

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 19-85 & 20-85:

MONTANA PUBLIC EMPLOYEES)
ASSOCIATION,)

Complainant and)
Defendant,)

- vs -)

FINAL ORDER

CITY OF GREAT FALLS,)
)

Defendant and)
Complainant.)

* * * * *

The Findings of Fact, Conclusions of Law and
Recommended Order were issued by Linda Skaar on July 28,
1986.

Exceptions to the Findings of Fact, Conclusions of Law
and Recommended Order were filed by David V. Gliko, attorney
for City of Great Falls on August 13, 1986.

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

1. IT IS ORDERED that the Exceptions to the Findings
of Fact, Conclusions of Law and Recommended Order are hereby
denied.

2. IT IS ORDERED that this Board therefore adopts the
Findings of Fact, Conclusions of Law and Recommended Order
of Hearing Examiner Linda Skaar as the Final Order of this
Board.

DATED this 29th day of October, 1986.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn
Alan L. Joscelyn
Chairman

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CERTIFICATE OF MAILING

I, Jennifer Jackson, do certify that
a true and correct copy of this document was mailed to the
following on the 30th day of October, 1986:

David V. Gliko
City Attorney
City of Great Falls
P.O. Box 5021
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Dave Stiteler
Montana Public Employees Association
P.O. Box 5600
Helena, MT 59604

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 19-85 and 20-85:

MONTANA PUBLIC EMPLOYEES)
ASSOCIATION,)
Complainant,)

vs.)

CITY OF GREAT FALLS,)
Defendant.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER

and)
CITY OF GREAT FALLS,)
Complainant,)

vs.)

MONTANA PUBLIC EMPLOYEES)
ASSOCIATION,)
Defendant.)

* * * * *

On September 16, 1985, the Montana Public Employees Association filed an Unfair Labor Practice charge with this Board alleging that the City of Great Falls violated the provisions of 39-31-401(5) MCA by bargaining in bad faith with the Montana Public Employees Association. In their charge, the MPEA asserted that during and subsequent to negotiations the City made certain economic commitments to them; the settlement and subsequent ratification was made on the basis of these commitments but after ratification it became apparent that the City had lied to them regarding those commitments. The union further charged that the City exhibited bad faith by taking a predetermined and inflexible position on economic matters and by failing to designate representatives with sufficient authority to bargain meaningfully.

On October 1, 1985, the City of Great Falls charged the Montana Public Employees Association with bargaining in bad

1 faith in violation of 39-31-402(2) because it refused to
2 execute the agreement following ratification by the union
3 membership.

4 For the purpose of hearing and decision, Unfair Labor
5 Practice charges #19-85 and #20-85 were combined. The
6 hearing was held on March 7, 1986 under the authority of
7 Section 39-31-405 MCA and in accordance with the Administra-
8 tive Procedures Act (Title 2, Chapter 4, MCA).

9 The Montana Public Employees Association was repre-
10 sented by David Stiteler and the City of Great Falls was
11 represented by David V. Gliko. Linda Skaar was hearing
12 examiner.

13 FINDINGS OF FACT

14 1. Negotiations for a second contract between the
15 MPEA bargaining unit and the City of Great Falls began on
16 June 21, 1985. Negotiations for the first contract
17 (1984-85) were long and difficult and had concluded not many
18 months before negotiations for the second contract began.

19 Members of the City bargaining team were spokesperson
20 Cheryl Bruskotter, Director of Community Services, Nathan
21 Tubergen, Director of Finance and Richard Gercken, Libra-
22 rian. Linda Merriman, Personnel Technician for the City
23 attended the sessions.

24 Members of the MPEA bargaining team were spokesperson
25 Jim Adams, Director of Field Services for MPEA and unit
26 members Judy Hardinger and Rosie Lewis. Adams is a seasoned
27 negotiator having bargained hundreds of contracts for MPEA
28 in the last 10 years.

29 Individual members of the two teams were friendly
30 toward one another in the bargaining sessions. The sessions
31 themselves were relatively brief with the City bargaining
32 team meeting with City Manager Al Johnson before and after

1 each session. It appeared to the Union that the City team
2 had to discuss every counter proposal with the City Manager.
3 Johnson testified that the City Commission set guidelines
4 which he conveyed to the team and he "never presumed to have
5 the final say in regard to budgetary items in negotiations."

6 2. The 1984-85 MPEA contract contained the same pay
7 plan (or matrix) which had been in use in the City of Great
8 Falls for several years. Negotiated into the MPEA contract,
9 the pay plan also continued to be used for the nonunion
10 employees. The pay plan follows:

<u>Step A</u>	<u>Step B</u>	<u>Step C</u>	<u>Step M</u>
6 months (probationary)	1 year 5% higher than A	15% range at annual 2% increments	Merit

13 |<--- 5% increase --- 5% increase--->|
14 | after 6 mos. after 1 year

15 |<----- 10% increase ----->|

16 Under this plan, an employee's pay increased 10% in the
17 first 18 months of his employment.

18 On June 21, 1985, the City's initial proposal was for
19 "take aways" from the 1984-85 contract plus a freeze on the
20 pay matrix. In other words, new employees would not move
21 from Step A to Step B after completing the probationary
22 period nor would more senior employees move into the Step C
23 pay range. There would be no merit pay.

24 The union made no proposal at the first meeting but
25 advanced a counter-proposal on June 28, 1985. It proposed
26 to trade the City's language items for the Union's economic
27 package: 70¢ per hour, fully paid health insurance and
28 elimination of a job classification grade. The City coun-
29 tered with a 1% salary increase but continued to insist on
30 no movement on the pay matrix. The teams worked on language
31 modifications at this and the next two sessions.

32

1 3. The third and fourth bargaining sessions occurred
2 on July 12 and 26. During the first of these meetings the
3 City team had been given authority by the City Commission to
4 raise the offer to 1½%, however, City offers continued to
5 provide for no movement on the pay matrix. This eventually
6 led the union to counter propose elimination of the "C" step
7 on the pay matrix. Under this proposal (and the one eventu-
8 ally agreed upon) employees, after finishing the proba-
9 tionary period, would move to step "B" and there would be no
10 further movement.

11 Before the union made the proposal eliminating a step,
12 a number of things were discussed. The City had settled
13 with the Teamster unit for a 2% increase. The Teamster
14 contract contained a "me-too" clause and the City team
15 asserted that 2% was a cap beyond which it could not move.
16 In pursuing his argument for a cents-per-hour increase
17 equivalent to the Teamster settlement but exceeding 2%,
18 Adams told the City team that the Teamsters' had indicated
19 to him that they would not enforce the "me-too" clause
20 because the wages of the MPEA unit were so low. The City
21 was not interested in looking into this further.

22 The union bargaining team felt it was losing ground
23 with every proposal made by the City. They believed they
24 were being punished for organizing. The nature of the City
25 offers led them to be concerned about losing ground compared
26 to the nonunion people who historically had shared the same
27 pay matrix. Adams started asking questions. Initially,
28 (July 12) he questioned Finance Director Tubergen about what
29 kind of wage increase would be given to the nonunion
30 employees and were the nonunion employees going to get a
31 better deal? Tubergen and Adams both testified that he
32

1 (Tubergen) replied that nothing he knew of was being
2 considered.

3 Ms. Bruskotter's testimony contradicts that of Tubergen
4 and Adams. When asked, "Was any direct question asked of
5 you--by Mr. Adams--or anyone else on your bargaining team,
6 whether or not--in that session--the nonunion employees
7 would receive more than the unit members?" Ms. Bruskotter
8 replied, "there was not a direct question asked." (Tape 3)
9 Although she agrees that Adams expressed concern with the
10 nonunion employees being treated more favorably than the
11 union employees, she said the City team acknowledged his
12 concern but did not respond.

13 The July 12, session ended after the union made a
14 proposal which the City team agreed to take back to their
15 "superiors." This union offer eliminated step "C" of the
16 pay plan.

17 4. At the bargaining session held on July 26, 1985,
18 the City team reported that the MPEA proposal was not
19 acceptable. As a counter proposal the City offered 2% on
20 the pay plan + 1% performance pay to be paid in a lump sum
21 in December (previously merit pay had been folded into the
22 base). This was about an 11¢ per hour increase. This offer
23 was made on the authority of the City Manager, who, Ms.
24 Bruskotter believed, had spoken to the City Commission.
25 Adams response to this offer was anger--he told the City
26 team that they (the unit) felt like they were being punished
27 for organizing. Adams again brought up the subject of the
28 nonunion employees and asked what wage increase they were
29 going to get and whether they were going to be treated
30 better than the MPEA employees. He was assured that no one
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1 would get more and that those on the pay matrix would
2 continue on the matrix.¹

3 The July 26 meeting ended when the MPEA bargaining team
4 agreed to take the City proposal to the unit without recom-
5 mendation.

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10 ¹On this point, testimony is conflicting. Ms.
11 Bruskotter remembers discussing the nonunion employees at
12 this meeting but asserts that no information was asked for
13 and none was given. She testified, "I think we talked some
14 about historic, that historically they had been the same.
15 We didn't have any authorization to talk about what would
16 happen with the nonunion people because we weren't
17 commissioned with that responsibility." "Nor did I
18 personally have any knowledge of what would happen to the
19 nonunion people." (Tape 4) Ms. Bruskotter also testified
20 that the Union did not ask any direct questions about
21 whether the nonunion employees would receive a bigger wage
22 increase than the unit members. (Tape 3) Testimony from
23 the other members of the City bargaining team neither
24 supported nor refuted Ms. Bruskotter's statements on the
25 meeting of July 26. The testimony of the City bargaining
26 team and Ms. Bruskotter's statements contrast sharply with
27 the testimony of the Union's bargaining team. Both Ms.
28 Hardinger and Ms. Lewis testified that Ms. Bruskotter had
29 specifically assured them that no one would get more than
30 2%--whether union or nonunion. Adams testified that he
31 asked very, very pointed questions and he was continually
32 told that there was no more money for others-- people on the
matrix would continue on the matrix. In response to the
question "Was there any question in your mind at all--when
you left the bargaining table with the T.A. [tentative
agreement] that you had assurances that the nonunion
employees--the exempt employees who shared this salary
matrix traditionally--were not going to get a better deal?"
Adams replied, "I've been doing this business for 10 years
and if I can't protect myself from the worst case scenario
that could happen at the bargaining table I haven't learned
very much and there was no question in my mind that when I
left that table those exempt employees who we feared so much
as getting favorable treatment could have gotten not only
favorable treatment but the very proposal we presented and
had rejected--I would still be at the bargaining table and
not at this hearing." (Tape 6)

29 All members of the City bargaining team recall Ms.
30 Bruskotter making the statement during negotiations that
31 they were not bargaining for the nonunion employees or that
32 the salaries paid to the nonunion employees was a management
decision. Ms. Bruskotter remembers having made the
statement that they were not bargaining for the nonunion
employees at the second meeting on June 28. She thinks that
she may have repeated the statement later but neither she
(Footnote Continued)

1 5. The MPEA membership turned down the City offer of
2 July 26, and the parties met again on August 2. Wages for
3 nonunion employees were not discussed during this relatively
4 short meeting where the parties tentatively agreed to the
5 following:

6 <u>Step A</u>	<u>Step B</u>	<u>Step C - M</u>
7 6 months	7% higher	Eliminated
8 (probationary)	than A	(employees over step
9 Increased 2%		C under former pay
		plan to receive
		additional 2%)

10 ←--- 7% increase -----→
 after 6 months

11 The unit ratified this agreement on August 6, 1985
12 after being assured that this was the pay plan that would be
13 shared by all employees under the pay plan--exempt and
14 non-exempt alike. Adams testified that he did not believe a
15 proposal would have been ratified without these assurances
16 (Tape 6).

17 The City Commission approved the agreement on August 7,
18 1985.

19 6. On August 7, at the same time he took the tenta-
20 tive agreement to the City Commission for approval, City
21 Manager Al Johnson also made a recommendation on wages for
22 the nonunion employees. The City Commission approved both
23 of Johnson's recommendations. The new pay plan for the
24 nonunion employees gives them larger increases than those
25 contained in the agreement with the MPEA bargaining unit.
26 This pay plan is identical to the last proposal made by the
27 union and rejected by the City:

28 <u>Step A</u>	<u>Step B</u>	<u>Step C</u>
29 6 months	10% higher	Eliminated
30 (probationary)	than A	
31 Increased 2%		

31 ←-- 10% increase -----→
 after 6 months

32 _____
 (Footnote Continued)
 nor any other member of the City team can definitely say if
 or when she did so.

1 This is a significant gain over the 1984-85 pay plan under
2 which a newly hired employee would receive a 10% wage
3 increase by the end of 18 months of employment. Under this
4 plan a newly hired employee would receive a 10% increase
5 after 6 months of employment. This plan is also signifi-
6 cantly more than the negotiated agreement with MPEA under
7 which a newly hired employee would receive a 7% increase
8 after 6 months of employment.

9 7. City Manager Al Johnson met with the City bar-
10 gaining team before and after every bargaining session. He
11 testified that he never presumed to have the final say in
12 regard to budgetary items in negotiations. The City Commis-
13 sion set guidelines which he conveyed to the team. He
14 testified that the City team never brought the issue of the
15 nonunion wage to his attention nor did he ever tell the team
16 to tell MPEA it would get the same increase as the exempt
17 employees (Tape 5).

18 Johnson testified that he made the decision on the pay
19 increase for the exempt employees after the settlement with
20 MPEA and that it was administratively convenient to have
21 both groups of employees on a pay plan with the same struc-
22 ture. In regard to the amount of the increase for exempt
23 employees he said, "in the case of exempt employee we were
24 not in negotiations with those employees--there wasn't a
25 bargaining process going on, these were people who had
26 basically hired on with the City with the understanding they
27 would receive that 5% increment between step increases."
28 The expectation was based on "the pay plan that was in
29 existence when they came to work for the City of Great
30 Falls." "If we were going to modify steps to reflect the
31 new model that had been negotiated with the MPEA we were
32

1 basically talking about a 10% differential and so we--what
2 we did was--basically reflect that and immediately in the
3 numbers in the increments for those employees and basically
4 the rationale, for that was that, we didn't have any
5 choice--we weren't bargaining with those people, we weren't
6 negotiating with them that was--that definitely would have
7 been an unfair labor practice--had we unilaterally decided
8 to do something else." (Tape 5)

9 8. After union ratification and City Commission
10 approval, the agreement was signed by representatives of the
11 City and presented to the union for signature. Judy
12 Hardinger signed the document. Before signing Rosie Lewis
13 heard rumors of the wage increase for the nonunion employees
14 and she called Jim Adams. A period of time elapsed while
15 Adams verified the rumor and determined the feeling of
16 members of the bargaining unit. On September 3, 1985 he
17 wrote the following letter to Cheryl Bruskotter:

18 September 3, 1985

19 Cheryl Brushkotter
20 Director, Community Development
21 City of Great Falls
22 P.O. Box 5021
23 Great Falls, MT 59403

24 Dear Cheryl:

25 I am returning our contract to you, unsigned. I
26 am doing so because a commitment, made by yourself
27 and your bargaining team, has not been upheld.

28 If you remember, one of our greatest concerns was
29 that the City would treat those excluded
30 employees, sharing the same salary matrix with us,
31 more favorably. You assured us, in no uncertain
32 terms, that this would not happen. There was a
commitment made, at the bargaining table, that
those "excluded" employees would receive the same
settlement. As you are aware, this has not
happened.

To make matters worse, those employees got the
very proposal that we submitted and had rejected
by the City Council as being too costly! You then
came back with a compromise and we agreed on the
condition that those excluded employees would

1 receive the same settlement. Cheryl, someone on
your side failed to live up to that commitment.

2 I have no other choice than to insist that the
3 City replace the pay plan in the contract with the
4 same salary schedule given to excluded employees
5 or MPEA will have to file unfair labor practice
6 charges against the City for not bargaining in
good faith. If I have not heard back from you by
September 10, 1985, those charges will be filed
the following day.

7 Respectfully submitted,

8
9 s/ _____
10 Jim Adams, Director
Field Services

11 DISCUSSION

12 ULP 19-85

13 Central to the determination of whether the City of
14 Great Falls failed to bargain in good faith with MPEA is a
15 determination of whether the union was entitled to informa-
16 tion about non-bargaining unit positions, whether the union
17 asked for this information and, if so, how the City re-
18 sponded.

19 The NLRB and the courts have long since held that
20 unions are entitled to data on nonbargaining unit positions
21 as long as that data is relevant to bargaining issues.² In
22 a case where the union was convinced that the alleged
23 greater wage increases granted the nonunit employees would
24 have been an item of great interest among unit employees,
25 the NLRB said,

26 Under the circumstances of this case,
27 where the established past practice of
28 Respondent was to maintain a degree of
wage parity between nonunit and unit

29
30 ²Press Democrat Publishing Company v. NLRB, CA 9, 629
31 F2d 1320, 105 LRRM 3046 (1980); Brown Newspaper Publishing
32 Co., 238 NLRB No. 187, 99 LRRM 1452 (1978); Curtiss-Wright
Corp. v. NLRB, 347 F.2d 61, CA 3, 59 LRRM 2433 (1965);
Hollywood Brands v. NLRB, CA 5, 54 LRRM 2780 (1963), cert.
denied, 377 US 923, 56 LRRM 2095.

1 employees of similar skills where the
2 percentage wage increase granted the
3 nonunit employees would be likely viewed
4 by the Union as the floor from which it
5 would make demands and below which it
6 would not settle... the wage data
7 concerning the nonunit personnel assumes
8 probable or potential relevance to the
9 Union's statutory responsibility...
10 Brazos Electric Power Cooperative, 241
11 NLRB No. 160, CA 5, 615 F2d 1100, 104
12 LRRM 2123 (1980).

7 Such is the case here. Historically, the unit and nonunit
8 employees shared the same pay matrix. The relevance of the
9 information requested was attested to by Adams who testified
10 that had it been known that the exempt employees would get a
11 greater increase than the union employees he would still be
12 at the bargaining table--he doubted that the agreement would
13 have been ratified.

14 Having established that the union was entitled to the
15 information we turn to the next question, did MPEA actually
16 ask for the information on the nonbargaining unit positions
17 and, if so, how did the City respond? In attempting to
18 answer these two questions we find that testimony conflicts
19 and we must make a determination of credibility. "'Credi-
20 bility' involves more than demeanor; it apprehends the
21 overall evaluation of testimony in the light of its ration-
22 ality or internal consistency and the manner in which it
23 hangs together with other evidence." Carbo v. U.S.,
24 C.A.Cal. 314 F2d 718, 749 (as quoted in Words and Phrases).
25 Thus we must weigh the testimony not just in the light of
26 the demeanor of the witnesses but test it against its
27 inherent probability or improbability, consistency or
28 inconsistency and whether or not it was uncontradicted or
29 contradicted.

30 Did MPEA ask for the information and, if so, how did
31 the City respond? All witnesses agreed that discussions of
32 the wages of exempt employees took place. The union

1 witnesses testified that these conversations were initiated
2 by questions from Jim Adams and the City gave specific
3 assurances that the exempt employees would receive no more
4 than the union employees. City Finance Director Tubergen
5 agrees that at least one conversation was initiated by a
6 question from Adams and he responded by saying he knew of no
7 plans to give the nonunion employees more. Ms. Bruskotter
8 agrees that conversations took place but stated they were
9 not initiated by a question nor did she respond with any
10 information--they simply talked about "historics". In
11 addition, she and other members of the City team remember
12 her saying at some point that they were not bargaining for
13 the nonunion employees, or that the salaries paid to the
14 nonunion employees was a management decision.

15 In answering the questions we must look to the subse-
16 quent events and the documentary evidence as well as the
17 oral testimony. The bargaining unit ratified the contract
18 after being assured (at the ratification meeting) that the
19 exempt employees would get no more than they. When the unit
20 found out that, in actual fact, the exempt employees were to
21 receive a larger increase it refused to sign the contract.
22 Adams then wrote to Cheryl Bruskotter: "You assured us, in
23 no uncertain terms, that this would not happen. There was a
24 commitment made, at the bargaining table, that those "ex-
25 cluded" employees would receive the same settlement."
26 (Letter from Adams to Bruskotter, September 3, 1985).

27 Analyzing the evidence, we find that conversations
28 about the wages to be paid to the exempt employees took
29 place. Ms. Bruskotter was the only witness who testified
30 that the conversation(s) did not include questions from
31 Adams on the wages to be paid exempt employees. Ms.
32 Bruskotter would have us believe these conversations were

1 merely general--they had no directed beginning and did not
2 result in the exchange of any information. However,
3 experience tells us that conversations at the bargaining
4 table are usually purposeful--they are part of the plan to
5 reach agreement. It seems highly improbable that such a
6 conversation would not begin with a question or a statement
7 requiring an answer. It seems even more improbable that a
8 conversation initiated to gain information would simply
9 trail off with no information being exchanged. It would
10 seem even more improbable that Adams (a seasoned negotiator)
11 would believe that they had been assured "in no uncertain
12 terms...that those 'excluded' employees would receive the
13 same settlement," if Ms. Bruskotter had simply replied to
14 his question that they were not bargaining for nonunit
15 employees or that the wages of the exempt employees was a
16 management decision.

17 While the memories of both parties were faded by time,
18 the testimony of the union witnesses was consistent,
19 non-contradictory and more probable than that of the City's
20 witnesses. From the testimony and evidence we must conclude
21 that the union specifically asked about the wages for the
22 exempt employees and was given assurances that those
23 employees would receive the same settlement as the MPEA
24 unit. That the information given must be true information
25 goes without saying. Thirty years ago the U.S. Supreme
26 Court spoke to this very point, "Good Faith necessarily
27 requires that claims made by either bargainer should be
28 honest claims." NLRB v. Truitt Mfg. Co., 351 US 149, 38
29 LRRM 2042 (1956). See also Eastern Market Beef Processing
30 Corp. 259 NLRB 102, 108 LRRM 1332 (1981) and Penntech Papers
31 Inc., 263 NLRB No. 33, 111 LRRM 1622 (1982) where the NLRB
32 found the employer in violation of the Act for making false

1 and misleading statements or providing misinformation to the
2 union.

3 While the NLRB and the Courts have made it clear that a
4 refusal to supply relevant information is a violation of the
5 Act, there is considerably less clarity on the question of
6 whether it is a per se violation or merely evidence of bad
7 faith bargaining.

8 The view that Truitt [supra] properly
9 interpreted means that refusal to supply
10 information is only evidence of bad
11 faith, not a per se violation, has been
12 followed in a number of circuit court
13 decisions, though some courts have
14 continued to apply a per se standard.

15 Cases where an employer has supplied misinformation
16 rather than refusing to supply information at all are rather
17 unusual. While it is clear that parties are required to
18 supply honest information, case law has not established
19 whether the supplying of misinformation is a per se vio-
20 lation or merely evidence of bad faith bargaining. It would
21 appear, however, that supplying misinformation has an even
22 more harmful effect than a refusal to supply information at
23 all. A party refused information acts or does not act
24 knowing that it does not have the information. There is
25 risk involved but the party is aware that the risk is there.
26 The party which is given incorrect information acts

26 ³The Developing Labor Law, ed. Charles J. Morris
27 (Bureau of National Affairs, Washington, D.C. 1983) 2nd ed.
28 pp. 608-609.

28 See Woodworkers v. NLRB, 263 F2d 483, 43 LRRM 2462 (CA DC,
29 1959); J.I. Case Co. v. NLRB, 253 F2d 149, 41 LRRM 2679 (CA
30 7, 1958), but see Curtiss-Wright Corp. v. NLRB, 347 F2d 61,
31 59 LRRM 2433 (CA 3, 1965), where the court stated that once
32 it is established that information is relevant, for the
employer to fail to produce the information on request is a
per se refusal to bargain; NLRB v. Fitzgerald Mills, 313 F2d
260, 52 LRRM 2174 (CA 2, 1963), cert. denied 375 US 834, 54
LRRM 2312.

1 believing that the information supplied is correct. The
2 actions they take, based on the misinformation, will not
3 have the expected result. While a contract may result there
4 will not be true mutual agreement. The reasoned bargaining
5 process, the constructive open discussions leading to mutual
6 agreement envisioned by the Act is made a mockery.⁴

7 Whether supplying misinformation is a per se violation
8 or merely evidence of bad faith bargaining is perhaps
9 immaterial because, in this case as in most cases, the
10 exchange of information does not occur in a vacuum. In
11 determining the issue of bad faith bargaining the Board of
12 Personnel Appeals, the NLRB and the Courts have adopted a
13 standard whereby each case is judged on the facts in the
14 individual case taking into consideration the "totality of
15 conduct" of the parties.⁵

16 Closely aligned with the bad faith bargaining/totality
17 of conduct concept is the concept of surface bargaining.
18 Like bad faith bargaining, surface bargaining is a
19 multi-faceted concept which has been found to include such
20 actions as (1) the employer's offer merely reiterating
21 existing practices and unduly delaying the submission of a
22 written counter proposal,⁶ (2) dilatory tactics and an

25 ⁴See H.K. Porter Co., 397 US 99, 73 LRRM 2561 (1970)
26 for a discussion of the intent of the National Labor
Relations Act.

27 ⁵NLRB v. Virginia Electric & Power Co., 314 US 469, 9
28 LRRM 405 (1941); Rhodes-Holland Chevrolet Co., 146 NLRB No.
29 156, 56 LRRM 1058 (1964). Joy Silk Mills, Inc. v. NLRB, 185
30 F2d 732, 27 LRRM 2012, (CA DC, 1950); Teamsters Local 2 v.
Silver Bow County Commissioners (ULP 4-76; Mountain View and
Pine Hills Education Assoc. v. State of Montana Personnel
Division (ULP 33-81).

31 ⁶Irvington Motors, Inc. 147 NLRB 565, 56 LRRM 1257
32 (1964), enforced per curiam, 343 F2d 759, 58 LRRM 2816 (CA 3
1965).

1 apparent intent to reach an impasse,⁷ and (3) failure to
2 designate an agent with sufficient authority.⁸

3 In examining the bargaining situation as a whole in
4 this case we find that the City bargaining team was composed
5 of individuals whose main function was community develop-
6 ment, finance or the library--individuals who were not
7 schooled in the intricacies of labor law. These bargainers
8 seem to have been unaware of their duty to supply relevant
9 information on nonbargaining unit positions and never
10 relayed the union's question to the City Manager (Finding of
11 Fact #7). Not aware of their legal obligation to supply the
12 information or the serious nature of the request it appears
13 that they simply gave an answer based on their knowledge of
14 past practice--an answer which turned out to be untrue. In
15 addition to their lack of knowledge of a complex process the
16 City team appeared to be hampered by too little authority.
17 For example, by July 12, the City team had been given the
18 authority by the City Commission to raise their offer to 1½%
19 and at the end of the meeting the City team took the union
20 counter proposal back to their "superiors" (it was this
21 proposal that was subsequently given to the nonunion em-
22 ployees). (Finding of Fact #3 and #4). The offer made by
23 the team on July 26 was made on the authority of the City
24 Manager, who Ms. Bruskotter believed, had spoken to the City
25 Commission (Finding of Fact #4). While the City Commission
26 had the right to ratify the agreement, it is not clear that

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29 ⁷Hilton Mobile Homes, 155 NLRB 873, 60 LRRM 1411
30 (1965), modified 387 F2d 7, 67 LRRM 2140 (CA 8, 1967).

31 ⁸NLRB v. Fitzgerald Mills, 313 F2d 260, 52 LRRM 2174
32 (CA 2, 1963); Billups Western Petroleum Co., 169 NLRB No.
 147, 67 LRRM 1328, enforced per curiam 416 F2d 1333, 72 LRRM
 2687 (CA 5, 1969).

1 they were not more actively involved in the bargaining.
2 From the evidence on the record, it appears that either the
3 City Commission or the City Manager were directing the
4 actual offers, as well as the timing of the offers, made by
5 the City team at the bargaining table . The function of the
6 City bargaining team was to go through the motions of
7 bargaining, relaying offers to the Union as directed by
8 higher authority. Failing to give negotiators sufficient
9 authority to carry on meaningful bargaining is considered by
10 the NLRB and the courts as factors in surface or bad faith
11 bargaining. In Billups Western Petroleum Co.,⁹ the NLRB
12 found that "Respondent's intention to engage in no more than
13 surface bargaining was further shown by the fact that its
14 bargaining representatives had no meaningful bargaining
15 authority, making them little more than a conduit for
16 communications to and from its president." In NLRB v.
17 Fitzgerald Mills, the fact that the employer gave its
18 negotiators only limited authority which resulted in delays
19 for referring proposals back to the employer's principals
20 was considered a factor. in a finding of bad faith
21 bargaining.¹⁰ Such was the case in the City of Great Falls.
22 The bargaining team for the City of Great Falls did not have
23 the authority required by the Act.

26 ⁹Supra.

27 ¹⁰NLRB v. Fitzgerald Mills, supra; see also Bonham
28 Cotton Mills, Inc., 121 NLRB 1235, 42 LRRM 1542 (1958)
29 enforced per curiam, 289 F2d 903, 48 LRRM 2086, CA 5, 1961;
30 Penntech Papers, Inc., 263 NLRB No. 22, 111 LRRM 1622
31 (1982); National Amusements, Inc., 155 NLRB 1200, 60 LRRM
32 1485 (1965); NLRB v. Herman Sausage Co., 122 NLRB 168, 43
LRRM 1090 (1958) Lower Flathead Education Assoc. v. Charlo
School Dist. No. 7, (ULP 14-76); Mountain View and Pine
Hills Education Assoc. v. State of Montana Personnel
Division (ULP 33-81).

1 In summary, we find that the City of Great Falls is in
2 violation of two requirements of the Act. First, it failed
3 to invest its bargaining team with meaningful bargaining
4 authority. Secondly, it gave the union incorrect informa-
5 tion. This incorrect information led the union to ratify an
6 agreement which would not have been made except for the
7 incorrect information supplied by the City. Had the City of
8 Great Falls used a bargaining team with real knowledge and
9 understanding of the collective bargaining process and
10 invested it with sufficient authority at the bargaining
11 table this situation would not have occurred. As it was,
12 because of the false assurances given to the MPEA team an
13 "agreement" was reached that was not a true meeting of the
14 minds.¹¹ The totality of the circumstances leads to the
15 conclusion that the City of Great Falls failed to bargain in
16 good faith.

17 CONCLUSIONS OF LAW

18 The City of Great Falls has failed to bargain in good
19 faith with the Montana Public Employees Association and by
20 so doing is in violation of 39-31-401(5) and 39-31-305 MCA.

22 DISCUSSION

23 ULP 20-85

24 It has long been established that the parties must
25 execute the collective bargaining agreement which was orally
26 agreed to at the bargaining table. Failure to execute the
27 agreement is a failure to bargain in good faith.¹² However,
28

29 _____
30 ¹¹Orion Tool, Die and Machine Co., 195 NLRB No. 194, 79
LRRM 1636 (1972).

31 ¹²H. J. Heinz v. NLRB, 311 U.S. 514, 7 LRRM 291 (1941);
32 NLRB v. Strong, 393 U.S. 357, 70 LRRM 2100 (1969).

1 as is frequently the case, there are exceptions to the rule.
2 The NLRB has not found a violation when an agreement was
3 reached after the employer's negotiator exceeded his
4 authority in agreeing to the crucial issue,¹³ when a
5 provision of the agreement was illegal,¹⁴ or would require
6 illegal conduct on the part of the employer.¹⁵ Failure to
7 execute was not found a violation when the agreement was
8 based on a promise by the union--a promise which the union
9 was unable to fulfill.¹⁶ Failure to sign an agreement
10 reached as a result of the employer's unfair labor practice
11 was not a violation.¹⁷ Finally, no violation was found when
12 the employer refused to execute an agreement which had been
13 arrived at through trickery. In Industrial Engineering Co.,
14 the Board found that under such circumstances the written
15 agreement did not constitute a consciously arrived at
16 understanding.¹⁸ In Taylor Chevrolet the Board again found
17 an employer not in violation of the Act because it had never
18 conciously agreed to a provision in the contract and
19 consequently there was never the meeting of minds required
20 by the Act.¹⁹

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22
23 ¹³NLRB v. Advanced Business Forms Corp., No. 72-1332,
24 CA 2, 82 LRRM 2161 (1973).

25 ¹⁴Stein Printing Company, 204 NLRB No. 2, 83 LRRM 1580
26 (1973).

27 ¹⁵Stackhouse Oldsmobile v. NLRB, No. 15308, CA 6, 55
LRRM 2895.

28 ¹⁶Kent Engineering, Inc., 180 NLRB No. 17, 72 LRRM 1639
29 (1969).

30 ¹⁷Dixie Sand & Gravel Co., 231 NLRB 6, 95 LRRM 1568
(1977).

31 ¹⁸173 NLRB No. 18, 69 LRRM 1227 (1968)

32 ¹⁹199 NLRB No. 176, 81 LRRM 1405 (1972)

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In this case as in those cited above, there was not a meeting of the minds. While the parties reached an "agreement", that "agreement" was based on the incorrect information supplied to the union by the City. The bad faith bargaining engaged in by the City led the union to make an agreement that would not have been made absent the incorrect information. There was no true meeting of the minds between the two parties and absent a meeting of minds the Act does not require MPEA to execute the "agreement".

CONCLUSIONS OF LAW

The Montana Public Employees Association is not in violation of 39-31-402(2) MCA.

RECOMMENDED ORDER

The City of Great Falls is ordered to cease and desist from bargaining in bad faith with the Montana Public Employees Association and specifically to:

1. Negotiate an agreement with the Montana Public Employees Association to replace the unexecuted 1985-86 agreement.
2. Appoint a bargaining committee with the authority to bargain in good faith with the union. The City is to provide the bargaining team with written guidelines setting forth their authority and limits. Any amendments to these guidelines and limits must also be in writing.
3. Until an agreement is reached with MPEA, provide the Board of Personnel Appeals with written notification of the date, time and duration of all bargaining sessions.

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and, post, on bulletin boards where employee information is usually posted, the following notice. This notice is to be posted in each and every workplace where a member of the MPEA unit works.

* * * * *

NOTICE

THE MONTANA BOARD OF PERSONNEL APPEALS HAS DETERMINED THAT THE CITY OF GREAT FALLS HAS BARGAINED IN BAD FAITH WITH THE MONTANA PUBLIC EMPLOYEES ASSOCIATION IN VIOLATION OF 39-31-401(5) MCA. The city has been ordered to:

- 1. Negotiate an agreement with the Montana Public Employees Association to replace the unexecuted 1985-86 agreement.
- 2. Appoint a bargaining committee with the authority and knowledge to bargain in good faith with the union. The City is to provide the bargaining team with written guidelines setting forth their authority and limits. Any amendments to these guidelines and limits must also be in writing.
- 3. Until an agreement is reached with MPEA, provide the Board of Personnel Appeals with written notification of the date, time and duration of all bargaining sessions.

DATED this _____ day of _____, 1986

CITY OF GREAT FALLS

By _____
City Manager

This notice shall remain posted for a period of 60 consecutive days from the date of posting and shall not be altered, defaced or covered.

1 Questions about this notice or compliance therewith may
2 be directed to the Board of Personnel Appeals, P.O. Box
3 1728, Helena, Montana 59624.

4 * * * * *

5 DATED this 28th day of July, 1986.

6 BOARD OF PERSONNEL APPEALS

7
8 By Linda Skaar
9 LINDA SKAAR
Hearing Examiner

10 NOTICE

11 Written exceptions to these Findings of Fact,
12 Conclusions of Law and Recommended Order may be filed within
13 twenty days. If no exceptions are filed with the Board of
14 Personnel Appeals within that time, the Recommended Order
15 shall become the Final Order of the Board. Exceptions shall
16 be addressed to the Board of Personnel Appeals, P.O. Box
17 1728, Helena, MT 59624.

18
19 CERTIFICATE OF MAILING

20 I, Linda Skaar, do certify that a true
21 and correct copy of this document was mailed to the
following on the 28th day of July, 1986.

22 David V. Gliko
23 City Attorney
24 City of Great Falls
P.O. Box 5021
Great Falls, MT 59403

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