

6/9/16  
CS

ATTORNEY GENERAL'S OFFICE  
HELENA, MONTANA

MAY 26 1988

RECEIVED

FILED

1988 JUL 25 PM 3:56

CINDY EVENSON

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY

\* \* \* \* \*

IN THE MATTER OF UNFAIR LABOR )  
PRACTICE NO. 17-87 )  
MONTANA PUBLIC EMPLOYEES )  
ASSOCIATION, INC., )  
Petitioner, )  
-vs- )  
THE DEPARTMENT OF JUSTICE, )  
HIGHWAY PATROL DIVISION, and )  
BOARD OF PERSONNEL APPEALS, )  
Respondents. )

Cause No. CDV 88-757  
MEMORANDUM AND ORDER

\* \* \* \* \*

MEMORANDUM

Before the Court is the petition of the Montana Public Employees Association (MPEA) for judicial review of a decision rendered by the Board of Personnel Appeals (Board). The matter has been fully briefed and argued and is ready for decision.



1 faith.

2 On June 17, 1987, MPEA filed an unfair labor practice  
3 charge with the Board alleging violation of Section 39-31-  
4 401(5), MCA, which provides that, "It is an unfair labor  
5 practice for a public employer to: refuse to bargain  
6 collectively in good faith with an exclusive representative."  
7 On January 6, 1988, the hearing examiner issued his findings,  
8 conclusions, and recommended order in which he determined that  
9 the charge was timely filed and that the Department had  
10 committed an unfair labor practice by unilaterally altering a  
11 working condition. The Department filed exceptions to the  
12 hearing examiner's decision asserting error in the conclusion  
13 that the charge had been timely and asserting further that MPEA  
14 had clearly waived its right to bargain during the contract  
15 period. On August 23, 1988, the Board issued its final order  
16 which upheld the hearing examiner's determination regarding the  
17 timeliness issue, but which reversed on the issue of waiver.  
18 The Board found that Article 23 of the contract constituted a  
19 clear and unambiguous waiver of MPEA's right to bargain during  
20 the term of the agreement. On September 14, 1988, MPEA filed  
21 this petition seeking reversal or modification of the Board's  
22 order.

23 /  
24 /  
25 /



1 charge by reason of service in the armed forces, in  
2 which event the 6-month period shall be computed from  
the day of his discharge.

3 Here, the memorandum informing the patrol officers of the  
4 impending time off without pay was sent the week of November 24,  
5 1986. Implementation of this directive did not occur until the  
6 first week of January 1987. The unfair labor practice charge  
7 was filed on June 17, 1987.

8 The Division argues that the November 24 memorandum  
9 provided actual or constructive notice of the alleged unfair  
10 labor practice and that MPEA failed to file its charge within  
11 the required six month period.

12 Montana's Collective Bargaining Act, Section 39-31-101, et  
13 seq., MCA, is very similar to the National Labor Relations Act,  
14 29 U.S.C. Section 141, et seq. (NLRA). Where these laws are  
15 similar, the Montana Supreme Court has approved and encouraged  
16 the Board's use of "federal administrative and judicial  
17 construction" in the interpretation of the public employee  
18 collective bargaining law. City of Great Falls v. Young, 41 St.  
19 Rep. 1174, 686 P.2d 185 (1984).

20 The question here is whether the statutory time began to  
21 run when MPEA first learned of the November 24 memorandum or  
22 when patrol officers were actually required to take leave  
23 without pay in January 1987. In addressing the six month  
24 limitation found in the NLRA, the Ninth Circuit Court of Appeals

25 /

1 has held: "[N]otice of the intention to commit an unfair labor  
2 practice does not trigger section 10(b)." National Labor  
3 Relations Board v. International Brotherhood of Electrical  
4 Workers, Local Union 112, AFL-CIO, 827 F.2d 530, 534 (9th Cir.  
5 1987). There the court agreed with the board that the  
6 limitations period began to run not when workers received  
7 reduction in force cards, but rather, when those layoffs  
8 actually began to take effect. Here, as there, it was not  
9 inevitable that the Division would execute its intentions  
10 outlined in the memorandum. Thus the limitations period did  
11 not begin to run until the first patrol officers took time off  
12 without pay in January 1987.

13 III. Does Article 23 of the parties' Collective Bargaining  
14 Agreement clearly waive MPEA's right to bargain during the term  
15 of the agreement? Section 2-4-702, MCA, provides for judicial  
16 review of "a final decision in a contested case." Here, it is  
17 the decision of the Board which the Court must review. That  
18 decision turned on the issue of waiver rather than on whether  
19 the action of the Division actually constituted an unfair labor  
20 practice. This, therefore, is the issue which the Court must  
21 review.

22 Section 39-31-305(2), MCA, imposes upon public employers  
23 and the exclusive representative of public employees the duty to  
24 bargain over certain items, including "wages, hours, fringe  
25 /

1 benefits, and other conditions of employment...." The Board  
2 found that Article 23 of the Collective Bargaining Agreement  
3 constituted a waiver of MPEA's statutory right to bargain during  
4 the term of the agreement.

5 Article 23 of the agreement provides:

6 The parties acknowledge that during negotiations  
7 which resulted in this Agreement, each had the  
8 unlimited right and opportunity to make demands and  
9 proposals with respect to any subject or matter not  
10 removed by law from the area of collective bargaining,  
11 and that the understandings and agreements arrived at  
12 by the parties after the exercise of that right and  
13 opportunity are set forth in this Agreement.  
14 Therefore, the Employer and the Association for the  
15 duration of this Agreement, each voluntarily and  
16 unqualifiedly waives the right, and each agrees that  
17 the other shall not be obligated to bargain  
18 collectively with respect to any subject or matter  
19 specifically referred to or covered in this Agreement,  
20 or not specifically referred to or covered in this  
21 Agreement even though such subjects or matters may, or  
22 may not, have been within the knowledge or  
23 contemplation of either or both of the parties at the  
24 time they negotiated or signed this Agreement. This  
25 Article shall not be construed to in any way restrict  
the parties from commencing negotiations under the  
applicable law on any succeeding agreement to take  
effect upon termination of this Agreement.

18 Federal circuit courts have recognized and followed the  
19 principle that a union may relinquish the statutory right to  
20 bargain if, as a part of the bargaining process, it elects to  
21 do so. Such a relinquishment, however, must be in "clear and  
22 unmistakable" language. Timken Roller Bearing Co. v. National  
23 Labor Relations Board, 325 F.2d 746 at 751 (6th Cir. 1963). In  
24 its order the Board stated:

25 The Board is well aware of NLRB, federal

1 appellate and state court decisions requiring precise  
2 language specifically waiving a particular right to  
3 bargain before finding a waiver of that particular  
4 bargaining right. Those jurisdictions do not  
interpret general waivers such as zipper clauses as  
waiving specific bargaining rights. We disagree with  
this interpretation.

5 Zipper clause waivers like the one at issue here  
6 are just as specific. The parties have clearly waived  
7 their right to bargain regarding any subject matter,  
8 whether specifically referred to in the contract or  
9 never considered by either party. A waiver containing  
10 language whereby the parties clearly and unambiguously  
agree to waive any and all bargaining rights should be  
given effect. State v. Maine State Employees  
Association, 499 A.2d 1228 (1985) and NLRB v. Southern  
Materials Co., 477 (sic) F.2d 15 (4th Cir. 1971).

11 In National Labor Relations Board v. Southern Materials  
12 Company, 447 F.2d 15 at 18 (4th Cir. 1971), the court considered  
13 a waiver clause that relieved the parties of the obligation to  
14 bargain collectively during the term of the contract not only  
15 with respect to matters found in the contract but also with  
16 respect to "subject matter not specifically referred to as  
17 covered in" the contract. The specific bargaining item at issue  
18 there was maintenance of a Christmas bonus. The court held that  
19 the breadth of this clause constituted "clear and unmistakable"  
20 language that a waiver was intended. Other courts have found  
21 "zipper clause" language substantially similar to that  
22 considered in Southern Materials, supra, to be a waiver of the  
23 rights and obligations of the parties to bargain collectively  
24 during the term of the contract. See National Labor Relations  
25 Board v. Auto Crane Co., 536 F.2d 310, (10th Cir. 1976) (wage

1 increase and thrift plan), Aeronca, Inc. v. National Labor  
2 Relations Board, 650 F.2d 501, (4th Cir. 1981) (Christmas  
3 bonus), State v. Maine State Employees Association, 499 A.2d  
4 1228, (Me. 1985) (state reorganization plan affecting wages,  
5 hours, and working conditions), and East Richland Education  
6 Association, IEA-NEA, v. Illinois Educational Labor Relations  
7 Board, 528 N.E.2d 751, (Ill. App. 4 Dist. 1988) (change in  
8 school calendar).

9       The Sixth Circuit Court of Appeals, however, has held that  
10 "zipper clauses" do not constitute a waiver of a union's  
11 statutory right to bargain over specific issues. Federal  
12 Compress & Warehouse Company v. National Labor Relations Board,  
13 398 F.2d 631, (6th Cir. 1968) (inclusion and classification of  
14 certain employees within bargaining unit), National Labor  
15 Relations Board v. Pepsi-Cola Distributing Company of Knoxville,  
16 Tennessee, Inc., 646 F.2d 1173, (6th Cir. 1981) (Christmas  
17 bonus). In National Labor Relations Board v. Challenge-Cook  
18 Brothers of Ohio, Inc., 843 F.2d 230, 233, (6th Cir. 1988)  
19 (effects of transfer of work from one plant to another), in  
20 analyzing language substantially similar to that in the case at  
21 bar the court stated: "When relying on a claim of waiver of a  
22 statutory duty to bargain, an employer has the burden of proving  
23 a clear relinquishment; silence in the collective bargaining  
24 agreement does not constitute a waiver. Nor do we construe the  
25 /

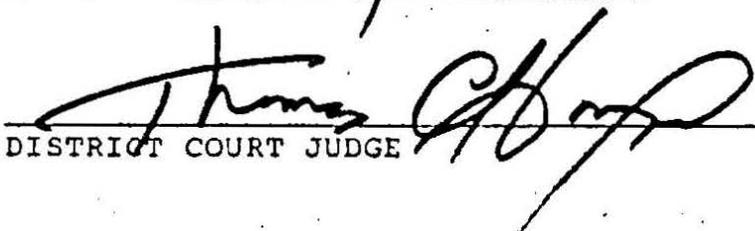
1 zipper clause as a clear relinquishment." Thus far, though, the  
2 Sixth Circuit Court of Appeals appears to stand alone in finding  
3 that a broadly worded "zipper clause" does not constitute a  
4 waiver of statutory bargaining rights.

5 The court cases cited by MPEA are distinguishable in that  
6 while they stand for the principle that waiver of a collective  
7 bargaining right must be in "clear and unmistakable" contract  
8 language, none of them specifically construe the impact of a  
9 broadly worded "zipper clause."

10 For this Court to reverse the Board I would have to find  
11 an abuse of discretion. Given the authority cited above, I am  
12 unable to find that the Board abused its discretion.

13 Pursuant to Section 2-4-704, MCA, and a review of the  
14 record here, the decision of the Board is AFFIRMED.

15 DATED this 25<sup>th</sup> day of May, 1989.

16  
17   
18 DISTRICT COURT JUDGE

19  
20  
21 pc: David W. Stiteler  
22 Melanie A. Symons  
23 ✓ Clay R. Smith  
24  
25

RECEIVED

JUL 28 1988

STATE PERSONNEL  
DIVISION  
STATE OF MONTANA  
BOARD OF PERSONNEL APPEALS

ATTORNEY GENERAL'S OFFICE  
HELENA, MONTANA  
AUG 25 1988  
RECEIVED

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 17-87:

MONTANA PUBLIC EMPLOYEES	)	
ASSOCIATION, INC.,	)	
	)	
Complainant,	)	FINAL ORDER
	)	
vs.	)	
	)	
THE DEPARTMENT OF JUSTICE,	)	
HIGHWAY PATROL DIVISION,	)	
	)	
Defendant.	)	

\* \* \* \* \*

PROCEDURE

Montana Public Employees Association, Inc., filed an unfair labor practice charge with the Board of Personnel Appeals on June 17, 1987. The complainant alleged that the Department of Justice, Highway Patrol Division, violated section 39-31-401(5), MCA, by unilaterally altering a substantial condition of employment (hours of work). The Department's response of June 26, 1987, denied the allegations and requested that the charge be dismissed as untimely.

A hearing was held before hearing examiner Arlyn L. Plowman, following which post-hearing briefs were filed. The hearing examiner, in Findings, Conclusions and Recommended Order dated January 6, 1988, determined the charge was timely filed and that the Department of Justice engaged in an unfair labor practice.

1 The Department of Justice filed Exceptions to the Order  
2 on January 25, 1988. The exceptions pertinent to this  
3 determination are 1) whether the unfair labor practice charge was  
4 filed in a timely manner; and 2) whether the complainant clearly  
5 and unequivocally waived its right to bargain during the term of  
6 the collective bargaining agreement. Briefs were filed and oral  
7 argument heard before the Board of Personnel Appeals on Friday,  
8 February 12, 1988.

9 ORDER

10 Upon reviewing the record and considering the briefs and  
11 oral arguments, the Board orders as follows:

12 1. The Board affirms all factual findings of the hearing  
13 examiner except Finding #11. Finding #11 is deleted in its  
14 entirety and replaced with the following:

15 "11. The collective bargaining agreement contains the  
16 following waiver, commonly known as a "zipper clause":

17 The parties acknowledge that during  
18 negotiations which resulted in this  
19 Agreement, each had the unlimited right and  
20 opportunity to make demands and proposals  
21 with respect to any subject or matter not  
22 removed by law from the area of collective  
23 bargaining, and that the understandings and  
24 agreements arrived at by the parties after  
25 the exercise of that right and opportunity  
are set forth in this Agreement. There-  
fore, the Employer and the Association for  
the duration of this Agreement, each  
voluntarily and unqualifiedly waives the  
right, and each agrees that the other shall  
not be obligated to bargain collectively  
with respect to any subject or matter  
specifically referred to or covered in this  
Agreement, or not specifically referred to or

1 covered in this Agreement, even though such  
2 subjects or matters may, or may not, have  
3 been within the knowledge or contemplation  
4 of either or both of the parties at the time  
5 they negotiated or signed this Agreement.  
6 This Article shall not be construed to in  
7 any way restrict the parties from commencing  
8 negotiations under the applicable law on any  
9 succeeding agreement to take effect upon  
10 termination of this Agreement.

11 Article 23 of the Collective Bargaining Agreement."

12 2. The Board affirms Conclusions of Law 1, 2, 3 and 4.

13 3. The Board unanimously affirms the result of Conclusion  
14 #5, the unfair labor practice charge was timely filed. However,  
15 the rationale behind the Board's conclusion differs significantly  
16 from that of the hearing examiner. The discussion of the hearing  
17 examiner is replaced with the following discussion:

18 "Pursuant to Section 39-31-404, MCA, a complainant generally  
19 has six months from the time of the unfair labor practice in  
20 which to file its charge. There are several different tests  
21 which can be used to determine when the six month statute of  
22 limitations should commence. The test of preference, at least  
23 with respect to these facts, is the test under which the statute  
24 commences to run upon the receipt of actual notice of the unfair  
25 labor practice.

"The concept of actual notice is subject to various  
interpretations. The critical point is when the action which  
comprises the unfair labor practice becomes "unconditional and  
unequivocal." Although there are cases to the contrary, NLRB v.  
IBEW Local 112, 126 LRRM 2292 (CA 9 1987), and American Distri-

1 buting Co. v. NLRB, 715 F.2d 446 (9th Cir. 1983), best exemplify  
2 the position of this Board.

3 "NLRB v. IBEW Local 112, supra, questions whether the  
4 statute of limitations is triggered when reduction of force cards  
5 are mailed or when actual layoffs occur. The Board adopted the  
6 date of actual layoff because the ROF cards did not provide  
7 unequivocal notice to workers that their rights were being  
8 violated. It was not inevitable at the time of the ROF cards  
9 were issued that layoffs would occur.

10 "American Distributing Co. v. NLRB, supra, is consistent  
11 with IBEW Local 112. It concerns an employer's discontinuation  
12 of contributions to the pension trust fund. The employer  
13 initially warned during collective bargaining agreement  
14 negotiations that when the bargaining agreement expired,  
15 contributions would no longer be made. Near the expiration of  
16 the bargaining agreement, in February or March, the employer  
17 reiterated its stance. Union representatives did not learn until  
18 November that employer contributions ceased May 1st. The  
19 Administrative Law Judge and the Ninth Circuit found actual  
20 notice triggering the six month statute could not occur until  
21 after the employer ceased contributing. Therefore, the charge  
22 filed in December was timely.

23 "Analogously, actual notice did not occur here until after  
24 the first implementation of the leave without pay policy. Prior  
25 to that time, the employer's position was revocable. Thus,

1 actual notice occurred when the Highway Patrol Division required  
2 the first employee to take a day's leave without pay. The first  
3 day of leave without pay was during the first week of January,  
4 1987. The charge was filed five and one-half months later, June  
5 17, 1987. The charge was timely filed."

6 4. The Board's determination in #5 below that the  
7 complainant clearly and unequivocally waived its right to bargain  
8 over any subject matter renders Conclusions of Law #6 and #7  
9 irrelevant.

10 5. The Board reverses Conclusion of Law #8, regarding  
11 whether the complainant waived its right to bargain over the  
12 Department of Justice's policy that certain highway patrol  
13 officers be required to take three days leave without pay.

14 The hearing examiner's Conclusion of Law #8 is struck and  
15 replaced with the following Conclusion of Law #6:

16 "Article 23 of the Collective Bargaining Agreement consists  
17 of a waiver of bargaining rights. It is a waiver of the type  
18 commonly referred to as a 'zipper clause'. The waiver contains  
19 language by which the parties clearly and unambiguously waive  
20 their rights to bargain over anything, including compulsory  
21 bargaining subjects such as layoffs, hours of work and work  
22 schedules.

23 Therefore, the Employer and the Association  
24 for the duration of this Agreement, each  
25 voluntarily and unqualifiedly waives the  
right, and each agrees that the other shall  
not be obligated to bargain collectively with  
respect to any subject or matter  
specifically referred to or covered in this

1 Agreement, or not specifically referred to or  
2 covered in this Agreement, even though such  
3 subjects or matters may, or may not, have  
4 been within the knowledge or contemplation of  
5 either or both of the parties at the time  
6 they negotiated or signed this Agreement.

7 "The Board is well aware of NLRB, federal appellate and  
8 state court decisions requiring precise language specifically  
9 waiving a particular right to bargain before finding a waiver of  
10 that particular bargaining right. Those jurisdictions do not  
11 interpret general waivers such as zipper clauses as waiving  
12 specific bargaining rights. We disagree with this  
13 interpretation.

14 "Zipper clause waivers like the one at issue here are just  
15 as specific. The parties have clearly waived their right to  
16 bargain regarding any subject matter, whether specifically  
17 referred to in the contract or never considered by either party.  
18 A waiver containing language whereby the parties clearly and  
19 unambiguously agree to waive any and all bargaining rights should  
20 be given effect. State v. Maine State Employces Association, 499  
21 A.2d 1228 (1985) and NLRB v. Southern Materials Co., 477 F.2d 15  
22 (4th Cir. 1971)."

23 6. Conclusion of Law #9 remains unchanged and becomes  
24 Conclusion of Law #7.

25 7. Conclusions of Law #10 and #11 are struck as irrelevant  
and unnecessary.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

8. New Conclusion of Law #8 shall state: "The complainant has failed to prove its case by a preponderance of the evidence."

9. New Conclusion of Law #9 shall state: "Since the complainant, in its zipper clause, clearly and unmistakably waived its right to bargain over any matter, including layoffs and reductions in hours, the Department of Justice was not required to engage in bargaining over its decision to impose three days leave without pay on various highway patrolmen. Therefore, no unfair labor practice occurred."

10. The Recommended Order of the hearing examiner is struck in its entirety and replaced with the following:

"The Unfair Labor Practice Charge No. 17-87, although timely filed, is dismissed as no unfair labor charge occurred."

DATED this 23rd day of August, 1988.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn  
Alan L. Joscelyn  
Chairman

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do certify that a true and correct copy of this document was mailed to the following on the 24<sup>th</sup> day of

August, 1988:

David Stiteler  
Staff Attorney  
Montana Public Employees Association  
P.O. Box 5600  
Helena, MT 59604-5600

Clay Smith  
Assistant Attorney General  
Justice Building  
215 North Sanders  
Helena, MT 59620-1401

RECEIVED

DEC 28 1987

STATE PERSONNEL  
DIVISION

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

619  
CS  
ATTORNEY GENERAL'S OFFICE  
HELENA, MONTANA

JAN 7 1988

RECEIVED

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 17-87

MONTANA PUBLIC EMPLOYEES )  
ASSOCIATION, INC., )

Complainant, )

vs. )

THE DEPARTMENT OF JUSTICE, )  
HIGHWAY PATROL DIVISION, )

Defendant. )

FINDINGS; CONCLUSIONS;  
AND RECOMMENDED ORDER

\* \* \* \* \*

INTRODUCTION

A hearing on the above-captioned matter was held on November 2, 1987 in the first floor conference room of the Department of Labor and Industry Building in Helena, Montana. Arlyn L. Plowman was the duly appointed hearing examiner for the Board of Personnel Appeals. The Complainant was represented by attorney David Stiteler. The Defendant was represented by Assistant Attorney General Clay Smith. The parties presented testimony and evidence, cross-examined witnesses and offered argument. Subsequent to the hearing the parties filed post-hearing briefs and the matter was deemed submitted on November 23, 1987.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



1           2.    At all relevant times there existed, between the  
2 Complainant and Defendant, a collective bargaining agreement  
3 covering the terms and conditions of employment for certain  
4 highway patrol officers.

5           3.    That collective bargaining agreement contained  
6 provisions dealing with seniority, layoffs, and a grievance/  
7 arbitration procedure culminating in binding arbitration.  
8 tion.

9           4.    Throughout the fiscal years 1985-86 and 1986-87  
10 the Department of Justice was subjected to a series of  
11 budget reductions. The Highway Patrol Division of the  
12 Department of Justice met those budget reductions, in large  
13 part, by reducing nonsalary personnel costs and deferring  
14 replacement of patrol cars.

15           5.    On November 12, 1986 the Governor's office directed  
16 further budget reductions.

17           6.    Due to concerns about the potential effects of  
18 this additional (November 12) budget reduction, the Com-  
19 plainant's executive director, Thomas Schneider, met with  
20 the Defendant's administrator, Colonel Robert Landon.  
21 During that meeting Schneider and Landon discussed the  
22 additional budget reduction and its effect on the highway  
23 patrol officers represented by the Complainant, and whether  
24 those officers would be spared the required leaves without  
25

1 pay as had previously been mandated for other Department of  
2 Justice employees. Landon told Schneider that his recommen-  
3 dation would be that the highway patrol officers represented  
4 by the Complainant again be spared from mandatory leaves  
5 without pay.

6 7. Subsequent to that meeting the Defendant issued a  
7 memorandum on November 24, 1986 requiring, that due to  
8 budget reductions, all highway patrol employees take three  
9 days leave without pay, one day per month during January,  
10 February, and March, 1987.

11 8. For management reasons the Defendant chose to  
12 implement the mandatory three days leave without pay in lieu  
13 of a reduction in force invoking the seniority and layoff  
14 provisions of the collective bargaining agreement.

15 9. The Complainant was not advised of the Defendant's  
16 decision to implement the mandatory three days leave without  
17 pay prior to the issuance of the November 24, 1986 memoran-  
18 dum. The Complainant did not receive a copy of the November  
19 24, 1986 memorandum until the following week.

20 10. Schneider and Landon, representatives of the  
21 Complainant and Defendant, had discussed the possibility of  
22 highway patrol officers being required to take leave without  
23 pay. However, prior to the November 24, 1986 memorandum, no  
24 bargaining over that possibility occurred, nor was the  
25

1 Complainant afforded an opportunity to bargain over the  
2 mandatory three days leave without pay required by the  
3 November 24, 1986 memorandum.

4 11. The collective bargaining agreement contains no  
5 clear and unequivocal language wherein the Complainant  
6 waived its right to bargain over mandatory leaves without  
7 pay. Although, the parties spent considerable time and  
8 effort, after the fact, during their 1987 negotiations on  
9 this issue; the record does not show that in the parties'  
10 prior bargaining the Complainant conscientiously yielded or  
11 clearly and unmistakably waived its interest regarding  
12 mandatory leaves without pay.

13 12. The Complainant filed a timely grievance alleging  
14 that the Defendant's requirement that highway patrol offi-  
15 cers take three days leave without pay violated the collec-  
16 tive bargaining agreement. That grievance was processed  
17 through the grievance/arbitration procedure to arbitration.

18 13. The arbitrator's award was issued June 12, 1987.<sup>1</sup>  
19 In that award the arbitrator dismissed the Complainant's  
20 grievance.

---

21  
22  
23 <sup>1</sup>That arbitrator's award along with associated exhibits  
24 and post-hearing briefs were submitted and made a part of  
25 the record in this matter.



1           4. Pursuant to Section 39-31-406 MCA the Complain-  
2 ant's case must be established by a preponderance of the  
3 evidence before an unfair labor practice may be found, Board  
4 of Trustees v. State of Montana, 103 LRRM 3090, 604 P.2d 770  
5 (1979); See also Indiana Products v. NLRB, 31 LRRM 2490, 202  
6 F.2d 613, CA 7 (1953) and NLRB v. Kaiser Aluminum and Chemi-  
7 cal Corporation, 34 LRRM 2412, 217 F.2d 366, CA 9 (1954).

8           5. Pursuant to Section 39-31-404, MCA no Notice of  
9 Hearing shall be issued upon any unfair labor practice more  
10 than six months before the filing of the charge with the  
11 Board of Personnel Appeals.

12           The Defendant cites, in its post-hearing brief, a NLRB  
13 decision, U. S. Postal Service 271 NLRB 61 (1984), 116 LRRM  
14 1417 and argues that the Complainant's complaint ought to be  
15 dismissed as untimely. In U. S. Postal Service, Supra, the  
16 NLRB focused upon the date of the unlawful act, rather than  
17 on the date it's consequences became effective. That Board  
18 later reviewed that decision in IATSE Local 659, 276 NLRB 91  
19 (1985), 120 LRRM 1135 and U. S. Postal Service, 285 NLRB 98  
20 (1987), 126 LRRM 1138. In these decisions the NLRB deter-  
21 mined that (six month) limitation period commences when the  
22 final adverse employment decision is made and communicated.

23           In any event, the (six month) limitation period does  
24 not begin to run until the party filing the charge receives  
25

1 actual notice that an unfair labor practice has occurred.  
2 Notice of the intention to commit an unfair labor practice  
3 does not trigger the (six month) limitation period, NLRB v.  
4 IBEW Local No. 112 (Fischbach/Lord Electric Company), 126  
5 LRRM 2292, CA 9 (1987); American Distributing Company v.  
6 NLRB, 115 LRRM 2046, 715 F2d 446, CA 9 (1983).

7 The parties in this matter had within their collective  
8 bargaining agreement a grievance/arbitration procedure.  
9 Under certain circumstances, were such grievance/arbitration  
10 procedures exist, it has been the practice of the NLRB and  
11 Board of Personnel Appeals to defer to the griev-  
12 ance/arbitration procedure, Collyer Insulated Wire, 192 NLRB  
13 150 (1971), 77 LRRM 1931 and Forsman, IAFF Local 436 v.  
14 Anaconda-Deer Lodge County, ULP 44-81 (1982).

15 Such a deferral to the grievance/arbitration procedure  
16 takes time. The (six month) limitation period should be  
17 tolled from the initiation of the dispute resolution process  
18 in the grievance/arbitration procedure until that process  
19 has reached a finality. See Gause v. North Carolina Ship-  
20 ping Association, Inc., 126 LRRM 2913, DC NC (1987).

21 Pursuant to the foregoing, the (six month) limitation  
22 period in this instance would not have commenced until the  
23 final adverse decision was made and implemented. That  
24  
25

1 adverse employment decision was not final until the arbitra-  
2 tor's award was received.

3 The NLRB decisions in U. S. Postal Service, supra,  
4 relate to unfair labor practice charges alleging discrimina-  
5 tion and that Board is there making a determination as to  
6 the timeliness of charges relating to a single adverse  
7 employment action. At issue here is a charge alleging a  
8 failure to bargain with continuing violations, NLRB v.  
9 White Construction Company, 32 LRRM 2198, 204 F2d 950, CA 5  
10 (1953). The (six month) limitation period does not bar  
11 unfair labor practice charges alleging continuing viola-  
12 tions, Sevako v. Anchor Motor Freight, Inc., 122 LRRM 3316,  
13 792 F2d 570 CA 6 (1986); American Mirror Company, 269 NLRB  
14 188 (1984), 116 LRRM 1048; Enterprise Products Company, 265  
15 NLRB 83 (1982), 112 LRRM 1412.

16 The complaint was filed well within six months of the  
17 receipt of the arbitrator's award and within six months of  
18 the last day (during March 1987) the affected highway patrol  
19 officers were required to take leave without pay. The  
20 complaint was filed timely.

21 6. An employer violates its duty to bargain collec-  
22 tively in good faith when it institutes a material change in  
23 the terms and conditions of employment that are compulsory  
24 subjects of bargaining without giving the exclusive  
25

1 bargaining representative both reasonable notice and an  
2 opportunity to negotiate about the proposed change. See  
3 Felbro, Inc., (Garment Workers Local 512) v. NLRB, 122 LRRM  
4 3113, 795 F2d 705, CA 9 (1986); NLRB v. Carbonex Coal  
5 Company, 110 LRRM 2567, 697 F2d 200 CA 10 (1982).

6 Layoffs are a compulsory subject of bargaining, see  
7 NLRB v. Advertisers Manufacturing Company, 125 LRRM 3024, CA  
8 7 (1987); NLRB v. Sandpiper Convalescent Center, 126 LRRM  
9 2204, CA 4 (1987); NLRB v. United Nuclear Corporation, 66  
10 LRRM 2101, 381 F2d 972, CA 10 (1967).

11 Hours of work and work schedules are compulsory sub-  
12 jects for bargaining, see Florida Steel v. NLRB, 101 LRRM  
13 2671, 235 NLRB 129, CA 4 (1979); Meatcutters v. Jewel Tea,  
14 59 LRRM 2376, 381 U. S. 676 (1965); Dow Chemical Company,  
15 102 LRRM 1199, 244 NLRB 129 (1979).

16 The Defendant violated it's Section 39-31-401 MCA duty  
17 to bargain collectively in good faith with the Complainant  
18 when it unilaterally changed the terms and conditions of  
19 employment for certain highway patrol officers by requiring  
20 that those officers take three days of leave without pay.  
21 Further, the Defendant did not afford the Complainant a  
22 meaningful opportunity to bargain regarding the requirement  
23  
24  
25

1 that the affected officers take three days leave without  
2 pay.<sup>3</sup>

3 7. The Montana Collective Bargaining for Public  
4 Employees Act at Section 39-31-303(3) reserves to public  
5 employers the right to relieve employees from duties because  
6 lack of work or funds.

7 While the Montana Collective Bargaining for Public  
8 Employees Act reserves to employers the right to relieve  
9 employees from duties because of a lack of work or funds,  
10 that same Act requires that public employers bargain collec-  
11 tively in good faith with the affected employees' bargaining  
12 representative regarding the effects of the public employ-  
13 er's decision to relieve employees from their duties.

14 8. Waiver of a collective bargaining right may only  
15 be established by "clear and unmistakable" evidence that the  
16 party intentionally yielded it's right. Equivocal, ambigu-  
17 ous language in a bargaining agreement is insufficient to  
18 demonstrate waiver, NLRB v. General Tire and Rubber, 122  
19

---

20  
21 <sup>3</sup>Whether the Defendant's actions constituted a layoff  
22 (reduction in force) or a change in work schedule (reduction  
23 in hours) is a distinction of little consequence here. It  
24 may very well be a distinction without a difference since in  
25 either case the end result is the same: both result in a  
change involving a compulsorily subject of bargaining with  
the affected officers losing work time and earnings.

1 LRRM 3152, 795 F2d 585, CA 6 (1986). Such a waiver will not  
2 lightly be inferred in the absence of clear and unequivocal  
3 language. Where an employer relies on a purported waiver to  
4 establish its freedom unilaterally to change terms and  
5 conditions of employment not contained in the collective  
6 bargaining agreement, the matter at issue must have been  
7 fully discussed and conscientiously explored during negotia-  
8 tions and the union must have conscientiously yielded or  
9 clearly and unmistakably waived it's interest in the matter,  
10 Rockwell International Corporation, 109 LRRM 1366, 260 NLRB  
11 153 (1982).

12 The Complainant cannot be held to have waived bargain-  
13 ing over a change that was presented as though it was a fact  
14 or deed already accomplished, NLRB v. National Car Rental  
15 System, 109 LRRM 2832, 672 F2d 1182, CA 3 (1982); Gulf  
16 States Manufacturing, Inc., v. NLRB, 113 LRRM 2789, 704 F2d  
17 1390, CA 5 (1983).

18 The Complainant had not waived its right to bargain  
19 regarding the Defendant's policy that certain highway patrol  
20 officers be required to take three days leave without pay.

21 9. The arbitrator's award is dispositive of the  
22 contractual dispute and that award stands insofar as it does  
23 not conflict with the law, see United Paperworkers Interna-  
24 tional Union v. Misco, Inc., 126 LRRM 3113, U. S. Supreme  
25

1 Court, 12-1-87, 86-651; A T & T Technologies v. C W A, 121  
2 LRRM 3329, 475 U.S. 643 (1986); and Postal Workers v. Postal  
3 Service, 122 LRRM 2094, 789 F2d 1, CA DC (1986).

4 The arbitrator's award is not dispositive of the  
5 allegation that the Defendant committed an unfair labor  
6 practice, see Nevins v. NLRB, 122 LRRM 3147, 796 F2d 14, CA  
7 2 (1986); Taylor v. NLRB, 122 LRRM 2084, 786 F2d 1516, CA 11  
8 (1986); Grand Rapids Die Casting v. NLRB, 126 LRRM 2747, CA  
9 6 (1987).

10 Arbitration following an employer's effectuation of a  
11 change in a term or condition of employment does not serve  
12 as a substitute for bargaining over whether such a change  
13 should be implemented in the first place, NLRB v. Merrill  
14 and Ring, Inc., 116 LRRM 2221, 731 F2d 605, CA 9 (1984).

15 10. Pursuant to Section 39-31-406 MCA if, upon the  
16 preponderance of the testimony taken, the Board is of the  
17 opinion that the Defendant named in the complaint has  
18 engaged in an unfair labor practice it shall state its  
19 findings and issue an order requiring the Defendant to cease  
20 and desist from the unfair labor practice and to take such  
21 affirmative action as will effectuate the policies of the  
22 Montana Collective Bargaining for Public Employees Act.

23 11. A remedy or affirmative action cannot be fashioned  
24 on the basis of an assumption as to what the Complainant and  
25

1 Defendant would have agreed to absent the Defendant's  
2 failure to bargain in good faith, Gulf States Manufacturing,  
3 Inc., v. NLRB, 114 LRRM 2727, 715 F2d 1020, CA 5 (1983).

4 In developing remedies for specific situations there  
5 must be an attempt to create a restoration of the situation  
6 as nearly as possible, to that which would have obtained but  
7 for the unfair labor practice (status quo ante), NLRB v.  
8 Keystone Consolidated Industries, 107 LRRM 3143, 653 F2d  
9 304, CA 7 (1981); Southwest Forest Industries, 121 LRRM  
10 1158, 278 NLRB 31 (1986); St. John's General Hospital v.  
11 NLRB, 125 LRRM 3463, CA 3 (1987).

12 In view of the Defendant's violations of its duty to  
13 bargain collectively in good faith, the Defendant must  
14 restore the situation to status quo ante. In order to do so,  
15 the Defendant must make the affected highway patrol officers  
16 whole and then, bargain collectively in good faith with the  
17 Complainant regarding the effects of any decision to relieve  
18 employees, represented by the Complainant, from their  
19 duties.

20 RECOMMENDED ORDER

21 It is hereby ordered that after this Order becomes  
22 final, the Defendant, Department of Justice, Highway Patrol  
23 Division, it's officers, agents, and representatives shall:  
24  
25

1           1. Cease and desist from refusing to bargain collec-  
2 tively in good faith with the Complainant as to wages,  
3 hours, and other conditions of employment for certain  
4 highway patrol officers for whom the Complainant is the  
5 recognized collective bargaining representative.

6           2. Cease and desist from unilaterally changing the  
7 terms and conditions of employment, which are compulsory  
8 subjects of bargaining, for certain highway patrol officers  
9 for whom the Complainant is the recognized collective  
10 bargaining representative.

11           3. The Defendant must take affirmative action to  
12 effectuate the purposes of the Montana Collective Bargaining  
13 for Public Employees Act and restore the status quo ante;

14           a) rescind the unilateral action which  
15 required that certain officers of the  
16 Highway Patrol, for whom the Complainant  
17 was and is the recognized Collective  
18 Bargaining Representative, take three  
19 days leave without pay;

20  
21           b) make whole those officers of the Highway  
22 Patrol, for whom the Complainant was and  
23 is the recognized Collective Bargaining  
24 Representative, and who were required to  
25

1 take three days leave without pay as a  
2 result of the Defendant's unilateral  
3 action in violation of the Defendant's  
4 duty to bargain collectively and in good  
5 faith;

6  
7 c) such highway patrol officers are to be  
8 made whole by repaying them for all lost  
9 wages and benefits they would have  
10 received had they not been required to  
11 take three days leave without pay.

12  
13 4. Once the status quo ante has been restored the  
14 Defendant shall grant the Complainant a meaningful  
15 opportunity to bargain collectively regarding the effects of  
16 any decision to relieve highway patrol officers, represented  
17 by the Complainant, from their duties.

18 5. The Defendant shall notify this Board in writing  
19 within twenty (20) days what steps have been taken to comply  
20 with this Order.

21 SPECIAL NOTICE

22 Exceptions to these Findings and Conclusions and this  
23 Recommended Order may be filed within twenty (20) days of  
24 service thereof. If no exceptions are filed the Recommended  
25

1 Order shall become the Final Order of the Board of Personnel  
2 Appeals. Address exceptions to the Board of Personnel  
3 Appeals, P. O. Box 1728, Helena, MT 596024.

4 Dated this 17<sup>th</sup> day of January, 1988.

6 BOARD OF PERSONNEL APPEALS

7   
8 Arlyn L. Plowman  
9 Hearing Examiner

10 CERTIFICATE OF MAILING

11 The undersigned does certify that a true and correct  
12 copy of this document was served upon the following on the  
13 6<sup>th</sup> day of January, 1988, postage paid and addressed as  
follows:

14 David Stiteler, Attorney at Law  
15 Montana Public Employees Association  
16 P. O. Box 5600  
17 Helena, MT 59604-5600

18 Clay Smith  
19 Assistant Attorney General  
20 State of Montana  
21 Justice Building  
22 215 North Sanders  
23 Helena, MT 59620-1401

24 Rodney Sundsted, Chief  
25 Labor Relations & Employee Benefits Bureau  
Department of Administration  
Room 130, Mitchell Building  
Helena, MT 59620



FOF3:043da

RECEIVED  
JUL 15 1992  
BOARD OF PERSONNEL APPEALS

1 MARC RACICOT  
2 Attorney General  
3 CLAY R. SMITH  
4 Solicitor  
5 Justice Building  
6 215 North Sanders  
7 Helena MT 59620-1401  
8 Telephone: (406) 444-2026

9 COUNSEL FOR RESPONDENT DEPARTMENT OF JUSTICE,  
10 HIGHWAY PATROL DIVISION

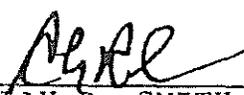
11 MONTANA 1ST JUDICIAL DISTRICT COURT  
12 LEWIS AND CLARK COUNTY

13 IN THE MATTER OF UNFAIR LABOR )  
14 PRACTICE NO. 17-87 )  
15 ) Cause No. CDV-88-757  
16 MONTANA PUBLIC EMPLOYEES )  
17 ASSOCIATION, INC., )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )  
29 )  
30 )  
31 )  
32 )  
33 )  
34 )  
35 )  
36 )  
37 )  
38 )  
39 )  
40 )  
41 )  
42 )  
43 )  
44 )  
45 )  
46 )  
47 )  
48 )  
49 )  
50 )  
51 )  
52 )  
53 )  
54 )  
55 )  
56 )  
57 )  
58 )  
59 )  
60 )  
61 )  
62 )  
63 )  
64 )  
65 )  
66 )  
67 )  
68 )  
69 )  
70 )  
71 )  
72 )  
73 )  
74 )  
75 )  
76 )  
77 )  
78 )  
79 )  
80 )  
81 )  
82 )  
83 )  
84 )  
85 )  
86 )  
87 )  
88 )  
89 )  
90 )  
91 )  
92 )  
93 )  
94 )  
95 )  
96 )  
97 )  
98 )  
99 )  
100 )

101 NOTICE IS HEREBY GIVEN pursuant to Rule 77(d), Mont. R.  
102 Civ. P., that the attached Memorandum and Order was filed  
103 herein on May 25, 1989.

1                    Respectfully submitted this 30th day of May, 1989.  
2

3  
4                    MARC RACICOT  
5                    Attorney General  
6                    State of Montana  
7                    Justice Building  
8                    215 North Sanders  
9                    Helena MT 59620-1401

10  
11  
12                    By:   
13                    CLAY R. SMITH  
14                    Solicitor

15                    CERTIFICATE OF SERVICE

16                    I hereby certify that I mailed a true and accurate copy  
17 of the foregoing, postage prepaid, by U.S. mail, to the  
18 following:

19                    David W. Stiteler  
20                    Attorney at Law  
21                    P.O. Box 5600  
22                    1426 Cedar  
23                    Helena, MT 59601

24                    Melanie A. Symons  
25                    Department of Labor  
                    P.O. Box 1728  
                    Helena, MT 59624-1728

DATED: 30 May, 1989

