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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR CHARGE NO. 15-87

MARY PAHUT,)

Complainant,)

vs.)

BUTTE SCHOOL DISTRICT NO. 1,)

Defendant,)

and)

BUTTE TEACHERS UNION, LOCAL)
NO. 332, MFT, AFT, AFL/CIO,)

Defendant.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

A hearing on the above matter was conducted on December 8, 1987, before John Andrew, hearing examiner. The hearing was conducted at the Administration Building of Butte School District No. 1 in Butte, Montana. The complainant was represented by D. Patrick McKittrick. Butte Teachers Union, Local No. 332 was represented by Mary Kay Starin. Robert C. Brown represented the School District.

The hearing reconvened by telephone on December 21, 1987, for the purpose of taking the testimony of Harry Freebourne. A briefing schedule was set and the matter was submitted as of September 30, 1988.

1 II. ISSUES

2 1. Whether Butte School District No. 1 acted arbi-
3 trarily, capriciously, unfairly, in bad faith, contrary to
4 law, and in doing so violated Sections 39-31-401 and 39-31-
5 201, MCA.

6 2. Whether Defendant, Union, breached its duty of
7 fair representation, acted arbitrarily, capriciously, and in
8 a perfunctory manner, contrary to law and by doing so
9 violated Sections 39-31-201, 39-31-205 and 39-31-402 MCA.

10 III. FINDINGS OF FACT

11 1. Mary Pahut (then Mary Jo Ruane) began her
12 employment with Butte School District No. 1 effective
13 September 2, 1969 (see letter of Charles Davis dated July 10,
14 1969 - Exhibit 12). She was placed as a speech - drama
15 teacher at West Junior High School in the BA+1 column with
16 zero experience.

17 2. On or about August 5, 1970, Mary Pahut advised
18 Superintendent Charles Davis that she was requesting "a
19 release from my contract". Ms. Pahut requested this release
20 so that she could be with her husband who had been drafted
21 into the armed services. Her letter on its face is not a
22 request for a leave of absence from employment.

23 3. In a letter dated August 18, 1970, (Exhibit #12)
24 the trustees "accepted your [Pahut's] resignation from School
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1 District No, 1 with regrets", (emphasis added). It is clear
2 that the trustees viewed Ms. Pahut's letter as a
3 resignation. Nothing occurred at that time to indicate
4 anything to the contrary. (Also see Exhibit 1/1)

5 4. On August 24, 1972, the Board offered Mary Pahut a
6 contract as an English and Social Studies teacher at West
7 Junior High. Ms. Pahut was placed at a BA+1 with one year
8 experience. She was recognized by the Board as a new teacher
9 and not as one returning from leave, (Exhibit #11). Ms.
10 Pahut accepted this offer and began teaching at West Junior
11 High.

12 5. In a letter dated March 20, 1975, Superintendent
13 Forest Wilson, advised Mary Pahut that all nontenured
14 teachers had been reviewed by the Superintendent and that she
15 was to be re-employed. Ms. Pahut did not dispute her status
16 as nontenured.

17 6. Contract negotiations for the year 1982 centered
18 around reduction in force language and a seniority clause as
19 a primary issue. In fact the Butte Teachers Union went on
20 strike over this very question. As a result of negotia-
21 tions, agreements for 1982 and subsequent years contained RIF
22 and Seniority language.

23 The initial seniority language is hardly the model of
24 clarity in terms of how a seniority list is to be compiled,
25

1 maintained, or even posted. The language for the contract
2 years 82-83, 83-85, and 85-87 regarding the seniority list
3 provides:

4 The Administration shall maintain a list showing the
5 seniority of each teacher. This list shall be prepared
6 once each year by November 1st. A separate seniority
7 list shall be maintained for specialists.

8 It is clear from the testimony that the seniority
9 provisions adopted in the contract were complex and subject
10 to numerous problems. It was impossible to develop an all
11 encompassing and accurate seniority list in a short period of
12 time. Rather, the process was one of fleshing out of the
13 seniority provisions through grievances and addressing
14 individual problems as they came to the surface. Ultimately
15 the 87-89 contract (Exhibit #23) contained a seniority list
16 provision that provided for posting, notice to the union, an
17 appeal process and ultimately that the list, once posted,
18 would be a final list, binding on the district and all
19 teachers thereon as of January 1 of each year. The 87-89
20 contract is in marked contrast to the predecessor agreements.
21 This distinction cannot be glossed over lightly as it has a
22 bearing on the obligations of the teachers, the District, and
23 the Union.

24 7. The initial seniority list (Exhibit #17) compiled
25 as of March 2, 1983, was compiled from information supplied

1 by teachers. This list on pages 16 and 20 reflects dates of
2 September 2, 1969, to September 1, 1982, as the term of
3 employment for Mary Pahut. As the cover letter of
4 Superintendent William C. Milligan indicates, this was an
5 initial draft and was to be posted on bulletin boards or in
6 the teachers lounge.

7 As the testimony shows, there was an ongoing effort to
8 compile a seniority list. This initial list (Exhibit #17)
9 bearing the typists initials ES (see page 28) was prepared
10 3-1-83 (see page 28) and distributed on March 2, 1983,
11 (Milligan's cover letter). It is this list upon which Mary
12 Pahut lists her claim for a September 2, 1969, seniority
13 date. An additional seniority list, Exhibit #2 was
14 offered by the Union. Jim Rosa, business agent for the
15 Union, testified that he received this list on May 7, 1983.
16 Exhibit 2 on page 27 again bears the typist's initials ES and
17 a preparation date of 5-4-83. Page 27 of Exhibit #2 follows
18 chronologically after page 26 of the exhibit. This exhibit
19 may well have been prepared after Exhibit 17 or at the least
20 represented a seniority list separate and distinct from
21 Exhibit 17. The exhibit is credible as is Mr. Rosa's
22 testimony that he received Exhibit #2 on May 7, 1983. This
23 exhibit shows a beginning date of September 5, 1972, for
24 seniority purposes of Mary Pahut. Additional exhibits #'s 3,
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1 5, and 8 also show September 1972 seniority dates. Again
2 Exhibit 2 was prepared after Exhibit No. 17.

3 8. On March 21, 1983, Mary Pahut was advised that her
4 employment with School District No. 1 would be terminated,
5 (Exhibit 1/2). At no place in that letter is Mary Pahut's
6 seniority date mentioned.

7 9. On May 27, 1983, Mary Pahut wrote a letter (Exhibit
8 1/3) to Superintendent William Milligan indicating that her
9 date of employment should be September of 1969 as her
10 separation was covered by the Soldiers and Sailors Relief
11 Act. Copies of this letter were not sent to the Union. Why
12 was Pahut concerned about her seniority date if Exhibit 17
13 were the correct/only seniority list? A probable answer-
14 Mary Pahut must have known there was a problem with her
15 seniority date. This discrepancy casts doubt not only on Ms.
16 Pahut, but also on the testimony of her husband that he
17 discussed the Soldiers and Sailors Reilef Act with Mr. Rosa
18 in 1983 - a discussion Mr. Rosa denies.

19 10. By letter dated August 11, 1983, (Exhibit 1/4)
20 Superintendent Milligan advised Mary Pahut that her seniority
21 date had been changed to September 1, 1969. No copies of
22 Milligan's letter were sent to the Union.

23 11. On September 23, 1983, Mary Pahut was advised by
24 Superintendent Milligan that she was being transferred to
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1 Butte High School and she would become a counselor. The
2 effective date of the transfer was September 1, 1983.

3 12. During the 83-84 and 84-85 school years there were
4 staff reductions, however no tenured teachers were laid off
5 nor were the guidance counselor positions affected. Thus,
6 there were no questions concerning Ms. Pahut's seniority
7 date. By the 85-86 school year additional cuts necessitated
8 a reduction in guidance counselor positions. At Butte High
9 School this meant that one position had to be transferred-
10 either Mary Jo Pahut or Ronald Kuecks.

11 On August 27, 1986, Superintendent Jeff Satterly, as
12 well as Jim Rosa were advised by Ronald Kuecks that he was
13 protesting his transfer instead of Mary Jo Pahut. Mr.
14 Kuecks seniority date was September 8, 1970. He had been a
15 guidance counselor since September 2, 1975.

16 On August 29, 1986, Jim Rosa advised Superintendent
17 Satterly that a grievance was being initiated pursuant to
18 Article 34 of the union contract.

19 Since Mary Pahut and Mr. Kuecks worked at the same
20 school the word got out to Mary Pahut that a grievance had
21 been filed by Mr. Kuecks. Ms. Pahut in an October 20, 1986,
22 letter to Jim Rosa requested copies of the Kuecks grievance
23 as well as a list of the people on the union grievance
24 committee.

1 13. On October 23, 1986, Mr. Rosa complied with Mary
2 Pahut's request and provided a list of the grievance commit-
3 tee. Rosa's correspondence of October 23 (Exhibit 1/11)
4 indicates copies of all communications from Mr. Rosa's office
5 regarding Mr. Kueckss grievance were enclosed. Ms. Pahut
6 denied receiving this information although she testified
7 that she never advised Mr. Rosa that she did not receive the
8 enclosures.

9 14. In August of 1986 Ms. Pahut and her husband alleged
10 that Mr. Rosa made representations that in view of the
11 Kuecks grievance Ms. Pahut should consider hiring an
12 attorney. Mr. Rosa denied making this statement and in fact
13 stressed that the union encouraged its membership to not
14 retain counsel and incur additional costs.

15 Be that as it may, by November 10, 1986, Mr. Rosa was
16 aware that Ms. Pahut had retained counsel. In a letter of
17 November 10, 1986, (Exhibit 1/12) Mr. Rosa advised Ms. Pahut
18 and her counsel that a meeting was desired to clarify the
19 matter of Ms. Pahut's seniority date.

20 15. On November 18, 1986, (Exhibit 1/13) Ms. Pahut
21 requested that Mr. Rosa send all original correspondence to
22 her counsel, Mr. McKittrick. Mr. Rosa complied and
23 requested Mr. McKittrick advise him as to dates when Pahut,
24 the grievance committee, Rosa, and McKittrick could meet to
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1 go over the Pahut seniority question.

2 16. On December 3, 1986, the grievance committee, the
3 Pahuts, McKittrick, and Rosa met for approximately two hours
4 to review the information supplied by Ms. Pahut. By this
5 date the grievance committee was aware of Exhibit 1/10
6 pertaining to the Soldiers and Sailors Relief and the fact
7 that it did not apply to dependents. No decision as to how
8 they would proceed with the Kuecks grievance was made on
9 December 3, 1986.

10 17. On December 4, 1986, the grievance committee, Jim
11 Rosa, and the Pahuts again met. Mr. McKittrick was not
12 available this date. On this date the grievance committee
13 decided to proceed with the grievance of Mr. Kuecks. The
14 Pahuts were advised of this decision.

15 18. Since an agreement had been reached between Mr.
16 Rosa and Superintendent Satterly to waive the established
17 grievance time frames in the Kuecks grievance it was not
18 until December 6, 1986, that Mr. Rosa advised Mr. Satterly
19 that the union was electing to continue with the grievance of
20 Kuecks. It was not an unusual practice for the District and
21 the Union to waive timelines. In fact, when it came to
22 handling seniority questions it is apparent that the Union
23 and the District used discretion in settling the disputes as
24 is best evidenced by the fact that during Superintendent
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1 Satterly's term alone approximately fifty complaints were
2 settled informally and no seniority questions went to
3 arbitration.

4 19. On December 8, 1986, Jim Rosa requested a list of
5 arbitrators from the FMCS. No copy of this letter was sent
6 to Mary Pahut or her counsel. On December 9, 1986, Mr.
7 McKittrick in a letter to Superintendent Satterly advised Mr.
8 Satterly of his understanding that the grievance procedure
9 concerning Mr. Kuecks was resolved in that no notice of
10 intent to arbitrate was filed within the five day period
11 specified in the contract. The record does not reflect any
12 response to Mr. McKittrick's letter although it is clear
13 that the waiver of timelines was not unusual and had been
14 agreed to by Satterly and Rosa. In short, the parties to the
15 Kuecks grievance - the Union (Mr. Kuecks), and the District
16 had agreed to the waiver.

17 20. Between December 8, 1986, and March 30, 1987, a
18 series of correspondence in evidence reflects the processing
19 of the Kuecks grievance. Neither the Complainant nor her
20 counsel were copied on any of this correspondence. Of
21 particular relevance to the District was Exhibit 1/39, the
22 cover letter from Mr. Rosa to the District's attorney and a
23 copy of the letter (Exhibit 1/10 received by counsel March
24 13, 1987) indicating that dependents were not covered by the
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1 Veterans Reemployment Rights Law. It was this correspondence
2 which triggered the District's decision to settle the Kuecks
3 grievance as the District at this time recognized
4 Superintendent Milligan's error in changing Ms. Pahut's
5 seniority date.

6 21. On March 30, 1987 (Exhibit 1/41) Mr. McKittrick was
7 advised that a settlement had been reached between Mr.
8 Kuecks, the Union, and the School District.

9 22. On March 30, 1987, Ms. Pahut sent a letter to Mr.
10 Rosa indicating her concern with the fact that her seniority
11 date was on a list specifying a date of 1972 as opposed to
12 1969. Ms. Pahut requested that the Union grieve the matter.

13 23. On April 3, 1987, counsel for Ms. Pahut was
14 advised that Mary Jo Pahut's seniority date would be changed
15 to September 5, 1972, for all applicable categories, (Exhibit
16 1/43). This change in seniority date made Mary Jo Pahut less
17 senior than approximately eighty five other teachers - the
18 same number that were adversely impacted had Mary Jo Pahut's
19 seniority date been 1972.

20 24. Ms. Pahut's request that her seniority date be
21 grieved was taken by Mr. Rosa to the Executive Council of
22 the Butte Teachers Union. In a letter dated April 9, 1987,
23 Mr. Rosa advised Ms. Pahut that the Council had agreed with
24 the decision of the School District. Ms. Pahut was further
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1 advised that the Union declined to grieve her seniority
2 date.

3 25. On June 25, 1987, Richard Carlson, Director of
4 Special Education Department, advised Mary Pahut that she
5 would be counselor at Butte High School for the 87-88 year.
6 This was done on June 25, 1987, and was clearly an error by
7 Mr. Carlson as it was outside the scope of his authority and
8 without the knowledge of Superintendent Carparelli.

9 IV. CONCLUSIONS OF LAW

10 1. The Veterans Reemployment Rights Law (Soldiers and
11 Sailors Relief Act), 38 USC 2021-2026 does not provide
12 reemployment rights or a preference for spouses of
13 individuals serving in the armed forces. Mary Jo Pahut used
14 this law as one basis for establishing a 1969 seniority
15 date. She did so erroneously. Moreover, she acted to change
16 her seniority date without advising the Union. As both
17 Defendents have stated, her "hands were not clean" thus
18 lending little if any credence to arguments of estoppel or
19 laches. Moreover, as pointed out by the Defendents, the
20 cases cited by the Complainant are distinct from the matter
21 at hand both in terms of the "clean hands argument" and also
22 in terms of the finality of the seniority lists.

23 2. Mary Jo Pahut resigned in 1970 thus constituting a
24 break in service. She did not prove otherwise. The Union
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1 was justified in not taking her grievance to arbitration
2 based on the strained interpretation of the contract as
3 offered by the Complainant. The Union was not arbitrary.

4 3. In Ford v. University of Montana, 183 Mont. 112,
5 598 P.2d 604, the Montana Supreme Court stated that to find a
6 breach of the duty of fair representation it must be shown
7 that the Union's action was in some way a product of bad
8 faith, discrimination, or arbitrariness. The Court then went
9 on to quote extensively from 48 Am. Jur.2d Labor and Labor
10 Relations. Those sections quoted were relevant to Ford v.
11 University, supra and are equally relevant to the case at bar
12 and are repeated below:

13 ... a union's action is non-arbitrary and in
14 performance of its duty of fair representation to
15 members where such action is based upon relevant,
16 permissible union factors which exclude the
17 possibility of being based upon motivations such
18 as personal animosity or political favoritism,
19 where it is a rational result of consideration of
20 those factors, and where it includes fair and
21 impartial consideration of the interest of all
22 employees.

19 There is not breach of a collective bargaining
20 agent's duty of fair representation in taking a
21 good faith position contrary to that of some
22 individuals whom it represents, or in supporting
23 the position of one group of employees against that
24 of another.

23 A wide range of reasonableness must be allowed to
24 a statutory bargaining representative in serving
25 the unit it represents, subject always to its
complete good faith and honesty of purpose in the
exercise of its discretion. A union has great
discretion in processing its members grievances,

1 and only in extreme cases of abuse of discretion
2 will the court interfere with the union's
3 decisions; in certain cases some individual rights
4 may be compromised for the greater good of the
5 members as a whole.

6 Although a union breaches its duty of fair
7 representation by arbitrarily ignoring a
8 meritorious grievance, or processing it in a
9 perfunctory way, a union does not breach its duty
10 of fair representation merely because it settles
11 the grievance short of the final grievance
12 procedure step of arbitration, even if a court
13 should later decide that the grievance was
14 meritorious. And although the ignoring or
15 perfunctory processing of a grievance may violate
16 the duty of fair representation, such duty does not
17 require a union to exhaust every theoretically
18 available procedure simply on the demand of a union
19 member, the decisive question being whether the
20 unions conduct is arbitrary, discriminatory, or in
21 bad faith. In its role as the exclusive agent for
22 all employees in a bargaining unit, the union has
23 the power to sift out frivolous grievances, abandon
24 the processing of a grievance which it determines
25 in good faith to be meritless, and to settle a
dispute with the employer short of arbitration...

15 Equally illustrative is the case of Ford Motor Company.
16 v Huffman, 31 LRRM 2549, 345 U.S. 330, where the Court held
17 that:

18 Inevitably differences arise in the manner and
19 degree to which the terms of any negotiated
20 agreement affect individual employees and classes
21 of employees. The mere existence of such
22 differences does not make them invalid. The
23 complete satisfaction of all who are represented is
24 hardly to be expected. A wide range of
25 reasonableness must be allowed a statutory
bargaining representative in serving the unit it
represents, subject always to complete good faith
and honesty of purpose in the exercise of its
discretion.

23 In Vaca v. Sipes, 386 U.S. 171, (1967) the Court in
24 addressing the processing of a grievance by a union stated:
25

1 Though we accept the proposition that a union may not
2 arbitrarily ignore a meritorious grievance or process it
3 in a perfunctory fashion, we do not agree that the
4 individual employee has an absolute right to have his
 grievance taken to arbitration regardless of the
 provisions of the collective bargaining agreement.

5 Finally, the Ninth Circuit in quoting from Robesky v.
6 Qantas Empire Airways, Ltd., 573 F.2d 1082 stated:

7 "The record provides no showing of ill will, prejudice
8 or deliberate bad faith on the part of the Union. . .
9 Nor does it show intentional conduct so egregious, so
 far short of minimum standards of fairness to the
 employee and so unrelated to legitimate union interests
 as to be arbitrary."

10 All of this leads to the questions: Did the Union act
11 in a reasonable manner in the way in which it handled the
12 Pahut matter and the Kuecks grievance; did the Union have
13 legitimate interests in handling these matters in the way in
14 which they were handled; and, did the Union act in an
15 arbitrary, discriminatory or bad faith fashion? The
16 record says no.

17 The grievance committee had good reason for processing
18 the Kuecks grievance. On the surface it was apparent that
19 the basis for giving Mary Pahut a seniority date of 1969-
20 The Soldiers and Sailors Relief Act - was in error.
21 Moreover, the method in which Mary Pahut had her date
22 initially changed was also in question in that the Union had
23 no notice from her that she has requested her date to be
24 changed and the District did not notify the Union it had been
25

1 changed. In essence the Union did not know there was a
2 problem and had no reason to know there was a problem until
3 two members were at tension over seniority. Once aware of
4 the problem the grievance committee heard Mary Jo Pahut's
5 side of the story, weighed the best interests of the Union
6 and its members as a whole, and elected to proceed with the
7 Kuecks arbitration. Their decision was well founded and the
8 record fails to show that the Union in any way singled out or
9 treated Mary Jo Pahut disparately.

10 It is true that the Union may have done a better job of
11 advising Mary Jo Pahut of the processing of the Kuecks
12 grievance. However, the fact that she was not regularly
13 notified of the details of the Kuecks grievance does not
14 negate the fact that she knew the Union was taking the Kuecks
15 grievance to arbitration and that ultimately the disposition
16 of the Kuecks matter would affect her seniority - either
17 positively or negatively.

18 Ultimately when the Kuecks matter was settled Mary
19 Pahut did suffer a change in her seniority date but that
20 change did not come about as a result of arbitrary or
21 capricious actions, personal animosities or bias by the Union
22 nor was it shown that the District compromised the Kuecks
23 grievance for other than sound, nondiscriminatory reasons.

24 Butte School District No 1 did not violate 39-31-401 or
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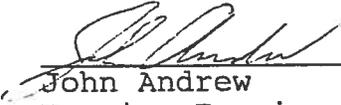
1 39-31-201 MCA nor did Butte Teachers Union, Local No. 332,
2 MFT, AFL-CIO violate 39-31-201, 39-31-205 or 39-31-402 MCA.

3 V. ORDER

4 It is recommended that Unfair Labor Practice Charge
5 Number 15-87 be dismissed.

6 Dated this 24th day of January, 1989.

7
8 BOARD OF PERSONNEL APPEALS

9
10 By: 

11 John Andrew
12 Hearing Examiner

13 NOTICE: Exceptions to these Findings of Fact, Conclusions of
14 Law and Recommended Order may be filed within 20 days of
15 service. If no exceptions are filed the recommended order
16 will become the final order of the Board of Personnel
17 Appeals.

18 CERTIFICATE OF MAILING

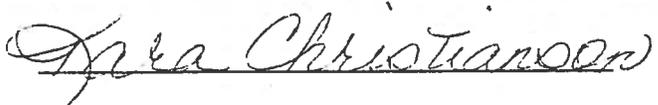
19 The undersigned does certify that a true and correct
20 copy of this document was mailed to the following on the
21 25th day of January, 1989.

22 D. Patrick McKittrick
23 Attorney at Law
24 P. O. Box 1184
25 Great Falls, MT 59403

Mary K. Starin, PC
Attorney at Law
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Butte, MT 59701

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 15-87:

MARY PAHUT,)

Complainant,)

- vs -)

BUTTE SCHOOL DISTRICT NO. 1)

Defendant,)

- and -)

BUTTE TEACHERS UNION, LOCAL)

NO. 332, MFT, AFT, AFL-CIO,)

Defendant.)

FINAL ORDER

The Findings of Fact, Conclusions of Law and Recommended Order was issued by Hearing Examiner John Andrew on January 24, 1989.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Timothy J. McKittrick, attorney for the Complainant, on February 10, 1989.

Oral argument was scheduled before the Board of Personnel appeals on August 23, 1989.

After reviewing the record, considering the briefs and oral arguments, 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.

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2. IT IS ORDERED that this Board therefore adopt the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner John Andrew as the Final Order of this Board.

DATED this 14th day of September, 1989.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn
Alan L. Joscelyn
Alternate 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 15th day of September, 1989:

D. Patrick McKittrick
Attorney for Complainant
P.O. Box 1184
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Robert C. Brown, Attorney
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2 BACKGROUND

3 Mary Pahut began her employment with Butte School
4 District No. 1, on September 2, 1969. In August 1970, she
5 requested to be released from her contract because her husband
6 was drafted into the armed forces and she wanted to accompany
7 him. After her return, she was again hired by the School
8 District on August 24, 1972.

9 In 1982, following a strike by the Union over the
10 issue, provisions were added to the Collective Bargaining
11 Agreement (CBA) regarding seniority and reductions in force.
12 An initial seniority list, dated 3-1-83, was compiled; Mary
13 Pahut's seniority date was listed as September 2, 1969. A
14 different list, dated 5-4-83, showed her seniority date as
15 September 5, 1972.

16 In a letter dated May 27, 1983, to then-
17 Superintendent William Milligan, Mary Pahut stated that her
18 date of seniority should be 1969 because ~~her~~ separation was
19 covered by the Soldiers and Sailors Relief Act. On August 11,
20 1983, Superintendent Milligan advised Pahut by letter that her
21 seniority date had been changed to September 1, 1969. Neither
22 letter was sent to the Union.

23 In 1986, there was a reduction in guidance counselor
24 positions at Butte High School where both Mary Pahut and Ronald
25

1 Kuecks worked. Kuecks, who had a seniority date of September
2 8, 1970, was told he would be transferred. He protested,
3 arguing that his seniority date was prior to that of Pahut.
4 The Union subsequently filed a grievance on his behalf, and on
5 December 6, 1986, notified the School District of the Union's
6 intent to proceed to arbitration. However, following receipt
7 of information that the Soldiers and Sailors Relief Act did not
8 apply to dependents, the School District agreed to resolve
9 Kuecks' grievance by changing Pahut's seniority date to
10 September 5, 1972. This was confirmed in a letter from
11 Superintendent Satterly to James Rosa, the Union's business
12 agent, dated April 3, 1987.

13 Pahut was aware of the Kuecks grievance; she met
14 with the grievance committee on December 3, 1986, and again on
15 December 4, 1986, prior to the Union's decision to take the
16 Kuecks grievance to arbitration. Her attorney was advised on
17 March 30, 1987 that a settlement had been ~~reached~~ on the Kuecks
18 grievance. On March 30, 1987, Pahut requested that the Union
19 grieve the fact that her seniority date was now listed as 1972.
20 Jim Rosa advised Pahut that the Executive Council of the Butte
21 Teachers Union agreed with the School District that her date
22 should be September 5, 1972, and declined to further process
23 her grievance.
24
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1 if supported by "substantial credible evidence in the record."
2 Terry, 220 Mont. at 217, 714 P.2d at 153. This has been
3 further clarified to mean that a finding is clearly erroneous
4 if a "review of the record leaves the court with the definite
5 and firm conviction that a mistake has been committed." Wage
6 Appeal v. Board of Personnel Appeals, 208 Mont. 33, 40, 676
7 P.2d 194, 198 (1984). A conclusion of law is controlling if
8 it is neither arbitrary nor capricious. Section 2-4-
9 704(2)(a)(vi), MCA.

10 The Montana Supreme Court has recently held that
11 conclusions of law are reviewed to determine if the agency's
12 interpretation of the law is correct. Steer, Inc. v.
13 Department of Revenue, ___ Mont. ___, 803 P.2d 601, 603, 47
14 St. Rep. 2199 (1990).

15 DISCUSSION

16 The issues in this case are relatively simple,
17 despite the volumes of briefs submitted.

18 1. Did the Union breach its duty of
19 fair representation to Pahut by settling
20 the grievance of another member short of
21 arbitration, and subsequently declining to
22 process Pahut's grievance?

23 2. Did the Union and School District
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1 violate their statutory duties and commit
2 an unfair labor practice in their handling
3 of the Kuecks grievance and by agreeing to
4 correct Pahut's seniority date to 1972?

5 3. Did Appellant Pahut have a vested
6 contract right to a seniority date of
7 1969, despite the fact that she was not
8 covered under the Soldiers and Sailors
9 Relief Act?

10 The hearing examiner and the Board found that the answer to
11 all of these questions was "No."

12 Pahut also argues that the Board failed to make
13 various necessary findings of fact and also challenges certain
14 findings of fact as erroneous.

15 FINDINGS OF FACT

16 Pahut alleges numerous errors in the findings of
17 fact, conclusions of law and recommended ~~order~~ of the hearing
18 examiner, which were adopted by the Board as its final order.
19 She contends that the hearing examiner was in error for not
20 adopting 65 specific findings of fact, listed on twenty pages
21 of her brief. These are the same facts argued by Pahut in her
22 brief to the hearing examiner dated June 20, 1988.

23 One ground on which to overrule an agency's decision
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1 under Section 2-4-704(2)(b), MCA, is that "findings of fact,
2 upon issues essential to the decision, were not made although
3 requested." However, Pahut's argument essentially is not that
4 the hearing examiner made insufficient findings of fact on
5 crucial issues, but rather that the hearing examiner and Board
6 failed to adopt her findings of fact; those that were adopted
7 did not agree with her contentions.

8 Findings are sufficient if they dispose of material
9 issues. Northern Plains Resource Council v. Board of Natural
10 Resources, 181 Mont. 500, 512, 594 P.2d 297, 304 (1979).
11 Furthermore, this court "may not substitute its judgment for
12 that of the agency as to the weight of the evidence on
13 questions of fact." Section 2-4-704(2), MCA. Much of Pahut's
14 argument simply comes down to a question of credibility--who
15 the hearing examiner believed as to what actually happened.
16 It is the trier of fact who makes that determination; this
17 court cannot substitute its judgment for ~~that~~ of the hearing
18 examiner in judging the credibility of witnesses. While
19 Pahut's requested findings of fact may or may not be correct,
20 the hearing examiner's findings of fact are sufficient to
21 dispose of the issues essential to the decision. Furthermore,
22 apart from minor errors which do not affect the decision, such
23 as an incorrect date in Finding No. 23, the findings of fact
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1 are supported by the record. This Court cannot overturn them.

2 Some of the hearing examiner's findings of fact blur
3 into conclusions of law, but that is not uncommon, nor does it
4 invalidate the decision.

5 Pahut also argues that the hearing examiner erred in
6 refusing to allow certain testimony of two witnesses.
7 However, a hearing examiner has the same authority as a judge
8 in ruling on the admissability of testimony. In this case,
9 one witness was asked if it were "fair" for a person's
10 seniority rights to be adversely affected by settlement of a
11 grievance to which she was not involved. This was properly
12 disallowed as misleading characterization of the facts. The
13 testimony of Pahut's husband regarding negotiation and
14 interpretation of the 1982-83 contract was also properly
15 disallowed, since another witness who was more actively
16 involved in the negotiations testified on these issues. There
17 was no error on the part of the hearing examiner.

18 UNION'S DUTY OF FAIR REPRESENTATION

19 The hearing examiner found that the Union did not
20 act arbitrarily or in bad faith in handling the Kuecks and
21 Pahut grievances, and thus did not violate its duty of fair
22 representation to Pahut. Pahut alleges that this conclusion
23 is in error.

1 Unions have a duty of fair representation of their
2 members. Teamsters Local No. 45 v. Board of Personnel
3 Appeals, 223 Mont. 89, 95-96, 724 P.2d 189, 193 (1986). Under
4 this duty, "a union may not arbitrarily ignore a meritorious
5 grievance or process it in a perfunctory manner." Id., citing
6 Vaca v. Sipes, 386 U.S. 171 (1967). A breach of this duty is
7 an unfair labor practice. Id.

8 This does not, however, mean that a union has a duty
9 to pursue to arbitration every grievance filed by one of its
10 members. A union member does not have an absolute right to
11 force the union to proceed to arbitration. Vaca v. Sipes, 386
12 U.S. at 191. The key word is "meritorious."

13 '[A] union does not breach its duty of
14 fair representation merely because it
15 settles a grievance short of the final
16 grievance procedure step of arbitra-
17 tion [S]uch duty does not require
18 a union to exhaust every theoretically
19 available procedure simply on the demand
20 of a union member, the decisive question
21 being whether the union's conduct is
22 arbitrary, discriminatory, or in bad
faith. In its role as the exclusive agent
for all employees in a bargaining unit,
the union has the power to sift out frivo-
lous grievances, abandon the processing of
a grievance which it determines in good
faith to be meritless, and to settle a
dispute with the employer short of
arbitration'

23 Ford v. University of Montana, 183 Mont. 112, 122-23, 598 P.2d
24 604, 610 (1979), quoting 48 Am. Jur.2d Labor and Labor

1 Relations § 401. Thus a union can consider the merits of a
2 grievance in determining how far to pursue it.

3 Seniority rights are a difficult and complicated
4 area, and inherently involve benefits to one individual at the
5 expense of others. The Union has an obligation to represent
6 all of its members fairly. Where there are conflicting
7 interests of its members, a union's responsibility is to "make
8 a rational judgment as to the merits of the competing claims
9 under the agreement and support the one that it concludes has
10 the greater merit." Belanger v. Matteson, 345 A.2d 124 (R.I.
11 1975). To allow Pahut to benefit from an error would unfairly
12 prejudice the employment rights of approximately 85 other
13 employees, including Ron Kuecks. The hearing examiner
14 correctly concluded that the Union did not breach its duty of
15 fair representation.

16 Pahut in her reply brief to this Court refers to the
17 public policy favoring arbitration of labor ~~disputes~~. This is
18 correct, but it is not relevant to the matter before this
19 Court, because here there is no dispute between the parties to
20 the CBA - the Union and the School District. The fact that a
21 matter is arbitrable does not mean that it must be arbitrated,
22 if the parties reach a mutually acceptable settlement prior to
23 arbitration. Grievance and arbitration provisions in a
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1 collective bargaining agreement contemplate that both the
2 employer and the union will "endeavor in good faith to settle
3 grievances short of arbitration." Vaca v. Sipes, 386 U.S. at
4 191.

5 Pahut relies on a strained interpretation of the
6 grievance provision indicating that it is the "employee" who
7 determines what a grievance is and who therefore has control
8 of the processing of the grievance. However, the issue before
9 the hearing examiner was not whether Ms. Pahut had a right to
10 take this matter to arbitration. She was informed in a letter
11 from Jim Rosa dated May 22, 1988, that she could pursue the
12 matter on her own. The issue here is whether the Union was
13 obligated to take the matter to arbitration. The hearing
14 examiner correctly concluded that it was not.

15 Pahut argues that it should be an arbitrator who
16 decides if her break in service in 1970 was voluntary, and
17 suggests that she was wrongfully denied a ~~leave~~ of absence at
18 that time. However, the Collective Bargaining Agreement for
19 1969-71 indicates that she was not eligible for a leave of
20 absence in 1970 because she was not tenured. See Exhibit 24.

21 Furthermore, the hearing examiner's conclusion that
22 Pahut resigned in 1970 is supported by the evidence. Her
23 letter of August 5, 1970 requested "a release from her
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1 contract" and the trustees accepted her "resignation."
2 Findings of Fact Nos. 2, 3. She was hired in 1972 as a new
3 teacher with one year of experience, not as a teacher
4 returning from a leave of absence. Finding of Fact No. 4. In
5 1975 she received a letter from the Superintendent regarding
6 her non-tenured status, which she did not dispute. Finding of
7 Fact No. 5. It is now much too late to suggest that an
8 arbitrator must decide if this two-year absence which occurred
9 some twenty years ago was other than voluntary. The hearing
10 examiner correctly applied the law in concluding that the
11 Union did not commit an unfair labor practice in refusing to
12 arbitrate this point.

13 TIMELINESS OF THE KUECKS GRIEVANCE

14 Pahut argues that Kuecks' grievance came too late
15 and that both the Union and the School District committed
16 unfair labor practices in their handling of an untimely
17 grievance. However, it was not until 1985 that Kuecks had
18 reason to question his seniority relative to that of Pahut.
19 It was in 1986 that Kuecks was reassigned from a counseling
20 position to a teaching position but Pahut was not reassigned,
21 even though Kuecks had been a counselor longer than Pahut.
22 Prior to that date the relative seniority position of the two
23 counselors had not been at issue. Kuecks' grievance on this
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1 issue was timely filed. What he was grieving was his improper
2 reassignment.

3 Furthermore, the CBA in effect in 1986 and
4 previously provided no deadlines either for filing of
5 grievances or for challenging the seniority lists. The only
6 relevant time lines in the CBA prior to the 1987-89 contract
7 were procedural, grievance processing deadlines.

8 Appellant makes much of the fact that the Union
9 failed to file a notice of intent to take Kuecks' grievance to
10 arbitration within the time period provided in the CBA, and
11 argues that this means that Kuecks' grievance was resolved
12 with finality against him at the preceding step. However,
13 there was credible evidence in the record that the Union and
14 School District orally agreed to extend this deadline, and
15 that this was not an uncommon practice.

16 Appellant argues that any such agreement, even if
17 made, was not effective. Appellant ~~fails~~ to distinguish
18 between deadlines for filing a grievance, and time frames for
19 processing a grievance. As Pahut notes in her brief,
20 contracts commonly provide a deadline for filing grievances,
21 and may specifically provide a time limit for protesting
22 seniority dates. Appellant is correct that these are
23 substantive and not merely procedural time limits; they serve
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1 situation. In many of those cases, the contract established
2 an absolute deadline for protesting errors in the seniority
3 lists. Here, however, it was not until 1987 that the contract
4 provided for a deadline for finalizing the seniority lists.
5 Clearly the Union and the School District considered the
6 establishment of correct seniority lists as a lengthy, ongoing
7 process, one which was still incomplete as late as 1988.
8 Seniority lists prior that time were considered drafts, and
9 were subject to correction.

10 Nor did the earlier lists in and of themselves
11 establish a vested contract right to a particular seniority
12 date; again, these lists were not considered final by either
13 the Union or the School District until 1988. There was no
14 intent by either party that the preliminary lists create any
15 vested rights to a particular date.

16 Furthermore, in this case the hearing examiner found
17 that it was Pahut herself who caused the error. Thus she had
18 "unclean hands" in this matter. The hearing examiner found
19 that she failed to inform the Union that she believed the May
20 7, 1983 list contained an incorrect seniority date for her.
21 She contacted the Superintendent directly, and it was on the
22 basis of her representation that she was entitled to the
23 benefit of the Soldiers and Sailors Relief Act that the
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1 Superintendent revised her seniority date to 1969. These
2 facts were not disputed by Pahut; rather it is the hearing
3 examiner's conclusion that she objects to. While it is
4 certainly true that the Superintendent should have
5 investigated further before accepting Pahut's assertion that
6 she was entitled to seniority credit for her two-year absence,
7 the School District is not the only party involved here, and
8 certainly is not the party on whom the consequences will fall.
9 To find that Pahut has a vested seniority of 1969 because the
10 School District failed to fully investigate penalizes not the
11 School District, but rather the approximately 85 employees
12 whose relative seniority rights were adversely affected.

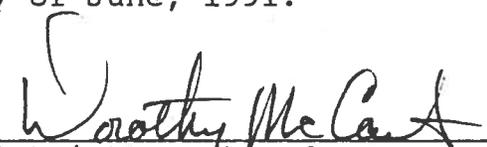
13 It is ironic that Pahut attempts to rest her case at
14 least in part on theories of equity. Perhaps the most
15 troubling aspect of her argument throughout this case is her
16 contention that because she convinced the Superintendent,
17 erroneously, that she was entitled by law to a 1969 seniority
18 date, everyone else had a duty to investigate her assertions
19 and catch the error: the School District, the Union, Ron
20 Kuecks, and the other 84 employees affected by it. Because
21 they did not question her seniority date until 1986, she
22 argues, they must accept the mistake and its consequences.
23 However, neither Pahut nor the School District notified the
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1 Union of the change, and it did not affect other employees
2 until the staff reductions in 1986. Given this lack of
3 knowledge and lack of reason to question Pahut's seniority
4 date, neither the Union nor the other employees should be
5 penalized for Pahut's error.

6 ORDER

7 IT IS HEREBY ORDERED that the findings of fact,
8 conclusions of law, and order of the Board of Personnel
9 Appeals are AFFIRMED.

10 DATED this 19 day of June, 1991.

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12 
13 Dorothy McCant
District Court Judge

14 pc: D. Patrick McKittrick
15 Mary Kay Starin
16 Melanie A. Symons
17 Robert C. Brown

18 Pahut.D&O

19 k