

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

1 IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 10-86;

2 LOCAL NO. 254, LABORERS)
3 INTERNATIONAL UNION OF)
4 NORTH AMERICA,)

5 Complainant,)

6 - vs -)

FINAL ORDER

7 DEPARTMENT OF ADMINISTRATION,)
8 STATE OF MONTANA,)

9 Defendant.)

10 The Findings of Fact, Conclusions of Law and Recommended
11 Order was issued by Hearing Examiner Stan Gerke on September 19,
12 1988.

13 Exceptions of the Hearing Examiner's Findings of Fact,
14 Conclusions of Law and Recommended Order were filed by Kathleen
15 F. Holden on behalf of the Defendant, Department of
16 Administration, State of Montana, on October 11, 1988.

17 Oral argument was scheduled before the Board of Personnel
18 Appeals on Friday, December 9, 1988.

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

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

23 2. IT IS ORDERED that this Board therefore adopt the
24 Findings of Fact, Conclusions of Law and Recommended Order of
25 Hearing Examiner Stan Gerke as the Final Order of this Board.

26 DATED this 6th day of January, 1989.

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28 BOARD OF PERSONNEL APPEALS

29
30 By Alan L. Joscelyn
31 Alan L. Joscelyn
32 Chairman

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CERTIFICATE OF MAILING

I, Janifer Jacobson, hereby certify that a true and correct copy of this document was mailed to the following on the 6th day of January, 1989:

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STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
EMPLOYMENT RELATIONS DIVISION
APPEALS BUREAU

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE 10-86

LOCAL NO. 254, LABORERS)	
INTERNATIONAL UNION OF NORTH)	
AMERICA,)	
)	
Complainant,)	
)	FINDINGS OF FACT;
-vs-)	CONCLUSIONS OF LAW;
)	AND
DEPARTMENT OF ADMINISTRATION,)	RECOMMENDED ORDER
STATE OF MONTANA,)	
)	
Defendant.)	

* * * * *

On April 29, 1986, the Complainant filed an unfair labor practice charge with this Board alleging the Defendant had violated Section 39-31-401(5) MCA by refusing to bargain in good faith. More specifically, the Complainant alleged the Defendant violated the Act by its action of refusing to bargain on the subject of transferring bargaining unit members from the Statewide Classification and Pay Plan to the Blue Collar Classification and Pay Plan.

In ANSWER filed with this Board on May 15, 1986, the Defendant denied any violations of Section 39-31-401(5) MCA. The Defendant further requested the unfair labor practice charge be dismissed on the grounds it was not timely filed.

This Board conducted an investigation in the matter and issued an Investigation Report and Determination on July 22, 1986. The Report found probable merit for the charge and concluded that a formal hearing was appropriate to address the merits of the charge and the timeliness issue.

A formal hearing in this matter was conducted on February 24, 1988, in the Department of Labor and Industry Building, Helena, Montana. The formal hearing was held under authority of Section 39-31-406 MCA and in accordance

1 with the Administrative Procedure Act, Title 2, Chapter 4,
2 MCA. John B. Whiston, Attorney at Law, Missoula, Montana,
3 represented the Complainant. The Defendant was represented
4 by Kathleen Holden, Associate Counsel, State Personnel
5 Division, Helena, Montana.

6 ISSUES

7 1. Whether unfair labor practice 10-86 was filed
8 within the statutory 6 month time period of 39-31-404 MCA.

9 2. Whether the Defendant's refusal to bargain on the
10 transfer of unit members from the Statewide Classification
11 and Pay Plan to the Blue Collar Classification and Pay Plan
12 was a violation of Section 39-31-401(5) MCA.

13 Additionally, the Parties stipulated that during the
14 course of the formal hearing, the Parties could present
15 evidence and testimony to the following question: Whether
16 or not the Board of Personnel Appeals has authority to
17 transfer employees from the Statewide Classification and
18 Pay Plan to the Blue Collar Classification and Pay Plan as
19 part of a classification appeal pursuant to Section
20 2-18-1011 MCA. The Hearing Examiner may use any such
21 evidence and testimony presented in addressing issues raised
22 in the Group Classification Appeal Number 14-86. Robert
23 Muir, Timothy Popp, Eugene Lonz, and Danny Emerson
24 classified as Maintenance Worker III's; Stephen Wilson and
25 Leland Gober classified as Maintenance Worker IV's versus
26 the State Personnel Division, Department of Administration.
27 Additionally, if it is found the Board has authority to
28 transfer employees from the Statewide Classification and Pay
29 Plan to the Blue Collar Classification and Pay Plan, a
30 hearing will be held in the merits of the Group
31 Classification Appeal Number 14-86.

1 State, County and Municipal Employees and engaged in
2 occupations typically associated with blue collar crafts
3 were included under the Blue Collar Classification and Pay
4 Plan.

5 8. Since the 1976-1977 negotiations concerning the
6 Blue Collar Classification and Pay Plan and the adoption of
7 the Blue Collar Classification and Pay Plan into law by the
8 1979 Legislature (Sec. 4, Ch. 678, L. 1979) at least two
9 additional bargaining units performing typically blue collar
10 craft work have been included under the Blue Collar
11 Classification and Pay Plan.

12 9. The bargaining unit members represented by the
13 Complainant in this matter are employed in traditional blue
14 collar crafts. The bargaining unit was certified by this
15 Board on May 20, 1985.

16 DISCUSSION

17 WHETHER UNFAIR LABOR PRACTICE 10-86 WAS FILED WITHIN THE
18 STATUTORY SIX MONTH TIME PERIOD OF SECTION 39-31-404 MCA.

19 The Montana Supreme Court has approved the practice of
20 the Board of Personnel Appeals in using federal court and
21 NLRB precedents as guidelines in interpreting the Public
22 Employees Collective Bargaining Act. State Department of
23 Highways v. Public Employees Craft Council, 165 Mont. 349,
24 529 P.2d 785 (1974), 87 LRRM 2101; AFSCME Local 2390 v. City
25 of Billings, 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753
26 (1976); State ex rel. Board of Personnel Appeals v. District
27 Court, 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297 (1979);
28 Teamsters Local 45 v. State ex rel. Board of Personnel
29 Appeals, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981),
30 City of Great Falls v. Young (Young III), _____ Mont. _____,
31 686 P.2d 185, 119 LRRM 2682 (1984).

32 The record shows the Defendant first refused to
negotiate the transferring unit members between pay plans on

1 September 12, 1985. On that same date, the Parties entered
2 into a tentative agreement to temporarily remove the issue
3 of transferring unit members from the bargaining table. The
4 tentative agreement was contingent upon ratification of the
5 total labor contract which occurred on November 8, 1985.
6 The unfair labor practice charge was filed on April 29,
7 1986. Logically, the six month appeal period should have
8 began on November 8, 1985, the date when the Defendant's
9 position of refusing to negotiate on the transfer issue was
10 solidified. Ignoring this logic, we can examine the Court's
11 handling of timeliness matters. In J. Ray McDermott &
12 Company v. NLRB, ___ F.2d ___, 98 LRRM 2191 (5th Cir. 1978),
13 the Appeals Court held when faced with an identical question
14 in identical circumstances:

15 This circuit has twice held that each refusal to
16 bargain by an employer under a duty to bargain is
17 a violation of the employer's duty, and that the
18 passage of more than six months time from one such
19 refusal does to bar action by the NLRB on a timely
20 complain based on a subsequent refusal. NLRB v.
21 Louisiana Bunkers, Inc., 5 Cir. 1969, 409 F.2d
22 1295, 1299-1300, 70 LRRM 3363; NLRM v. White
23 Construction & Engineering Co., 5 Cir. 1953, 204
24 F.2d 950, 952-953, 32 LRRM 2198. Our reasoning is
25 not controlled by a conclusory labeling of the
26 employer's duty or of his violation as a
27 "continuing" one. Rather, we recognize that the
28 primary purpose of the six-month rule is to assure
29 prompt adjudications of disputes based on fresh
30 evidence. McDermott's refusal to bargain was
31 based on motives contemporaneous with its refusal
32 to bargain on April 21, 1976. The filing of a
complaint on April 29, 1988 brought those motives
into question, and was timely with regard to the
unfair labor charge alleged. Cf., Local Lodge
1424 v. NLRB, 1960, 352 U.S. 411, 416-422, 80
S.Ct. 822, 4 L.Ed.2d 832, 45 LRRm 3213; NLRB v.
McCready and Sons Inc., 6 Cir. 1973, 482 F.2d 872,
83 LRRM 2674.

I find the unfair labor practice charge was timely
filed.

WHETHER THE DEFENDANT'S REFUSAL TO BARGAIN ON THE TRANSFER
OF UNION MEMBERS FROM THE STATEWIDE CLASSIFICATION PAY PLAN
TO THE BLUE COLLAR CLASSIFICATION AND PAY PLAN WAS A
VIOLATION OF SECTION #39-31-401(5) MCA.

1 This identical question was addressed in Local Union
2 254, Laborers International Union v. Ellen Feaver, in her
3 capacity as Director, Department of Administration, State of
4 Montana, Cause No. ADV 85-043, District Court, First
5 Judicial District, State of Montana in and for the County of
6 Lewis and Clark (Feb., 1985). The question rose in a
7 petition for alternative writ of mandate and for declaratory
8 relief filed by the Petitioner, Local Union 254. The
9 Petitioner sought an alternative writ of mandate ordering
10 the Respondent, Department of Administration, to immediately
11 negotiate the transfer of bargaining unit members from the
12 Statewide Classification and Pay Plan to the Blue Collar
13 Classification and Pay Plan. Upon review, the Court found
14 that the construction of the State statutes in question
15 (Collective Bargaining Act for Public Employees; State
16 Employees Classification and Pay Act) involved a "profound
17 exercise of discretion" and no clear legal duty exists. The
18 court dismissed the Petitioner's request for alternative
19 writ of mandate and observed the decision on construction of
20 the statute should be left to the agency responsible for the
21 decision.

22 The Defendant, in this instant matter, argues the
23 transferring of bargaining unit members from the Statewide
24 Classification and Pay Plan to the Blue Collar
25 Classification and Pay Plan is a permissive subject of
26 bargaining. Relative to the Group Classification Appeal
27 associated with this matter, the Defendant further argues
28 this Board lacks jurisdiction to hear a classification
29 appeal requesting that it transfer employees from the
30 Statewide Classification and Pay Plan to the Blue Collar
31 Classification and Pay Plan. If allowed to do so, the
32 Defendant argues, this Board would be interfering with the

1 collective bargaining process by permitting the Parties to
2 achieve concessions through the appeals procedure which were
3 not achievable through collective bargaining. Conversely,
4 the Complainant argues the transfer of employees between pay
5 plans is a mandatory subject of bargaining and the
6 Defendant's refusal to bargain the subject is a violation of
7 Section 39-31-401(5) MCA. The Parties do agree that the
8 proper method of moving employees from the Statewide Classi-
9 fication and Pay Plan to the Blue Collar Classification and
10 Pay Plan is through the collective bargaining process.

11 Ignoring, for the moment, any possible conflict between
12 the Collective Bargaining Act for Public Employees and the
13 State Employees Classification and Pay Act, a fundamental
14 review and determination of the negotiable status of the
15 transfer of employees between classification and pay plans
16 is in order.

17 To determine which subjects are mandatory subjects of
18 the bargaining this Board has utilized the balancing test
19 adopted by the Kansas Supreme Court in 1973 (N.E.A. v.
20 Shawnee Mission Board of Education, 512 P.2d 426, 84 LRRM
21 2223) and followed by the Pennsylvania Supreme Court
22 (Pennsylvania Labor Relations Board v. State College Area
23 School District, 337 A2d 262, 90 LRRM 2081). The Kansas
24 Supreme Court said:

25 It does little good, we think, to speak in
26 terms of "policy" versus something which is not
27 policy. Salaries are a matter of policy, and so
28 are vacation and sick leaves. Yet we cannot
29 doubt the authority of the Board to negotiate and
30 bind itself on these questions. The key, as we
31 see it, is how direct the impact of an issue is
32 on the well being of the individual teacher, as
opposed to its effect on the operation of the
school system as a whole. (Emphasis added) The
line may be hard to draw, but in the absence of
more assistance from the legislature the courts
must do the best they can.
The similar phraseology of the N.L.R.A. has had a
similar history of judicial definition. See

1 Fibreboard Corporation v. Labor Board., 379 U.S.
2 203, 13 L.ED. 2d 233, 85 S. Ct. 398, 57 LRRM 2609
3 and especially the concurring opinion of Steward,
J. at pp. 221-222.

4 See also ULP #5-77, Florence-Carlton Unit of the
5 Montana Education Association v. McCone County School
6 District #1.

7 Wages, hours and working conditions represent the foun-
8 dation of all collective bargaining. The impact of
9 wages on an individual employee is ultimate. The placement
10 of an employee on a pay plan or matrix must be negotiable.
11 Considerations for the effect on the employer's operations
12 must be set aside.

13 Related State statutes must now be reviewed to
14 determine if the mandatory negotiability status of
15 transferring employees between pay plans should be tempered
16 or conditioned.

17 The Collective Bargaining Act for Public Employees
18 provides (Section 39-31-305 (2) MCA):

19 For the purpose of this chapter, to bargain
20 collectively is the performance of the mutual
21 obligation of the public employer or his desig-
22 nated representative to meet at reasonable times
23 and negotiate in good faith with respect to wages,
24 hours, fringe benefits, and other conditions of
employment or the negotiation of an agreement or
any question arising thereunder and the execution
of a written contract incorporating any agreement
reached. Such obligation does not compel either
party to agree to a proposal or require the making
of a concession.

25 The act also provides in Section 39-31-401(5)MCA that
26 it is an unfair labor practice for the employer to:

27 refuse to bargain collectively in good faith with
28 an exclusive representative.

29 These provisions of the Act have not been modified
30 since the enactment of the Act in 1973. Also in 1973, the
31 Legislature passed Senate Bill No. 411, Ch. 440, Laws of
32 Montana (1973) which directed the Department of Administra-

1 tion to develop a Statewide Classification and Pay Plan for
2 state employees. The 1975 Legislature adopted the Classi-
3 fication and Pay Plan developed by the Department of
4 Administration as Section 59-907 R.C.M. 1947, the predeces-
5 sor to Section 2-18-203 MCA. The 1975 measure specifically
6 required that the Department of Administration would bargain
7 on classification matters and wages:

8 Review of positions-change in classification.
9 The department shall continuously review all
10 positions on a regular basis and adjust classifica-
11 tions to reflect significant changes in duties
12 and responsibilities; provided, however, employees
13 and employee organizations will be given the
14 opportunity to appeal any changes in classifica-
15 tions or positions. Anything relevant to the
16 determination or reasonable classifications and
17 grade levels for state employees shall be a
18 negotiable item appropriate for the consideration
19 of the state and exclusive representatives under
20 the provisions of Title 59, chapter 16. R.C.M.
21 1947.

22 Since the enactment of both the Collective Bargaining
23 Act for Public Employees and the Classification and Pay Act,
24 some tension developed concerning the negotiating of wages
25 for organized employees under Section 39-31-305 MCA and the
26 setting of wages for nonorganized employees through classi-
27 fication methodology adopted by the 1975 Legislature. One
28 philosophy advocated salaries for all state employees should
29 be exempt from the collective bargaining process and be
30 determined by the classification methodology administered by
31 the Department of Administration. The opposing philosophy
32 strongly advocated that wages of organized employees should
be established through the collective bargaining process.

The concerns of the negotiability of wages and the
administration of the Statewide Classification and Pay Plan
were discussed. However, the 1977 Legislature, in their
modification of Section 1. Section 59-907, R.C.M., 1947 (now
Section 2-18-203 MCA) again specifically required that
classification matters and wages be negotiated:

1 "59-907. Review of positions-changes in classifi-
2 cation. (1) The department shall continuously
3 review all positions on a regular basis and adjust
4 classifications to reflect significant changes in
5 duties and responsibilities.

6 (2) Employees and employee organization will be
7 given the opportunity to appeal any changes in
8 classifications or positions.

9 (3) The period of time for which retroactive pay
10 for a classification or position appeal may be
11 awarded under this chapter or under 82A-1014 may
12 not extend beyond 30 days prior to the date the
13 appeal was filed. This provision shall not affect
14 a classification or position appeal already in
15 process on the effective date of this act.

16 (4) Anything relevant to the determination of
17 reasonable classifications and grade levels for
18 state employees shall be a negotiable item appro-
19 priate for the consideration of the state and
20 exclusive representative.

21 During the same period of time, negotiations had began
22 for the development of a Blue Collar Classification and Pay
23 Plan (see Findings of Fact Nos. 7 & 8). The Blue Collar
24 Classification and Pay Plan was recognized in law by the
25 1979 Legislature (Sec. 4, Ch. 698, L. 1979). This Act
26 established the separate pay matrixes and the implementation
27 language now found in Section 2-18-303 MCA.

28 The 1979 Legislature also modified language in the
29 Statewide Classification and Pay Plan Act by eliminating the
30 negotiability of classification matters and wages pertaining
31 to those employees included in the Statewide Classification
32 and Pay Plan. The same modifications retained the
negotiability of classification matters and wages for those
employees included in the Blue Collar Classification and Pay
Plan. Thus two separate and distinct classification and pay
plans were established.

2-18-203. Review of positions -- change in
classification. (1) The department shall
continuously review all positions on a regular
basis and adjust classifications to reflect
significant changes in duties and responsibili-
ties. In the event adjustments are to be made to
the classification specifications or criteria

1 utilized for allocating positions in the classification specifications affecting employees within a bargaining unit, the department shall consult with the representative of the bargaining unit prior to implementation of the adjustments, except for blue-collar, teachers, and liquor store clerks classification plans, which shall remain mandatory negotiable items under the Collective Bargaining Act.

6 (2) Employees and employee organizations will be given the opportunity to appeal the allocation or reallocation of a position to a class. The grade assigned to a class is not an appealable subject under 2-18-1011 through 2-18-1013.

9 (3) The period of time for which retroactive pay for a classification appeal may be awarded under parts 1 through 3 of this chapter or under 2-18-1011 through 2-18-1013 may not extend beyond 30 days prior to the date the appeal was filed. This provision shall not affect a classification or position appeal already in process on April 26, 1977.

13 (Note: Since the 1979 Legislature, separate classification and pay plans have been established for teachers, employed at State institutions, and liquor store clerks.)

15 It is clear that beginning in 1979 an employee who is within the Statewide Classification and Pay Plan will have his classification and corresponding grade level, or wage rate, determined by the adopted classification methodology. The employee can appeal his designated classification within the classification plan through the established appeal procedure administered by this Board. An employee within the Blue Collar Classification and Pay Plan has his classification and pay rate established by the collective bargaining process. Modifications to his classification and/or pay rate is also accomplished through collective bargaining.

27 In this instant matter, the Complainant is not attempting to change an assigned classification or wage rate nor is the Complainant attempting to modify the criteria utilized for allocating positions within the Statewide Classification and Pay Plan. The Complainant is attempting to transfer from the Statewide Classification and Pay Plan

1 to the Blue Collar Classification and Pay Plan. The Blue
2 Collar Classification and Pay Plan was established for
3 employees belonging to bargaining units and engaged in
4 traditional blue collar work. The Complainant, a group of
5 state employees employed in the State Capitol Complex area,
6 do belong to a bargaining unit and are engaged in tradition-
7 al blue collar crafts. The Complainant meets those qualifi-
8 cations for entry into the Blue Collar Classification and
9 Pay Plan established by state statute. State statute does
10 not prohibit or condition a transfer from the Statewide
11 Classification and Pay Plan to the Blue Collar
12 Classification and Pay Plan. The transfer may affect an
13 employee's classification and pay rate and, as found above,
14 would be a mandatory subject of bargaining.

15 CONCLUSIONS OF LAW

16 Unfair Labor Practice Charge No. 10-86 was filed in a
17 timely manner. The Defendant has violated Section
18 39-31-401(5) MCA by refusing to negotiate a mandatory
19 subject of bargaining.

20 RECOMMENDED ORDER

21 The Defendant shall immediately cease and desist from
22 refusing to negotiate the transfer of state employees from
23 the Statewide Classification and Pay Plan to the Blue Collar
24 Classification and Pay Plan.

25 SPECIAL NOTE

26 In accordance with Board's Rule ARM 24.25.107(2), the
27 above RECOMMENDED ORDER shall become the FINAL ORDER of this
28 Board unless written exceptions are filed within 20 days
29 after service of these FINDINGS OF FACT, CONCLUSIONS OF LAW,
30 AND RECOMMENDED ORDER upon the Parties.

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DATED this 19th day of September, 1988.

BOARD OF PERSONNEL APPEALS

By: Stan Gerke
Stan Gerke
Hearing Examiner

CERTIFICATE OF SERVICE

I, Sara Christensen, do hereby certify that a true and correct copy of this document was mailed to the following on the 30th day of September, 1988.

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