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UCLP-5-17-86  
MONTANA DISTRICT COURT  
23  
Local 150038Z  
15001063

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

3 -----  
4 BILLINGS EDUCATION ASSOCIATION, )  
5 MEA, )

6 Petitioner, )

7 - vs - )

Cause No. CDV-85-937

8 MONTANA BOARD OF PERSONNEL )  
9 APPEALS and TRUSTEES OF )  
10 YELLOWSTONE COUNTY SCHOOL )  
11 DISTRICT NO. 2, )

MEMORANDUM AND ORDER

12 Respondent. )

13 BILLINGS ELEMENTARY SCHOOL )  
14 DISTRICT NO. 2 and HIGH SCHOOL )  
15 DISTRICT NO. 2, YELLOWSTONE )  
16 COUNTY, MONTANA, )

17 Cross-petitioner, )

18 - vs - )

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19 MONTANA BOARD OF PERSONNEL )  
20 APPEALS AND BILLINGS EDUCATION )  
21 ASSOCIATION, MEA, )

Standard's Bureau

22 Cross-respondents. )

23 -----  
24 Before the Court are a Petition for Judicial Review  
25 filed by the Billings Education Association (BEA) and a Cross  
Petition filed by Billings Elementary School District No. 2  
and High School District No. 2 (District). Both Petitions  
address the Final Order of the Board of Personnel Appeals

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HILEY & LORING, Y & C

FILED 12-15-86  
CLARA GILREATH, Clerk of District Court  
By MADDY Deputy

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(2) #3

1 (BPA) of August 27, 1985. Briefs having been filed by BEA,  
2 the District and the BPA and oral argument having been heard,  
3 the matter is ready for decision.

4 PROCEDURAL BACKGROUND

5 In late January 1984, the BEA conducted a survey among  
6 the teachers at Lincoln Junior High School in Billings, Montana.  
7 The results of the survey were given to Dr. William K. Poston,  
8 Jr., Superintendent of the District (Poston) on February 9,  
9 1984, and were distributed to the Lincoln School staff and  
10 to Trustees of the District.

11 On March 7, 1984, Poston sent a letter to BEA President  
12 Mark Jones (Jones) strongly protesting the survey and its  
13 distribution. Poston advised Jones that the District's attorney  
14 had informed him that statements in the survey were libelous  
15 and circulation of the survey presented grounds for legal  
16 action and disciplinary action relative to employment against  
17 those persons involved in "soliciting, compiling and distribu-  
18 ing" the survey results. Poston also asked Jones to meet  
19 with him in Poston's office on March 3, 1984. Jones attended  
20 that meeting as requested. Subsequently, on March 15, 1984,  
21 the BEA filed an unlawful labor practice charge with the  
22 BPA against the District, alleging in Count I that the March  
23 7th letter constituted a threat to discipline union members  
24 engaged in protected, concerted activity, in violation of  
25 Section 39-31-401(1) and (3), MCA, and Section 39-31-201,

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1 MCA. The second Count alleged that Jones had been denied  
2 presence of a union representative at his meeting with Poston.

3 Count III of the charge involved an unrelated situation.  
4 On February 28, 1984, Poston had met with his "cabinet,"  
5 a group of central office administrators and a building  
6 principal who commonly met to discuss and handle District  
7 concerns. The informal minutes of that meeting included  
8 the following:

9 The soliciting of Board Members on concerns of  
10 the school district, without following through  
11 the chain of command, prior to going to the Board  
12 (sic), will be considered as an act of insubordina-  
13 tion. Those staff members not observing this  
14 procedure can expect to receive the appropriate  
15 reprimand. This will effect (sic) all staff  
16 members.

17 Count III of the Unfair Labor Practice charge addressed the  
18 above paragraph and said, in pertinent part:

19 Board members are elected public officials  
20 and any member of the bargaining unit has a right,  
21 protected by the United States and Montana con-  
22 stitutions, to contact elected officials for  
23 the redress of grievances. Threatening a reprimand  
24 for the exercise of such rights is a violation  
25 of Section 39-31-401(1), MCA, which protects  
the Section 39-31-201, MCA, rights of the employees.

A hearing was held before Hearing Examiner Rick D'Hooge,  
who issued comprehensive, detailed (80 pages) Findings of  
Fact, Conclusions of Law and Recommended Order on August  
30, 1984. The Hearing Examiner found in regard to Count  
I that the subject survey was a concerted, protected activity  
under Section 39-31-201, MCA, and that Poston's March 7th

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1 letter and the March 9th meeting with Jones constituted an  
2 unfair labor practice. The Hearing Examiner's recommendation  
3 was that the District be ordered to cease and desist from  
4 "interfering with protected concerted activities of the BEA  
5 or its members as stated in Section 39-31-201, MCA, by trying  
6 to stop future Lincoln survey reports." The Hearing Officer  
7 recommended dismissal of Counts II and III.

8 Both the BEA and District filed Exceptions to this Order.  
9 The BEA excepted to the dismissal of Count III, and the District  
10 to the Hearing Examiner's determination relative to Count I.  
11 No exceptions were filed with respect to Count II and it  
12 is not before the Court.

13 A hearing was held before the full Board of Personnel  
14 Appeals (BPA) and post-hearing briefs were filed. The BPA's  
15 Final Order of August 27, 1985, denied the BEA's exception  
16 to Count III. As to the District's Exceptions to Count I,  
17 the Final Order stated as follows:

18 1. It Is Ordered that this Board adopts  
19 Findings of Fact of Hearing Examiner Rick D'Hooge  
20 and all portions of the Hearing Examiner's dis-  
21 cussion that are consistent with this Final Order.  
(Emphasis supplied)

22 3. It Is Ordered that this Board substitute  
23 its own Conclusions of Law for that of the Hearing  
24 Examiner as follows.

25 'That since the BEA conducted a survey subsequent  
to the Lincoln School Survey, the March 7 letter  
and the March 9 meeting did not constitute a

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1 threat to discipline members for engaging in  
2 protected concerted activities in violation of  
Section 39-31-401(1), MCA.'

3 BPA's Final Order, pp. 1-2.

4 From this Final Order, both parties appeal. While the  
5 BEA's Petition addresses solely Count I of the Final Order,  
6 in its brief it argues that the BPA should be reversed on  
7 Count III as well. The District objects to the Final Order  
8 "to the extent that the Board's Final Order may be interpreted  
9 as finding that the BEA was engaged in protected concerted  
10 activities under Section 39-31-201, M.C.A. when it solicited,  
11 compiled and distributed the Lincoln Survey Report . . ."  
12 (District's Response and Cross-Petition, p.3) The alignment  
13 of the parties is as follows: The BEA agrees with BPA that  
14 the Lincoln Survey was "protected activity" while challenging  
15 the BPA's Final Order dismissing Counts I and III. The District  
16 and the BPA agree that dismissal of both Counts is proper,  
17 but disagree as to whether or not the Lincoln Survey constituted  
18 a protected activity.

19 FACTUAL BACKGROUND

20 Neither party has made specific objections to the Hearing  
21 Examiner's Findings of Fact, adopted by the Board. For that  
22 reason, the factual background recited here is derived from  
23 those findings along with various evidentiary documents in  
24 the record. No written transcript of the hearing of August  
25 30, 1984, was provided the Court.

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1 Prior to the commencement of the 1983-1984 school year,  
2 two new administrators were assigned to Lincoln Junior High  
3 School in Billings: Carolyn McKennan, Principal, and Carol  
4 Chatlain, Dean of Students. Prior to her appointment to  
5 that post, Ms. McKennan had been a successful elementary  
6 school principal but had had no previous experience in a  
7 junior high setting as either teacher or principal. Her  
8 disciplinary beliefs and values differed from those of previous  
9 administrators at Lincoln. She believed, for example, in  
10 setting disciplinary rules on an as-needed basis, not before-  
11 the-fact. While she explained her ideas at a faculty meeting  
12 at the beginning of the 1983-1984 school year, some teachers  
13 did not understand or were confused about her policy. (Findings,  
14 Nos. 3, 5, pp. 6 and 7) By the second week of the school  
15 year, Jones was receiving phone calls from Lincoln teachers.  
16 Through November and December of 1983, he continued to advise  
17 the teachers to give the new administration time to "work  
18 into a junior high setting." (Finding, No. 6, p. 8) Although  
19 individual teachers tried to talk with Ms. McKennan and Chatlain,  
20 they testified that they found the "doors closed" and "walls  
21 up" to any discussion. (Findings, No. 8, p. 9) While no  
22 committee of teachers ever asked McKennan to attend a meeting  
23 to discuss their problems, McKennan testified that she was  
24 "somewhat uncomfortable" with such a meeting and would have  
25 preferred a meeting with a small group or one-on-one. (Finding,

1 No. 8, pp. 9 - 10)

2 Dr. Poston was aware of the Lincoln problems by mid-fall,  
3 1983. Joyce Butler, MEA Uniserv Director for the Billings  
4 area, had advised Poston of those problems and that she planned  
5 to gather additional information which she would share with  
6 him. Poston testified that he encouraged such input. (Finding,  
7 No. 8, p. 10) In January 1984, in the midst of a disciplinary  
8 incident involving a Lincoln teacher and student, Butler  
9 told both Jones and Poston that she planned to survey the  
10 Lincoln teachers relative to their situation. Poston did  
11 not disagree, but stated that he desired specific information  
12 relative to any problems. (Finding, No. 11, pp. 11 - 12)

13 Butler and Jones met with 35 - 38 Lincoln teachers on  
14 January 26, 1984. Following about 45 minutes of open discussion,  
15 Butler presented and explained the survey form. She informed  
16 the teachers that specific information and constructive  
17 recommendations were needed. However, she also informed  
18 them that signatures on the survey were optional, that the  
19 survey results would be confidential and that from the results  
20 a report would be prepared for Poston and the BEA. (Finding,  
21 No. 13, pp. 12 - 13) Anonymity was to be maintained as the  
22 Lincoln teachers were afraid of reprisals if they could be  
23 identified from the survey report. (Finding, No. 15, p. 14)

24 The survey that was utilized requested four items of  
25 demographic information, then asked the following two open-

1 ended questions:

2 5. What is your major concern(s) with your present  
3 teaching assignment in Lincoln?

4 6. What constructive recommendations would you  
5 propose to remedy the present situation?

6 (Finding, No. 14, p. 14)

7 Replies to Questions 5 and 6 were typed in a verbatim  
8 list, which Butler categorized and from which she derived  
9 a list of 22 "General Concerns," six "Recommendations From  
10 the Faculty" and 9 other "Recommendations," the latter  
11 apparently offered by Butler herself. The "Conclusion"  
12 arrived at, again apparently by Butler, was that a "negative  
13 spirit" dwelt at Lincoln, that there was little effective  
14 communication among the certified staff and that "feelings  
15 of fear, reprisal and antagonism seem(ed) to reign over the  
16 staff." (Finding, No. 22, pp. 18 - 21) To those introductory  
17 pages was added the verbatim list of the teachers' responses  
18 to items 5 and 6.

19 The Hearing Examiner made a statistical analysis of  
20 the responses to questions 5 and 6, apparently in consideration  
21 of the District's contention that the goal of the teachers  
22 and their union was to unlawfully force a change of administrators  
23 at Lincoln. (Finding, No. 22, p. 29) He determined that the  
24 main purpose of the BEA, MEA and Lincoln teachers was not  
25 to change Lincoln administration, but to gather information  
to be used to improve the teachers' working conditions.

1 (Findings 23 and 24, pp. 29 - 32) In that goal, the survey  
2 report failed. Dr. Poston testified that it did not accomplish  
3 the effect desired by Jones and Butler, that it had "no effect  
4 on the school Board in carrying out the policies of the school  
5 Board." (Finding, No. 31, p. 38)

6 The report, complete with verbatim responses, was handed  
7 to Poston at a breakfast meeting attended by Jones, Butler,  
8 Poston and Gary Rogers, Director of Secondary Education, on  
9 February 9, 1984. Despite the BEA's intention that only  
10 teachers and administrators at Lincoln, central office administrators  
11 and the school board were to receive copies of the report, it  
12 was distributed throughout the school system, the city of  
13 Billings and other parts of the state. There was conflicting  
14 testimony as to how and by whom such wide distribution was  
15 accomplished. The distribution was, however, apparently  
16 accomplished in the two or three days after February 9, 1984.  
17 (Finding, No. 30, pp. 35 - 37; Finding, No. 32, p. 39)

18 On March 7, 1984, Jones received a letter from Poston  
19 which ended with this paragraph:

20 As there are grounds for both litigation against  
21 the Billings Education Association and disciplinary  
22 action against yourself and other teachers involved  
23 in gathering and distributing the survey results,  
24 these are options to which the Board of Trustees  
25 must give serious consideration. I therefore  
ask that you cease and desist any further distribu-  
tion of or comment on the survey results, and  
that you meet with me at my office on Friday,  
March 9, 1984, at 2:15 p.m., to further discuss  
this issue and its ramifications.

(Finding, No. 33, p. 41)

1 Jones attended the March 9th meeting at which McKennan  
2 was also present. Poston restated the contents of the March  
3 7th letter, asked Jones for information relative to the persons  
4 responsible for the origination of the survey and asked what  
5 Jones thought would be appropriate disciplinary action. Jones  
6 refused to answer those questions, though he did tell Poston  
7 to whom the BEA had distributed reports. (Finding, No. 36,  
8 pp. 42 - 43)

9 Dr. Poston testified that it was not his intention to  
10 discipline Mr. Jones, that the objective of the School District  
11 was to stop the Lincoln Survey Report from recurring. No  
12 one was ever disciplined for the Lincoln Survey, the report  
13 or its distribution. (Finding, Nos. 38 and 39, pp. 43 - 44)

14 Later that school year, the BEA conducted a survey at  
15 Meadowlark Elementary School. Dr. Poston testified that  
16 the results of that survey were not distributed to other  
17 schools or to the community, provided the administration  
18 with good information, were not libelous in nature though  
19 some parts were non-specific, and were what Poston had expected  
20 of the Lincoln Report. Jones testified that, from the Lincoln  
21 Report, the BEA learned how to keep the survey under control.  
22 (Finding, No. 43, pp. 45 - 48)

23 STANDARD OF REVIEW

24 The Montana Administrative Procedures Act (MAPA), Section  
25 2-4-704(2) sets forth the standard of judicial review of contested

1 administrative cases.

2 (2) The court may not substitute its judgment  
3 for that of the agency as to the weight of the  
4 evidence on questions of fact. The court may  
5 affirm the decision of the agency or remand the  
6 case for further proceedings. The court may  
reverse or modify the decision if substantial  
rights of the appellant have been prejudiced  
because the administrative findings, inferences,  
conclusions, or decisions are:

7 (a) in violation of constitutional or statutory  
8 provisions;

9 (b) in excess of the statutory authority  
of the agency;

10 (c) made upon unlawful procedure;

11 (d) affected by other error of law;

12 (e) clearly erroneous in view of the reliable,  
13 probative, and substantial evidence on the whole  
record;

14 (f) arbitrary or capricious or characterized  
15 by abuse of discretion or clearly unwarranted  
exercise of discretion; or

16 (g) because findings of fact, upon issues  
17 essential to the decision, were not made although  
requested.

18 The Montana Supreme Court has clarified the application  
19 of the terms "clearly erroneous" and "abuse of discretion."

20 [F]indings of fact by an agency have been  
21 subject to a 'clearly erroneous' standard of  
22 review by the courts. . . . Conclusions of law  
23 are subject to an 'abuse of discretion' review.  
24 These standards differ due to the agency's expertise  
regarding the facts involved and the court's  
expertise in interpreting and applying the law.  
(Citations omitted)

25 City of Billings v. Billings Fire Fighters Local No. 521, 200  
Mont. 421, 430, 651 P.2d 627, 632 (1982)



1 (1st Cir. 1982).

2 1. DID THE APPEAL TO THE PUBLIC CONCERN  
3 PRIMARILY WORKING CONDITIONS?

4 2. DID THE APPEAL TO THE PUBLIC NEEDLESSLY  
5 TARNISH THE COMPANY'S IMAGE?

6 (a) WERE THE ASSERTIONS MADE IN RECKLESS  
7 DISREGARD OF THE TRUTH?

8 (b) WERE THE ASSERTIONS MADE IN THE SPIRIT  
9 OF LOYAL OPPOSITION - NOT OUT OF MALICE OR ANGER?

10 (Hearing Examiner's Discussion, p. 59)

11 D'Hooge applied the facts of the Lincoln situation to  
12 that legal standard.

13 1. He determined that concerns of the student discipline  
14 and teacher evaluation have an effect on teachers' working  
15 conditions (Finding, No. 7, pp. 8 - 9) and that the Lincoln  
16 Survey Report involved an on-going labor dispute, noting  
17 that Lincoln teachers had tried to talk to their building  
18 administrators and that Poston himself had been advised of  
19 the problem in the fall of 1983. (Finding, No. 8, pp. 9 -  
20 10)

21 2. D'Hooge further determined that the Lincoln Survey  
22 Report did not needlessly tarnish the image of Lincoln Junior  
23 High School or District No. 2, noting that the BEA did not  
24 state that the District provided a poor education. (Discus-  
25 sion, pp. 60 - 62) He compared and distinguished a number  
of NLRB cases on the question before making that determination.  
He referred to Roanoke wherein the employer had alleged that

1 statements made on local television by nurses "intentionally  
2 or negligently disparaged and discredited the quality of  
3 nursing care available at the hospital, to the point of  
4 insinuating that it was unsafe," (538 F.2d at 610) and to  
5 Mount Desert in which an employee's letter to a newspaper  
6 editor had complained about staffing levels, working condi-  
7 tions and patient care and services. (695 F.2d at 636) In  
8 both those cases, the employees took their complaints directly  
9 to the public, yet the federal courts found the employees'  
10 public statements to be protected under National Labor Rela-  
11 tions Act (NLRA) Section 7 and 8(a) [Section 39-31-201,  
12 39-31-401, MCA.] (Discussion pp. 60 - 62)

13 A distinction which stands out between Roanoke and Mount  
14 Desert and this action is that here, although the Lincoln  
15 teachers discussed going to the public with their concerns,  
16 they decided they did not want everyone to know of their  
17 problem. (Finding, No. 13, p. 13) Jones testified that  
18 it was not proper for the Survey Report to be general know-  
19 ledge, that the BEA was attempting to resolve the problem  
20 internally at the lowest level and that the BEA only intended  
21 to give copies of the Survey Report to the people involved.  
22 (Finding, No. 31, p. 37)

23 2.(a) Addressing the truth of the survey statements,  
24 D'Hooge did find that some statements were not accurate.  
25 However, he also found that the statements did not meet the

1 test for being maliciously false or deliberately and reck-  
2 lessly untrue. D'Hooge cited, among others, Texaco Inc.,  
3 v. NLRB, 462 F.2d 812 (1972) and Linn v. United Plant Guard  
4 Workers of America, 383 U.S. 53, (1966), where it was stated,  
5 "the most repulsive speech enjoys immunity provided it falls  
6 short of a deliberate or reckless untruth." D'Hooge found  
7 that such statements as "discipline policy - none" resulted  
8 from the teachers' misunderstanding or confusion rather than  
9 outright fabrication. (Discussion at p. 64)

10 2.(b) Finally, D'Hooge found no malice or anger in  
11 statements made on the survey report. After citing examples  
12 of both malice and lack of malice from federal precedent,  
13 D'Hooge pointed to his Findings, Nos. 12, 13, 18, 22, 23, and  
14 24 evidencing the BEA's objectives, absent malice or anger,  
15 to attempt to improve the School District.

16 From the above, D'Hooge concluded that when the BEA  
17 solicited, compiled and distributed the Lincoln Survey Report,  
18 it was engaged in protected, concerted activities under the  
19 Jefferson Standard Test as implemented by the NLRB and the  
20 courts.

21 The District argues that the survey report was not pro-  
22 tected primarily on the basis of the District's allegation  
23 that the BEA was unlawfully attempting to replace Lincoln  
24 administrators, an act reserved to the employer. In making  
25 this argument, the District relies on NLRB v. Red Top, Inc.,

1 455 F. 2d 721 (8th Cir. 1972) and Puerto Rico Food Products  
2 Corp. v. NLRB, 619 F.2d 153 (1st Cir. 1980).

3 In Redtop, employees were angered by their supervisor's  
4 negative evaluations. In addition to threatening to go to  
5 his supervisor with their complaints, various employees threatened  
6 the supervisor with physical reprisals, pounded their fists  
7 on his desk and a chair and cursed. The Eighth Circuit affirmed  
8 the hearing examiner's findings that such acts took the  
9 employees out of the protection of Section 7 of NLRA (39-31-201,  
10 MCA):

11 We quite agree with the board's general rationale  
12 that employees may not be discharged for rude  
13 or impertinent conduct in the course of presenting  
14 grievances . . . but we do not think the pro-  
15 tection afforded by Section 7 should extend  
to gross insubordination, threats of physical  
harm or the carrying out of activities detri-  
mental to the employer's business relation-  
ship . . .

16 455 F.2d at p. 728

17 Puerto Rico Food Products established the rule that  
18 employee protests over supervisors is a protected activity  
19 only if (1) the unpopular supervisor is a low-level supervisor  
20 whose identity constitutes a "working condition" for the  
21 employees, and (2) the protest is reasonable. The court,  
22 in its discussion, stated that:

23 Generally where employee protests over supervisory  
24 personnel have come within the arguable purview  
25 of Section 7 the supervisor has been linked with  
an underlying employment related concern.  
(Emphasis added)

619 F.2d at p. 156

1           The Hearing Examiner considered Red Top and Puerto Rico  
2 Food, along with other NLRB cases involving employee dis-  
3 satisfaction with supervisors. He set out, at page 69 of  
4 his discussion, the legal standard derived from a long line  
5 of such cases.

6           (a) THE EMPLOYEE PROTEST OR ACTIVITY OVER  
7 A CHANGE IN SUPERVISORY PERSONNEL MUST IN FACT  
8 BE A PROTEST OVER THE ACTUAL CONDITIONS OF THEIR  
9 EMPLOYMENT.

10           (b) THE MEANS OF PROTEST MUST BE REASONABLE.

11           - GENERALLY STRIKES OVER CHANGES IN  
12 EVEN LOW LEVEL SUPERVISORY PERSONNEL  
13 ARE NOT PROTECTED.

14           - LETTER WRITING EXPRESSING OPPOSITION  
15 AND/OR VOICING OF COMPLAINTS FOUND  
16 PROTECTED.

17           (a) Applying the above standard to the Lincoln situation  
18 and citing Findings, Nos. 5, 6, 7 and 22 relative to student  
19 discipline and teacher evaluation, the Hearing Examiner determined  
20 that those matters clearly affected teachers' working conditions.

21           (b) Relative to the reasonableness of the union's action,  
22 D'Hooge reiterated that the activities of the BEA and/or  
23 the teachers had been found to be protected, concerted activities  
24 under Jefferson Standard, the two-pronged test of which includes  
25 an evaluation of how reasonably the activities were conducted.

(Discussion, p. 70)

          Based on his analysis, the Hearing Examiner made the  
following Conclusion of Law:

1           The Lincoln Survey Report was protected  
2           concerted activities under Section 39-31-201,  
3           MCA. By his March 7 letter and his March 9  
4           meeting, Dr. Poston tried to stop the Lincoln  
5           Survey Report from happening again in the future,  
6           a violation of Section 39-31-401(1), MCA.  
7           (Emphasis added to first sentence)

8           The BPA, in its Final Order, substituted its own Con-  
9           clusion of Law: "That since the BEA conducted a survey sub-  
10          sequent to the Lincoln School Survey, the March 7 letter  
11          and the March 9 meeting did not constitute a threat to dis-  
12          cipline members for engaging in protected concerted activities  
13          in violation of Section 39-31-401(1), MCA."

14          While its Final Order did not expressly state that the  
15          BPA was adopting the underscored sentence of the Hearing  
16          Examiner's Conclusion, the implication in its very limited  
17          Conclusion is that the BEA members had engaged in protected  
18          concerted activities. That implication is supported by the  
19          BPA's arguments in this action. In its response brief of  
20          April 24, 1986, the BPA states:

21                 . . . .  
22                 First of all, the Board affirmed the Hearing  
23                 Examiner finding that the survey constituted  
24                 protected concerted activity. It does not dispute  
25                 the finding that the School District threatened  
                  BEA members with disciplinary action. However,  
                  it did not find that the threat constituted a  
                  violation of Section 39-31-401(1), MCA.

(BPA's brief dated April 24, 1986, p. 4)

As noted, in reviewing an agency's decision, the Court  
will defer to the agency's interpretation of the pertinent

1 statutes under the particular facts of the action and will  
2 not disturb the agency's determination unless that interpretation  
3 is arbitrary, capricious or an abuse of discretion. Hearing  
4 Officer D'Hooge made a systematic and comprehensive review  
5 of NLRB actions in determining that the BEA activities relative  
6 to the subject survey report were protected concerted activities  
7 pursuant to Section 39-31-201, MCA. Finding no abuse of dis-  
8 cretion, this Court will not disturb that determination.

9 Did Poston's Letter and the Subsequent Meeting Constitute  
10 a Threat?

11 The second step in analyzing Count I of the Unfair Labor  
12 Practice charge is to determine whether Poston's letter of  
13 March 7, 1984, and the meeting of March 9, 1984, constitute  
14 an unlawful threat to employees' protected activities.

15 In addition to its primary contention that the BEA activities  
16 were not protected, the District argues that the March 7th  
17 letter did not constitute a threat because (1) it was not  
18 a specific threat and (2) no disciplinary action was intended  
19 or taken. (District's brief of April 24, 1986, p. 11) The  
20 District cites no authority to support its argument to the  
21 Court but it was the same argument made to the Hearings  
22 Examiner who, in addressing those points (Finding, No. 39,  
23 p. 44), determined that this was not the test to be applied.  
24 He cited Bill Johnson's Restaurant v. NLRB, 660 F. 2d 1335,  
25 1341 (9th Cir. 1982) as the proper test.

1 The Board found that the restaurant had violated  
2 section 8(a)(1) by threatening and interrogating  
3 employees. An employer's interrogation of an  
4 employee violates section 8(a)(1) if, under all  
5 the circumstances, the interrogation reasonably  
6 tends to restrain or interfere with the employee  
7 in the exercise of his or her protected § 7 rights.  
8 . . . The test is whether the interrogation tends  
9 to be coercive, not whether the employee was in  
10 fact coerced. (Citations omitted)

11 Applying that test, D'Hooge found that Poston's letter and  
12 the meeting did tend "to be coercive because of the number  
13 of times libel and litigation are stated." (Finding, No.  
14 39, p. 44)

15 The District suggests a third argument for dismissing  
16 Count I, i.e., that the subsequent successful survey at  
17 Meadowlark Elementary School somehow cured any alleged attempt  
18 to interfere with the first survey. This argument was not  
19 made before the Hearing Officer but is offered by the District  
20 as a possible rationale for the BPA's Conclusion of Law.  
21 The District cites Passavant Memorial Area Hospital v. NLRB,  
22 98 LRRM 1492, 1493 (1978) for the principle of labor law  
23 which holds that if unlawful employer behavior is modified  
24 so that the interference with protected activities does not  
25 continue, any asserted unfair labor practice is cured and  
dismissal is proper.

It is settled that under certain circum-  
stances an employer may relieve himself of  
liability for unlawful conduct by repudiating  
the conduct. To be effective, however, such  
repudiation must be 'timely,' 'unambiguous,'  
'specific in nature to the coercive conduct,'

1 and 'free from other proscribed illegal conduct.'  
2 (Cites omitted) Furthermore, there must be  
3 adequate publication of the repudiation to the  
4 employees involved and there must be no pro-  
5 scribed conduct on the employer's part after  
6 the publication. (Cite omitted)

7 This argument is not supported by the record. Not only  
8 was the argument never made before the BPA, but there is  
9 no indication in the record before the Court that the District  
10 ever repudiated Dr. Poston's actions. On the contrary, the  
11 District has contended throughout this action that the BEA's  
12 activities were not protected and that no threat occurred.

13 As noted in the review of the factual background of  
14 the matter, neither the BEA nor the District has made specific  
15 objections to the Hearing Examiner's Findings of Fact, adopted  
16 en toto by the BPA. It is apparent that the District does  
17 not agree with all the Hearing Examiner's Findings. For  
18 example, in its brief of April 24, 1986, the District states,  
19 "It was admitted at the hearing that BEA members were responsible  
20 for this wide distribution [of the Survey Report]," citing  
21 Finding of Fact, No. 30. That statement is not an accurate  
22 representation of the Hearing Examiner's Finding. D'Hooge,  
23 in discussing how the Survey Report was distributed, referred  
24 to specific testimony of eight separate witnesses. (Finding,  
25 No. 30, pp. 35 - 37), in making the determination that "the  
additional circulation, above the BEA distribution, cannot  
be attributed to the BEA or denied by the BEA." (Discussion,

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1 p. 48) Any objections the District may have appear to go  
2 to the weight of the evidence rather than its substance and  
3 are not supported by evidence showing that the Hearing Examiner's  
4 Findings are clearly erroneous in view of the reliable, pro-  
5 bative and substantial evidence on the whole record. Section  
6 2-4-704(2), MCA; City of Billings, supra.

7 Absent such a showing, the Court will not disturb the  
8 Findings of the Hearing Examiner.

9 Count III

10 Although the BEA did not in its Petition request review  
11 of the dismissal of Count III, the issue was argued by all  
12 parties in their briefs and, therefore, I will address it.

13 Count III of the Unfair Labor Practice charge goes to  
14 the minutes of Superintendent Poston's "cabinet meeting"  
15 of February 28, 1984, and involves a situation unrelated  
16 to the Survey Report. The Boulder Elementary School Faculty  
17 had objected to letters of appreciation for United Way dona-  
18 tions being placed in teachers' personnel files. Apparently  
19 the Boulder faculty had informed the District No. 2 Board  
20 of Trustees of their objection and the Trustees had directed  
21 Poston to discontinue the practice. It was this act of direct  
22 communication with the Board of Trustees which led to the  
23 discussion in "cabinet" on February 28, 1984. As noted  
24 earlier in this Opinion, the minutes of that meeting included  
25 a statement to the effect that should staff members make

1 contact with Board members other than through the chain of  
2 command, they could expect to receive reprimands. Count  
3 III alleged that the District, through its agent Poston,  
4 was attempting to prevent BEA members from making any direct  
5 contact with School Board Trustees.

6 It is undisputed that School Board policy 272 P establishes  
7 a line of responsibility requiring that all personnel refer  
8 matters requiring administrative action to the administrator  
9 in charge of the problem area. (Finding, No. 28, p. 34)  
10 There was no evidence of the District using that policy to  
11 interfere with protected BEA activities. (Finding, No. 29,  
12 p. 34) Dr. Poston's testimony that the contested excerpt  
13 from the cabinet meeting was inaccurate is not disputed.  
14 (Finding, No. 28, p. 34)

15 Under these facts, the Court finds no error in the Board's  
16 dismissal of Count III of the Unfair Labor Practice charge.

17 BPA's Conclusion of Law

18 The BPA's Conclusion of Law relative to Count I is impossible  
19 to comprehend. No legal authority nor rationale is offered  
20 for its rejection of the Hearing Examiner's Conclusion of  
21 Law, the Order merely stating that the BPA was adopting the  
22 Hearing Examiner's Findings of Fact and "all portions of  
23 the Hearing Examiner's Discussion that are consistent with  
24 this Final Order."

25 In its arguments to the Court, the BPA states that:

1 First of all, the Board affirmed the Hearing  
2 Examiner's finding that the Survey constituted  
3 protected concerted activity. It does not  
4 dispute the finding that the School District  
5 threatened BEA members with disciplinary action.

6 (BPA Response Brief, April 24, 1986, p. 4)

7 "The School District did threaten disciplinary action, but  
8 the issue is whether such a threat constituted a violation  
9 under law." (Id. at p. 7. Emphasis in original)

10 The BPA went on to make a statement which appears to  
11 be the key to its Conclusion of Law in the Final Order: "The  
12 Hearing Examiner concluded that the purpose of the threat  
13 was to stop the school surveys from being conducted in the  
14 future." (Id.) This is a misstatement. The Hearing Examiner's  
15 Conclusion was much more limited, encompassing solely the  
16 Lincoln Survey Report. His recommended order was likewise  
17 limited. There is no evidence on the record that the District  
18 attempted to stop all school surveys. Therefore, a subsequent  
19 survey, absent repudiation by the District of its threat,  
20 has no legal significance.

21 In a less extensive discussion involving a less complex  
22 legal question, the Court might be able effectively to determine  
23 on what legal grounds the BPA relies. Here, Hearing Examiner  
24 D'Hooge filled 34 legal-sized pages with extensive case law  
25 and legal tests of standards and comprehensive discussion  
of the application of that law to those facts. The BPA has  
given no clue as to which legal authorities or interpretations

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1 governed its Conclusion and Order.

2 Absent legal support for its Conclusion of Law, the  
3 BPA's rejection of the Hearing Examiner's Conclusion can  
4 only be deemed arbitrary or characterized as an abuse of  
5 discretion, prejudicial to substantial rights of Petitioner  
6 BEA. I conclude, therefore, that the Final Order should be  
7 modified. The recommended Conclusion of Law and Order of  
8 the Hearing Examiner relative to Count I should be reinstated.  
9 The dismissal of Count III should be affirmed.

10 NOW, THEREFORE, IT IS ORDERED that the Final Order of  
11 the Board of Personnel Appeals as it relates to Count I is  
12 reversed and the Board is directed to adopt the recommended  
13 order of its Hearing Examiner. With respect to Count III,  
14 the Final Order of the Board is affirmed.

15 DATED this 15<sup>th</sup> day of December, 1986.

16   
17 \_\_\_\_\_  
18 DISTRICT JUDGE

19 pc: Sol Lovas  
20 Emilie Loring  
21 Mary Ann Simpson

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STATE OF MONTANA  
BOARD OF PERSONNEL APPEALS

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APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 5-84

BILLINGS EDUCATION ASSOCIATION)  
MEA,

Complainant,

vs.

YELLOWSTONE COUNTY SCHOOL  
DISTRICT NO. 2, BILLINGS,  
MONTANA

Defendant.)

FINAL ORDER

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\* \* \* \* \*

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Rick D'Hooge on May 22, 1985.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Emilie Loring, attorney for the Complainant, on June 7, 1985 and by Lawrence Martin, attorney for the Defendant, on June 12, 1985.

Oral argument was scheduled before the Board of Personnel Appeals on Wednesday, July 31, 1985.

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

1. It Is Ordered that this Board adopts the Findings of Fact of Hearing Examiner Rick D'Hooge and all portions of the Hearing Examiner's Discussion that are consistent with this Final Order.

2. It Is Ordered that BEA's exceptions to Count III be denied.

3. It Is Ordered that this Board substitute its own Conclusions of Law for that of the Hearing Examiner as follows. "That since the BEA conducted a survey subsequent to the Lincoln School survey, the March 7 letter and the

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March 9 meeting did not constitute a threat to discipline members for engaging in protected concerted activities in violation of Section 39-31-401(1) MCA.

4. It Is Ordered that this Board substitute its own Final Order for the Hearing Examiner's Recommended Order as follows: "It is the Final Order of this Board that the matter of Unfair Labor Practice charge No. 5-84 be dismissed."

Dated this 27 day of August, 1985.

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 27 day of August, 1985:

Emilie Loring  
Hilley & Loring P.C.  
121 4th St. N., Ste. 2G  
Great Falls, MT 59401

Lawrence R. Martin  
Felton & Martin P.C.  
450 Hart Albin Bldg.  
P.O. Box 2558  
Billings, MT 59103-2558

Suzanne Gessner

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STATE OF MONTANA  
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 5-84

BILLINGS EDUCATION ASSOCIATION, )  
MEA, )

Complainant, )

vs. )

YELLOWSTONE COUNTY SCHOOL )  
DISTRICT NO. 2, BILLINGS, )  
MONTANA )

Defendant. )

FINDINGS OF FACT  
CONCLUSIONS OF LAW, AND  
RECOMMENDED ORDER

\*\*\*\*\*

This recommended order addresses the questions of (1) the width and breadth of protected, concerted activities when a labor organization has allegedly solicited, compiled and publicly distributed a survey report, (2) the elements of a public employee's "Weingarten" rights and (3) the public employer's alleged actions to limit its employees access to an elected school board.

Billings Education Association (Complainant, BEA) filed the following charges:

.....

1. Charging Party, the Billings Education Association (BEA), is the recognized exclusive representative of the Defendant's professional employees in its Billings, Montana, school system.

COUNT I

2. The BEA was receiving a number of complaints about teaching and working conditions in a particular Billings school, Lincoln Junior High School. In order to find the facts, determine if there were any violations of the collective bargaining agreement and, if possible, resolve the situation amicably with Defendant's administration, the BEA conducted a survey among its members in Lincoln.

3. Throughout the process, Defendant's Superintendent, William K. Poston, Jr., was kept informed by the BEA and on February 9, 1984 BEA leadership had breakfast with Supt. Poston and provided him with a copy of the survey report.

1 4. Almost a month later, on March 7, 1984,  
2 Supt. Poston wrote a letter to BEA President Mark  
3 Jones, attached as Exhibit A, threatening discipli-  
4 nary action against the BEA members involved in  
5 soliciting and distributing the survey.

6 5. The threat to discipline BEA members who  
7 have engaged in protected concerted activities is  
8 a violation of Section 39-31-401(1) and (3), MCA.

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COUNT II

6. As shown in Exhibit A, Superintendent  
Poston required BEA President Jones to meet with  
him on March 9, 1984. Although the letter clearly  
threatens disciplinary action, Supt. Poston denied  
President Jones' request that he have a union  
representative with him.

7. An employer's refusal to permit a union  
representative at an interview the employee rea-  
sonably believes may result in discipline is a  
violation of Section 39-31-401(1), MCA.

COUNT III

8. On or about February 28, 1984 Defend-  
ant's Superintendent Poston held a Superinten-  
dent's Cabinet meeting, the minutes of which were  
widely available within Defendant's school system,  
Exhibit B. At the meeting, according to the  
minutes, Defendant's agent, the superintendent,  
took the position that contacting Board members  
directly would be considered an act of insubordi-  
nation and would subject staff members to reprimand.

9. Board members are elected public offi-  
cials and any member of the bargaining unit has a  
right, protected by the United States and Montana  
constitutions, to contact elected officials for  
the redress of grievances. Threatening a reprimand  
for the exercise of such rights is a viola-  
tion of Section 39-31-401(1), MCA which protects  
the Section 39-31-201, MCA rights of employees.

The Yellowstone County School District Number 2 (Defen-  
dant, employer) denied any violations of Sections 39-31-401  
(1) and (3) MCA. For reasons set forth below I find in this  
case that Yellowstone County School District did violate  
Section 39-31-401(1) MCA by trying to stop future Lincoln  
survey reports, Count I; and that Yellowstone County School  
District did not violate Section 39-31-401(1) MCA as stated  
in Count II and III. The Board of Personnel Appeals does  
not have the jurisdiction to hear about the rights and pro-  
tections of the United States and Montana constitutions.

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1 On August 30, 1984 a hearing was held to determine if  
2 the defendant violated sections 39-31-401 (1) and (3) MCA.  
3 The hearing was held under the authority of Section  
4 39-31-406 MCA and the Administrative Procedure Act (Title 2,  
5 Chapter 4, MCA). The parties agreed that the Billings  
6 Education Association is a labor organization as defined by  
7 the collective bargaining act for public employees,  
8 39-31-103 MCA; and that the Defendant is a public employer  
9 as defined by the collective bargaining act for public  
10 employees, 39-31-103 MCA. Neither party raised a question  
11 of the Board of Personnel Appeals jurisdiction in this  
12 matter.

13 Because the Board of Personnel Appeals has little  
14 precedent in some areas, I will cite federal statute and  
15 case law for guidance in the application of Montana's Col-  
16 lective Bargaining Act, Title 39, Chapter 31, MCA (Act). The  
17 federal statute will generally be the National Labor Rela-  
18 tions Act, 29 U.S.C., Section 151-166 (NLRB) precedent for  
19 guidance. (State Department of Highways v. Public Em-  
20 ployees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974);  
21 AFSCME Local 2390 v. City of Billings, 555 P.2d 507, 93 LRRM  
22 2753, (1976); State of Montana ex. rel., Board of Personnel  
23 Appeals v. District Court of the Eleventh Judicial District,  
24 598 P.2d 1117, 103 LRRM 2297, (1979); Teamsters Local 45 v.  
25 Board of Personnel Appeals and Stewart Thomas McCarvel,  
26 635 P.2d 1310, 38 State Reporter 1841, (1981).

27 After a thorough review of the testimony, exhibits,  
28 posthearing briefs and reply briefs I make the following:

29 FINDINGS OF FACT

30 The employer's first witness's, Ms. Van Valkenberg,  
31 testimony will be given credit only to the extent the emp-  
32 loyer's first witness's testimony is supported by other

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1 witnesses' testimony and/or exhibits. Several areas of the  
2 first witness's testimony are in conflict with a BEA exhibit.  
3 The BEA exhibit is controlling and credible.

4 1. During the time in question the following sections  
5 of school board policy were in effect:

6 Policy 272P, Line of Responsibility

- 7 A. All personnel shall refer matters requiring admin-  
8 istrative action to the administrator in charge of  
9 the area in which the problem arises.  
10 B. When necessary, administrators shall refer such  
11 matters to the next higher authority.  
12 C. Through the Superintendent, each employee of the  
13 District shall be responsible to the Board.  
14 (District Exhibit 2).

15 Policy 272P was adopted Septmeber 24, 1979 (Reicher, tape  
16 5).

17 Policy 531A, Student Behavior Code

18 The parent is expected to cooperate with school  
19 authorities and to support necessary disciplinary  
20 measures. It is the parent's responsibility to  
21 notify the school of any unusual behavior pattern  
22 or medical problem that might lead to serious  
23 difficulties.

24 The teacher has primary responsibility for all  
25 matters of conduct and discipline in the class-  
26 room, in the school building, and on the school  
27 grounds. Teachers have authority to:

- 28 - deny certain classroom privileges  
29 - use such reasonable measures as may be necessary  
30 to maintain discipline  
31 - remove a student temporarily from the classroom.

The principal has the final responsibility for  
discipline of the students in his building.

It is the responsibility of the principal or his  
designee to:

- 32 - establish and implement rules and regulations  
for student conduct in his school  
- make these policies, rules, and regulations  
readily available to students and parents  
- supervise and support teachers in their obliga-  
tion to maintain discipline and create an atmos-  
phere conducive to student self-regulation  
- impose necessary disciplinary measures includ-  
ing, but not limited to, imposing suspension or  
recommending expulsion to the superintendent of  
schools

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- defend every individual within the school against arbitrary and unfair treatment. (District Exhibit 6)

.....  
School District Policy 531A gives the school building principal the right to set discipline policy for that building within the broad guidelines of the policy. (McKenna, tape 6).

Policy 532P, Student Discipline

Each teacher is expected to establish satisfactory student behavior with positive and constructive methods. If a problem is encountered, it shall be referred to the appropriate building administrator.

The goal of student discipline shall be the dictionary usage "self-control or orderly conduct." It is not to be confused with punishment. The goal of discipline is maturity and socially acceptable conduct.

If necessary, disciplinary procedures may be established through the cooperation of the parents, teachers and the building principal. (District Exhibit 6).

Policy 533P, Corporal Punishment

Where normal efforts to achieve satisfactory student discipline are not successful, corporal punishment may be administered according to state law. (School District Exhibit 6).

Policy 637P, Evaluation

.....  
The Board delegates to the Superintendent the responsibility of developing, organizing, and implementing a system-wide program for evaluating the instructional process as one means to ensure quality instruction. Each certified staff member will be evaluated annually, using the forms and procedure contained in the Evaluation Manual approved by the Board. (District Exhibit 4).

.....  
2. The parties renewed a collective bargaining agreement covering a period July 1, 1983 through June 30, 1985. The collective bargaining agreement, District Exhibit 1, contains several articles relevant to the charges.

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1 Article II, Section 2, Appropriate Unit provides among  
2 other things that speech therapists be included in the col-  
3 lective bargaining unit; and that coordinators are excluded  
4 from the collective bargaining unit. I find this to mean  
5 that a coordinator of speech therapists is not in the col-  
6 lective bargaining unit.

7 Article III, Section 9, Meet and Confer, provides, upon  
8 request, the employer shall meet and confer with the union  
9 to discuss educational policies and other matters not in-  
10 cluded in the terms and conditions of employment.

11 Article III, Section 11, Association Leave, provides  
12 that an elected or appointed representative of the union  
13 shall be granted leave to attend state, regional, and nation-  
14 al meetings and conferences; and that the president of the  
15 union shall give the superintendent notice at least three  
16 days in advance of usage except in cases of emergency.

17 Article XII, Section 1, Grievance Definition, provides  
18 that a grievance shall mean an allegation by a teacher,  
19 teachers, or association resulting in a dispute or disagree-  
20 ment as to the interpretation or application of any term(s)  
21 of the agreement.

22 Article XV, Section 6, Teacher Evaluation, Effect, pro-  
23 vides that evaluation and evaluation procedures shall be a  
24 matter of school board policy and shall not be part of this  
25 agreement. Some areas of the Evaluation Procedures are sub-  
26 ject to the Grievance Procedures.

27 Article XVI, Section 1, Student Discipline, provides  
28 that the school district shall have a policy on student dis-  
29 cipline and shall distribute the policy to each teacher at  
30 the beginning of the school year.

31 3. In early August 1983, the school district assigned  
Carolyn McKennan to the position of Lincoln Junior High  
School principal. Before this assignment, Ms. McKennan was

1 principal for seven years at McKinnley Elementary School  
2 plus other experiences. Ms. McKennan has been a successful  
3 Elementary Administrator (District Exhibit 3). Ms. McKennan  
4 knew that her discipline policy was different than other  
5 administrators that had been at Lincoln Junior High; that  
6 there was some difference on what she viewed as correct  
7 discipline for students; and that her view may cause some  
8 problems with the staff (McKennan, tape 6).

9 4. Lincoln Junior High School is one of five junior  
10 high schools in the employer's educational system. Lincoln  
11 Junior High School employs about 45 to 47 full time equiva-  
12 lent teachers and about 20 support staff.

13 5. During the 1983-84 school year there was a discipl-  
14 ine policy at Lincoln Junior High School. The discipline  
15 policy printed in the student-parent handbook was a copy of  
16 the school district's discipline code along with examples of  
17 expected behavior in the cafeteria, expected behavior when  
18 arriving early at school and when the students may be in the  
19 building (McKennan, tape 5).

20 At the beginning of the school year, Ms. McKennan, at a  
21 faculty meeting, explained her discipline beliefs and values.  
22 Ms. McKennan set very few discipline rules such as: if a  
23 student runs in a hall for the third time, the student loses  
24 his free time privileges for a week. Ms. McKennan believes  
25 in only setting discipline rules out of need, not before  
26 (McKennan, tape 6).

27 Mark Jones, BEA President, compared the old teacher-  
28 student handbook with the 1983-84 teacher-student handbook  
29 for Lincoln Junior High School and found the earlier discipl-  
30 ine policy was removed. Mr. Jones agreed that from some of  
31 his talks with the teachers, some discipline policy did  
32 exist at Lincoln Junior High School but the teachers did not

1 understand the policy or the teachers were confused about  
2 the policy where the Lincoln survey report states "student  
3 discipline policy - none", the statement may not be accurate  
4 (Jones, tapes 3, 4).

5 A second Lincoln student discipline policy was estab-  
6 lished in May 1984 (McKenna, tape 6).

7 6. Starting about the second week of the 1983-84  
8 school year, Mr. Jones received several telephone calls from  
9 teachers- at Lincoln Junior High School about a discipline  
10 problem. Mr. Jones advised the teachers to give the new  
11 administrator some time to work into a junior high setting.  
12 Mr. Jones continued the same advise until November-December  
13 1983 (Jones, tape 3).

14 Joyce Butler, Uniserv Director for the Billings area,  
15 union business agent, received telephone calls from Lincoln  
16 teachers about student discipline problems, teacher eval-  
17 ation problems, teachers being pressured and inability of  
18 teachers to meet with Lincoln School Administrator. The  
19 major problems at Lincoln were teacher evaluation and stu-  
20 dent discipline. (Butler, tapes 1, 2; Jones, tape 3).

21 7. All parties agree that the school administration by  
22 School Board policy and the Collective Bargaining Agreement  
23 has the responsibility for establishing student discipline  
24 and teacher evaluation (Butler, tape 1; Jones, tape 3;  
25 Poston, tape 7).

26 Ms. Butler states that student discipline and teacher  
27 evaluation absolutely does have an effect on the teachers'  
28 working conditions (Butler, tape 2).

29 The record contains no other testimony about student  
30 discipline and teacher evaluation compared to working condi-  
31 tions. Taking into account School Board policy 531A and  
32 532P which states the teacher has primary responsibility for

1 all classroom discipline, and taking into account School  
2 Board policy 637P which provides for an evaluation of tea-  
3 chers to ensure the quality of education, I cannot logically  
4 disagree with Butler's statement. I cannot logically find  
5 the teacher has primary job responsibility for student  
6 discipline on one hand and the same primary job responsibi-  
7 lity for student discipline on the other hand not to be part  
8 of working conditions. I find that student discipline and  
9 teacher evaluation does have an affect on the teachers'  
10 working conditions.

11 8. Before the survey and the survey report, the  
12 Lincoln teachers tried to correct the problem at the school.  
13 Because of past acquaintances, Karen Lynch, a Lincoln tea-  
14 cher, tried to talk to Carol Chaflain, a Lincoln administra-  
15 tor, about the Lincoln problem. Ms. Lynch testified that  
16 the Lincoln teachers specifically tried to talk to the  
17 Lincoln administration about the problems; that the Lincoln  
18 teachers found the doors closed and the walls up to any  
19 discussion; and that the Lincoln teachers were very frus-  
20 trated (Lynch, tape 8).

21 Mr. Jones states that the meetings to correct the  
22 Lincoln problems were fruitless; that the Lincoln adminis-  
23 tration's doors were closed to problem-solving; that the  
24 Lincoln teachers were not getting any satisfaction by talk-  
25 ing with the Lincoln administration, that the Lincoln tea-  
26 chers had made an effort to make the Lincoln administration  
27 aware of the problems; and that he thinks the Lincoln tea-  
28 chers made a reasonable effort to solve their problem short  
29 of the survey report (Jones, tape 4).

30 When asked if a committee, a group of teachers, or a  
31 BEA representative before January 26 ever asked her to  
32 attend a meeting to discuss the problems of the type in the

1 survey report, Ms. McKennan answered no. When asked if she  
2 would have attended such a meeting, Ms. McKennan answered  
3 she may have but she had some concerns about such a meeting.  
4 Later, the record reveals that Ms. McKennan was approached  
5 about a faculty meeting where the teachers could just stand  
6 up and air their grievances. Ms. McKennan was somewhat  
7 uncomfortable with this type of meeting and would have  
8 preferred a meeting on a one-to-one basis or with a small  
9 group of teachers (McKennan, tape 6).

10 Dr. William Poston, superintendent of Billings schools,  
11 knew about the problems at Lincoln mid-fall 1983. Ms.  
12 Butler informed Dr. Poston about the problems and stated she  
13 was going to gather additional information and share the  
14 information with him. Dr. Poston encouraged input from  
15 others including teachers (Poston, tape 6).

16 9. Late November, Mr. Jones talked to Ms. Butler  
17 about the problems at Lincoln. Mid-December the teachers at  
18 Lincoln requested a BEA grievance training meeting. Mid-  
19 December, a meeting was scheduled for the Lincoln teaching  
20 staff for January 26, 1984. A grievance training meeting is  
21 a meeting to explain to the teachers what a grievance con-  
22 sists of and how to proceed with the filing of a grievance  
23 (Butler, tape 2).

24 10. About January 23, 1984, a Lincoln teacher was in-  
25 volved in a corporal punishment incident with a student.  
26 Ms. McKennan called Dr. Poston about the incident. Dr.  
27 Poston directed Ms. McKennan to remove the teacher from the  
28 classroom and put a substitute teacher in the classroom. On  
29 January 24, Dr. Poston called Ms. Butler about the incident  
30 and asked Ms. Butler to join him in a meeting with the  
31 teacher about the incident. Ms. Butler indicates that  
32 rumors were rampant about the Lincoln teacher, the incident,

1 the removal of the teacher from the classroom probably with-  
2 out pay and the Lincoln administration's lack of support  
3 for the teachers in disciplining students. From the meet-  
4 ings between Dr. Poston, Ms. Butler and the Lincoln teacher  
5 over the corporal punishment incident, the Lincoln teacher  
6 returned to his classroom with full pay and without any  
7 reprimand. Ms. Butler judged the corporal punishment inci-  
8 dent was handled well, with good results and with no grie-  
9 vances (Butler, tapes 1, 2; Poston, tape 6).

10 11. Some time during the meetings over the corporal  
11 punishment incident, Ms. Butler informed Dr. Poston that  
12 because of the incident and discussion with others, the  
13 January 26 meeting changed from a grievance training meeting  
14 to a meeting to find out exactly what the problems were at  
15 Lincoln and to listen to the concerns the teachers had. Ms.  
16 Butler stated that the teachers wanted something more than  
17 to know how to file a grievance; that the teachers wanted to  
18 know what they could do about the problem; and that she did  
19 not know specifically what the problems were. During this  
20 time, Ms. Butler talked with about ten different Lincoln  
21 Junior High School teachers. Ms. Butler informed Dr. Poston  
22 that she was going to survey the Lincoln teachers to find  
23 out what the problem was; that she would ask the teachers to  
24 suggest ways of taking care of the problem; and that she  
25 would compile the information into a report. Also, to a  
26 small extent Ms. Butler used the January 26 meeting to see  
27 if there was any violation(s) of the collective bargaining  
28 agreement. Separately, Ms. Butler told both Dr. Poston and  
29 Mr. Jones about the questions on the survey. Dr. Poston  
30 told Ms. Butler that he needed specific information about  
31 the problems at Lincoln. For example: if non-arrival of  
32 equipment was the problem, he needed to know what equipment

1 did not arrive, what date, for whom, for what activity and  
2 who failed to fill the order. Dr. Poston stated he needed  
3 the specific information in order to do anything about the  
4 problem. Also during one of the meetings Ms. Butler and Dr.  
5 Poston scheduled a breakfast meeting for February 9 to  
6 review the result of the Lincoln teacher meeting of January  
7 26 (Butler, tapes 1, 2; Jones, tape 3, 4; Poston, tape 6).

8 12. During one of these meetings before January 26,  
9 Ms. Butler told Dr. Poston that the BEA was extending an  
10 invitation to the school administration to work together to  
11 solve a problem. Dr. Poston accepted. Ms. Butler felt that  
12 she had a commitment from the school administration to work  
13 together (Butler, tape 1).

14 13. Mr. Jones and Ms. Butler had a meeting with about  
15 35-38 Lincoln Junior High teachers on January 26 in the  
16 music room of the Lincoln school.

17 After some introductions and statements from Ms. Butler  
18 and Mr. Jones, all the parties at the meeting had an open  
19 discussion of the problems and what actions should be taken.  
20 For about 45 minutes teachers at the meeting spoke about  
21 their problems at Lincoln Junior High School. The tone of  
22 the meeting was agitation (Bonk, tape 5; Van Valkenberg,  
23 tape 4; Jones, tape 3).

24 Ms. Butler informed the teachers that because of the  
25 corporal punishment incident the nature of the meeting had  
26 changed; that a survey was developed; that only the informa-  
27 tion from the survey would be used without the optional  
28 signature but a signature would be helpful in locating the  
29 person; that only Mr. Jones, a secretary, and herself would  
30 see the survey report; that they pointed out the report  
31 should be kept within Lincoln as much as possible; that she  
32 had the confirmation from the school district that the

1 school district would work with BEA; and that from the  
2 survey, a written report would be prepared for Dr. Poston  
3 and the BEA.

4 As per Dr. Poston's request, Ms. Butler informed the  
5 teachers that specific information about the problem was  
6 needed (Butler, tapes 1, 2; Jones, tape 3; Van Valkenberg,  
7 tape 5). Ms. Butler instructed the teachers when addressing  
8 the question of constructive recommendations to remedy the  
9 problem to answer in a constructive and realistic manner.  
10 Ms. Butler further told the teachers that recommendations  
11 are limited. For example: we cannot say the School Dis-  
12 trict must do this or that and we cannot say the School  
13 District must hire or fire so and so (Butler, tapes 2, 8).

14 The participants at the meeting talked about alterna-  
15 tive courses of action if the survey report did not produce  
16 any action from Dr. Poston. The talk about alternative  
17 courses of actions were: (a) a faculty letter to the Lincoln  
18 parents, (b) neighborhood coffee clutches with the parents,  
19 and (c) informational picketing (Bonk, tape 5; Van Valkenberg,  
20 tape 4).

21 The majority of the Lincoln teachers said they wanted a  
22 copy of the survey report. Ms. Butler agreed. Mr. Jones,  
23 Ms. Butler and the teachers talked about the impact a survey  
24 report would have on the school mill levy if not done pro-  
25 perly. The teachers did not want everyone to know about  
26 their problem. Ms. Butler was aware of some of the comments  
27 she would receive on the survey forms. Mr. Jones saw a copy  
28 of the survey questions before the meeting (Butler, tapes 1,  
29 2; Jones, tape 3; Lynch, tape 8).

30 14. Near the end of the meeting, the following survey  
31 form was passed out:  
32

LINCOLN JUNIOR HIGH

Faculty Survey

January 26, 1984

SURVEY

1. What is the total number of years of your teaching experience?  
\_\_\_\_\_ (include the 83-84 year)
2. How many years have you taught in SD #2? \_\_\_\_\_
3. What was the first school year that you taught at Lincoln Junior High? \_\_\_\_\_
4. In what other schools in SD #2 have you taught?
5. What is your major concern(s) with your present teaching assignment at Lincoln?
6. What constructive recommendations would you propose to remedy the present situation?

(Optional): Name \_\_\_\_\_  
Home phone \_\_\_\_\_  
(BEA Exhibit 1)

The completed survey forms were collected as the meeting adjourned.

15. Ms. Butler first did a demographic sort to the completed survey. Ms. Butler instructed her secretary to do a verbatim listing of the replies to questions five and six. The only exception to the verbatim listing of the replies was in cases where the anonymity of the teacher would be jeopardized. The Lincoln teachers were afraid of reprisals if any teachers could be identified from the survey report. Ms. Butler verified a few of the replies to questions five and six of the survey report. Mr. Jones verified one item

1 in reply to questions five and six - lack of discipline  
2 policy by comparing handbooks. (Butler, tape 1; Jones, tape  
3 3).

4 Some of the Lincoln teachers did not know their replies  
5 to questions 5 and 6 would be reported verbatim (Bonk, tape  
6 5; Van Valkenberg, tape 4).

7 16. About January 31, Dr. Poston called Ms. Butler and  
8 asked if Gary Rogers, Ms. McKennan's immediate supervisor,  
9 could join the February 9 breakfast meeting. Ms. Butler  
10 agreed (Butler, tape 1).

11 17. Some time between January 26 and February 9, 1984,  
12 the teachers at Lincoln Junior High School had second thoughts  
13 about their comments on the survey report. The Lincoln  
14 teachers were scared of the repercussions. Some of the  
15 teachers were trying to undo what had been done. A group of  
16 Lincoln teachers wanted the survey report destroyed. Mr.  
17 Jones was at a Lincoln teachers meeting where the teachers  
18 talked about the appropriateness of a survey report going to  
19 Dr. Poston. The Lincoln teachers made the decision about  
20 this question. The Lincoln BEA building rep polled the  
21 Lincoln teachers about giving the survey report to Dr.  
22 Poston. The poll was tied. The giving of the survey report  
23 first to Ms. McKennan, then to Dr. Poston, was okay with Ms.  
24 Lynch and the majority of the Lincoln teachers. (Jones,  
25 tapes 3, 4; Lynch, tape 8).

26 18. Ms. Butler may have given Dr. Poston a rough draft  
27 of the completed reply to questions five and six on about  
28 February 3, 1984. Ms. Butler told Dr. Poston that the  
29 Lincoln administration was going to need a lot of support  
30 from his office. Dr. Poston testified that he did not get a  
31 rough draft copy (Butler, tape 1; Poston, tape 6). (NOTE:  
32 we do not need to resolve the question about Dr. Poston re-

1 ceiving a rough draft February 3 because this fact would not  
2 change the results of this recommended order. The same  
3 applied to the question, did Dr. Poston see a copy of the  
4 completed report before February 9).

5 On February 6, Ms. Butler had a social lunch with  
6 school board member Ellen Allwise and a second lady. This  
7 social lunch was scheduled a month earlier and was not  
8 because of the Lincoln Junior High School problems. The  
9 ladies had some conversation about the amount of cooperation  
10 between the school administration, the BEA and Ms. Butler's  
11 office. Ms. Butler told the other ladies that she was very  
12 pleased with the amount of cooperation between the parties.  
13 Ms. Butler cited the invitation to work together and the  
14 upcoming survey. The school board member asked if she could  
15 have a copy of the survey report. Ms. Butler replied that  
16 the decision to give her a copy would be made by the BEA  
17 (Butler, tapes 1, 2).

18 19. Ms. Butler visited Lincoln Junior High School some  
19 time before February 9. The Lincoln teachers informed Ms.  
20 Butler that the Lincoln teachers wished to handle the prob-  
21 lem within the Lincoln school as much as they could. The  
22 Lincoln teachers wanted to give a copy of the survey report  
23 first to the Lincoln administration. The Lincoln teachers  
24 picked a committee of three Lincoln teachers to give a copy  
25 of the report to Ms. McKennan at the end of the school day  
26 of February 8 (Butler, tapes 1, 2; Jones, tapes 3, 4).

27 20. Ms. McKennan received her copy of the report late  
28 February 8. Ms. McKennan phoned Mr. Rogers about the report  
29 later February 8 (McKennan, tape 6).

30 21. Dr. Poston, Mr. Jones, Ms. Butler and Mr. Rogers  
31 attended the February 9 breakfast meeting at a public res-  
32 taurant. The BEA gave a copy of the survey report along

1 with a cover letter to Dr. Poston and Mr. Rogers. The above  
2 individuals had some general conversation. Dr. Poston told  
3 Ms. Butler and Mr. Jones that the administration at Lincoln  
4 Junior High had got a copy of the survey report the night  
5 before; and that the Lincoln administration was upset.

6 Ms. Butler and Mr. Jones informed Dr. Poston and Mr.  
7 Rogers that the Lincoln teachers wished to work on the prob-  
8 lems internally.

9 Mr. Jones informed Dr. Poston and Mr. Rogers that the  
10 teachers at Lincoln Junior High School would be getting a  
11 copy of the report the next day. During this timeframe, Dr.  
12 Poston was told the school board members would be getting a  
13 copy of the survey report. Dr. Poston had no objections to  
14 this distribution. After glancing through the survey report,  
15 Mr. Jones told Dr. Poston that we are not passing judgement  
16 on the accuracy of this report; and that we are just giving  
17 you a copy of the information we got. Dr. Poston asked Mr.  
18 Jones if he was recommending a termination or discipline.  
19 Mr. Jones replied that his role was to give the school  
20 administration the information; that he was not recommending  
21 anything; and that it was up to the school administration to  
22 do as they see fit. Mr. Jones still stands by that posi-  
23 tion.

24 At this meeting, Dr. Poston did not say anything about  
25 disciplining anyone because of the survey report. When Dr.  
26 Poston left the breakfast meeting, he had the impression he  
27 had to get involved in Lincoln and take some sort of action.  
28 After the breakfast meeting, Dr. Poston, Mr. Rogers and Ms.  
29 McKennan had a meeting at the Lincoln school to discuss the  
30 survey report (Butler, tape 1; Jones, tapes 3, 4; Poston,  
31 tape 6).

1 The BEA believed that at the February 9 meeting, the  
2 parties were using the provisions of Meet and Confer, Article  
3 III, Section 9 of the Collective Bargaining Agreement with-  
4 out making a formal request to meet and confer (Butler, tape  
5 1). The record contains no other information on Meet and  
6 Confer. Ms. Butler's statement is controlling.

7 22. The cover letter and part of the survey report  
8 states the following:

9 Attached is a report on the general findings relative  
10 to situations at Lincoln Junior High School.

11 A survey was given to each faculty member in attend-  
12 ance at a meeting on January 26, 1984. That survey is  
13 included in the report.

14 This report is shared with you by the Billings Educa-  
15 tion Association as a demonstration of willingness on  
16 the part of the BEA to work with district administra-  
17 tion to improve conditions at Lincoln. The report  
18 includes some recommendations. These suggestions are  
19 made in hopes that the administration will be agree-  
20 able to also make recommendations.

21 The BEA truly desires to work with the administration  
22 on a cooperative basis to bring about positive develop-  
23 ments among the faculty, administration, students, and  
24 parents at Lincoln Junior High School. Thank you for  
25 your assistance and cooperation with these critical  
26 concerns.

27 (BEA Exhibit 2)

28 SURVEY REPORT - LINCOLN JUNIOR HIGH SCHOOL

29 . . . . .  
30 On January 26, 1984, a meeting with the faculty of  
31 Lincoln Junior High School was held with Mark Jones,  
32 President of the Billings Education Association, and  
33 Joyce Butler, MEA UniServ Director. There were thirty-  
34 eight members of the Lincoln faculty present at the  
35 meeting. Of these, thirteen teachers are non-tenured,  
36 and twenty-five are tenured. Total teaching experi-  
37 ence of individual teachers present at the meeting  
38 ranged from first year teachers to a teacher with  
39 twenty-three years of experience. The specific break-  
40 down is shown on the survey form which is included in  
41 this report. These thirty-eight teachers collectively  
42 bring experience to Lincoln from twenty-six other  
43 schools in Billings School District #2. These schools  
44 are listed on the back of the survey. This report is  
45 a result of the discussion that took place at the  
46 meeting and the information that was provided on the  
47 survey form completed by the thirty-eight faculty mem-  
48 bers in attendance.



1                   RECOMMENDATIONS FROM THE FACULTY:

2                   Also during the discussion, faculty members were asked  
3                   to identify specific recommendations to remedy the  
4                   present situation. These recommendations are as  
5                   follows:

- 6                   1.    There should be teacher input in the Handbook  
7                   including defining rules and establishing  
8                   consequences.
- 9                   2.    Set standards which are consistently applied to  
10                  the following:
- 11                  A.  Discipline  
12                  B.  Teacher observation and evaluation  
13                  C.  Follow up on observations
- 14                  3.    Provide more administrative support in guarding  
15                  student safety - particularly around school  
16                  buses.
- 17                  4.    Change in administration.
- 18                  5.    Cease discrimination against men teachers. The  
19                  perception exists that male teachers get poorer  
20                  evaluations and less support.
- 21                  6.    Discontinue harrassment of non-tenure teachers.

22                  To this list, the following recommendations are also  
23                  offered.

24                  RECOMMENDATIONS:

- 25                  1.    Provide adequate in-service training on M.  
26                  Hunter methods and theories for those teachers  
27                  who are being evaluated by those standards.
- 28                  2.    Readminister the Purdue Inventory to Lincoln  
29                  staff. At the time faculty completed this  
30                  survey, they were unaware of who building level  
31                  administrators were. This survey could shed  
32                  light on several key issues: teacher rapport  
with principal, rapport among teachers, teacher  
load, curriculum issues, teacher status, satis-  
faction with teaching, and school facilities  
and services.
- 3                  3.    Organize a faculty, administration, parent com-  
mittee to review discipline problems and develop  
specific discipline policies that will be es-  
tablished for the entire school. These poli-  
cies/rules should be printed for every student  
and teacher. Parents should also be made aware  
of these policies/rules.
- 4                  4.    Faculty members should be allowed to request  
administration to schedule "issue(s) of concern"  
on agenda of regularly scheduled faculty meet-  
ings. This would enhance communication between  
teachers and administration and among teachers.

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5. Teachers who are new to the building (and especially the district) could be assigned a "buddy" teacher during their first year at the school. This would provide for more positive teacher interaction as well as assist new teachers in locating necessary equipment and supplies.
6. Minimize PA announcements which are disruptive to classroom procedures. Make all announcements over PA at one time each day, i.e., the last five minutes of first period. Have all daily announcements printed and run off and placed in each teacher's mail box one-half hour before student day begins. Each teacher can post these announcements in their classroom.
7. Conduct a building meeting to review the District staff evaluation procedures.
8. Provide for regular and consistent teacher representation on Parent Advisory Committee. Follow PAC meetings with written reports to the entire faculty.

Comments on Items #5 and #6 of the survey are itemized in the following pages of this report.

CONCLUSION:

Overall, there is a negative spirit that dwells at Lincoln Junior High School. In general, the situation there is one where faculty members feel that they have no ownership or buy-in in the operation of the school. There is very little effective communication between teachers and administrators or amongst the teachers themselves. Feelings of fear, reprisal, and antagonism seem to reign over the staff. All of this distracts from teachers performing at their best.

Cooperation between School District #2 administration and the Billings Education Association is needed to provide positive development for maximum utilization of the talents of staff and administration.

.....

5. What is your major concern(s) with your present teaching assignment at Lincoln?
  - No school discipline
    - a. We have children in this school at 7:00 in the morning until God knows when. Children refuse to leave the school at night. Talked to McKennan and she did not seem to see anything wrong.
    - b. A child hit me - I took him to the counselors office. I was called in by McKennan and Chatlain and asked "What did you do for that boy."

1 #5 (continued)

2 c. Obscene tee shirts or ones advertising  
3 liquor and beer are "OK". McKennan will be  
4 the one to determine whether they are "appropriate or not."

- 5 - The teacher is guilty! Teacher is very seldom  
6 backed.  
7 - Lack of discipline.  
8 - McKennan and Chatlain are very abusive of Bill  
9 Jull.  
10 - Teacher is wrong first - will listen later.  
11 - No interaction at faculty meetings. Programs  
12 set up and controlled by Principal.  
13 - No support for teachers concerning students.  
14 - Student punishment is: out of class 1+ periods  
15 and being talked to. Kids think this is a joke.  
16 - The kids are getting more and more rowdy and  
17 they show no respect for teachers or each other  
18 (halls messy, running, fighting - all grades  
19 dropped)  
20 - Discipline policy varies from child to child  
21 - depends on who child is and who parents are.  
22 - Some teachers are treated differently than  
23 others. If they use "Assertive Discipline" there  
24 is more follow up. Other teachers are harrassed.  
25 - I have been evaluated - no write up yet. It has  
26 been 15 days.  
27 - There seems to be lack of support from the  
28 administration. Carol Chatlain does not take a  
29 stand on how to handle discipline. She tends to  
30 think that notification of others is the best  
31 way (ex: parole; parents, or just to talk). I  
32 feel parents and students have more control over  
teachers.  
- The administration seems to think that students  
are always right.  
- The lack of taking a stand or making rules is  
ridiculous. Students allowed to wear anything  
and eat anything anytime. Seems to be a little  
hoodlum community. I've never worked under any-  
thing or anyone like Carol Chatlain. A concern  
of mine is teacher morale. I hate seeing so many  
people unhappy. We feel like they really don't  
think we know anything.  
- No pre-conference or follow up on evaluation. No  
written evaluation.  
- Lack of administrative tact in working with  
staff.  
- Lack of stern/consistent discipline.  
- I feel overwhelmed by all the new things I'm  
faced with.  
- We really need new English materials.  
- I haven't been evaluted in 2 years - or yet this  
year.  
- Also - the student has first say over the teacher.  
The teacher must justify actions in front of  
students or to students.  
- Lack of communication from office to classroom.  
- Inability to see principal without making ap-  
pointment.  
- Treated like a little kid.

#5 (continued)

- Lack of administrative support - all you get is the run-around.
- Problem with refusing to make schedule changes which affect my teaching ability.
- Illegal placement of students.
- I have not been evaluated and am concerned because of what has been done in other evaluations.
- Extra assignments not covered by stipends.
- Within this building seniority is meaningless. Appointments are by who you get along with. No one has any expertise but our administrator regardless of background. Some of our teachers have worked hard to develop expertise and should be recognized as such.
- Teachers are belittled, criticized by administrators in the presence of parents and students.
- I feel that the students and Lincoln are not getting the best education.
- This school seems to be a mess. We have had 4 interruptions of the school day in 4 days.
- No one seems to know what's going on.
- Faculty meetings are a waste of time - they should be more informative and not instructional.
- Lack of administrative support.
- Antagonism by administrators.
- Undermining discipline by administrators.
- The elimination of rules (gum, beer shirts, shirts with nasty comments, etc.)
- Intimidation of non-tenured staff.
- Threats of lawsuits by administrators unnecessarily.
- No teacher input on policies.
- Lack of discipline.
- Lack of concern for human beings' feelings.
- No communication.
- Definite partiality.
- Avoidance of problems at hand.
- Never any notices about future events.
- Students are in the building at all hours - the girls' locker room is a complete mess with writing all over the walls.
  
- Lack of support by administration.
- Repeated criticism by administration.
- No administration back up with discipline problems; no consistency in office policy concerning discipline (student attendance, swearing in halls, etc.)
- Administrators criticize teachers in front of students.
- Administrators doubt teacher's word when told of conflicts between teachers and students.
- Observation by administrator with no follow up conference till several weeks later.
- We are sadly lacking materials at Lincoln. I requisitioned a file cabinet in September; still have received no file cabinet. Administration seems unconcerned about lack of materials.
- Students' rights over-shadow teachers' rights.

#5 (continued)

- Students swearing, roughhousing in halls is worse here than in any building I've ever taught in. Gum all over walls, floors, etc.
- Assertive discipline is used against teachers.
- Principal never patrols the halls.
- Principal rarely available for personal conference with teachers.
- No school rules - they were thrown out at the beginning of the year by our current "leader".
- Lack of administrative support - too often I've sent students to the office and had nothing done.
- Inconsistent support - sometimes there is support, sometimes not - it seems that the child and who his parents happen to be influence this.
- Different levels of administrative support for different teachers - those using Chatlain's pet assertive discipline mode are able to send students to the dean with 4 checks, I have been told I may not.
- No teacher input - ex. mini-courses set up by principal - first students were surveyed, then teachers who were expected to teach these after school courses were notified - still given no guidelines for course goals.
- No use of forms and procedures by administrators - I was assigned a new student Monday, January 23, by Chatlain - she still has not made the transfer official by filling out and distributing the required form - the counselor had no information on the schedule change, either - I had to track "Ms. C" down to find out what was going on.
- Lack of classroom experience on part of administrators - Chatlain has none, McKennan only in elementary special ed.
- Lack of support for teachers with discipline problems.
- Lack of organization and communication - teachers are not told of changes with advance notice - both meetings and changes in the class day are announced at a late time.
- Teachers have no input; the school is run (when some communication is used) by the office. Consideration or common courtesy is lacking.
- The student's voice is heard first before having a discussion with the teacher - regarding any problems with students.
- Lack of consistent discipline policies.
- One way communication: I feel I am approached with an "I'll talk, you listen!" kind of attitude. My point of view is not respected. I am often interrupted when I'm sharing my opinion or concerns.
- Problems are minimized or ignored - discipline, garbage in halls, student behavior in assemblies.
- Inconsistencies in handling of discipline.
- Lack of professionalism among administrators (Dean of Students).
- "Unofficial evaluations" - inaccessibility of principal for discussion or conferences.

#5 (continued)

- Policies of current administration has created a lack of respect toward teachers and as a result, an increase in discipline problems. No input allowed - lack of organization.
- My input is/was not accepted in establishing school policy at Lincoln. A good school has a policy that is agreed upon by administration and teaching staff.
- Constructive assistance to teachers having difficulties is needed.
- Inconsistency regarding school discipline policy.
- Inconsistency in handling discipline and school matters.
- The morale of the teachers.
- The lack of backing for teachers who find a need to discipline students. In fact the teachers are verbally put down in the presence of students and teachers. If the teacher is wrong in discipline matters a private discussion should take place between the teacher and administrator.
- Lack of or not enough communication.
- No cohesiveness between administration and teachers.
- What the principal says she will do - never happens.
- Lack of up-to-date materials.
- Lack of discipline among students - noise, pushing, gum-chewing, etc. in halls and classes.
- Communication between faculty and administration - lack of.
- Discipline policy - none.
- Lack of support for teachers in difficult situations - always side with students and parents against teacher.
- Poor (no) communication between staff and administration. The administration is autocratic, they continually take the student's side on every issue thus putting the faculty on the defensive on every issue. The dean is continually guarding the student's rights and never regards the right of the teacher.
- Our evaluations do not follow the contract, no pre-conference offered or written evaluation within 10 days.
- Too much theory from administration. No common sense.
- The world's worst and most arbitrary discipline policy.
- Discipline problems: No standard foundation or policy for student problems.
- Evaluation process is not being followed as according to the SD #2 contract (ie: No pre-conferences no option given to me!)
- Dissatisfaction among staff and administration. Seems to be mutiny on the horizon! General unrest.
- Discipline in school seems to lack direction and focus. Intent is good but it seems all talk.
- Although this is not my problem at this writing - I feel that many of my peers have been very critically evaluated - unjust.
- Process and follow through of discipline.

1 #5 (continued)

- 2 - Failure of communication between administration  
and staff.
- 3 - I am very dissatisfied with the lack of set  
4 rules, policies, and consequences for students  
by the administration. Example - Students may  
5 chew gum in classroom (not mine).
- 6 - Students have candy - wrapper remains are found  
all over the school.
- 7 - On occasions when I send students out of the  
classroom for disciplinary action, the Dean has  
8 either been unavailable, door closed, on the  
telephone etc. Just today she told me to handle  
9 the situation myself. Chatlain does not have the  
ability to resolve student-teacher problems. She  
10 is not-even supportive of the teacher. I have  
been in meetings where she quizzed teachers, put  
11 them down for certain actions - in front of  
staff. I personally do not find her effective  
in handling student disruptions. Her little  
12 chats with students do not work.
- 13 - Student behavior in the halls: swearing, run-  
ning, fighting, slamming lockers, rude and  
14 disrespectful to teachers. Teachers try to be  
visible and are, it's just that nothing happens  
to students when they are taken to the office  
15 for these offense. Heck, the (students) can wear  
beer t-shirts, wear walkmans and carry portable  
16 stereos all over the school. The students run  
this school.
- 17 - Kids have rowdy hall behavior.
- 18 - Lack of visibility on the part of the 3 adminis-  
trators.
- 19 - Teachers are afraid - but kids aren't. They  
don't fear being sent to the office.
- 20 - Kids all over town know about the "mess" at  
Lincoln.
- 21 - Erratic method of schedule changes.
- 22 - Assemblies - lack of respect for those on the  
stage.
- 23 - Messages and notices to teachers are often  
confusing - daily schedule changes are often  
24 made at the last minute and are given over the  
P.A.
- 25 - Floors of halls - always messy with candy and  
gum wrappers.
- 26 - Writing on the bathroom walls.
- 27 - Counselors are forced to do the vice principal's  
jobs of scheduling.
- 28 - No one keeping the kids out of the hall before  
7:30 a.m.
- 29 - Kids allowed to remain in building after school.
- 30 - Inconsistent applying of rules.
- 31 - Some teachers are treated well, some are treated  
very poorly.
- 32 - Lack of respect of counselors by administration  
in CST.
- Kids side taken instead of teachers.
- Need more equipment in the classroom - file  
cabinets, teacher desk, more tables.
- No pre-conference before evaluation. No follow  
up after evaluation to see that suggestions for  
improvement have been fulfilled.

1 #5 (continued)

- 2 - Lack of (strong) discipline.  
3 - Lack of positive communication with administra-  
4 - Student rights over teacher rights.  
5 - Need some positive reinforcement - less of a  
6 - negative evaluation approach. Says one thing  
7 - verbally and written way too negative.  
8 - Not enough faculty - administration communica-  
9 - tion.  
10 - More communication on policy.  
11 - Administration not using the faculty resources  
12 - of ideas.  
13 - I believe the administration is using the prob-  
14 - lems they created in discipline as the teacher's  
15 - creation.  
16 - I feel that the evaluation process is poor.  
17 - Evaluation does not follow contract. I feel  
18 - discriminatory practices against myself in my  
19 - evaluation.  
20 - Discipline is at a standstill.  
21 - Students have no regard for following rules.  
22 - Teachers do not have any rights.  
23 - Administrator should be held accountable to tea-  
24 - chers to give expectations, equal rights and  
25 - positive support.

15 6. What constructive recommendations would you pro-  
16 pose to remedy the present situation?

- 17 - Make Mr. Jull Principal.  
18 - Set policy on discipline for all - equally.  
19 - Solid backing for all teachers not just favo-  
20 - rites or those using "Assertive Discipline".  
21 - Get rid of Chatlain!!  
22 - Have a stricter discipline policy.  
23 - Have stricter consequences for students' misbe-  
24 - havior. After school suspension obviously isn't  
25 - working.  
26 - Recommend Bill Jull head man. The other two  
27 - remove and hire someone that can be good admi-  
28 - nistration to both students and teachers.  
29 - How about another form filled out by Lincoln  
30 - teachers that was assembled the first PIR day  
31 - last fall. We could not answer most of them  
32 - because we didn't know administrators.  
- We need a chance to air our concerns about the  
- problems.  
- We need to know just where we stand - discipl-  
- line, etc.  
- Better inservice for new teachers about proce-  
- dures at junior high.  
- Weekly staff newsletters detailing meetings,  
- procedure for homeroom, etc.  
- Cut down evaluating others so much - let's treat  
- everyone equally.  
- Need to look at an administrator who understands  
- the junior high setting and can be supportive of  
- teachers within legal rights of the law. Tea-  
- chers are expected to be positive and use assert-  
- ive discipline and give students equal rights.  
- Transfer me to a senior high.

#6 (continued)

- Get communications going specifically in the area of discipline.
- Make Mr. Jull Principal.
- Fire Ms. Chatlain.
- Transfer Mrs. McKennan to elementary.
- Bill Jull should be principal.
- Parents should be informed.
- A principal who will support teachers at Lincoln.
- Bill Jull made principal.
- Bring in some strong and knowledgeable administrators to replace McKennan and Chatlain.
- Change the administration.
- I feel our present administrators are not qualified to handle a junior high; therefore, I feel the only solution is for a change in administration (Dean and Principal).
- Need a definite set of rules.
- Open communication from the administration at this school. We have never had this. All we have are directives.
- Firm policies concerning the above matters. I don't know where the administration stands!
- Treat all teachers in a positive manner - not be friendly to some and unfriendly to others.
- Work with teachers - not against them.
- Don't tell people they have a right to sue teachers.
- I really don't know.
- Tighten rules and enforcement.
- Allow teachers to assign detention without going through a dean.
- Reassignment of Carol Chatlain. She should not be dealing with personnel.
- Faculty committee should meet with Mrs. McKennan. She should agree to listen and take actions on their suggestions.
- I wish I knew - my "gut-level" feeling is new administration.
- Weekly bulletin.
- Discipline policy established for school dressing:
  - a. Obscene T-shirts
  - b. Hall behavior
- Work with teachers - not against them.
- Avoid criticism of teachers in front of students.
- Send Chatlain to some other place.
- Clue McKennan in, force her to listen.
- Keep Wm. Jull.
- Cooperative attitudes and actions on part of administration toward enforcing an effective discipline policy. We need to see faculty and administration working at enforcing rules! Administrators must lead in a big visible way.
- Evaluations are highly critical and not constructive. Seem to be written for the purpose of demonstrating observer's ability to find fault. Where is the help we need to become a better teacher?
- Stronger discipline by administration especially in Dean of Students or change in Dean (ASA).
- Availability of communication with administration.
- Consistent policies in regard to student problems.
- Remove the dean.

1 #6 (continued)

- 2 - Put a strong disciplinarian MALE in leadership  
3 position. This I see as crucial.  
4 - There should be more consistent discipline from  
5 the main office and more backing of teachers  
6 when they administer discipline.  
7 - Stricter rules with enforcement.  
8 - Get administration to talk to their staff and  
9 use their resources.  
10 - Change of administration, with the exception of  
11 vice principal.

(Exhibit A, Attached to School  
District's Response)

12 The substantive part of the above survey report con-  
13 tains some 230 numbered and highlighted entries. The num-  
14 bered entries are general conclusions of the survey report.  
15 Of the 36 numbered entries only one states a "change in  
16 administration". That is one out of 36 or 2.3%. Of the 140  
17 verbatim highlighted responses to question #5, none of the  
18 statements make any reference to a change in administration.  
19 Of the 56 verbatim highlighted responses to question #6,  
20 some 19 entries make some type of reference to a change in  
21 administration. That is 19 out of 56 or 33.9%. Overall out  
22 of some 230 entries, only some 20 entries make some refer-  
23 ence to a change in administration - 8.7%.

24 23. Ms. Butler and Mr. Jones's purpose in the survey  
25 report.

26 Ms. Butler states the purpose of the survey report was  
27 to identify specific problems, bring the problems forcefully  
28 with effect with impact to the administration so we could  
29 get some attention and force to see what could be done  
30 (Butler, tape 2). Later Ms. Butler states the purpose of  
31 the survey report was to gather information on what the  
32 problems were and to try to get some constructive solutions  
(Butler, tape 8). When asked if part of the desire of the  
Lincoln community was to eliminate those Lincoln administra-

1 tors, Ms. Butler answered some of the people did feel that  
2 way and agreed that a thread of eliminating the Lincoln  
3 administrators ran through the survey report (Butler, tape  
4 2). Ms. Butler denied that the objective of the survey  
5 report was to get rid of the Lincoln administrators (Butler,  
6 tape 8). Butler also stated the survey report was to find  
7 out if there was any violations of the Collective Bargaining  
8 Agreement. Ms. Butler had done similar survey reports in  
9 other schools, in other situations. No grievance was filed  
10 over the Lincoln problems or on information from the Lincoln  
11 survey report (Butler, tape 1).

12 Mr. Jones states the reason for the survey report was  
13 to get a clear handle on the Lincoln problem. Mr. Jones  
14 agrees that the survey report contains inflammatory noncon-  
15 structive items (Jones, tape 4).

16 Because Ms. Butler had done survey reports in other  
17 schools in other situations, I find Ms. Butler with some  
18 input from Mr. Jones to be the chief engineer behind the  
19 survey report.

20 Looking at (a) Mr. Jones's above statements, (b) Mr.  
21 Jones's "not recommending any termination or discipline"  
22 statement of February 9, before any dispute, (c) Ms. Butler's  
23 above statements, (d) Ms. Butler's before January 26 invita-  
24 tion to work with the school district's statement to Dr.  
25 Poston, (e) Ms. Butler's instructions to the teachers about  
26 survey recommendations on January 26, (f) Ms. Butler's  
27 comments to school board member Allwise on February 3, (g)  
28 Ms. Butler's report cover letter of February 9, and (h) the  
29 last sentence in the conclusion of the survey report, I find  
30 Ms. Butler and partly Mr. Jones's purpose in the survey  
31 report was to improve the teachers' working conditions in  
32 the area of student discipline and teacher evaluation plus

1 to a minor extent to gather additional specific information.

2 I do not find Ms. Butler and Mr. Jones's purpose in the  
3 survey report was to have any of the Lincoln administrators  
4 transferred, eliminated or terminated. Looking at Ms.  
5 Butler's "teachers wanted something more than to know how to  
6 file a grievance" statement, I do not find the purpose of  
7 the survey report was collective bargaining agreement grievance  
8 related.

9 24. The Lincoln teachers' purpose in the survey report.

10 The Lincoln teachers saw severe and damaging problems  
11 at the school. The Lincoln teachers had to find a solution  
12 (Lynch, tape 8). Because the Lincoln problems were not  
13 being handled the way some of the Lincoln teachers felt, the  
14 Lincoln teachers wanted a change in administration. The  
15 survey report showed the Lincoln administration to be incom-  
16 petent. Ms. Bonk, a Lincoln teacher, agreed in part (Bonk,  
17 tape 5). The Lincoln teachers did not want to hurt anyone  
18 with the survey report. Ms. Lynch agreed that some of the  
19 statements in the survey report unfortunately hurt. Ms.  
20 Lynch also stated that sometimes we must tell the truth; and  
21 that if the statements in the survey report were looked at  
22 objectively, the statements should not hurt (Lynch, tape 7).

23 In response to a leading question, Dr. Poston agreed  
24 that one of the threads that ran through the survey report  
25 was an attempt to change Lincoln administration (Poston,  
26 tape 7).

27 Looking at (a) the above statements, (b) the statements  
28 of Ms. Butler above, (c) the Lincoln teachers' second thoughts  
29 and concerns about the survey report, and (d) the statistical  
30 summary of the survey report, I do not believe the Lincoln  
31 teachers' main purpose in the survey report was to change  
32 Lincoln administration. The main purpose of the survey  
report was to change the student discipline procedure and

1 the teacher evaluation procedure. To change administration  
2 at Lincoln school is only a thread in the survey report.

3 25. The affect of the survey report on the Lincoln  
4 school administration, the Lincoln teachers and Lincoln  
5 students.

6 The survey report was demoralizing to the Lincoln ad-  
7 ministration (Poston, tape 7). Ms. McKennan was stunned by  
8 the survey report. The survey report affected Ms. McKennan  
9 physically, mentally and her reputation (McKennan, tape 6).

10 The survey report divided the Lincoln teachers into two  
11 groups - for administration and against administration. Some  
12 of the Lincoln teachers were forced to decide which group  
13 they would be part of. Ms. Bonk isolated herself because  
14 she was intimidated by the more vocal people. The Lincoln  
15 teachers were very upset. The problem between the Lincoln  
16 teachers is still going on (Bonk, tape 5; Van Valkenberg,  
17 tape 4; McKennan, tape 6; Poston, tape 7).

18 The Lincoln survey report was demoralizing to the  
19 Lincoln students (Poston, tape 7). The survey report had a  
20 negative affect on the Lincoln students. The students would  
21 say "we are the worst bunch of kids you ever had" and "aren't  
22 we awful". To minimize the negative affect of the survey  
23 report on the students, Ms. McKennan spent a lot of time  
24 reassuring the Lincoln students and directed the Lincoln  
25 teachers to do the same (McKennan, tape 6).

26 26. During the middle of February 1984, Dr. Poston and  
27 Mr. Jones had an ongoing exchange about the school district's  
28 policy of placing a letter of appreciation in the teacher's  
29 personnel file who gave to the United Way. Mr. Jones, Dr.  
30 Poston and others attended the February 13 school board  
31 meeting. One of the school board members wanted to talk  
32 about a letter from the Boulder school faculty to the Execu-

1           tive Director of the United Way. The Boulder faculty letter  
2           was objecting to the letters of appreciation. After hearing  
3           from both Dr. Poston and Mr. Jones about the matter, the  
4           school board directed the school administrator to discon-  
5           tinue the practice of putting a letter of appreciation into  
6           the teachers' personnel file for those teachers who gave to  
7           the United Way (Jones, tape 3).

8           Mr. Jones judged that Dr. Poston was visibly angry over  
9           the United Way appreciation letters (Jones, tape 3).

10          27. On February 28, 1984, the superintendent's cabinet  
11          had a meeting. The superintendent's cabinet is a group of  
12          central office administrators and one building principal,  
13          that meets with the superintendent to discuss current prob-  
14          lems, projects and past, present, future actions of the  
15          school board. One of the items of the February 28 meeting  
16          was reported as follows:

17                 The soliciting of Board Members on concerns of the  
18                 school district, without following through the  
19                 chain of command, prior to going to the Board,  
20                 will be considered as an act of insubordination.  
               Those staff members not observing this procedure  
               can expect to receive the appropriate reprimand.  
               This will effect all staff members.

21                                 (Exhibit B, attached to the School  
22                                 District's Response).

23          The above report was produced by a building principal from a  
24          lengthy discussion at the superintendent's cabinet meeting.  
25          The report of the superintendent's cabinet meeting is the  
26          method the superintendent's cabinet uses to communicate with  
27          the other school administrators.

28          The BEA received a copy of the February 28 meeting  
29          report from school board member Howard Simmons. Mr. Jones  
30          did not know how wide the report of the superintendent's  
31          cabinet meeting was normally distributed. After receiving a  
32          copy of the superintendent's cabinet's February 28 meeting

1 report, the BEA did widely distribute the meeting report  
2 (Jones, tapes 3, 4).

3 28. Dr. Poston contends that the above report does not  
4 reflect what transpired at the superintendent's cabinet  
5 meeting; that the administration was having problems with  
6 teachers going to the school board with personal matters  
7 without first following the chain of command; that a school  
8 district operates more efficiently if the school district's  
9 administration can deal with a problem first; that his com-  
10 ments at the superintendent's cabinet meeting were in line  
11 with school board policy 272P, supra; that he was not at-  
12 tempting to stop the teachers from talking with the school  
13 board about any matter; that if teachers wanted to talk to  
14 the school board about a personal issue, the teachers should  
15 talk first to the school administration; and if the teacher  
16 wanted to talk to the the school board members about a  
17 public issue the teacher can talk to the school board first  
18 (Poston, tape 7). Both Dr. Poston and Mr. Jones agreed that  
19 it is not proper for a teacher to contact a school board  
20 member(s) outside the chain of command about a personal  
21 matter (Jones, tape 4; Poston, tape 7).

22 29. Only one teacher was confronted by the school  
23 administration for talking to a school board member about a  
24 personal issue. Except for the one above teacher, the  
25 record contains no evidence of the employer reprimanding,  
26 threatening to reprimand or intimidating a teacher for  
27 talking to a school board member(s) about the survey report,  
28 the United Way letter or other BEA business (Jones, tapes 3,  
29 4; Poston, tape 7). The record contains no evidence of the  
30 employer using School Board Policy 272P to interfere with  
31 any protected BEA business.  
32

1                   30. Distribution of the survey report.

2                   The survey report circulated through the school dis-  
3                   trict, parts of the Billings community and the state (Butler,  
4                   tape 2; Bonk, tape 5; Lowney, tape 5; Mossman, tape 5;  
5                   McKenna, tape 6).

6                   The BEA intended only to give copies of the survey  
7                   report to the Lincoln teachers, the Lincoln administration,  
8                   the school district administration and school board members  
9                   (Jones, tape 3). The BEA office informed Ms. Butler the  
10                  number of copies of the survey report was needed for distri-  
11                  bution (Butler, tape 2). The survey report was distributed  
12                  in the Lincoln school by BEA members (Jones, tape 3). Some  
13                  of the Lincoln support staff asked for copies of the survey  
14                  report. BEA members did give copies of the survey report to  
15                  the Lincoln support staff (Lynch, tape 8). The Lincoln  
16                  teachers did not intend teachers in other schools to get  
17                  copies of the survey report. Ms. Lynch did not know how  
18                  teachers outside of the Lincoln school got copies of the  
19                  Lincoln survey report (Lynch, tape 8).

20                 Ms. Butler did not know of any BEA members distributing  
21                 the survey report and could not say no BEA members distri-  
22                 buted the Lincoln survey report (Butler, tape 2). The BEA  
23                 took no steps to limit the distribution of the survey report  
24                 (Jones, tape 3; Van Valkenberg, tape 4; Butler, tape 2).

25                 Shortly after February 9, two copies of the survey  
26                 report were available in Meadowlark school. The first copy  
27                 of the survey report was brought to Meadowlark school by a  
28                 speech therapist, an itinerant teacher. The speech thera-  
29                 pist travelled to all schools in the employer's school  
30                 system. This speech therapist coordinates the speech therapy.  
31                 Ms. Lowney, Principal, Meadowlark school, did not know if  
32                 this coordinator of speech therapy is a member of the col-

lective bargaining unit (Lowney, tape 5). By combining these facts and the findings in fact number 2, collective bargaining unit, I find this coordinator of speech therapy to be outside the collective bargaining unit.

Ms. Lowney did not know how the second copy of the survey report got on the coffee table in the teachers' lounge. At the Meadowlark school, all staff, support staff, and parent volunteers have access to the teachers' lounge (Lowney, tape 5).

Shortly after February 9, a copy of the Lincoln survey report was available in the Ponderosa school either on the principal's desk or the teachers' lounge. Like Meadowlark school, the Ponderosa school's teachers' lounge is open to all staff and volunteers. Ms. Mossman, Principal, Ponderosa school, did not know how a copy of the survey report got into Ponderosa school (Mossman, tape 5).

While Ms. Mossman was at an April 13 conference in Bozeman, she was questioned by a professor about the survey report. The professor did not state how he found out about the Lincoln survey report. April 13 is after the Billings Gazette reported about the Lincoln survey report on March 15 and 16 (Mossman, tape 5; School District Exhibit 7).

Ms. McKennan called the Glasgow Montana school system about another school matter. A member of the Glasgow school community stated he had a copy of the survey report. When Ms. McKennan asked the gentleman from Glasgow how he got a copy of the survey report, the gentleman just laughed (McKennan, tape 6).

Ms. McKennan has had no knowledge of how the survey report was distributed (McKennan, tape 6).

Kim Larson, news reporter for the Billings Gazette, asked Mr. Jones to see or get a copy of the survey report.

1 Mr. Jones refused. During one of the meetings between the  
2 Lincoln teachers and Mr. Jones, the Lincoln teachers said no  
3 to the newspaper's request for a copy of the survey report  
4 (Jones, tapes 3, 4; Bonk, tape 5).

5 31. Effect of the distribution of the survey report.

6 Ms. Butler agreed, in her opinion, it was appropriate  
7 for the survey report to be widely distributed through the  
8 school district. When asked do you think it was appropriate  
9 to have a survey report with statements like (quote omitted)  
10 circulating throughout the community, Ms. Butler generally  
11 answered that she felt it was not appropriate to have the  
12 kind of problems we had at Lincoln; and that because of the  
13 nature of the information she had in the survey report and  
14 the things she was told, she would answer yes (Butler, tape  
15 2).

16 Mr. Jones believes the survey report in the wrong  
17 hands, people outside the problem, could do harm to the  
18 school administration. Mr. Jones felt that it was not  
19 proper for the survey report to be general knowledge in the  
20 community because the BEA was attempting to resolve the  
21 problem internally at the lowest level and because the BEA  
22 only intended to give copies of the survey report to the  
23 people involved (Jones, tape 3).

24 A group of seven Ponderosa teachers, BEA members,  
25 drafted a letter of protest to the BEA board of directors  
26 about the Lincoln survey report. The seven Ponderosa tea-  
27 chers thought the Lincoln survey report should have been  
28 handled differently and the survey report had a negative  
29 effect on the school district. The Ponderosa teachers and  
30 the Ponderosa principal had a meeting with Mr. Jones about  
31 the Lincoln survey report, the unfair labor practice charges  
32 and related matters. Mr. Jones told the Ponderosa teachers

1 that the BEA erred in the distribution of the survey report.  
2 The letter of protest was never delivered (Mossman, tape 5).

3 Members of the Billings community and teachers from  
4 other schools were talking about the survey report. Members  
5 of the Billings community and teachers from other schools  
6 would ask Lincoln teachers and school administrators if the  
7 problems at Lincoln Junior High School were as bad as they  
8 were reported. Some Lincoln parents were pleased with the  
9 operation of the Lincoln school during the 1983-84 school  
10 year. Some Lincoln parents would question the Lincoln ad-  
11 ministration about the Lincoln problem (Van Valkenberg, tape  
12 4; Bonk, tape 5; Lowney, tape 5; Mossman, tape 5; McKennan,  
13 tape 6; Poston, tape 7).

14 The net effect of the Lincoln survey and survey report  
15 was that it was absolutely disruptive and circumvented any  
16 opportunity the school district had to take appropriate  
17 action at the Lincoln school. Dr. Poston was not sure what  
18 the purpose of the survey report was but the Lincoln survey  
19 report did not accomplish the desired affect as stated by  
20 Ms. Butler and Mr. Jones. The Lincoln survey report back-  
21 fired. The survey report had no effect on the school board  
22 in carrying out the policies of the school board. The  
23 Lincoln survey report provided a red flag of hostility to  
24 other school administrators who face difficult issues. The  
25 Lincoln survey report undermined the administrative steel of  
26 other administrators (Poston, tapes 6, 7).

27 The school administrators are tenured teachers and have  
28 all the rights of tenured teachers. The Lincoln school ad-  
29 ministrators' rights were ran over by the Lincoln survey and  
30 Lincoln survey report. The school district has the right to  
31 do all the evaluation of the teachers and administrators by  
32 school board policy. The collective bargaining agreement

1 only addresses the question of evaluation of school district  
2 teachers (Poston, tapes 6, 7; school district policy 637P;  
3 Article XV of the collective bargaining agreement).

4 Dr. Poston states the Lincoln survey report was not  
5 what he expected; that he did not get what he wanted; that  
6 he did not support what he got; that what he got was a  
7 general demoralizing advice that he could not do anything  
8 about; that he did and would have supported a survey report  
9 that was therapeutically critical with specific problems he  
10 could respond to; that he did not support the Lincoln survey  
11 report being distributed in other schools and to non-tea-  
12 chers; that the teachers talked to students in the class-  
13 rooms about the Lincoln problems and the Lincoln survey  
14 report; and that in his mind the Lincoln problems, the  
15 survey and the Lincoln survey report was handled badly  
16 (Poston, tapes 6, 7).

17 Ms. McKennan believes that if the Lincoln teachers on a  
18 one-to-one basis or in a small group had discussed the  
19 Lincoln problems with her, the effect would have been more  
20 constructive than the survey report. Ms. McKennan believes  
21 that if the survey report was kept within the Lincoln school  
22 the survey report would not have been so destructive and  
23 that a lot of the Lincoln problems could have been corrected  
24 (McKennan, tape 6).

25 32. Between February 9 and March 7, 1984, Dr. Poston  
26 called Mr. Jones and asked that the BEA stop distributing  
27 the survey report. Dr. Poston told Mr. Jones that the  
28 school board members had got a copy of the survey report;  
29 and that some of the school board members were upset. Mr.  
30 Jones replied to Dr. Poston that the BEA had intended only  
31 to parties involved, and that the above distribution was  
32 accomplished in two or three days after the February 9

1 breakfast meeting. Therefore Dr. Poston's request to stop  
2 distribution was moot (Jones, tape 3).

3 33. On March 7, 1984 Mr. Jones received the following  
4 letter from Dr. Poston.

5 As you know, you shared with me a copy of the  
6 "Survey Report" on Lincoln Junior High School  
7 which was compiled by the Billings Education  
8 Association, purporting to report the comments of  
9 the teachers of Lincoln Junior High School con-  
cerning the administration of that school. I am  
told that the Survey Report was widely distributed  
throughout the school district and its personnel.

10 On behalf of the Board of Trustees, the Billings  
11 Education Association's actions in soliciting,  
compiling, and indiscriminately distributing the  
Survey Report are strongly protested.

12 For your information, a copy of the Survey Report  
13 has been reviewed by the district's attorney, and  
14 he informs us that the statements contained there-  
15 in are libelous, and that your circulation of the  
16 document presents grounds for an action against  
17 the Billings Education Association for libel.  
18 Additionally, the indiscriminate distribution of  
19 the Survey Report appears to constitute a viola-  
20 tion of Montana's statutes and school district  
21 policies reserving to the district the right to  
22 evaluate its employees, and to make all management  
23 decisions concerning their retention. A similar  
24 reservation of management rights is contained in  
25 the collective bargaining contract, which your  
26 organization negotiated and approved. Therefore,  
27 it is the school district's position that the  
28 Billings Education Association has violated the  
29 terms of the collective bargaining contract by its  
30 indiscriminate circulation of this anonymous  
31 survey.

32 Our attorney further informs us that the viola-  
tions of statute and policy, and the indiscrimi-  
nate circulation of libelous statements, provide  
grounds for disciplinary action against those  
school district employees who were involved in  
soliciting, compiling, and distributing the survey  
results.

Promulgation of the Survey Report is also highly  
unprofessional conduct on the part of the Billings  
Education Association. The solicitation of anony-  
mous complaints, and the widespread distribution  
of the anonymous comments, reveals a dangerously  
irresponsible attitude on the part of the Billings  
Education Association. This type of irresponsible  
behavior certainly appears to be of assistance in  
achieving what must be the Association's goal of  
fostering non-cooperation and insubordination with  
the current administration and Board. Indeed,  
such methods are not helpful to resolution of any

1 serious problem, particularly since they show a  
2 disdain for and an attempt to bypass the pre-  
scribed policies and procedures for action.

3 As there are grounds for both litigation against  
4 the Billings Education Association and discipli-  
5 nary action against yourself and other teachers  
6 involved in gathering and distributing the survey  
7 results, these are options to which the Board of  
8 Trustees must give serious consideration. I there-  
9 fore ask that you cease and desist any further  
10 distribution of or comment on the survey results,  
11 and that you meet with me at my office on Friday,  
12 March 9, 1984, at 2:15 p.m., to further discuss  
13 this issue and its ramifications." (Exhibit A,  
14 attached to the Unfair Labor Practice charge).

15 - Mr. Jones left a photocopy of the letter at Ms. Butler's  
16 office because she was out of town for a few days at a  
17 training workshop. Mr. Jones had a meeting with the BEA  
18 Board of Directors. (Jones, tape 3).

19 34. Ron Russell, a teacher at the Career Center, and  
20 alternate member of the BEA executive board, attended the  
21 Board of Director's meeting on March 7, 1984. Dr. Poston's  
22 March 7 letter was discussed. The BEA Board of Directors  
23 preferred that Mr. Jones did not meet with Dr. Poston alone.  
24 The next night, March 8, Mr. Russell learned that Mark Jones  
25 had no one to go with him to the meeting with Dr. Poston as  
26 the Board of Directors preferred. Mr. Russell volunteered  
27 to accompany Mr. Jones to the meeting with Dr. Poston. Mr.  
28 Jones instructed Mr. Russell to follow the proper procedures  
29 in securing leave time to attend the meeting.

30 About 7:40 a.m. on March 9, Mr. Russell asked his prin-  
31 cipal, Mr. Crumbaker, for leave time to attend the Jones-  
32 Poston meeting at 2:15 that day. Mr. Russell also informed  
33 Mr. Crumbaker about Mr. Jones' instructions.

34 Mr. Crumbaker called the school district administra-  
35 tion. Mr. Crumbaker probably talked to Mr. Rogers first,  
36 then to Dr. Poston. Dr. Poston replied no if Mr. Russell  
37 had to leave his classroom. Mr. Russell had classroom res-

possibilities with the third time block at 2:00 p.m., with student clean up at 2:20 p.m. and with the student dismissal at 2:40 p.m. Mr. Crumbaker did not get a chance to explain to Dr. Poston that Mr. Russell's class would be covered by another teacher. Mr. Russell was present when Mr. Crumbaker called.

At 8:00 a.m., Mr. Russell left a message for Mr. Jones to call. Mr. Russell talked to Mr. Jones at noon.

Mr. Russell observed that the other six members of the BEA board of directors could not secure leave time to attend the Jones-Poston meeting because the other board members have a longer class schedule (Russell, tape 4; Jones, tape 3; Poston, tape 7)

35. After being informed about Mr. Russell's denial of leave time to attend the Jones-Poston meeting, Mr. Jones tried to get a lawyer to attend the meeting. The Lawyer could not because of short time notice and scheduling.

During this time, Mr. Jones did talk to the BEA's legal counsel from Great Falls about the meeting. The BEA legal counsel instructed Mr. Jones not to give any incriminating information at the meeting. Mr. Jones did not have time to contact anyone else about attending the meeting.

At no time before the meeting did Mr. Jones ask Dr. Poston for a union representative at the meeting (Jones, tape 3; Poston, tape 7).

36. Dr. Poston, Ms. McKennan and Mark Jones were present at the March 9 meeting. Dr. Poston restated the contents of the March 7 letter. Dr. Poston asked Mr. Jones who started the survey, who organized the survey, who in Lincoln School started the activities, and what Mr. Jones thought would be appropriate disciplinary action for these activities.

1 To these questions, Mr. Jones did not answer and in-  
2 formed Dr. Poston that he was advised by legal counsel not  
3 to reveal anything that may be incriminating to himself or  
4 others.

5 The parties did talk about the distribution of the  
6 survey. Mr. Jones did tell who they distributed the survey  
7 report to. Ms. McKennan asked Mr. Jones if he was trying to  
8 ruin her. Mr. Jones replied no and stated the survey report  
9 was not personal.

10 Again, McKennan-Poston requested the names of the  
11 individuals involved. The meeting ended with the parties  
12 agreeing to call the following week and schedule a second  
13 meeting with both legal counsels present. The follow-up  
14 meeting with legal counsels present never took place.

15 Mr. Jones never directly asked Dr. Poston for union  
16 representation at the meeting. At no time before the meet-  
17 ing or during the meeting did Mr. Jones ask for union repre-  
18 sentation. At no time during the meeting did Mr. Jones ask  
19 Dr. Poston to stop the meeting. Mr. Jones did not object to  
20 meet with Dr. Poston alone because Mr. Jones thought Dr.  
21 Poston had made up his mind and Mr. Jones had no one to  
22 represent him if Dr. Poston agreed. Mr. Jones simply did  
23 not answer the questions. Dr. Poston did not insist Mark  
24 Jones answer the questions (Jones, tape 3; Poston, tape 7).

25 37. Mr. Jones judges from Dr. Poston's questions that  
26 if he took the blame for the survey report that discipline  
27 was his and if he named who was involved in the survey re-  
28 port, the discipline would be theirs (Jones, tape 3).

29 38. By way of the March 7 letter and the March 9  
30 meeting, Dr. Poston was registering a protest about the way  
31 the Lincoln survey report was done. Dr. Poston stated the  
32 objective of the school district was to stop the Lincoln

1 survey report from happening again. The damage of the  
2 Lincoln survey report had already been done. The letter and  
3 the meeting was a chance for Dr. Poston and Mr. Jones to  
4 work out a course of action for the future. Dr. Poston  
5 stated that he did not intend to discipline Mr. Jones; and  
6 that he did not intend to stop Mr. Jones from having a  
7 representative at the March 9 meeting (Poston, tape 7).

8 39. Mr. Jones was never disciplined for the Lincoln  
9 survey or the Lincoln survey report. No one was ever dis-  
10 ciplined for the Lincoln survey or the Lincoln survey report  
11 (Jones, tape 4; Poston, tape 7). Looking at (a) Dr. Poston's  
12 letter of March 7, (b) Dr. Poston's actions of not insisting  
13 Mr. Jones answer his questions of March 9, (c) Dr. Poston's  
14 statement of support for an inhouse, specific, therapeutic  
15 report, (d) Dr. Poston's statement that the school district  
16 intended to stop the Lincoln survey report from happening  
17 again, and (e) the fact that no one was disciplined for the  
18 survey report, I find the March 7 letter and the March 9  
19 meeting was to stop a future survey report of the type and  
20 distribution of Lincoln from happening again.

21 Looking at the same above facts, I find Dr. Poston's  
22 March 7 letter and March 9 meeting tends to be coercive  
23 because of the number of times libel and litigation are  
24 stated.

25 40. On March 15, 16 and May 22, 1984, the Billings  
26 Gazette reported at length about the Lincoln survey report  
27 and related activities (District Exhibit 7). Ms. Bonk  
28 believes that the newspaper report of the Lincoln survey  
29 report made the Lincoln problems sound much worse than they  
30 were (Bonk, tape 5).

31 41. After the filing of the Unfair Labor Practice  
32 charges Dr. Poston called Mr. Jones. In reference to Count

1 First is concern over the possible disruptive  
2 effect of such surveys on the evaluation process.  
3 By statute, district policy, and the master agree-  
4 ment, evaluation of administrators is reserved to  
5 the district board. By its own contract, the BEA  
6 has waived collective influence over the evalua-  
7 tion process. Unsolicited and biased surveys such  
8 as the Lincoln survey are not helpful to the  
9 evaluation process, and they solicit conclusions  
10 not facts which could be properly investigated.  
11 The anonymous source produces complaints which are  
12 unverifiable. They are subjective rather than  
13 objective, and therefore the complaints are of  
14 doubtful validity and trustworthiness. A major  
15 factor in this concern is that the use of such  
16 surveys could appear to be an attempt to both  
17 bypass the normal chain of responsibility and to  
18 present a variety of negative criticism while  
19 protected behind the cloak of anonymity. This  
20 type of approach could possibly be seen as vindic-  
21 tive with little trustworthy merit and is not  
22 helpful to eventual resolution of any serious  
23 problems involved. In fact, it may mitigate  
24 against evaluation and accountability of adminis-  
25 trators.

14 Second is the concern for potential violations of  
15 the rights of the subject administrator. The  
16 solicitation of anonymous negative comments to be  
17 presented as fact deprives the administrator of  
18 the basic elements of due process: an objective  
19 hearing, an opportunity to challenge data, and an  
20 opportunity to confront those making the charges.  
21 A biased survey, such as the type used at Lincoln  
22 School which requested only negative comments, is  
23 probably neither fair to the subject nor represen-  
24 tative of total performance of the school adminis-  
25 trator in question. Even if not so intended, the  
26 anonymous negative survey is a perfect vehicle for  
27 making and circulation of unfounded and libelous  
28 comments and criticisms, which either would not be  
29 made if the maker faced public disclosure, or  
30 could be proven false if the facts underlying the  
31 charge could be identified and investigated. A  
32 major concern is the potential effect on the  
33 administrator of the irresponsible disclosure of  
34 unfair and non-rebuttable anonymous negative  
35 criticisms.

26 Third is concern over the effect of such surveys  
27 on school functioning. A biased survey outside  
28 normal channels could be viewed as contentious and  
29 antagonistic, rather than a sincere attempt to  
30 work out any difficulties in a reasonable manner.  
31 The solicitation process itself, which focuses on  
32 and solicits negative comments, only serves to  
33 exacerbate any existing problems and strengthen  
34 any existing negativity or hostility. The BEA's  
35 apparent willingness to use these surveys also  
36 casts serious doubts on any possibility of help  
37 for a situation. It further could create an  
38 adversary relationship between administrators and  
39 teachers which is obviously counter-productive to

1 the development of the spirit of cooperation  
2 necessary to work together to provide quality  
education and teacher job satisfaction.

3 Last, and certainly most importantly, I am con-  
4 cerned about the motivation for the survey. I am  
5 greatly interested in the concerns and job satis-  
6 faction of teachers, and I care about their needs.  
7 As you explained it, there are teachers who feel  
8 they have complaints about their relationships  
9 with the principal, but do not wish to file formal  
10 grievances. Of course, that is their prerogative,  
11 but I would hope such matters could be resolved  
12 informally at the school level. It seems best for  
13 the teachers to personally visit with the princi-  
14 pal about their concerns to seek resolution. If  
15 that is unsatisfactory, the individual teacher may  
16 contact the elementary or secondary director to  
17 discuss the matter on an informal basis. This  
18 approach, involving face-to-face discussion, has  
19 high likelihood of resolving any difficulties in  
the supervisor-subordinate relationship.

20 As to the surveys, our legal counsel advises that  
21 the solicitation and distribution of such surveys  
22 is not a protected activity under federal and  
23 state law. As such, it has no special protected  
24 status, and its potential for violations of the  
25 administrators' rights, and of statute, policy,  
26 and the master agreement, pose serious problems  
27 which need to be addressed. While I am open to  
28 objective and proper comments, the biased solici-  
29 tation of anonymous negative criticisms does not  
30 seem to provide any useful information, and creates  
31 an atmosphere which is actually counter-productive  
of any efforts towards resolution of perceived  
problems.

32 Because of these serious concerns, I hope the BEA  
will reconsider its plan to conduct such a survey  
and will work toward cooperation with the district  
toward mutual goals of harmonious working relation-  
ships. Genuine interest in solving any problems  
would seem to call for nothing less.

(BEA Exhibit 3)

33 Dr. Poston found the Meadowlark School survey report  
34 was handled in a good manner. According to Dr. Poston, the  
35 Meadowlark survey did not violate any one's rights, was not  
36 distributed to the other schools, was not widely distributed  
37 in the community, provided the school administrators with  
38 some good information, contained some non-specific parts but  
39 not libelous in nature, and provided a good form of teacher  
40 input. The Meadowlark survey report was what Dr. Poston

1 expected when the Lincoln survey report was done (Poston,  
2 tape 7). The Meadowlark survey report did not become public  
3 information because the BEA learned from the Lincoln survey  
4 report on how to keep the survey report under control (Jones,  
5 tape 4).

6  
7 DISCUSSION

8  
9 Count I of Unfair Labor Practice Charge 5-84

10 Comparing the statements contained in Count I of the  
11 Unfair Labor Practice Charge with the above findings, the  
12 BEA, BEA officer(s), BEA agent(s) or BEA member(s):

- 13 1. Did receive a number of complaints from the  
14 Lincoln teachers about student discipline,  
15 teacher evaluation and other item(s) (FF 6),  
16 2. Before January 1984, did try to correct some  
17 of the complaints (FF 8),  
18 3. During the fall of 1983 did inform and conti-  
19 nue to inform Dr. Poston about the Lincoln  
20 complaints and the future actions of the BEA  
21 (FF 8, 11),  
22 4. On January 26 did do a survey of some 35-38  
23 Lincoln teachers (FF 13),  
24 5. Did verbatim compile the Lincoln survey into  
25 a report (FF 15) and  
26 6. Did distribute the Lincoln survey report to  
27 Lincoln teachers, Lincoln support staff,  
28 Lincoln administration, school district  
29 administration and school board members (FF  
30 30).

31 The Lincoln survey report did become widely distributed (FF  
32 30). The additional circulation, above the BEA distri-  
33 bution, cannot be attributed to the BEA or denied by the  
34 BEA (FF 30). The Lincoln survey report was distributed by  
35 at least one non-bargaining unit member, coordinator of  
36 speech therapy (FF 30). Dr. Poston by his March 7 letter  
37 and his March 9 meeting did try to stop the Lincoln survey  
38 report from happening in the future (FF 39).

39 The issue is DID DR. POSTON BY TRYING TO STOP THE  
40 LINCOLN SURVEY REPORT FROM HAPPENING IN THE FUTURE INTERFERE  
41 WITH PROTECTED CONCERTED ACTIVITIES OF THE BEA?  
42

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A. THE LEGAL STANDARD TO BE APPLIED TO COUNT I.

Because the Board of Personnel Appeals has never addressed this issue before, we will look to the National Labor Relations Board for guidance.

We begin our review of the law in this area with a quote from Professor Morris in the Developing Labor Law, 2nd Edition, 1983.

In cases presenting the issue of whether particular employee conduct is sufficiently "disloyal" to remove it from the protection of Section 7, the Board has progressively narrowed the area of unprotected activity.

Developing Labor Law, P. 161

The U.S. Supreme Court in NLRB vs. Electrical Workers (Jefferson Standard Broadcasting Company) 346 U.S. 465, 33 LRRM 2183, (1953) addressed these facts:

1. Stalelated negotiations between the union and the employer.
2. Peaceful picketing by union technicians while continuing employment without striking.
3. ". . . Without warning, several of its technicians launched a vitriolic attack on the quality of the company's television broadcasts. Five thousand handbills were printed over the designation 'WBT TECHNICIANS'. These were distributed on the picket line, on the public square two or three blocks from the company's premises, in barber shops, restaurants and busses. Some handbills made no reference to the union, to a labor controversy or to collective bargaining. They read:

'IS CHARLOTTE A SECOND-CLASS CITY?

'You might think so from the kind of Television programs being presented by the Jefferson Standard Broadcasting Co. over WBT. Have you seen one of their television programs lately? Did you know that all the programs presented over WBT are on film and may be from one day to five years old. There are no local programs presented by WBT. You cannot receive the local baseball games, football games or other local events because WBT does not have the proper equipment to make these pickups. Cities like New York, Boston, Philadelphia, Washington receive such programs nightly. Why doesn't the Jefferson

1 Standard Broadcasting Company purchase the  
2 needed equipment to bring you the same type  
3 of programs enjoyed by other leading American  
4 cities? Could it be that they consider  
Charlotte a second-class community and only  
entitled to the pictures now being presented  
to them?

5 'WBT TECHNICIANS'

6 (33 LRRM at 2184).

- 7 4. The discharging of the technicians involved  
8 sponsoring and distributing the above hand-  
bill.

9 The U.S. Supreme Court set forth the following lesson:

10 Section 10(c) of the Taft-Hartley Act expressly  
11 provides that "No order of the Board shall require  
the reinstatement of any individual as an employee  
12 who has been suspended or discharged, or the pay-  
ment to him of any back pay, if such individual  
13 was suspended or discharged for cause." There is  
no more elemental cause for discharge of an emp-  
14 loyee than disloyalty to his employer. It is  
equally elemental that the Taft-Hartley Act seeks  
15 to strengthen, rather than to weaken, that coop-  
eration, continuity of service and cordial contrac-  
16 tual relation between employer and employee that  
is born of loyalty to their common enterprise.

17 . . . . .  
18 Many cases reaching their final disposition in  
19 the Courts of Appeals furnish examples emphasizing  
the importance of enforcing industrial plant  
20 discipline and of maintaining loyalty as well as  
the rights of concerted activities. The courts  
21 have refused to reinstate employees discharged for  
"cause" consisting of insubordination, disobe-  
22 dience or disloyalty. In such cases, it often has  
been necessary to identify individual employees,  
23 somewhat comparable to the nine discharged in this  
case, and to recognize that their discharges were  
24 for causes which were separable from the concerted  
activities of others whose acts might come within  
25 the protection of Section 7. It has been equally  
important to identify employees; comparable to the  
26 tenth man in the instant case, who participated in  
simultaneous concerted activities for the purpose  
27 of collective bargaining or other mutual aid or  
protection but who refrained from joining the  
28 others in separable acts of insubordination,  
disobedience or disloyalty. In the latter in-  
29 stances, this sometimes led to a further inquiry  
to determine whether their concerted activities  
30 were carried on in such a manner as to come within  
the protection of Section 7.

31 . . . . .  
32 In the instant case the Board found that the  
company's discharge of the nine offenders resulted

1 from their sponsoring and distributing the "Second-  
2 Class City" handbills of August 24-September 3,  
3 issued in their name as the "WBT TECHNICIANS" from  
4 August 24 through September 3, unquestionably  
5 would have provided adequate cause for their  
6 disciplinary discharge within the meaning of  
7 Section 10(c). Their attack related itself to no  
8 labor practice of the company. It made no refer-  
9 ence to wages, hours or working conditions. The  
10 policies attacked were those of finance and public  
11 relations for which management, not technicians,  
12 must be responsible. The attack asked for no  
13 public sympathy or support. It was a continuing  
14 attack, initiated while off duty, upon the very  
15 interests which the attackers were being paid to  
16 conserve and develop. Nothing could be further  
17 from the purpose of the Act than to require an  
18 employer to finance such activities. Nothing  
19 would contribute less to the Act's declared pur-  
20 pose of promoting industrial peace and stability.

21 The fortuity of the coexistence of a labor  
22 dispute affords these technicians no substantial  
23 defense. While they were also union men and  
24 leaders in the labor controversy, they took pains  
25 to separate those categories. In contrast to  
26 their claims on the picket line as to the labor  
27 controversy, their handbill of August 24 omitted  
28 all reference to it. The handbill diverted atten-  
29 tion from the labor controversy. It attacked  
30 public policies of the company which had no dis-  
31 cernible relation to that controversy. The only  
32 connection between the handbill and the labor  
33 controversy was an ultimate and undisclosed pur-  
34 pose or motive on the part of some of the sponsors  
35 that, by the hoped-for financial pressure, the  
36 attack might extract from the company some future  
37 concession. A disclosure of that motive might  
38 have lost more public support for the employees  
39 than it would have gained, for it would have given  
40 the handbill more the character of coercion than  
41 of collective bargaining. Referring to the attack,  
42 the Board said "In our judgement, these tactics,  
43 in the circumstances of this case, were hardly  
44 less 'indefensible' than acts of physical sabo-  
45 tage."

(33 LRRM at 2186-88)

26 The 4th Circuit Court of Appeals in Roanoke Hospital  
27 vs. NLRB, 538 F2d. 607, 92 LRRM 3158, 1967, found the emp-  
28 loyer violated Section 8(a)(1) of the NLRA by issuing a  
29 warning notice to nurse Weinman, removing nurse Fields name  
30 from the hospital call-in list and not re-employing nurse  
31 Fields. In Roanoke Hospital, supra, nurse Fields sent the  
32 following letter to the newspaper:

Nursing dilemma

I RESENT your labeling the local nursing salary situation a pay gripe. It is a hard fact in every local nurse's life.

In 1953 I graduated from nursing school. I was dedicated, enthusiastic, concerned, and wanted to work with people. Eleven years of hospital nursing have taken their toll on me.

I find dedication will not feed my family; enthusiasm will not pay the house note. Concern will not build a bank account for old age nor help with my children's college education. Love will not provide me with a car, or gas to run it. Former patients will not provide my family's clothing.

I recently left hospital nursing for employment in a physician's office. The salary is good, the benefits are excellent. The duties are a challenge not a frustration. After a day's work I know I will not be asked to work eight hours more because of a help shortage, and I feel guilty when I say no. For the first time in nine years I have time to spend with my family.

Many more nurses in this area are leaving hospital nursing for the same reasons.

The public cannot afford to continue to sit idle or remain mute concerning such a sad situation as nursing finds itself in in our area. Won't you speak up before more nurses leave hospital nursing?

(92 LRRM at 3159)

Nurse Fields and nurse Weidman were elected temporary officers of the Virginia Nursing Association during the upcoming organizational campaign. Later, both nurses were interviewed by a local television station. The nurses were reported to state the following during the television interview:

There are times, especially the 3:00 to 11:00, and the 11:00 to 7:00 shifts, where there are no rn's to cover the whole medical-surgical unit of 40 patients. And this isn't just particular at our hospital alone in the valley. . .that's a known fact. And, you know we feel very badly about this, we feel it is directly related also to the salary and benefits situation we're having, like Helen was saying earlier. The cost of living, according to the National Chamber of Commerce figures, that have come out, are just as high here in the Roanoke area as they are anywhere in the country. And yet our salaries in this area are like 60 to 80 cents an hour lower than they are anywhere else in the country.

(92 LRRM at 3160)

1 The 4th Circuit Court of Appeals sets forth the fol-  
2 lowing lesson:

3 . . . . .  
4 [Director of Nursing] Hanley met with Weinman.  
5 Hanley stated that she "was appalled at what she  
6 had said on the television interview." Weinman  
7 responded that she had said nothing which was  
8 untrue. Hanley replied: "That may be so; but the  
9 impression that you created with the public was  
10 disastrous to the hospital as far as I was con-  
11 cerned."

12 . . . . .  
13 Hanley told Fields that she would not be reemp-  
14 loyed "because of her prospective dissatisfaction  
15 with employment at Community Hospital based on  
16 publicly announced dissatisfaction and frustration  
17 with working conditions at Community Hospital."

18 As to Weinman, the Hospital argues that, regard-  
19 less of its motivation, the warning notice could  
20 not constitute an unfair labor practice since her  
21 disparaging and disloyal statements were unpro-  
22 tected under NLRB v. International Brotherhood of  
23 Electrical Workers, 346 U.S. 464, 33 LRRM 2183  
24 (1953). [Jefferson Standard] "Irene Wienman,  
25 either intentionally or negligently, disparaged  
26 and discredited the quality of nursing care avail-  
27 able at the Hospital, to the point of insinuating  
28 that it was unsafe." Brief for Appellant at 33.

29 We conclude that Weinman's statements were not  
30 unprotected. As Hanley admitted, they were true,  
31 and unlike the statements found unprotected in  
32 Electrical Workers, supra, they were directly  
33 related to protected concerted activities then in  
34 progress.

(92 LRRM at 3160)

35 The Eighth Circuit Court of Appeals in NLRB v. Grey-  
36 hound Lines, 660 F. 2d. 354, 108 LRRM 2531, 1981, found the  
37 employer violated Section 8(a)(1) of the NLRA by suspending  
38 two bus drivers for issuing a press release announcing the  
39 intentions of the bus drivers to strictly obey the 55 mile  
40 an hour speed limit. The 8th Circuit Court of Appeals set  
41 forth the following lesson:

42 . . . . .  
43 On August 26, [Driver] Benner distributed the fol-  
44 lowing press release to the media:

1 Head: GREYHOUND DRIVERS TO SET LABOR DAY PACE  
2 - Greyhound drivers nationwide will drive strictly  
3 within the 55 mile-per-hour speed limit through  
4 the Labor Day weekend to save fuel and set an  
5 example for other drivers.

6 Several members of the State Highway Patrols  
7 have commended the drivers for this effort.

8 It is well known that on rare occasions Grey-  
9 hound drivers will slip over the 55 mph limit to  
10 accommodate their passengers after departure  
11 delays, bus breakdowns, inclement weather and  
12 other unexpected delays.

13 Veteran driver and Union Steward, Jerry Jenson  
14 said "over 350 drivers interviewed last week from  
15 coast to coast unanimously supported the plan  
16 which is expected to result in some connecting  
17 departure delays."

18 Jenson declined to comment when asked if the  
19 "Slowdown" had anything to do with a recent at-  
20 tempt to work regular-run drivers seven days a  
21 week without overtime, the dismissal of 36 drivers  
22 three weeks ago in Salt Lake City who were protest-  
23 ing alleged contract violations, or with Grey-  
24 hound's numerous runs that are impossible to  
25 operate within the 55-mph speed limit.

26 On September 6, Benner and Jenson received dis-  
27 disciplinary notices with fourteen-day suspensions  
28 for "words or acts of hostility to the Company, or  
29 words or acts which result in damage to the Com-  
30 pany's reputation, property or services and for  
31 divulging affairs of the Company without approval."

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It is argued by respondent that not all concerted activity is protected by Section 7. Among the unprotected categories of activities are those "characterized as 'indefensible' because they . . . show a disloyalty to the workers' employer which . . . [is] unnecessary to carry on the workers' legitimate concerted activities." NLRB v. Washington Aluminum Co., 370 U.S. 9, 17, 50 LRRM 2235 (1962). See NLRB v. Local Union No. 1229 (IBEW), 346 U.S. 464, 477, 33 LRRM 2183 (1953). Respondent concedes that employee communications to the public may be protected, that is, "defensible;" if they are directly related to an ongoing labor dispute, are not a disparagement of the Company's reputation or the quality of the Company's product, and are not maliciously motivated. See Local 1229, supra; Allied Aviation Service Co. of New Jersey, Inc., 248 NLRB No. 26, 103 LRRM 1454 (1980), enf'd, 636 F.2d 1210, 108 LRRM 2279 (3d Cir. 1980); Stephens Institute, 241 NLRB No. 133, 101 LRRM 1052 (1979). It is respondent's position that the press release issued by Benner and Jenson does not fall within this range of protected communications.

First, respondent argues that there was no ongoing labor dispute. There was no evidence that any grievance had been filed, although grievance procedures under the collective bargaining agree-

1 ment were in effect at that time. However, there  
2 were statements by the Board that Benner had  
3 complained unsuccessfully to the Company on several  
4 occasions regarding the schedule problems. 29  
5 U.S.C. Section 152(9) defines labor dispute as  
6 including "any controversy concerning terms, tenure  
7 or conditions of employment." (Emphasis  
8 added.) Given this broad definition, we conclude  
9 that the Board's finding is supported by the  
10 evidence of discussions and actions preceding and  
11 in preparation for the proposed "slowdown" over the  
12 Labor Day weekend in protest of company policies  
13 and actions.

14 Second, respondent contends that even if there  
15 existed an ongoing labor dispute, the press release  
16 was not a communication directly related to  
17 the dispute and was therefore unprotected. The  
18 reason stated in the press release itself for the  
19 "slowdown" was to save fuel and set an example.  
20 Respondent submits that the only reference in the  
21 press release of employee grievances was in the  
22 fifth paragraph and that Jenson's refusal to  
23 comment on the matters mentioned therein should  
24 not be considered a "communication" relation to  
25 the dispute. The Board, however, takes the position  
26 that by refusing to comment, Jenson was  
27 indirectly conveying the employees' message that  
28 the proposed "slowdown" was, in fact, a protest  
29 against the enumerated company actions and policies.

30 In Allied Aviation, the Board stated that "the  
31 touchstone [is] not whether the communication  
32 constituted a virtual carbon copy of the specific  
arguments raised with the respondent, but [is],  
rather, whether the communication was a part of  
and related to the ongoing labor dispute." 103  
LRRM at 1456 (emphasis in original). Regardless of  
the reasons stated in the release itself, it is  
clear from the discussions and actions preceding  
the release that the "slowdown" was in protest of  
the enumerated grievances, and it is likely that  
the reference to the grievances in the last paragraph  
of the release would suggest such a relationship  
to the reader. We therefore find substantial  
evidence to support the Board's finding that the  
press release was related to the ongoing dispute.

33 Third, respondent contends that the press release  
34 constituted a public disparagement of the Company's  
35 product and reputation and was therefore unprotected.  
36 See Local 1229, 346 U.S. at 474; Allied  
37 Aviation, 103 LRRM at 1456. Respondent asserts  
38 that the statement regarding expected connecting  
39 departure delays indicates to the public that  
40 Greyhound's service would be inadequate over the  
41 holiday weekend. The press release also implies  
42 that Greyhound condones or encourages exceeding  
the speed limit in order to avoid or to minimize  
delays, although, in fact, Greyhound provides in  
the Drivers' Rule Book that drivers must obey all  
posted speed limits and "[w]hen late, stay late."  
(Emphasis in Rule Book.) Respondent argues that  
the statements and accompanying insinuations  
constitute a disparagement of Greyhound's services  
and reputation.

1 The Board, on the other hand, characterized the  
2 reference to expected delays as a simple statement  
3 that, as a result of the drivers' strict obser-  
4 vance of the speed limit to protest the Company's  
5 actions, some delays might occur. The Board found  
6 that the release did not contain any insults or  
7 negative insinuations about the Company's services  
8 or integrity with respect to the customers.

9 In comparing the statements in the press release  
10 to others that have been found protected and  
11 unprotected, we cannot disagree with the Board's  
12 finding that the statements fall short of an  
13 unprotected disparagement. Compare Allied Aviation,  
14 supra (letters to customers that employer's proce-  
15 dures were unsafe, protected), and Community Hos-  
16 pital of Roanoke Valley, Inc. v. NLRB, 583 F.2d  
17 607, 92 LRRM 3158 (4th Cir. 1976) (statement in  
18 television interview that hospital was under-  
19 staffed, protected), with Local 1229, supra (hand-  
20 bills criticizing employer's local programming,  
21 unprotected).

22 Finally, respondent argues that the release is  
23 not protected because it was maliciously moti-  
24 vated. See Allied Aviation, 103 LRRM at 1456. As  
25 evidence of malice, respondent relies on Benner's  
26 statement that "things would really be screwed up  
27 if we held to 55 for any period of time." Respon-  
28 dent also points out that the press release con-  
29 tained false statements regarding the alleged  
30 dismissal of the Salt Lake drivers and the seven-  
31 day work week proposal, which had been rescinded  
32 before the release. This disregard for the truth,  
33 respondent contends, is additional evidence of  
34 Benner's and Jenson's malicious motive.

35 The Board again viewed the actions challenged by  
36 respondent in a different light. Benner's state-  
37 ment was interpreted as merely a prediction of the  
38 potential effectiveness of the proposed "slowdown"  
39 rather than as evidence of an intent to harm the  
40 Company. The Board further found that Benner had  
41 attempted to confirm the dismissal of the Salt  
42 Lake drivers and was relying on the information he  
43 had received from people in Salt Lake City. We  
44 cannot say the Board's finding of no malicious  
45 motive is not supported by the record.

46 We recognize that the "lines defining [Section 7  
47 rights] have of necessity been painted with broad  
48 strokes." Hugh H. Wilson Corp v. NLRB, 414 F.2d  
49 1345 1347, 71 LRRM 2827 (3d Cir. 1969).

50 (Emphasis added, 108 LRRM at 2532-3)

51 The 1st Circuit Court of Appeals in NLRB vs. Mount  
52 Desert Island Hospital, 695 F.2d 634, 112 LRRM 2118, 1982,  
53 found the employer violated Section 8(a)(1) of the NLRA with  
54 the following facts and teachings:

1 The Hospital hired Grange as a licensed practical  
2 nurse in September 1977. In May 1978, Grange  
3 began to voice complaints about working conditions  
4 in the Hospital as well as what he considered to  
5 be inept managerial policies. He discussed his  
6 concerns with fellow workers, placed signed and  
7 unsigned complaints in the Hospital's suggestion  
8 box, and approached his supervisor, Director of  
9 Nursing Louise Dunne, to discuss his view of the  
10 Hospital's shortcomings.

11 After receiving little response from his super-  
12 riors, Grange sent a letter to the editor of the  
13 Bar Harbor Times on July 3, 1978. This letter  
14 detailed his complaints, both with regard to  
15 working conditions at the Hospital and with regard  
16 to the level of patient care provided by the  
17 Hospital. Subsequent to the publication of the  
18 letter on July 6, the editor of the Times visited  
19 the hospital and discussed working conditions with  
20 thirty additional employees who substantiated many  
21 of Grange's claims. Two weeks later, Grange  
22 circulated a petition among the employees of the  
23 Hospital requesting that the community and the  
24 Board of Trustees of the Hospital investigate  
25 working conditions at the Hospital. Over one  
26 hundred employees signed the petition. The Times  
27 printed the petition on July 27. The adverse  
28 publicity allegedly was a factor in the decision  
29 of the Board of Trustees to cancel its capital  
30 fund drive. The Hospital did not discipline  
31 Grange for his activities.

32 Grange resigned of his own accord in December  
1978 to pursue a more advanced nursing degree as a  
registered nurse (RN). At his exit interview he  
reiterated that, while he enjoyed working with  
fellow employees, he had found many of the Hospi-  
tal's procedures to be grossly inadequate. He  
received notification that he passed the RN exami-  
nation in March 1979.

In a letter sent shortly thereafter to Dunne,  
his former supervisor, Grange requested an appli-  
cation for summer employment. Grange called the  
Hospital on March 27 to renew his request. Dunne  
responded that nursing positions were available,  
particularly on one shift. Grange said he wanted  
such a position. Dunne told him to consider that  
he was hired. Grange submitted an official appli-  
cation. Dunne's assistant informed him again to  
consider himself employed as of the summer.

When Dunne returned from vacation, she informed  
Lotreck, the Hospital Administrator, that she  
planned to hire Grange. According to hospital  
procedures, it was necessary for Lotreck to ap-  
prove all hiring decisions. Lotreck instructed  
Dunne to tell Grange that no positions were avail-  
able, stating that he could not hire someone who  
had caused the Hospital so much trouble. Subse-  
quently, on May 2, Lotreck instructed his assis-  
tant to contact the administrator of the Sonagee  
Estates Nursing Home to describe the Hospital's  
dissatisfaction with Grange and to recommend that  
Sonagee not hire him if he should apply. The  
administrator of Sonagee testified that he re-

1 received a phone call informing him that Grange was  
2 a troublemaker who had caused grief at the Hospi-  
3 tal.

4 The Hospital next asserts that, even if concer-  
5 ted, Grange's letter to the newspaper did not con-  
6 stitute "protected" activity. It relies on the  
7 Supreme Court's decision in NLRB v. Local Union  
8 No. 1229, International Brotherhood of Electrical  
9 Workers (Jefferson Standard Broadcasting Co.), 346  
10 U.S. 464, 33 LRRM 2183 (1953), for the proposition  
11 that concerted activity which manifests disloyalty  
12 to an employer is unprotected under the Act. In  
13 Jefferson Standard, employees striking a broad-  
14 casting company passed out leaflets attacking the  
15 company's programming as amateurish and second-  
16 class. The Court held that distributing the leaf-  
17 lets was indefensible since the leaflets attacked  
18 company policies unrelated to labor relations,  
19 they did not ask for public support, and the em-  
20 ployees were obligated to protect the employer's  
21 interests while remaining on the company payroll.  
22 Id. at 475-77. In implementing the disloyalty  
23 rule of Jefferson Standard, the Board and courts  
24 of appeals have focused on two criteria - whether  
25 the appeal to the public concerned primarily work-  
26 ing conditions and whether it avoided needlessly  
27 tarnishing the company's image. For example, the  
28 Board in Coca-Cola Bottlings Works, 186 NLRB 1050,  
29 75 LRRM 1551 (1970), found that striking employees  
30 who distributed leaflets warning customers of pos-  
31 sible vermin and dirt in coke bottles were not en-  
32 gaged in protected activity. In American Arbitra-  
tion Association Inc., 223 NLRB 71, 96 LRRM 1431  
(1977), the Board found that in protesting work  
conditions an employee forfeited her protected  
status by ridiculing her employer in a question-  
naire mailed to clients. See also New York China-  
town Senior Citizens Coalition Center, Inc. and  
April S. Sung, 239 NLRB 614, 100 LRRM 1028 (1978)  
(Board found that employees who publicly disparaged  
the way their employer managed the center were not  
protected under the Act). Similarly, the Hospital  
here argues that Grange's decision to air his com-  
plaints in public demonstrated disloyalty and hence  
the activity was unprotected. It suggests that  
Grange should have continued to protest internally  
through the proper channels and that his public  
display proves that he was not sincerely interest-  
ed in improving labor relations.

The Board and courts of appeals, however, have  
found public appeals protected when they appeared  
necessary to effectuate the employees' lawful aims.  
In Misericordia Hospital Medical Center v. NLRB,  
623 F.2d 808, 104 LRRM 2666 (2nd Cir.1980), the  
court held that the employer violated Section 8(a)  
(1) in discharging a nurse for conveying criticism  
of the hospital administration's staffing policies  
to an outside accrediting agency. Although some  
of the complaints were directed at managerial  
policies outside the scope of working conditions,

the court found sufficient nexus with a labor dispute to hold that the activity was protected. Id. at 812-14. Similarly, in Community Hospital of Roanoke Valley, Inc. v. NLRB, 538 F.2d 607, 92 LRRM 3158 (4th Cir. 1976), the court upheld the Board's finding that the employee in question was not "disloyal." There, in a case strikingly similar to the instant one, Weinman, a nurse, in interviews on television protested the hospital's working conditions. The court held that the nurse's statements were directly connected to the working conditions at the hospital, were not fabricated, and hence were not disloyal. Id. at 610. Indeed, in the instant case, Grange had complained to his superiors previously and had placed signed complaints in the suggestion box. Apparently he felt that recourse to the public was necessary. The Hospital attempts to distinguish Roanoke Valley by asserting that the nurse's charges were justified in Roanoke while Grange's arguably were not. Such a distinction strikes us as not persuasive as long as the assertions were not made in reckless disregard of the truth. Grange's comments, like those of Weinman, were made for the purpose of improving working conditions and thus the level of patient care. The ALJ found that criticism of the Hospital's administration was intertwined inextricably with complaints of working conditions. Even if the staffing situation were worse in Roanoke, Grange published his letter in a spirit of loyal opposition - not out of malice or anger. We hold that the Board's conclusion that Grange's public protests were protected under the Act finds substantial support in the record.

(Emphasis added, 112 LRRM  
at 2119, 2120, 2122, 2133.)

From all the above teachings, the test to determine if employee's communications are protected activities is:

1. DID THE APPEAL TO THE PUBLIC CONCERN PRIMARILY WORKING CONDITIONS?
2. DID THE APPEAL TO THE PUBLIC NEEDLESSLY TARNISH THE COMPANY'S IMAGE?
  - (a). WERE THE ASSERTIONS MADE IN RECKLESS DISREGARD OF THE TRUTH?
  - (b) WERE THE ASSERTIONS MADE IN THE SPIRIT OF LOYAL OPPOSITION - NOT OUT OF MALICE OR ANGER?
- B. THE FACTS OF THIS CASE APPLIED TO THE ABOVE STATED LEGAL STANDARDS

1 1. Did the Lincoln Survey Report concern primarily  
2 working conditions? The BEA was complaining and protesting  
3 actions concerning their employment - handling of student  
4 discipline and teacher evaluation (FF7). Student discipline  
5 and teacher evaluation does have an affect on the teacher's  
6 working conditions (FF7).

7 Like Greyhound, supra, the Lincoln Survey Report in-  
8 volved a labor dispute. Greyhound teaches that employee  
9 communications are "defensible if they are directly related  
10 to an ongoing labor dispute." Like Section 29 U.S.C. 152(9),  
11 Section 39-31-103(10), MCA finds a labor dispute as includ-  
12 ing "any controversy concerning terms, tenure or conditions  
13 of employment or concerning the association or representa-  
14 tion of persons in negotiating, fixing, maintaining, chang-  
15 ing or seeking to arrange terms or conditions of employment,  
16 regardless of whether the disputants stand in the proximity  
17 relation of the employer and employee".

18 The Lincoln Survey Report involved an ongoing labor dis-  
19 pute. The Lincoln teachers tried to talk to Lincoln manage-  
20 ment about the problems (FF8). Ms. Butler and Dr. Poston  
21 had their first talk about the Lincoln school problems in  
22 the fall of 1983 (FF8). Ms. Butler and Dr. Poston had  
23 additional talks about the Lincoln school problems (FF 11,  
24 12).

25 Unlike Jefferson Standard, supra, but like Roanoke  
26 Hospital, supra, Greyhound, supra and Mount Desert Island  
27 Hospital, supra, the Lincoln Survey Report concerned working  
28 conditions.

29 2. DID THE LINCOLN SURVEY REPORT NEEDLESSLY TARNISH  
30 THE SCHOOL DISTRICT'S IMAGE?

31 In Jefferson Standard, supra, the technicians stated  
the Company provided poor television programs. In the

1 Lincoln Survey Report, the BEA did not state the school  
2 district provided a poor education (FF22). I do not find  
3 Jefferson Standard handbill equal to the Lincoln Survey  
4 Report.

5 In Roanoke Hospital, supra, the nurses complained about  
6 wages and staffing levels - no RNs on the 11-7 shift in the  
7 medical-surgical unit. In the Lincoln Survey Report, the  
8 BEA complained about student discipline and teacher evalua-  
9 tion. The employer in Roanoke Hospital, supra, stated "Nurse  
10 Irene Weinman either intentionally or negligently disparaged  
11 and discredited the quality of nursing care available at the  
12 hospital, to the point of insinuating that it was unsafe."  
13 The 4th Circuit Court of Appeals rejected the employer's  
14 argument and found Weinman's statements protected. When I  
15 compare the statement in Roanoke Hospital, supra, to the  
16 statements in the Lincoln Survey Report, I find them compa-  
17 rable and the Lincoln Survey Report was protected.

18 The employer in Greyhound, supra, argued the employee's  
19 press release constituted a public disparagement of the  
20 company product and reputation and was therefore unpro-  
21 tected. The Court rejected the employer's argument. When I  
22 compare the press release in Greyhound, supra, to the state-  
23 ments in the Lincoln Survey Report, I find them comparable  
24 and the Lincoln Survey Report protected.

25 The employer in Mount Desert Island Hospital, supra,  
26 argued that the employee's decision to air his complaints in  
27 public demonstrated disloyalty - unprotected activities.  
28 The Court rejected the employer's argument. The employee  
29 was complaining about staffing levels, work load, patient  
30 care and wages. When I compare the employee's letter to the  
31 editor in Mount Desert Island Hospital, supra, to the Lin-  
32 coln Survey Report, I find them comparable and the Lincoln  
Survey Report protected.

1           The District of Columbia Court of Appeals in Retail  
2 Store Union (Coca Cola Bottling Works) vs. NLRB, 466 F.2d  
3 380, 80 LRR 3244, 1972, found the union's "Health Warning"  
4 leaflets implying that because of the inexperienced replace-  
5 ments at the plant, coca cola bottles might be unclean and a  
6 hazard to the health, an unprotected statement. When I  
7 compare the leaflets in Coca Cola, supra, to the statements  
8 in the Lincoln Survey Report, I do not find the same type of  
9 implications. In Coca Cola, supra, the leaflets stated  
10 "empty coke bottles very often serve as collectors of strange  
11 things. Roaches, ants, flies, bugs, and even dead mice are  
12 found in return bottles." After the bold words Health  
13 Warning! and Beware! I do not find the Coca Cola leaflets  
14 comparable to the Lincoln Survey Report. I do not find the  
15 BEA implied with the same force or greater force that the  
16 school district had a poor educational product as the Coca  
17 Cola leaflet did.

18           The NLRB in Springfield Library and Museum, 238 NLRB  
19 No. 221, 99 LRRM 1289, 1978, found the employer violated the  
20 NLRA by reprimanding the union president because she wrote  
21 an article for the union newsletter that referred to the  
22 alleged incompetency of an employer official. I find the  
23 union newsletter in Springfield, supra, comparable to the  
24 Lincoln Survey Report.

25           I find the Lincoln Survey Report did not needlessly  
26 tarnish the school district's image. The Lincoln Survey  
27 Report did not tarnish the school district's image like the  
28 hand bills did in Jefferson Standard, supra, and Coca Cola,  
29 supra. The Lincoln Survey Report is comparable to the pro-  
30 tected activities in Roanoke Hospital, supra, Greyhound,  
31 supra, Mount Desert Island, supra, and Springfield, supra.

1 2(a) DID THE BEA'S ASSERTIONS IN THE LINCOLN SURVEY  
2 REPORT RECKLESSLY DISREGARD THE TRUTH?

3 In a handbilling case, the 3rd Circuit Court of Appeals  
4 in Texaco Inc. vs. NLRB, \_\_\_ F. 2d \_\_\_ 88 LRRM 2283, 1972,  
5 set forth the following test:

6 "It is well settled that misstatements made in the  
7 course of concerted activity which denounce an  
8 employer for his conduct in labor relations. . .  
9 only forfeit the statutory protection when it is  
10 evident that the statements are deliberately or  
11 maliciously false."

(80 LRRM at 2285)

12 The 6th Circuit Court of Appeals in NLRB v. Cement Transport  
13 Inc., 490 F.2d 1024, 85 LRRM 2292, 1974, states:

14 In the context of a struggle to organize a  
15 union, "the most repulsive speech enjoys immunity  
16 provided it falls short of a deliberate or reck-  
17 less untruth" so long as the allegedly offensive  
18 actions are directly related to activities pro-  
19 tected by the Act and are not so egregious as to  
20 be considered indefensible. Linn v. United Plant  
21 Guard Workers of America, Local 114, 383 U.S. 53,  
22 61, 61 LRRM 2345 (1966); NLRB v. Local 1229, Int'l  
23 Brotherhood of Electrical Workers, 346 U.S. 464,  
24 33 LRRM 2183 (1953); NLRB v. Washington Aluminum  
25 Co., 370 U.S. 9, 17, 50 LRRM 2235 (1962). See  
26 also Hugh H. Wilson Corp v. NLRB, 414 F.2d 1345,  
27 1355-56, 71 LRRM 2827 (3rd Cir. 1969); Crown Central  
28 Petroleum Corp v. NLRB, 430 F.2d 724, 731, 74 LRRM  
29 2855 (5th Cir. 1970); NLRB v. Thor Power Tool Co.,  
30 351 F.2d 584, 587, 60 LRRM 2237 (7th Cir. 1965).  
31 (85 LRRM at 2296)

32 In Springfield, supra, the NLRB cited Linn v. United  
33 Plant Guard Workers of America, 383 U.S. 53, 61 LRRM 2335,  
34 1966, which states "the most repulsive speech enjoys immu-  
35 nity provided it falls short of a deliberate or reckless  
36 untruth". Also see Letter Carriers v. Austin, \_\_\_ U.S. \_\_\_,  
37 86 LRRM 2740, 1974. Also see Stephens Institute, 241 NLRB  
38 No. 133, 101 LRRM 1052, 1974, Greyhound, supra, and Mount  
39 Desert Island, supra.

40 From the above case, a test of deliberately false or  
41 maliciously false or recklessly untrue has to be met for a  
42 statement to be unprotected.

1 Looking at Finding 5, the statement "discipline policy -  
2 none" is not an accurate statement. An accurate statement  
3 would have been "discipline policy - teachers do not under-  
4 stand or teachers are confused about the discipline policy".  
5 I judge the difference between the two statements to be more  
6 of a case of semantics and not a case of outright fabrica-  
7 tion.

8 When I compare the statements in the Lincoln Survey  
9 Report to the statements in Texaco, supra, Cement Transport,  
10 supra, Springfield, supra, plus the statements in Scony  
11 Mobile Oil Co. vs. NLRB, 357 F.2d 662, 61 LRRM 2553, CA2,  
12 1966 and Walls Mfg. Co. vs. NLRB, 321 F.2d 753, 53 LRRM  
13 2428, CADC, 1963, cited by the school district, I find the  
14 statements comparable.

15 Applying the above test to the case at hand, I find the  
16 Lincoln Survey Report to not be deliberately false or mali-  
17 ciously false or recklessly untrue.

18 2(b) DID THE BEA MAKE THE ASSERTIONS IN THE LINCOLN  
19 SURVEY REPORT IN THE SPIRIT OF LOYAL OPPOSITION - NOT OUT OF  
20 MALICE OR ANGER?

21 The NLRB in American Hospital Assn., 230 NLRB No. 10,  
22 95 LRRM 1266, 1977, states:

23 In any event, the mere fact that an employee may  
24 be sarcastic or insulting in his pursuit of acti-  
25 vity otherwise protected should not and does not  
26 in and of itself render the activity unprotected  
27 or him unfit for continued employment. It must  
28 indeed be "flagrant" or "fraught with malice."  
29 Here there is no indication of a malicious  
30 intent on the part of the employees. From a  
31 reading of Turkey Tactics, it is clear that there  
32 were areas of substantial concern to employees and  
they were motivated to try to change what they  
felt were inappropriate management decisions.  
Rather than maliciously attempting to hurt the  
Company I conclude from the leaflets, as well as  
the testimony of the discharges, that they were  
attempting to better a company for which they were  
working as professionals.

1 For instance, in Southwestern Bell Telephone,  
2 supra, [200 NLRB 667, 82 LRRM 1247 (1972)], emplo-  
3 yees wore T-shirts with "Ma Bell is a cheap mo-  
4 ther," which was found to be obscene and insulting.  
The employees were asked to remove the T-shirts or  
cover them up which they refused to do. Only then  
were they disciplined.

(95 LRRM at 1267)

6 The NLRB in American Arbitration Assn., 233 NLRB No. 12, 96,  
7 LRRM, 1231, 1977, gives an example of an unprotected ques-  
8 tionnaire of an employee which states:

9 "1. Should jeans suits be allowed to be worn by  
10 (a) supervisors, (b) secretaries, (c) the direc-  
tor, (d) administrators?

11 "2. Are jeans hats more appropriate when worn on  
12 the heads of (a) administrators, (b) secretaries,  
13 (c) janitors, (d) directors, (e) supervisors?

14 "3. Do jeans jackets look better on (a) dogs,  
15 (b) directors, (c) administrators, (d) all of the  
above, (e) none of the above?

16 "4. When worn in the reception area, are jeans  
17 coveralls more attractive on (a) attorneys, (b)  
18 secretaries, (c) supervisors, (d) nobody in the  
19 whole world?

20 "5. Should jeans be worn in the office of the  
21 AAA by (a) children, (b) monkeys, (c) directors,  
22 (d) administrators, (e) electricians, (f) letter  
23 carriers, (g) claimant's attorney, (h) respon-  
24 dent's attorney, (i) claimant, (j) dogs, (k)  
25 grownups, (l) the President, (m) temporary help,  
26 (n) part time help, (o) permanent part time help,  
27 (p) supervisors, (q) janitors, (r) anyone from the  
28 firm of Sommers, Schwartz, Silver, (s) nobody from  
29 D.A.I.I.E., (t) reporters, (u) Italians, (v) Xerox  
30 sales representatives, (w) witnesses, (x) secreta-  
31 ries, (y) some of the above, (z) all of the above?"

(96 LRRM at 1432)

32 The Court in Mount Desert Island, supra, said the above  
questionnaire ridiculed the employer (112 LRRM at 2123).

In the case at hand, I find the BEA was intending to  
improve a problem they saw at Lincoln Junior High School.  
This attempt to improve the Lincoln problem was done in a  
spirit of cooperation (FF 12, 13, 18, 22, 23, 24). When I  
compare the Lincoln Survey Report, the Lincoln Survey Report  
cover letter and other findings to the statements in American  
Hospital, supra, Springfield, supra, and Mount Desert Island,  
supra, I find the statements comparable. I do not find the

1 Lincoln Survey Report statements tried to maliciously hurt  
2 the school district or management employees. Looking at  
3 Findings 23, 24, 31, and 36 I find the Lincoln Survey Report  
4 did have a negative effect on the school district and man-  
5 agement employees. But, the Lincoln Survey Report did not  
6 maliciously hurt the school district or management employ-  
7 ees, or make obscene, insulting or ridiculing statements of  
8 management employees. The BEA's first objective was not to  
9 hurt anyone, but to attempt to improve the School District  
10 (FF 12, 13, 18, 22, 23, 24). In addition, I find no anger  
11 or malice in the Lincoln Survey Report or the BEA or the  
12 teachers.

13 The BEA did make the assertions in the Lincoln Survey  
14 Report in the spirit of loyal opposition - without malice or  
15 anger.

16 The BEA with the Lincoln Survey Report meets all the  
17 elements of the above stated legal standards. When the BEA  
18 solicited, compiled and distributed the Lincoln Survey  
19 Report, the BEA was engaged in protected concerted activi-  
20 ties under the Jefferson Standard, supra, test as imple-  
21 mented by the NLRB and the courts.

22 C. ANALYSIS OF VARIOUS MISCELLANEOUS ASSERTIONS  
23 RAISED BY THE EMPLOYER

24 1. The employer alleges that the BEA was attempting  
25 to replace the Lincoln administrator(s). This is alleged by  
26 the employer to be illegal citing Puerto Rican Food Product  
27 Corp. v. NLRB, 619 F.2d 153, 104 LRRM 2304, CA1, 1980, and  
28 NLRB v. Red Top Inc., 455 F.2d 721, 79 LRRM 2497, CA8, 1982.

29 First, the facts do not support the allegation that the  
30 Lincoln Survey Report was an attempt to change Lincoln  
31 administrator(s). In findings 23 and 24 I do not find the  
32 main thrust of the Lincoln Survey Report was to replace the  
Lincoln administrators.

1           Second, even assuming for argument's sake that such was  
2 the intent or motive of the BEA in conducting this survey,  
3 that allegation must be analyzed under the following stan-  
4 dard.

5  
6           Two basic criteria must be satisfied before  
7 employee concerted action over supervisory staf-  
8 fing matters will be protected. First, the "emp-  
9 loyee protest over a change in supervisory person-  
10 nel [must] in fact [be] a protest over the actual  
11 conditions of their employment. . ." Slip op. at  
12 4; see, e.g., NLRB v. Okla-Inn, 488 F.2d 498, 84  
13 LRRM 2585 (10th Cir. 1973) (discharged supervisor  
14 had attempted to alleviate employees' oppressive  
15 workload); NLRB v. Guernsey-Muskingum Electric  
16 Co-op, Inc., 285 F.2d 8, 47 LRRM 2260 (6th Cir.  
17 1960) (foreman allegedly made employees' job  
18 harder because foreman was inexperienced and did  
19 not understand the work). Mere sympathy for the  
20 economic well-being of a discharged supervisor  
21 divorced from any employee employment-related  
22 concern of their own, for example, would not  
23 qualify. Secondly, the means of protest must be  
24 reasonable. Slip op. at 6. Generally, "strikes  
25 over changes in even low level supervisory person-  
26 nel are not protected." (104 LRRM at 2305)

27           In Red Top, supra, the 8th Circuit Court of Appeals  
28 denied enforcement of an NLRB decision where the employees  
29 did not press their grievance in good faith but instead were  
30 engaged in a conspiracy to undermine the local manager. The  
31 employees were attempting to have the local manager fired.  
32 The employees lost their protection of the NLRA when they  
33 threatened the local manager with physical violence.

34           The 1st Circuit Court of Appeals in Abilities and Good-  
35 Will, Inc. v. NLRB 612 F.2d 6, 103 LRRM 2029, 1979, denied  
36 enforcement of an NLRB order when the employer discharged 21  
37 strikers who refused to return to work until the employer  
38 re-hired a high level management official. The 1st Circuit  
39 Court teaches:

40           The decision whether or not an employee protest  
41 over a change in management personnel is protected  
42 under the Act is a difficult one which requires

1 the balancing of competing interests. Tradition-  
2 ally, the interest of the employer in selecting  
3 its own management team has been recognized and  
4 insulated from protected employee activity. No  
5 court has ever held that the Act protects employee  
6 protests over changes in top level management  
7 personnel, nor has the Board previously advocated  
8 such a rule.

9 The employees, however, do have an interest in  
10 the composition of management personnel, and in  
11 exceptional circumstances this interest may out-  
12 weigh that of management. Thus, when the particu-  
13 lar management official involved is a low level  
14 foreman or supervisor who deals directly with the  
15 employees' concern with the identity of that  
16 person is directly related to the terms and condi-  
17 tion of their employment, both the Board and the  
18 courts have found that employee protests over  
19 changes in supervisory personnel may be protected.  
20 See NLRB v. Okla-Inn, 488 F.2d 498, 503, 84 LRRM  
21 2585 (19th Cir. 1973); NLRB v. Guernsey-Muskingum  
22 Elec. Coop., Inc., 285 F.2d 8, 47 LRRM 2260 (6th  
23 Cir. 1960); NLRB v. Phoenix Mutual Life Insurance  
24 Co., 167 F.2d 983, 22 LRRM 2089 (7th Cir.), cert.  
25 denied, 335 U.S. 845, 22 LRRM 2590 (1948).

26 We agree with the result in these cases. With a  
27 low level supervisor, the employer's interest in  
28 having unfettered control over his selection is  
29 reduced while the nexus between his identity and  
30 the employees' work conditions is greater. Thus,  
31 in such a case, to the extent that an employee  
32 protest over a change in supervisory personnel is  
in fact a protest over the actual conditions of  
their employment, their protest would in principle  
be protected activity under the Act.

...  
the general rule adopted by the courts has been to  
look at a variety of factors, including the rea-  
sonableness of the means of protest, in order to  
determine if the employees' activities were pro-  
tected.

In so proceeding, courts have generally held  
over Board protest that employee strikes over  
changes in even low level supervisory personnel  
are not protected. See Henning & Chaedic, Inc. v.  
NLRB, supra; American Art Clay Co. v. NLRB, supra;  
Dobbs House, Inc. v. NLRB, supra. On the other  
hand, courts have found protected the writing of  
letters expressing opposition. NLRB v. Phoenix  
Mutual Life Insurance Co., 167 F.2d 983, 22 LRRM  
2089 (7th Cir.), cert. denied, 335 U.S. 845, 22  
LRRM 2590 (1948), or the simple voicing of com-  
plaints. NLRB v. Guernsey-Muskingum Elec. Coop.,  
Inc., 285 F.2d 8 47 LRRM 2260 (6th Cir. 1960).

103 LRRM at 2030-31

1 From the above cases, the test to determine if the  
2 activity is protected activities when protesting supervisory  
3 personnel is:

4 (a) THE EMPLOYEE PROTEST OR ACTIVITY OVER A CHANGE IN  
5 SUPERVISORY PERSONNEL MUST IN FACT BE A PROTEST OVER THE  
6 ACTUAL CONDITIONS OF THEIR EMPLOYMENT.

7 (b) THE MEANS OF PROTEST MUST BE REASONABLE.

8 - GENERALLY STRIKES OVER CHANGES IN EVEN LOW LEVEL

9 SUPERVISORY PERSONNEL ARE NOT PROTECTED.

10 - LETTER WRITING EXPRESSING OPPOSITION AND/OR

11 VOICING OF COMPLAINTS FOUND PROTECTED.

12 THE LEGAL STANDARD APPLIED TO THE ASSERTION,

13 (a) Was the Lincoln Survey Report a protest over  
14 actual conditions of the teachers' employment?

15 Looking at Finding 1, the building principal, Ms.  
16 McKennan, has the right to set student discipline policy  
17 within broad guidelines. Looking at finding 5, Ms. McKennan  
18 explained her "different" discipline beliefs and values.  
19 Looking at findings 6 and 22, the major problems at Lincoln  
20 were student discipline and teacher evaluation. Looking at  
21 finding 7, student discipline and teacher evaluation does  
22 have an affect on teachers' working conditions. From the  
23 above findings I can only rule that the Lincoln Survey  
24 Report was about teachers' working conditions - conditions  
25 of the teachers' employment. Also see the first part of the  
26 Jefferson Standard test as implemented by the NLRB and the  
27 courts.

28 (b) Was the means of protest, the Lincoln Survey  
29 Report, reasonable - no strike?

30 Since the BEA and/or the teachers' actions did not  
31 involve a strike, their activity, the survey, is within the  
32 parameters of reasonableness. Abilities and Goodwill, 103

1 LRRM at 2031. Because Ms. McKennan is a first line super-  
2 visor the Lincoln Survey Report meets the test of low level  
3 supervisory.

4 The activities of the BEA and/or the teachers have  
5 already been found to be protected, concerted activities  
6 under the U.S. Supreme Court's two prong test in Jefferson  
7 Standard, 346 U.S. 465. That test includes an evaluation of  
8 how reasonably the activity was conducted. For the above  
9 reason, on both the facts and the legal standard, I reject  
10 the school district's assertion about attempting to replace  
11 the Lincoln administration.

12 2. The school district contends they did not inter-  
13 fere with protected activities because the school district  
14 did not discipline or specifically threaten to discipline  
15 anyone for the Lincoln survey report.

16 It is true that the school district did not discipline  
17 anyone or specifically threaten to discipline anyone (FF  
18 39). But, this fact is not the test. The 9th Circuit Court  
19 of Appeals in Bill Johnson's Restaurant vs. NLRB \_\_\_ F2d  
20 \_\_\_, 109 LRRM 3027, 1982, sets forth the following test:

21 The [NLRB] Board found that the restaurant  
22 [employer] had violated section 8(a)(1) by threat-  
23 ening and interrogating employees. An employer's  
24 interrogation of an employee violates section  
25 8(a)(1) if, under all the circumstances, the  
26 interrogation reasonably tends to restrain or  
27 interfere with the employee in the exercise of his  
28 or her protected Section 7 rights. Clear Pine  
29 Mouldings, Inc. v. NLRB, 632 F.2d 721, 725, 105  
30 LRRM 2132 (9th Cir. 1980), cert. denied, \_\_\_ U.S.  
31 \_\_\_, 101 S.Ct. 2317, 68 L.Ed.2d 841, 107 LRRM 2384  
32 (1981); Penasquitos Village, Inc. v. NLRB, 565  
F.2d 1074, 1080, 97 LRRM 2244 (9th Cir. 1977).  
The test is whether the interrogation tends to be  
coercive, not whether the employee was in fact  
coerced. Clear Pine Mouldings, Inc. v. NLRB, 632  
F.2d at 725; NLRB v. Anchorage Times Publishing  
Co., 637 F.2d 1359, 1364, 106 LRRM 2900 (9th Cir.  
1981).

(109 LRRM at 3031)

1 THE TEST IS WHETHER THE INTERROGATION TENDS TO BE COER-  
2 CIVE.

3 In the case at hand, we find Dr. Poston wrote the March  
4 7 letter and had the March 9 meeting to register a protest  
5 about the Lincoln survey report and to stop the Lincoln sur-  
6 vey report from happening in the future (FF 39). Applying  
7 the test of Bill Johnson, supra, to the above facts it is  
8 clear that Dr. Poston by his March 7 and 9 actions intended  
9 to restrain, interfere and coerce Mark Jones and the BEA  
10 from doing a Lincoln survey report in the future. The March  
11 7 and 9 actions tend to be coercive (FF 39). The fact that  
12 no one was disciplined or no one was specifically threatened  
13 with discipline is immaterial. The school district's prof-  
14 fered defenses are not defenses under the applicable legal  
15 test, supra.

16 3. The school district contends they did not inter-  
17 fere with protected activities because the nature of the  
18 Lincoln Survey Report was immoderate, unreasonable and ir-  
19 responsible. Further, the school district contends the  
20 Lincoln Survey Report was not protected activities because  
21 (a) the anonymous nature of the published remarks, (b) the  
22 negative and derogatory nature of the remarks, (c) the wide  
23 distribution beyond that needed for effective use of the  
24 survey, (d) the apparent effort to embarrass the Lincoln  
25 administration, (e) the non-specific statements with no  
26 effort made to ensure accuracy or edit out blatant inaccura-  
27 cies and inflammatory remarks, and (f) the general tenure of  
28 harrassment which underlay the preparation and distribution  
29 of the report.

30 The alleged immoderate, unreasonable, and irresponsible  
31 nature of the Lincoln Survey Report, or of the actions of  
32 the BEA or the teachers and the alleged negative, derogatory,

1 embarrassing, inaccurate, inflammatory and harrassing nature  
2 of the remarks have been analyzed under the proper statement  
3 of the test in the second prong of the Jefferson Standard  
4 test, supra, at pages 59-65 of this decision.

5 The alleged anonymous nature of the Lincoln Survey  
6 Report and the alleged non-specific nature of the remarks  
7 plus the wide distribution of the survey, are irrelevant to  
8 a determination of whether the survey is protected, concer-  
9 ted activity. The test is Jefferson Standard as implemented  
10 by the NLRB and the courts. See the above two prong test of  
11 Jefferson Standard.

12 4. The school district contends they did not inter-  
13 fere with protected activities because the BEA violated the  
14 understanding with Mr. Poston by acting in bad faith con-  
15 cerning the contents of the survey report and its distribu-  
16 tion. First, this is not the test. The test is Jefferson  
17 Standard as implemented by the NLRB and the courts.

18 Second, it is true that Dr. Poston asked Ms. Butler to  
19 request specific information from the Lincoln teachers (FF  
20 11); that Ms. Butler did ask for specific information (FF  
21 13); that the Lincoln Survey Report did not contain specific  
22 information (FF 22); that the BEA informed Dr. Poston of a  
23 limited distribution of the Lincoln Survey Report (FF 21,  
24 33); and that the Lincoln Survey Report was widely distri-  
25 buted (FF 30). The Circuit Court of Appeals in Texaco,  
26 supra, states:

27 The final contention of appellant [employer] is  
28 that the promise of the union not to distribute  
29 "undesirable" literature effectively waived the  
30 employees' right to distribute the leaflet in  
31 question. The courts and the Board have repeat-  
edly held that a relinquishment or waiver of a  
protected right must be "clear and unmistakable."  
It is not clear on its face what the union's  
promise meant in this case.

32 (80 LRRM at 2285)

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In the case at hand, I fail to see how the BEA waived any of its rights to produce and distribute the Lincoln survey report by the above facts. Also for a complete discussion of waivers see Teamsters Local 190 v. Lockwood School System, Unfair Labor Practice charge 9-83, Board of Personnel Appeals. Except for the above Texaco, supra, case, in all other cases cited the employer had no prior knowledge or control of the upcoming distribution of information. Nothing in the case at hand required the BEA to get prior permission to do the Lincoln survey report. I do not find the school district's argument persuasive.

5. The school district contends that they did not interfere with protected activities because the BEA failed to use the Meet and Confer provisions of the collective bargaining agreement.

First, this is not the test. See Jefferson Standard as implimented.

Second, in Finding 21, Ms. Butler states the parties at the February 9 meeting were using the provisions of Meet and Confer without formally requesting Meet and Confer. Because the record lacks any information to the contrary, I find Ms. Butler's statement controlling. The parties were using the Meet and Confer provisions of the collective bargaining agreement, Finding 2.

I find the BEA by having an early fall 1983 dialogue with Dr. Poston about the Lincoln problem (FF 8), by having an ongoing dialogue during the corporal punishment incident about the Lincoln problem (FF 11), and by the February 9 meeting (FF 21) was involved in normal Meet and Confer activities provided for by the collective bargaining agreement. I do not find the school district's argument persuasive. Additionally, the Meet and Confer section of the

1 Labor Agreement is not the exclusive means by which the  
2 employees may present their concerns to the employer. The  
3 Meet and Confer is only one aspect of protected, concerted  
4 activity.

5 6. The school district contends they did not inter-  
6 fere with protected activities because the BEA violated  
7 Article V, Management Rights, violated XV, Teacher Evalua-  
8 tion and violated XVI, Student Discipline of the collective  
9 bargaining agreement by conducting the Lincoln survey report.  
10 It is alleged that the BEA in essence waived their rights in  
11 these areas. Neither party cites any case law for guidance.

12 First, in all the above cited articles of the collec-  
13 tive bargaining agreement, none of the articles contain  
14 "clear and unmistakable language" waiving the BEA's rights  
15 to object to, or voice a complaint about, or grieve manage-  
16 ment's actions. It is elementary labor law that a waiver  
17 must be in "clear and unmistakable language" (Plumber's  
18 Local #669 vs. NLRB 600 F2d 918, 101 NLRM, 2014, 1979;  
19 NLRB v. C&C Plywood Corp., 385 U.S. 421, 64 LRRM 2065, 1967;  
20 Teamsters Local 190 v. Lockwood School District, ULP 9-1983),  
21 Board of Personnel Appeals.

22 Second, the Lincoln survey report can be reasonably  
23 seen as an evaluation of the Lincoln school administration.  
24 The Lincoln survey report is not an evaluation of the Lincoln  
25 teachers. Assuming arguendo, that Article XV, Teacher  
26 Evaluation, is a waiver of the BEA's rights to object to  
27 Teacher Evaluation, Article XV is not a waiver covering  
28 school administrators, someone outside the collective bar-  
29 gaining unit.

30 Third, in Finding 7, I found student discipline and  
31 teacher evaluation has an effect on the teacher's working  
32 conditions. I read school district policy 531A and 532P to

1 mean a teacher has primary responsibility for student dis-  
2 cipline and a teacher will be held accountable for his/her  
3 student discipline performance. For the above reason, I do  
4 not find the above sections of the Labor Agreement have been  
5 violated.

6 7. The school district contends they did not inter-  
7 fere with protected activities because with the Lincoln  
8 survey report, the BEA violated management's rights section  
9 of 39-31-303 MCA and violated the school board's authority  
10 to hire and fire in Section 20-3-324(1) MCA.

11 It is unclear how the Survey Report diminished the  
12 school district's authority to hire and fire. Their autho-  
13 rity remains intact.

14 Both Section 39-31-303 MCA and Section 20-3-324(1) MCA  
15 gives management the right to hire or fire and direct the  
16 work force. These rights are not unlimited. These rights  
17 are balanced against the rights of employees to self orga-  
18 nize, to form, to join, to assist any labor organization, to  
19 bargain collectively and to engage in other concerted acti-  
20 vities for the purposes of collective bargaining or other  
21 mutual aid or protection free from interference, restraint  
22 or coercion. Section 39-31-201 MCA.

23 The Lincoln survey report may have influenced the  
24 school district's decision to retain the Lincoln administra-  
25 tion staff at Lincoln. I believe the influence of the  
26 Lincoln survey report was only minor because Dr. Poston  
27 stated the Lincoln survey report had no effect on the school  
28 district in carrying out its policy (FF 31). We must bal-  
29 ance the employee's rights to complain about working condi-  
30 tions-student discipline and teacher evaluation - against  
31 the school district's right to hire, fire and direct the  
32 work force.

1           Because of Dr. Poston's "no effect" statement, the bal-  
2           ance of the two opposing rights is tipped in favor of the  
3           BEA to engage in the Lincoln survey report. I do not find  
4           section 39-31-303 MCA has been violated.

5           We should address one additional question. Was the BEA  
6           wise in doing the Lincoln survey report?

7           The U.S. Supreme Court in Washington Aluminum, supra,  
8           states "the reasonableness of the workers' decision to  
9           engaged in concerted activity is irrelevant to the determi-  
10          nation of whether a labor dispute exists or-not" 50 LRRM at  
11          2238. Also see Labor Board v. MacKay Radio and Telegraph  
12          Co., 304 U.S. 333, 2 LRRM 610. From the above teachings of  
13          U.S. Supreme Court, I find Ms. McKennan's testimony - that  
14          if the BEA did not do the Lincoln survey report, the Lincoln  
15          problem would have been corrected - immaterial in this deci-  
16          sion (FF 31). The wisdom of the BEA's decision to engage in  
17          the Lincoln survey report is not a determinant in this case.  
18          The wisdom of the BEA is judged by its own membership (FF  
19          17, 30).

20          For the above reasons, I conclude that the BEA's acti-  
21          vities with the Lincoln survey report to be protected con-  
22          certed activities under Section 39-31-201 MCA. By Dr.  
23          Poston's March 7 letter and his March 9 meeting, Dr. Poston  
24          tried to stop future Lincoln survey reports, protected  
25          concerted activities. Looking at the record as a whole, and  
26          specifically at the Meadowlark survey report, Finding 43, I  
27          believe Dr. Poston's actions of March 7 and 9 to be more of  
28          a one time violation of Montana's collective bargaining act,  
29          Section 39-31-101 MCA. Because of this fact and because  
30          Section 39-31-101 MCA, Policy, states it is the policy of  
31          the State of Montana to remove certain recognized sources of  
32          strife and unrest and to encourage practices and procedures

1 of collective bargaining to arrive at a friendly adjustment  
2 of all dispute, I will only order the school district to  
3 cease and desist from interfering with protected concerted  
4 activities. To require the school district to do such  
5 things as post notices would not be in harmony with the  
6 policy of Montana's Collective Bargaining Act.

7  
8 COUNT II OF UNFAIR LABOR PRACTICE CHARGE 5-84

9 The BEA alleges that the employer refused to permit a  
10 union representative at the March 9 meeting with management  
11 which Mr. Jones reasonably believed might result in discipl-  
12 line is a violation of Section 39-31-401(1) MCA.

13 The above facts do not support the charge as stated.

14 The facts of the case are:

- 15 1. Dr. Poston refused to let Mr. Russell attend  
16 the March 9 meeting because Mr. Russell had  
17 class responsibilities (FF 34).
- 18 2. The request for Mr. Russell to attend the  
19 March 9 meeting was requested by Mr. Russell  
20 (FF 34).
- 21 3. Mr. Jones never before the meeting or at the  
22 start of the meeting or during the March 9  
23 meeting requested union representation (FF  
24 35, 36).

25 The Board of Personnel Appeals first used the principle  
26 of Weingarten in Kessler Association of Teachers, MEA v.  
27 Kessler School, ULP 16, 20-1981, Board of Personnel Appeals.  
28 The U.S. Supreme Court in NLRB v. Weingartener, 420 U.S.  
29 251, 88 LRRM 2689, 1975 states that an employee can insist  
30 upon union representation at an employer's investigation  
31 interview. The BEA cited Pacific Telephone & Telegraph Co.  
32 v. NLRB, 711 F. 2d 134, 113 LRRM 3529, CA9, 1983 as control-  
ling. The 9th Circuit Court states:

If the right to insist on concerted protection  
against possible adverse employee action encompasses  
union representation at interviews such as  
those here involved, then in our view the securing  
of information as to the subject matter of the  
interview and a pre-interview conference with a  
union representative are no less within the scope

1 of that right. The Board's order that failure to  
2 provide such information and grant such pre-inter-  
3 view conferences constituted unfair labor prac-  
4 tices is as permissible a construction of Section  
5 7 as was the construction upheld in Weingarten.  
Without such information and such conference, the  
ability of the union representative effectively to  
give the aid and protection sought by the employee  
would be seriously diminished.

6 The second question presented by the petition is  
7 whether the request for a conference must come  
8 from the employee himself. Here, in the case of  
9 Ebojo, Revada and Martinez, the request came from  
10 the union representative. As we note in footnote  
11 3, the Supreme Court has stated that the right to  
12 union representation at an investigatory interview  
13 as defined by the Board is a right which must be  
14 requested by the employee and which the employee  
15 may choose to forego. See Weingarten, 420 U.S. at  
16 257. We read this to mean that the employer need  
17 not suggest that the employee have union represen-  
18 tation and not, as Pacific Telephone argues, that  
19 only the employee himself may so request. In our  
20 judgment, once union representation has been  
21 afforded, the representative may speak for the  
22 employee he represents and either the union repre-  
23 sentative or the employee may make the request for  
24 pre-interview conference.

25 We affirm the decision of the Board holding that  
26 Pacific Telephone violated Section 8(a)(1) by  
27 failing to inform Flores and Ebojo as to the  
28 subject matter of the interview and failing to  
29 grant Ebojo, Revada and Martinez pre-interview  
30 conferences with their union representatives.

31 . . . . .  
32 [Footnote 3]

The Weingarten court noted in several other  
respects "the contours and limits of the statutory  
right" as shaped by the Board in Mobile Oil and  
other decisions: the employee must request repre-  
sentation; his right is limited to situations  
where he reasonably believes the investigatory  
interview may result in disciplinary action; "the  
employer is free to carry on his inquiry without  
interviewing the employee and thus leave to the  
employee the choice between having an interview  
unaccompanied by his representative or having no  
interview and foregoing any benefits that might be  
derived from one"; and the employer is under no  
duty to bargain with the attending union represen-  
tative. Weingarten, 420 U.S. at 256-60.

(113 LRRM at 3531)

The NLRB in Appalachian Power Co., 253 NLRB No. 135,  
106 LRRM 1041, 1980, accepted the administrative law judge  
decision where (a) employees Parsons and Noffsinger refused

1 to do alleged unsafe work, (b) the two employees were dir-  
2 ected to the maintenance superintendent Hill's office, (c)  
3 employee Parsons paged shop steward Goff to Hill's office,  
4 (d) shop steward Goff appeared at the meeting, (e) a manage-  
5 ment official inquired why Goff was at the meeting, (f) Goff  
6 replied "I'm here for the meeting", (g) Goff was ordered to  
7 leave by a management official, and (h) neither employee  
8 Parsons nor Hoffsinger made any comment. The administra-  
9 tive law judge stated:

10  
11 . . . . .  
12 the General Counsel contends that Goff's assertion  
13 that he was present at the meeting as shop steward  
14 was a sufficient invocation of Weingarten's [420  
15 U.S. 251, 88 LRRM 2689] protections even without a  
16 specific request to the employer from the employees  
17 involved. This position stretches Weingarten  
18 beyond the boundaries currently demarked by the  
19 Board or the courts.

16 In Weingarten, the Supreme Court expressly  
17 endorsed the Board's view that the employee must  
18 request representation, but that he "may forgo his  
19 guaranteed right and if he prefers, participate in  
20 an interview unaccompanied by his union represen-  
21 tative." N.L.R.B. v. J. Weingarten, supra, at  
22 257. His continued participation is, then, a  
23 volitional matter and it is within his discretion  
24 to waive his guaranteed right.

21 The reason for vesting this choice with the  
22 employee is clear. As the Court explained in  
23 Weingarten, it is the individual employee who has  
24 an immediate stake in the outcome of the discipli-  
25 nary process for it is his job security which may  
26 be jeopardized in any confrontation with manage-  
27 ment. Id. at 261. Therefore, it should be the  
28 employee's right to determine whether or not he  
29 wishes union assistance to protect his employment  
30 interests. The union representative's interest in  
31 attending such a meeting is not solely to safe-  
32 guard the employee's interests but also to assure  
other employees that the aid and protection pro-  
vided to one employee will be available to them in  
a similar situation. Id.

28 If, as the General Counsel contends, the right  
29 to be present at a disciplinary interview could be  
30 asserted by the union representative, the employee  
31 no longer would have the choice of deciding whe-  
32 ther the presence of the representative was more  
or less advantageous to his interests. Thus, one  
of the fundamental purposes of the rule as arti-  
culated in Weingarten would be undermined.

1 While the facts in the present case are somewhat  
2 distinguishable from the situation where a union  
3 representative, completely on his own motion,  
4 seeks to assert a representative role at a manage-  
5 ment-conducted meeting, I am constrained to con-  
6 clude that the present record does not establish  
7 that the employees expressed a continued concern  
8 for union representation since Parsons did not  
9 renew his request or insist that Goff remain when  
10 he had the opportunity of communicating that  
11 desire directly to Hill.

12 I find that no precedents which would authorize  
13 extending the Weingarten principle in the manner  
14 suggested by the General Counsel. Rather, the  
15 Board consistently has required that the involved  
16 employee initiate the request for representation.  
17 See, e.g., Kohl's Food Company, 249 NLRB No. 13,  
18 104 LRRM 1063 (1980); First National Super Mar-  
19 kets, Inc. d/b/a Pick-N-Pay Supermarkets, 247 NLRB  
20 No. 162, 103 LRRM 1317 (1980); cited in Airco, Inc.,  
21 249 NLRB No. 81, 104 LRRM 1153 (1980) (Chairman  
22 Fanning's concurrence); Lennox Industries, Inc.,  
23 supra; Inland Container Corp., 240 NLRB No. 187,  
24 100 LRRM 1421 (1978).

25 Further, the Board has held that the employee's  
26 request for union representation must not only be  
27 personal, but also must be directed to the man-  
28 agement official who alone knows why he wishes to  
29 communicate with the employee and is in a position  
30 to assess whether or not to grant the employee's  
31 request for representation. Thus, in Lennox  
32 Industries, supra, an employee's request for union  
representation which was made to a management of-  
ficial prior to the commencement of a disciplinary  
interview conducted by another supervisor, was  
found to be insufficient to trigger Weingarten  
where the request was not made known to the offi-  
cial who called for and conducted the meeting.

In the present case, Parsons' call was not an  
effective invocation of his Weingarten rights  
since Hill was not privy to that call. There is  
no reason to assume that Parsons was unaware of  
his right to seek union representation or that he  
harbored a belief that a renewed request would be  
denied. Indeed, he knew he was entitled to rep-  
resentation, for just the previous day Goff had  
accompanied him to a meeting with production  
superintendent Goldie Williams without incident.

The General Counsel suggests still another rea-  
son for invoking Weingarten. He argues that  
Parsons' and Noffsinger's failure to comment when  
Goff spoke to Harrison in the corridor, served to  
ratify Goff's statement that he was present as the  
shop steward. However, since Hill was unaware of  
Goff's presence and did not hear the exchange  
between Goff and Harrison, \* \* \* he could not be  
aware of any ratification of Goff's statement by  
Parsons or Noffsinger. In these circumstances,  
Hill could extract no significance from the em-  
ployees' silence. Since Hill had no knowledge of  
Parsons' desire for union representation, it can-  
not be said that the Respondent violated the  
employees' Section 7 rights.

1 From the above, the test is:

- 2 1. The employee who is being disciplinary inter-  
3 viewed has to ask for union representation.  
4 A union representative cannot ask for an  
5 employee.  
6 2. The employee or the employee requested union  
7 representative may then ask for a pre-inter-  
8 view conference with the employer to deter-  
9 mine the nature of the interview.  
10 3. The employee and the union representative  
11 then are entitled to a private conference  
12 before the interview.  
13 4. At both the pre-interview conference and the  
14 interview the union representative is free to  
15 speak.

16 Applying the above test to the case at hand, I find Mr.  
17 Jones did not perfect his rights to union representation at  
18 the March 9 meeting because he, himself, did not request  
19 union representation. I find no violation of Montana's  
20 collective bargaining act in Count II.

21 COUNT III OF UNFAIR LABOR PRACTICE CHARGE 5-84

22 The BEA charged that the school district threatened to  
23 reprimand staff members for contacting school board members  
24 a violation of 39-31-401(1) MCA, U.S. Constitution, and the  
25 Montana Constitution.

26 First, the facts in this case do not support the charge.  
27 In Finding 29, we found that except for one teacher, the  
28 record contains no evidence of the employer reprimanding,  
29 threatening to reprimand or intimidating a teacher for  
30 talking to a school board member about the Lincoln survey  
31 report, United Way letters or other BEA business. The  
32 record contains no evidence of the employer using School  
Board Policy 272P to interfere with any protected BEA busi-  
ness.

Second, in Finding 28, no one refuted Dr. Poston's  
contention that the report of the superintendent's cabinet  
meeting was not an accurate reflection. Dr. Poston's state-  
ment is the best evidence we have available in the record.

1 Third, the Board of Personnel Appeals and this hearing  
2 examiner does not have the expertise or the jurisdiction to  
3 rule on the U.S. and Montana constitutional issues and cases  
4 cited by the parties. Specifically, the Board of Personnel  
5 Appeals and this hearing examiner are not ruling on the  
6 constitutional issues raised by the parties. See AFSCME  
7 Council #9 vs. State of Montana, ULP #11-79, Board of Per-  
8 sonnel Appeals.

9 Because of the lack of evidence I find no violation of  
10 Montana's Collective Bargaining Act in Count III. Because  
11 of the lack of jurisdiction, I do not rule on the constitu-  
12 tional issues raised in Count III.

13  
14 CONCLUSION OF LAW

15 The Lincoln survey report was protected concerted  
16 activities under Section 39-31-201 MCA. By his March 7  
17 letter and his March 9 meeting, Dr. Poston tried to stop the  
18 Lincoln survey report from happening again in the future, a  
19 violation of Section 39-31-401(1) MCA.

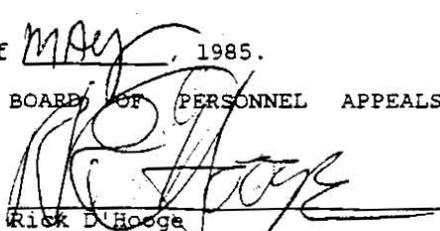
20  
21 RECOMMENDED ORDER

22 The Yellowstone County School District No. 2, Billings,  
23 Montana or its agent, defendants, are ordered to cease and  
24 desist from interfering with protected concerted activities  
25 of the BEA or its members as stated in Section 39-31-201 MCA  
26 by trying to stop future Lincoln survey reports. All other  
27 counts of Unfair Labor Practice charge No. 5-84 are dis-  
28 missed.

29 DATED this 22nd day of May, 1985.

30 BOARD OF PERSONNEL APPEALS

31  
32 By:

  
Rick D'Hooge  
Hearing Examiner

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NOTE: As stated in Board of Personnel Appeals rules 24.26.584 ARM, Exceptions, the parties shall have 20 calendar days to file written exceptions to this Recommended Order. If no written exceptions are filed, this Recommended Order will become the FINAL ORDER of the Board of Personnel Appeals.

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 22nd day of May, 1985:

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