

ULLP-16-83

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE COUNTY OF MISSOULA

Cause No. 59590)
UNIVERSITY TEACHERS UNION (UTU),)
Local 119, MONTANA FEDERATION)
OF TEACHERS, AMERICAN FEDERATION)
OF TEACHERS, AFL-CIO,)
Plaintiffs,)
vs.)
ROBERT BANAUGH, WALTER J.)
BRIGGS, and RAHAL DHESEI,)
Defendants.)

FILED FEB 5 1986
BONNIE J. HENRI, Clerk
By _____ Deputy

ORDER AND JUDGMENT

RECEIVED
FEB 13 1986
APPEALS

IT IS HEREBY ORDERED:

(1) That the Plaintiff is entitled to Judgment against the Defendants in an amount equal to all of the UTU equivalent fees which the Defendants have accrued under the collective bargaining agreement between the UTU and the Montana University system, plus prejudgment interest of six percent and plus the costs of the suit. Therefore:

(a) Judgment is entered against the Defendant Robert Banaugh in favor of the Plaintiff UTU in the amount of \$661.66, plus prejudgment interest of six percent running on the 1983-1984 fees of \$288.96 from May 8, 1984 to the date of entry of judgment and prejudgment interest of six percent running on the 1984-1985 fees of \$372.70 from October 31, 1984 to the date of entry of judgment, plus one-third of Plaintiff's costs.

(b) Judgment is entered against Defendant Walter J. Briggs, in the amount of \$164.72, plus prejudgment interest of six percent running from May 8, 1984 until the date of entry of judgment, plus one-third of the Plaintiff's costs.

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(c) Judgment is entered against Defendant Rahal Dhesi in the amount of \$202.43, plus prejudgment interest of six percent running from May 8, 1984, until the date of entry of judgment, plus one-third of Plaintiff's costs.

(2) On failure of the Defendants to pay the judgment as ordered against them that Plaintiff is granted execution on the judgments.

DATED this 5th day of February, 1986.

JOHN S. HENSON
Judge John Henson

RECEIVED
OCT 28 1985

APPEALS

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MISSOULA

Cause No. 59590/35)
UNIVERSITY TEACHERS UNION (UTU),)
Local 119, MONTANA FEDERATION)
OF TEACHERS, AMERICAN FEDERATION)
OF TEACHERS, AFL-CIO,)
Plaintiffs,)
vs.)
ROBERT BANAUGH, WALTER J.)
BRIGGS, and RAHAL DHESI,)
Defendants.)

FILED OCT 24 1985
BONNIE J. HARRIS, Clerk
By Carla E. Rasmussen, Deputy

OPINION
AND
ORDER

The matters presently before the Court are the above-named parties' Motions for Summary Judgment on Plaintiff's action against Defendants, and on Defendant Briggs' Counterclaim against Plaintiff in the form of judicial review.

The various issues presented by this case can be condensed to three (3), which are:

- (1) Whether Section 3.200 of the subject Collective Bargaining Agreement (CBA) is legally enforceable against Defendants;
- (2) Whether, addressing Defendant Briggs' Counterclaim, the Department of Labor and Industry's Board of Personnel Appeals erred as a matter of law in dismissing Brigg's unfair labor practice (ULP) charge against Plaintiff; and
- (3) Whether under the CBA, Plaintiff is entitled to the remedy of specific performance and to recover attorney's fees if successful in its present motion.

The Court will treat each issue in the order listed.

For the reasons below-enumerated, this Court holds in favor of Plaintiff on its Motion for Summary Judgment, and against Defendant Briggs on the Counterclaim for judicial review.

The essential facts are not in dispute. Defendants are members of the subject collective bargaining unit, although not members of Plaintiff Union (UTU). UTU negotiated and obtained a collective

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1 bargaining agreement (CBA) with the Montana University System,
2 effective July 1, 1983, through June 30, 1987. Included in the
3 CBA is Section 3.200, or the "union security" clause, which states
4 in pertinent part:

5 "Section 3.200 Union Security

6 During the term of this agreement members of the
7 bargaining unit shall either become members of the UTU
8 or pay equivalent fees determined by the UTU as set forth
9 below.

10 Employees in the bargaining unit may sign a statement
11 provided by the UTU stating their objection in principle
12 to becoming a member of the UTU or financially supporting
13 the UTU and elect to contribute an equivalent amount to
14 one or more charitable organizations authorized by the
15 UTU.

16 * * * * *

17 In no event shall failure to pay the obligations
18 result in termination of employment or otherwise affect
19 the terms and conditions of employment of any employee
20 in the bargaining unit. Any employee in the bargaining
21 unit who fails to pay the authorized obligation shall
22 be subject to the following:

23 Step 1. A joint conference with a representative from
24 the union and a representative of the
25 administration at which the duties and obligations
26 of the employee are explained to him/her.

27 Step 2. Civil action by the UTU for damages against the
28 employee.

29 Section 3.200, pp. 8-11, CBA, Plaintiff's Exhibit "A" (emphasis
30 added).

31 Defendants here claim that Section 3.200 of the CBA, the "union
32 security" clause, is unenforceable against them because Plaintiff
(UTU) had no authority to bind members of the bargaining unit on
that section as it "does not 'affect any terms or conditions of
employment'." (Defendants' Memorandum in Support of Defendants'
and Counterclaimant's Motion for Summary Judgment, at p. 4). That
is, Defendants argue, Section 3.200, by its own terms, is not a
term or condition of employment and therefore is not a topic upon
which the bargaining agent (UTU) had authority to bind the principal
(Defendants' Memorandum, at p. 6). This Court disagrees.

1 Clearly, the UTU, as exclusive bargaining agent (Section 3.100,
2 Recognition, CBA at pp. 7-8), possesses authority to bargain upon
3 "terms and conditions of employment." N.L.R.B. v. Allis-Chalmers
4 Manufacturing Company, 388 U.S. 175, 180 (1977). The Defendants,
5 as members of the collective bargaining unit, are bound by the CBA,
6 regardless whether or not they are members of the union. Steele
7 v. Louisville and N.R.R., 323 U.S. 192 (1944).

8 Section 3.200 is clearly a "condition" or "obligation" of
9 employment. See, San Lorenzo Educ. Ass'n v. Wilson et al., 32 Cal.
10 3d 841, 654 P.2d 202, 206 (1983); Eastern Michigan University v.
11 Morgan, 100 Mich.App. 219, 298 N.W.2d 886, 889-90 (1980). The Montana
12 Collective Bargaining for Public Employees Act (MCBPEA) specifically
13 authorizes such union security clauses by stating, in pertinent
14 part:

15 "39-31-401 Unfair labor practices of public employer. It
16 is an unfair labor practice for a public employer to:

17 (3) discriminate in regard to hire or tenure of employment
18 or any term or condition of employment in order to encourage
19 or discourage membership in any labor organization; however,
20 nothing in this chapter or in any other statute of this
21 state precludes a public employer from making an agreement
with an exclusive representative to require, as a condition
of employment, that an employee who is not or does not
become a union member, must have an amount equal to the
union initiation fee and monthly dues deducted from his
wages in the same manner as checkoff of union dues;"

22 Section 39-31-401(3), M.C.A. (emphasis added). This statute clearly
23 demonstrates that in Montana, such "union security" clauses or devices
24 are, as a matter of law, enforceable conditions of employment.

25 In approaching the second issue, namely Defendant Briggs'
26 Counterclaim for judicial review, this Court has reviewed the
27 Administrative Record (A.R.) appended to the present Court record.
28 On November 30, 1983, Defendant Briggs filed an Unfair Labor Practice
29 (ULP) charge with the Department of Labor and Industry's Board of
30 Personnel Appeals wherein he avers:

31 ///

32

1 "The University Teacher's Union (UTU), has engaged in
2 unfair labor practices pursuant to Mont. Code Ann. §
3 39-31-402(1), (2) (1983), in that it restrained and coerced
4 employees in the exercise of their guaranteed rights and
5 that it did not in good faith represent the interests
6 of the members of the bargaining unit during collective
7 bargaining. In addition, the UTU breached its duty,
8 pursuant to Mont. Code Ann. § 39-31-205 (1983), to represent
9 the interests of all the employees in the bargaining unit
10 without discrimination.

11 Statement of the Charges (attached to ULP Charge, A.R.)

12 Board of Personnel Appeals Administrator Robert R. Jensen
13 dismissed Briggs' ULP claim, stating in pertinent part:

14 "No investigation of the ULP charges is necessary because
15 the charges fail to allege facts which constitute a
16 violation of the Act [MCBPEA]. Without an alleged violation
17 of the Act, this Board does not have jurisdiction."

18 Administrator's Order of Dismissal, at p. 5 (A.R.) Briggs filed
19 timely exceptions to the Order of Dismissal on February 28, 1984,
20 and Oral Argument was scheduled before the full Board on April 27,
21 1984.

22 On May 22, 1984, after reviewing the record and considering
23 the briefs and oral argument before it, the Board found as follows:

- 24 "1. That even if all the facts contained in the charge
25 are true, no known unfair labor practice has been alleged;
- 26 2. That the Board believes it has no subject matter
27 jurisdiction over the allegations;
- 28 3. It is ordered that the Complainant's Exception to
29 the Order of Dismissal are hereby denied; and
- 30 4. It is ordered that this Board therefore adopts the
31 Administrator's Order of Dismissal as the Final Order
32 of this Board."

33 Board of Personnel Appeals Final Order (A.R.) This Court in its
34 research has found not one Montana or federal case, nor have
35 Defendants provided or cited any, that would support Defendants'
36 averrance that the Board erred as a matter of law in dismissing
37 Briggs' ULP charge. The Board's May 22, 1984, Order is hereby
38 affirmed as final on the issues presented to and decided by it.

39 The third and last issue consists of two components: whether

1 Plaintiff is entitled to specific performance and whether Plaintiff,
2 by the terms of the CBA, is entitled to an award of attorney's fees
3 in the present act.

4 Section 3.200 of the CBA provides that bargaining unit members
5 who fail to pay the authorized obligation shall be subject to "(c)ivil
6 action by the UTU for damages against the employee." Section 3.200,
7 CBA, at p. 10. Section 27-1-411, M.C.A., provides in relevant part
8 that:

9 "Specific performance of an obligation may be compelled
10 when:

11 (3) it would be extremely difficult to ascertain the actual
12 damage caused by the nonperformance of the act to be done;"

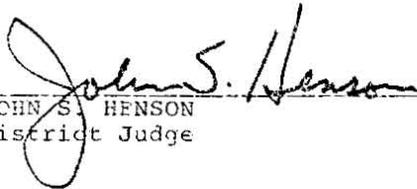
13 In the case at bar, the actual damage caused by Defendants' refusal
14 to pay union fees or an equivalent amount as specified in Section
15 3.200 (CBA) is possible to liquidate, contrary to Plaintiff's
16 contention (Plaintiff's Reply Brief in support of Plaintiff's Motion
17 for Summary Judgment, at p. 7). Rather, the amount due to Plaintiff
18 would presumably be those fees outstanding and due as of the date
19 of this Order. Future acts of noncompliance, in defiance of the
20 present Order, shall be subject to sanctions and further Court order
21 requiring payment of fees or equivalent amounts.

22 With regard to attorney's fees, Plaintiff asserts that Section
23 3.200's "civil action for damages" clause warrants this Court's
24 award to Plaintiff of attorney's fees in this action. The Court
25 disagrees. The CBA does not specifically state that "damages" under
26 the language of Section 3.200 shall include attorney's fees if the
27 UTU is successful in its civil action against a unit member who
28 fails to pay the union fee or authorized obligation. Such language
29 could easily have been included, but without such specific language
30 the Court will not interfere with the plain provisions of the CBA.
31 See, Eastern Michigan University v. Morgan, 100 Mich.App. 219,
32 298 N.W.2d 886, at 891 (1980). The Court finds Plaintiff's cited
cases, Smith v. Fergus County, 98 Mont. 377, 39 P.2d 193 (1934),

1 and Home Insurance Co. v. Pinski Bros., 160 Mont. 219, 500 P.2d
2 945 (1972) unpersuasive to its determination.

3 For the rationale given above, the Court hereby grants Summary
4 Judgment in favor of UTU on its claim against Defendants Baraugh,
5 Briggs, and Dhesi under Section 3.200 of the CBA. Correspondingly,
6 Summary Judgment on Defendant Briggs' Counterclaim is granted in
7 favor of Plaintiff. Pursuant to request of counsel during oral
8 argument to reserve the question of damage, Plaintiff shall within
9 ten (10) days of this Order submit to the Court a statement of present
10 damages, disregarding attorney's fees. Defendants shall, within
11 ten (10) days thereafter, submit objections, if any, to the amount
12 of the obligations designated by Plaintiff. A hearing by this Court,
13 if requested, may be given if discrepancies arise. If Defendants'
14 objections are not timely made as specified above, an Order will
15 be entered in the amount designated by Plaintiff. Future
16 noncompliance with the requirements of Section 3.200 shall be subject
17 to sanctions and further court order.

18 DATED this 24th day of October, 1985.

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21 
22 JOHN S. HENSON
District Judge

23 cc: Joan Jonkel
24 Robert Phillips
25 James Gardner
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 16-83:

WALTER J. BRIGGS,)
)
 Complainant,)
)
 - vs -)
)
 UNIVERSITY TEACHERS UNION,)
 UTU, MFT, AFT, AFL-CIO,)
 University of Montana,)
 Missoula, Montana,)
)
 Respondents.)

FINAL ORDER

On February 7, 1984, the Administrator issued an order dismissing these charges for the reason that they fail to allege facts constituting a violation of the Collective Bargaining Act.

Exceptions to the Order of Dismissal were filed by Complainant's Attorney on February 28, 1984.

Oral argument was scheduled before the Board of Personnel Appeals on April 27, 1984.

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

1. That even if all the facts contained in the charge are true, no known unfair labor practice has been alleged.
2. That the Board believes it has no subject matter jurisdiction over the allegations.
3. It is Ordered that the Complainant's Exceptions to the Order of Dismissal are hereby denied.
4. It is Ordered that this Board therefore adopts the Administrator's Order of Dismissal as the Final Order of this Board.

DATED this 22nd day of May, 1984.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn
Alan L. Joscelyn
Chairman



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CERTIFICATE OF MAILING

I, Jennifer Jacobson, do certify that a true and correct copy of this document was mailed to the following on the 31st day of May, 1984:

Robert J. Phillips
Suite 104, Central Square
201 West Main
Missoula, MT 59802

Joan Jonkel
JONKEL & KEMMIS
Box 8687
Missoula, MT 59807

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 16-83:

WALTER J. BRIGGS,)
)
 Complainant,)
)
 - vs -) ORDER OF
) DISMISSAL
)
 UNIVERSITY TEACHERS' UNION)
 (UTU), MFT, AFT, AFL-CIO,)
 UNIVERSITY OF MONTANA,)
 MISSOULA,)
)
 Defendant.)

* * * * *

On November 30, 1983, Walter J. Briggs through his attorney Robert J. Phillips, filed this unfair labor practice charge against the University Teachers Union. On December 15, 1983, the UTU filed an Answer, a Motion to Dismiss and a Motion to Strike, and Brief in Support. On January 16, 1984, attorney Phillips filed a Memorandum in Opposition to Motions of Respondent. The UTU filed a Reply Memorandum on January 27, 1984.

The UTU's Brief in Support makes two requests. First, the UTU asks this Board to "strike" the charge because the charge allegedly does not contain "a clear and concise statement of facts constituting the alleged violation" required by A.R.M. 24.26.680(3)(c). We will treat this motion as a motion for more definite statement pursuant to A.R.M. 1.3.216. The UTU's second request is a Motion to Dismiss for failure to state a claim upon which relief can be granted. We will treat each motion separately.

THE MOTION FOR MORE DEFINITE STATEMENT

The UTU asserts that the ULP charge does not incorporate Briggs' Memo of 11-16-83. That is not so. The Memo was

1 filed with the charge and while not specifically incorpor-
2 ated by reference which proper pleading dictates, it is
3 nevertheless an "attachment" as noted by the ULP charge.

4 The UTU then asserts that if the Memo is considered a
5 part of the pleadings, it is a "shot gun" approach and still
6 violates A.R.M. 24.26.680(3)(c). Because we grant the
7 Motion to Dismiss, the Motion for More Definite Statement is
8 denied.

9
10 THE MOTION TO DISMISS

11 The UTU first asserts that "the Board of Personnel
12 Appeals does not have the power to provide a remedy to
13 employees who fail to contribute or to abide by the condi-
14 tions of a negotiated contract." Page 7 of UTU's brief.
15 The UTU goes on to assert that "in similar cases, the NLRB
16 has held that no duty of fair representation ever attaches
17 where the employee has not paid his dues or equivalency
18 obligation as required by the contract. John J. Roach & Co.
19 96 LRRM 1281, 1283 (1972); Buckley v. AFTRA 426 (sic) 496
20 F.2d 305, 311 (2 Cir. 1974), cert. denied 419 U.S. 1093
21 (1974)."

22 Neither of those cases stand for the proposition cited.
23 Neither the BPA's authority to remedy a ULP pursuant to
24 39-31-406 nor a Union's duty to fairly represent all bargain-
25 ing unit members is vitiated by the alleged breach of con-
26 tract by a bargaining unit member. Neither case cited by
27 the UTU stands for that proposition. Furthermore, the clean
28 hands theory is an equitable doctrine. Since the BPA's
29 authority and the Union's duty are statutorily established,
30 the presence of unclean hands by a complainant or a bargain-
31 ing unit member in no way lessens the Board's authority to
32 remedy a ULP or a Union's duty of fair representation.

1 The UTU next asserts that the UTU did not have to allow
2 non-union members of the bargaining unit to vote on contract
3 ratification, citing Afro-American Police League v. Frater-
4 nal Order of Police, Chicago Lodge, 553 F. Supp. 664 (Ill.,
5 1982); and Gocłowski v. Penn Central Transp. Co., 545 F.
6 Supp. 227, Aff'd 707 F.2d 1401 (Pa., 1982). The UTU goes on
7 to assert that the non-union members were nevertheless
8 allowed to vote.

9 Counsel for the complainant makes several points in
10 response. He first asserts that the BPA does not have the
11 authority to dismiss a complaint.

12 A complaint which fails to state a claim upon which
13 relief can be granted does not vest this Board with authority
14 to hear and decide the case. Therefore, this Board is free
15 to dismiss a complaint which fails to state a claim. See
16 also ARM 24.26.680(4).

17 The complainant next asserts in his Brief in Opposition
18 that the Union Security Clause "was not a proper topic for
19 bargaining" and "the UTU had no authority to bargain on this
20 issue." Those assertions are frivolous. It is elementary
21 that a union security clause is a mandatory subject of bar-
22 gaining. It is a contradiction in terms to assert that it
23 is an unfair labor practice for a union to bargain about a
24 mandatory subject of bargaining. If requested to do so, the
25 employer was legally obligated to bargain over said topic.

26 The fact that the negotiated union security clause
27 contains an enforcement mechanism different than the more
28 common termination of the employee in no way lessens its
29 status as a valid union security clause. If a union security
30 clause which provides for the termination of an employee for
31 non-payment of his/her fair share is legal, then a fortiori
32

1 a union security clause which provides a civil action method
2 of dues collection is also legal.

3 The complainant does not address the UTU's assertions
4 that the non-union members did not even have to be allowed
5 to vote on contract ratification.

6 The only remaining allegation by the complainant dis-
7 cussed in his brief is that,

8 The attachments to the complaint allege that the
9 UTU has engaged in intentional inhibition of a dis-
10 cussion of the Collective Bargaining Agreement in order
11 to coerce employees into voting in favor of the Union
12 Security Clause. It alleges that those employees
13 voting "no" on the agreement were harassed, all in
14 violation of MCA 39-31-206(2).

15 The factual allegations underlying those assertions
16 (found in Sections I, A, 1 and 2 of Briggs' November 14,
17 1983 Memo) mention an alleged failure by the UTU to fully
18 debate the merits of the proposed contract and an allegation
19 that people who voted "no" on the contract received "verbal
20 harassment" from the union.

21 Since the law does not require the UTU to allow non-
22 union members to vote on contract ratification, the above
23 allegations do not allege either (a) a breach of the duty
24 of fair representation or (b) a violation of 39-31-206.

25 For the above stated reasons, the Board takes the
26 following actions:

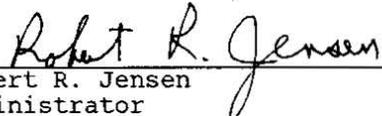
27 1. That portion of the charge alleging that the union
28 committed an unfair labor practice by negotiating a union
29 security clause is dismissed for not alleging a violation of
30 the Act. It fails to state a claim upon which relief can be
31 granted.

32 2. That portion of the charge alleging the union
violated 39-31-206 and/or committed an unfair union labor

1 practice in the manner in which the union handled the rati-
2 fication procedure is dismissed.

3 No investigation of the ULP charges is necessary because
4 the charges fail to allege facts which constitute a violation
5 of the Act. Without an alleged violation of the Act, this
6 Board does not have jurisdiction.

7 Dated this 7 day of February, 1984.

8
9 
10 Robert R. Jensen
11 Administrator

12 NOTICE

13 Any party aggrieved by this Order may appeal to the
14 full Board of Personnel Appeals by filing Exceptions to
15 this Order setting forth the grounds alleging error. The
16 Exceptions must be filed within 20 days from receipt of
17 this Order. If exceptions are not filed, this Order
18 becomes the Final Order of the Board.
19

20 CERTIFICATE OF SERVICE

21 The undersigned does certify that a true and correct
22 copy of this document was mailed to the following on the
23 7th day of February, 1984, postage paid and
24 addressed as follows:

25
26 Robert J. Phillips
27 Suite 104, Central Square
28 201 West Main
29 Missoula, MT 59802

30
31 Joan Jonkel
32 Jonkel & Kemmis
P.O. Box 8687
Missoula, MT 59807



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