

1 STATE OF MONTANA
2 BEFORE THE BOARD OF PERSONNEL APPEALS

3 IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 54-89:

4 FEDERATION OF BUTTE-SILVER)
5 BOW PUBLIC EMPLOYEES 4372,)
6 vs. Complainant,) FINDINGS OF FACT;
7 CITY OF BUTTE, TIM CLARK,) CONCLUSIONS OF LAW;
8 PERSONNEL DIRECTOR,) ORDER
9 Defendants.)

10 * * * * *

11 I. INTRODUCTION

12 The above matter comes on as a result of an Unfair Labor
13 Practice filed by the Federation of Butte-Silver Bow Public
14 Employees, 4372, hereinafter the Federation, on September 25,
15 1989.

16 Pursuant to an agreement between the parties facts have been
17 stipulated and the matter submitted to the hearing examiner for a
18 decision. Representing the Federation is Dan Evans. Representing
19 Butte-Silver Bow is Ross Richardson. Appearing amicus curiae
20 for the Court is Lewis Brown, Jr. The matter was submitted on
21 March 2, 1990.

22 II. STIPULATED ISSUE

23 Since the District Court by its Order dated August 15, 1989
24 directed Butte-Silver Bow to reclassify the employees, and Butte-
25 Silver Bow had no choice but to follow the Order, does compliance
by Butte-Silver Bow constitute an Unfair Labor Practice.

1 III. STIPULATED FACTS

2 1. On August 15, 1989 District Court Judges Arnold Olsen
3 and Mark P. Sullivan issued an order to remove Department
4 Secretaries Barbara Verbance and Betty Peterson from the
5 collective bargaining unit.

6 2. The order was based on the assertion that the above
7 mentioned employees are confidential as defined in 39-31-103(12).

8 3. Reclassification was not sought by Butte-Silver Bow and
9 Butte-Silver Bow takes no position as to the confidentiality of
10 the above named employees.

11 4. Tim Clark, Personnel Director, pursuant to the Order of
12 Court, directed the Payroll Clerk to reclassify the secretaries
13 consistent with the District Court's Order. A copy of this Order
14 and memo to the Payroll Clerk was sent to Patsy Johnson, Local
15 Union President, on August 15, 1989.

16 5. The City and County of Butte-Silver Bow and the Butte
17 Silver Bow Public Employees Federation Local 4372, MFT, AFT, AFL-
18 CIO are parties to a Collective Bargaining Agreement which
19 contains the following recognition clause:

20 The Employer recognizes the Federation as the exclusive
21 representative for all deputies and assistants of the
22 following elected officials of the City and County of
23 Butte-Silver Bow State of Montana: Auditor, Clerk and
24 Recorder, Clerk of Court, Superintendent of Schools,
25 and Treasurer; and all other secretarial, parking
enforcement officers, bookkeeping, stenographic and
clerical employees of the Butte-Silver Bow Municipal
Government excluding summer employees, elected
officials, chief deputies, confidential employees,

1 supervisory employees, management employees, and all
2 other persons as defined by the Act 39-31-103, MCA.

3 6. On the 25th day of September 1989 the Federation filed
4 an Unfair Labor Practice alleging that the removal of the above
5 named employees from the bargaining unit constituted violation of
6 Section 39-31-401(1) and (5) MCA as well as Section 39-31-202
7 MCA.

8 IV. DISCUSSION

9 The question before the hearing examiner is whether the
10 removal of employees from the bargaining unit under Court order
11 constituted an unfair labor practice. There is no factual
12 dispute that the employees in question were members of the
13 bargaining unit at the time they were removed. There also seems
14 to be no question that the employer was Butte Silver-Bow as the
15 Defendant's brief states that the District Court is not the
16 employer.

17 In removing employees from the bargaining unit the employer
18 was between the proverbial rock and the hard place. On the one
19 hand was possible contempt of Court if the Court Order was not
20 obeyed. On the other hand was an unfair labor practice. To be
21 sure, the contempt possibility was no doubt the more pressing
22 consideration and necessitated compliance. However, the
23 collective bargaining agreement between Butte Silver-Bow and the
24 Federation is a contract. It is a contract that guarantees
25 certain rights to employees subject to its provisions. These

1 were not "at will" employees, a fact that distinguishes this case
2 from that of Mead v. McKittrick, 223 Mont. 428, 727 P.2d 517. In
3 complying with the Court Order Butte Silver-Bow has not lived up
4 to its contractual obligation to the Federation and to the
5 employees. Rights and privileges enjoyed under the contract
6 have been taken away from employees without due process and
7 without utilization of the statutory mechanism for determining
8 the composition of bargaining units contained in 39-31-202 MCA.

9 The answer of Butte-Silver Bow to this is that the
10 Federation should appeal the Court Order. I agree with the
11 Federation. Butte-Silver Bow did not have to sit back and
12 comply with the Court Order relying on what appears to be a
13 defense of necessity. Butte-Silver Bow had an obligation and
14 perhaps continues to have an obligation to appeal the Court
15 Order. It was not just the Federation who was signatory to the
16 contract. For either the Federation or Butte-Silver Bow to do
17 nothing negates the contract as it applies to the employees in
18 question and as it applies to the overall integrity of the
19 contract.

20 In its brief the Federation asks that the Board of Personnel
21 Appeals find that the District Court exceeded its authority and
22 violated the Constitution of the State. It is well settled that
23 administrative agencies cannot rule on constitutional questions.
24 Hand in hand with this, it is not for an administrative agency to
25 declare that a Court has exceeded its authority. Agencies can

1 interpret laws - especially laws that are within their field of
2 expertise.

3 This appears to be a case of first impression in Montana.
4 39-31-202 MCA provides that the Board of Personnel Appeals shall
5 decide the unit appropriate for collective bargaining purposes.
6 The language is mandatory. Other than agreement between the
7 parties to the bargaining agreement no other statutory scheme
8 exists to determine appropriate bargaining units nor is there any
9 statutory scheme that gives the Courts the ability to determine
10 bargaining units except through judicial review subsequent to
11 Board action. That has not occurred in this case. Rather, the
12 Court has declared two people confidential under 39-31-103 MCA
13 without Board involvement. Moreover, based on the letter of the
14 Court attached to the Defendant's answer to the summons served by
15 the Board, these positions were removed without applying long
16 established Board of Personnel Appeals and National Labor
17 Relations Board precedent to determine confidential status. See
18 for example Siemens Corp., 224 NLRB 216, 92 LRRM 1455, and UC #6-
19 79, UD #27-79 and UD #8-83.

20 In summation, public employees have the right to organize
21 and bargain collectively under the Collective Bargaining Act for
22 Public Employees. The Board of Personnel Appeals is charged with
23 protecting the integrity of that Act. The integrity of the Act
24 has been brought to question in this case in that the statutory
25 scheme for determining appropriate bargaining units has not been

1 followed. The Board cannot condone such action if the Act is to
2 have meaning.

3 V. CONCLUSIONS OF LAW

4 1. The State of Montana and the Board of Personnel Appeals
5 have jurisdiction over this complaint under the provisions of 39-
6 31-401 et seq. The fact that no appeal was taken of the District
7 Court Order is not sufficient to act as a bar to the charge filed
8 by the Federation. The charge was filed in a timely fashion and
9 does concern matters subject to the provisions of the Collective
10 Bargaining Act and the jurisdiction of the Board of Personnel
11 Appeals.

12 2. Butte-Silver Bow committed an unfair labor practice by
13 unilaterally removing Barbara Verbance and Betty Peterson from
14 the bargaining unit. Those actions constitute a violation of
15 39-31-401(1) and (5) MCA as well as 39-31-202 MCA.

16 3. Absent agreement between the parties as to the
17 composition of a bargaining unit the Board of Personnel Appeals
18 has exclusive jurisdiction to determine the confidential status
19 of employees within a bargaining unit as well as the composition
20 of a bargaining unit under the authority of 39-31-202 MCA and
21 ARM 24.26.610 through ARM 24.26.622 as well as ARM 24.26.630.

22 VI. RECOMMENDED ORDER

23 It is recommended that Barbara Verbance and Betty Peterson
24 be reinstated in the bargaining unit.

1 Dated this 4th day of April, 1990.

2 BOARD OF PERSONNEL APPEALS

3
4 
5 BY JOHN ANDREW
Hearing Examiner

6 NOTICE: Exceptions to these Findings of Fact, Conclusion of Law,
7 and Recommended Order, may be filed within twenty (20) days of
8 service. If no exceptions are filed the Recommended Order will
9 become the Order of the Board of Personnel Appeals.

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11 CERTIFICATE OF SERVICE

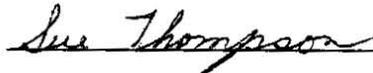
12 The undersigned does certify that a true and correct copy of
13 this document was served upon the following on the 6th day of
14 April, 1990, postage paid and addressed as follows:

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