Springfield, supra, the employers announced intentions to
30 pay holiday benefits for bargaining unit members for working
31
32

1 October 1,1979. The employer reneged on its announced
2 intentions. The announced intentions dealt with a mandatory
3 subject of bargaining.

4 The parties have not cited a case that addresses a
5 question of a stated future intentions of an employer during
6 negotiations to pay non-bargaining unit employees. After an
7 extensive research of NLRB cases and other state juris-
8 dictions, I have been unable to find a case in point.

9 Because the Board of Personnel Appeals is guided by
10 Section 39-31-101 MCA which states: "In order to promote
11 public business by removing certain recognized sources of
12 strife and unrest, it is the policy of the state of Montana
13 to encourage the practice and procedure of collective bargaining
14 to arrive at a friendly adjustment of all disputes between
15 public employers and their employees", we must look at the
16 effect at this case on the parties. The affect of this case
17 on the union is one of frustration and undermining by making
18 the union feel ineffective. The union's chapter president,
19 Nancy Jones, felt as if she bought a sack of hot air because
20 management did not live up to their announced intentions.

21 In this case, if I ruled that the employer violated
22 section 39-31-401(5 MCA), I may be hampering the collective
23 bargaining process. The ruling may have the effect of
24 saying that all the give and take of the collective bargaining
25 process may be subject to a question of misrepresentation. A
26 ruling of this nature would have both parties closely watching
27 all of their statements. In effect, a ruling of this type
28 would have the same end result on negotiations as a tape
29 recorder or a court reporter has on negotiations. See NLRBvs.
30 Bartlett-Collins Co., 639 F. 2d 652,106 LRRM2272, Ca 10, 1981.

31 If I ruled the employer violated section 39-31-401(5),
32 MCA, I may be giving the union something they did not ask

1 for or could not get at the collective bargaining table.
2 Did the union think of a "me too" clause and did not pursue
3 it, or did the union try unsuccessfully to negotiate a "me
4 too" clause are all questions on my mind. The record is
5 silent in this area. A "me too" clause can take several
6 forms such as: if any other county employees receive a
7 larger raise than the employees of this bargaining unit,
8 then the employees of this bargaining unit shall also receive
9 the larger raise, or such as: if any other county employees
10 receive a larger raise than the employees of this bargaining
11 unit, then the union has a right to reopen this collective
12 bargaining agreement to renegotiate wages. I believe a
13 hearing examiner should never give a party to an unfair
14 labor practice charge proceeding anything the party did not
15 receive at the collective bargaining table. In this case, I
16 may be publicly chastising management for violating a non-
17 existing "me too" clause. I state "publicly chastising"
18 because the union's prayer is for a cease and desist order
19 plus an apology.

20 The effects of this case on management are very high
21 regardless of the final ruling. For sometime to come, the
22 employees and the labor organization will not believe manage-
23 ment.

24 When I weigh the negative effects of this case on the
25 union against the other negative affects listed above, I
26 believe the long range effect of this case can best be
27 served by dismissing this charge.

28 In examining this case we must also look at the "totality
29 of conduct". The union's brief states: "The subject of
30 employer's misrepresentations during bargaining has not been
31 a major topic for the NLRB. Most cases deal with the subject
32

1 also cover "totality of conduct" or other charges of bad
2 faith bargaining." By looking at finding #6 we see that
3 Greg Jackson's raise was one of ten or twelve items given to
4 the union to assure them that they would not be singled out
5 to bear the brunt of a budget shortage. Because the record
6 in this case contains no other indication of bad faith
7 bargaining, I must assume that no other bad faith bargaining
8 existed. Therefore, I cannot find a "totality of conduct"
9 charge.

10 Because the statement in question is about future
11 intentions of the employer not to increase the pay of a
12 non-bargaining unit employee, because I find no guidance in
13 the NLRB and/or other state case law, because the effect of
14 this case would best be served by the dismissal of the
15 charge, and because I cannot base this case on the "totality
16 of conduct" I believe this charge should be dismissed.

17 I must point out to the future reader of this rec-
18 ommended order that this hearing examiner has been very
19 troubled by the effects of this case. Given a small change
20 in facts, I would have ruled differently. I suggest the
21 reader see the Administrative Law Judges decision in J.P.
22 Stevens, 239 NLRB 738, 1978, for the effect on the union of
23 a Hobson's choice as compared to the Administrative Law
24 Judges decision in Adolph Coors Co., 235 NLRB 271, 1978, for
25 the effect on the union of misrepresentation during implementa-
26 tion. The facts of this case presents a question that is
27 just too close to call. I do not want management to believe
28 that I am blessing their past actions or will bless similar
29 actions by them. In the employer's opening statement, I
30 think Mr. Johnson stated it best when he said that there are
31 only two important fundamentals in this process; first, that
32

1 the parties tell the truth and second that the parties avoid
2 making statements they can not support. Mr. Johnson also
3 stated that he would apologize to the union and its members
4 for the sequence of events which took place plus any misunder-
5 standings about an increase in pay for any employee. (tr.
6 44, 45)

7
8 III. CONCLUSIONS OF LAW

9 For the reasons set forth above, a conclusion of law
10 that Lewis and Clark county did not violate section
11 39-31-401(5), MCA as charged is in order.

12 IV. RECOMMENDED ORDER

13 It is recommended that the unfair labor practice charge
14 #31-82 be dismissed.

15 Dated this 29th day of April, 1983.

16 BOARD OF PERSONNEL APPEALS

17
18 By: 
19 Rick D'Hooge
20 Hearing Examiner

21 NOTE: As stated in the Board of Personnel Appeals rules,
22 the parties have twenty (20) calendar days to file written
23 exceptions to this Recommended Order. If no written exceptions
24 are filed this Recommended Order becomes the full and final
25 Order of the Board of Personnel Appeals.

26 CERTIFICATE OF MAILING

27 The undersigned does certify that a true and correct
28 copy of this document was mailed to the following on the
29 2nd day of May, 1983:

30 Duane Johnson
31 Management Associates
32 P.O. Box 781
Helena, MT 59624

Montana Public Employees Association
P.O. Box 5600
Helena, MT 59604

PAD6:G

