

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGES 11, 12, 13, 14, 15, AND
16-94

WILLIAM BUHL, SERGE MYERS AND)
JAMES A. GRESS)
Complainants,)
vs.)
I.U.O.E. LOCAL 400 AND MONTANA)
DEPARTMENT OF CORRECTIONS AND)
HUMAN SERVICES)
Respondent.)

FINAL ORDER

The above-captioned matter came before the Board of Personnel Appeals on February 27, 1997 on the basis of an appeal by the Complainants to the Findings of Fact, Conclusions of Law and Order issued by a Department hearing officer.

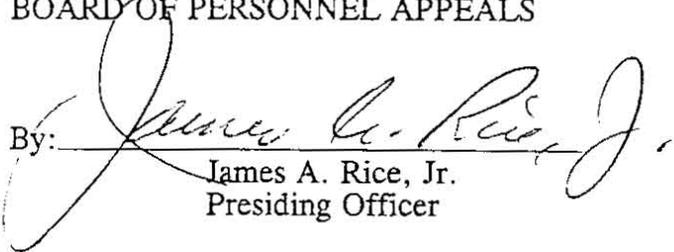
Appearing before the Board were James P. Lippert for the Complainants, Peter Michael Meloy for the Union, and Vivian V. Hammill for the Department of Corrections and Human Services.

After review of the record and consideration of the arguments by the parties, the Board concludes that the record supports the decision of the hearing officer. Accordingly, the Board orders as follows:

1. **IT IS HEREBY ORDERED** that the Board adopts the Findings of Fact, Conclusion of Law, and Order issued by the hearing officer.
2. **IT IS FURTHER ORDERED** that the appeal is dismissed.

DATED this 3 day of March, 1997.

BOARD OF PERSONNEL APPEALS

By: 
James A. Rice, Jr.
Presiding Officer

Board members Rice, Talcott, Hagan, Perkins and Schneider concur.

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

CERTIFICATE OF MAILING

I, Dorlene Barnes, do hereby certified that a true and correct copy of this document was mailed to the following on the 4 day of March, 1997:

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STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NOS. 11-94,
12-94, 13-94, 14-94, 15-94 & 16-94:

WILLIAM M. BUHL, SERGE MYERS,)
AND JAMES G. GRESS,)

Complainants,)

vs.)

INTERNATIONAL UNION OF)
OPERATING ENGINEERS LOCAL 400,)
AFL-CIO, & MONTANA DEPARTMENT)
OF CORRECTIONS & HUMAN)
SERVICES,)

Defendants.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

A formal hearing in the above-entitled matter was conducted on February 20, 21, 22, and 23, 1996, in Helena, Montana before Michael T. Furlong, duly appointed Hearing Officer of the Labor Commissioner. The hearing was conducted under authority of Section 39-31-406, MCA, and in accordance with the Montana Administrative Procedures Act, Title 2, Chapter 4, Part 6, MCA. The Complainants were represented by James B. Lippert, Attorney at Law, Helena, Montana. Serge Myers, William Buhl, James Gress, Dan Evans, Jerry Wheeler, Jack Caldwell, Thomas Gooch, and Chuck Cashell appeared as witnesses for the Complainants. The Montana Department of Corrections and Human Services was represented by Vivian Hammill, Legal Counsel of the Department of Administration. Thomas Gooch, Karl Englund, and Dan Evans appeared as witnesses for the Montana Department of Corrections and Human Services. The International Union of Operating Engineers, Local 400 was represented by Peter

1 Michael Meloy, Attorney at Law, Helena, Montana. Don Rogers,
2 Robert Matz, Bob Johnston, Art Huot, Chuck Cashell, Karl Englund,
3 and Kathy van Hook appeared as witnesses on behalf of the
4 International Union of Operating Engineers Local 400.
5 Complainants' Exhibits 1A through D, 2A through C, 3, 5A and B, 6,
6 10, 12, 13, 16, and 21 were admitted into evidence. Defendants'
7 Exhibits A, C, H, I, O1 and 2, P, S1 & 2, T and U were admitted
8 into evidence. The parties submitted post-hearing briefs and reply
9 briefs which are included in the record.

10 This hearing came on as a result of the Complainants filing
11 unfair labor practice charges against the state and their Union
12 Local 400 arising out of the June 30, 1993 layoffs of Galen boiler
13 operating engineers rather than Warm Springs boiler operating
14 engineers.

15 Counsel for the Complainant, Serge Myers, at the onset of the
16 hearing on February 20, 1996, moved to dismiss the unfair labor
17 practice charges he filed against the State and the Union. The
18 defendants did not object to the motion to dismiss. Therefore, the
19 unfair labor practice charges filed by Serge Myers against the
20 Defendants is dismissed with prejudice.

21 II. ISSUES

22 1. Whether the Department of Corrections and Human Services
23 violated Section 39-31-401(1) and (5), MCA. More specifically,
24 Complainants Buhl and Gress alleged the Department of Corrections
25 and Human Services committed an unfair labor practice in that it
26 refused to bargain in good faith as required by Montana Code
27 Annotated, Section 39-31-405(5), and further discriminated against
28 Buhl and Gress by acquiescing to the Union with regard to seniority

1 rights and layoffs, a violation of Montana Code Annotated, Section
2 39-31-401(1).

3 2. Whether the Local 400 committed an unfair labor practice
4 pursuant to Section 39-31-402, MCA. More specifically, the
5 Complainants filed the unfair labor practice charge against the
6 Union alleging that it breached its duty of fair representation to
7 Complainants by inadequately investigating their grievances,
8 arriving at an incorrect decision and refusing to process their
9 grievances to arbitration.

10 3. Whether the Complainants are entitled to relief in the
11 form of reinstatement, back pay, pension contributions, and
12 interest thereon as provided by Section 39-31-403, MCA.

13 III. FINDINGS OF FACT

14 1. In 1975, the State of Montana operated separate hospitals
15 at Galen and Warm Springs. Maintenance engineers (engineers)
16 employed at Galen were contained in a bargaining unit and were
17 being represented by Local 400 of the International Union of the
18 Operator Engineers, AFL-CIO. Engineers employed at Warm Springs
19 were contained in a bargaining unit and were being represented by
20 Local 971 of the International Unit of the Operating Engineers,
21 AFL-CIO.

22 2. In 1980, Locals 400 and 971 merged into Local 400.
23 Thereafter, Local 400 was recognized as the exclusive bargaining
24 representative for engineers at the separate campus locations in
25 Galen and Warm Springs.

26 3. In 1983, the State consolidated the Galen and Warm
27 Springs and renamed the combination "Montana State Hospital".

1 4. Local 400 and the State entered into a series of
2 collective bargaining agreements following a consolidation of the
3 two campuses in 1983 which covered the engineers employed at Galen
4 and Warm Springs campuses.

5 5. Following the hospital merger, the engineers at Galen and
6 Warm Springs continued to be assigned separate supervisors and
7 different work schedules, including a rotating shift at Warm
8 Springs and a straight shift at Galen. There was no interchange of
9 employees between the two units. In addition, the Galen unit
10 maintained a separate pension plan through the Union.

11 6. Complainants, William M. Buhl and James A. Gress were
12 employed as engineers assigned to the Galen campus. Buhl was
13 hired on September 1, 1984. Gress was hired on July 28, 1983.
14 Both were members of the Local 400 and, therefore, employed under
15 the terms and conditions of the collective bargaining agreement.

16 7. Beginning in the mid-1980's, indications surfaced that
17 one of the campuses might be closed and it was anticipated that
18 some of the engineers would be laid off. As a result, State and
19 Local 400 officials participated in discussions during the 1989 and
20 1991 bargaining session concerning the contract interpretation of
21 seniority and the order of layoffs for the engineers. During
22 those discussions, no resolution was reached concerning the
23 seniority issue of whether a separate seniority roster existed for
24 each campus or a combined roster existed including all engineers at
25 both campuses.

26 8. Jerry Wheeler was the business manager for Local 400 from
27 1984 to 1989. During that period, he had several discussions with
28 Department personnel concerning the seniority of the Galen and Warm

1 Springs engineers. Wheeler was of the impression from those
2 discussions that if one of the campuses closed, the engineers would
3 be laid off by date of hire under a combined seniority list.

4 9. Several seniority lists had been posted at the campuses
5 following the hospital merger in 1983. The Montana State Hospital
6 Administrative Office had posted several combined lists of the
7 Galen and Warm Springs engineers which showed their date of hire.
8 One of the lists was actually posted by Wheeler who had a clerk at
9 the hospital administrative office type the list. However, Wheeler
10 did not consult with the engineers at either campus concerning the
11 seniority list he posted. The personnel officer for the Montana
12 State Hospital acknowledged that none of the lists were prepared
13 for the purpose of establishing that there was a combined seniority
14 list. There were also older lists posted at the campuses showing
15 separate units. However, those lists were created prior to the
16 consolidation of the Galen and Warm Springs Hospital in 1983.

17 10. Don Rogers served as assistant business manager for Local
18 400 from April 1991 through May 1993. He noticed there was an
19 increasing concern amongst the engineers at Galen and Warm Springs
20 regarding the layoff issue. In May 1991, he commenced researching
21 the order in which engineers from the two campuses would be laid
22 off in compliance with the collective bargaining agreement. He
23 found that an investigation was necessary in order for the Union to
24 determine whether each campus was a separate unit with a separate
25 seniority roster or whether a combined seniority existed between
26 campuses. It was the Union's intention to provide the results of
27 their investigative finding to the Department and the operating
28

1 engineers at each campus due to the continuing rumor that Galen
2 would be closed.

3 11. During the review, Rogers found that both Warm Springs
4 and Galen had almost identical labor agreements and that the
5 engineers performed basically the same type of work. However, he
6 discovered major differences which would preclude the concept that
7 the campuses shared seniority. These differences included:

8 The Warm Springs engineers were denied the option of
9 participating in the Central Pension Fund of the International
10 Union of Operating Engineers during the 1989 contract
11 negotiations, while participation was granted to the Galen
12 engineers.

13 The Warm Springs engineers were not allowed to bid on the
14 sewer plant position at the Galen campus when it became
15 vacant.

16 12. On January 16, 1992, Rogers notified the Department by
17 letter of the Union's position that the engineers at Galen and Warm
18 Springs maintain separate seniority. Rogers also provided the
19 Galen and Warm Springs engineers a copy of the letter. Thereafter,
20 Rogers did not receive a response from the Department or the
21 engineers from the campuses concerning the Union's findings.

22 13. Under directive of the legislature, the State announced
23 the closing of the Galen campus in the early spring of 1993. As a
24 result, several operating engineers at Montana State Hospital were
25 to be laid off in June 1993. The layoffs were to occur according
26 to employment seniority under the terms of the existing collective
27 bargaining agreement ratified between Local 400 and the State on
28 December 20, 1991. (Exhibit 21)

14. Following the hospital merger in 1983, the Department had
taken the position that Galen and Warm Springs engineers were a
combined unit. Upon the announcement that Galen would be closed,

1 the Department initially continued in support of their position
2 that one seniority list existed and the least senior engineers from
3 the combined list would be laid off. Using a combined seniority
4 list, the state determined that three engineers from Warm Springs
5 and two engineers from Galen, including Gress, would be retained.
6 The remainder of the engineers, including Buhl, were to be laid
7 off. On April 7, 1993, Complainant Buhl received notice that he
8 was being laid off effective June 30, 1993.

9 15. On April 29, 1993, two engineers at Warm Springs, who
10 received layoff notices, filed grievances pursuant to Article 8 of
11 the collective bargaining agreement. Article 8 contains a
12 grievance procedure culminating in final and binding arbitration.
13 (Exhibit 21, page 5). They alleged that there were separate
14 seniority lists for each campus and the engineers from Galen were
15 prohibited from carrying their seniority from Galen to Warm Springs
16 pursuant to Article 7, Section 6, of the collective bargaining
17 agreement which states, in part:

18 "Maintenance engineers going from one bargaining unit to
19 another bargaining unit of the union shall not carry
their seniority with them".

20 16. Initially, the Department denied the grievance from the
21 Warm Springs engineers maintaining that only one seniority list
22 existed and the operators from both campuses shared a common
23 seniority. Therefore, the decision to lay off the Warm Springs
24 operators with the least seniority was appropriate. At that time,
25 the Union notified the Department that they would proceed to
26 arbitration with the Warm Springs engineers' grievances if
27 necessary consistent with the position that the layoffs of the
28

1 engineers should occur on the basis that Galen and Warm Springs
2 were separate units.

3 17. In April and early May 1993, the Union received
4 correspondence from an attorney representing the Warm Springs
5 operators scheduled for layoff concerning their grievance. He
6 contended that in the past the Union had consistently taken a
7 position that the Warm Springs and Galen campuses were treated as
8 separate units. He pointed out that each had separate seniority
9 lists for purposes of layoff, there was no interchange of personnel
10 within the two units, the Galen unit had separate pension plans,
11 and each unit had separate supervisors and work schedules.

12 18. After receiving the correspondence from the Warm Springs
13 engineers' attorney, the Union decided to further investigate the
14 seniority issue. They hired legal counsel with a background in
15 labor relations for guidance. In connection with the
16 investigation, the Union reviewed prior records, prior hiring and
17 layoff practices of both campuses, and interviewed the affected
18 engineers. The Union, through their business manager, also sought
19 assistance from a labor mediator to analyze the information that
20 had been gathered during the investigation. The Union prepared a
21 breakdown of the investigative findings which showed the various
22 factors pertaining to the question of whether separate units or one
23 unit existed. (Exhibit 16) The mediator helped separate the
24 relative investigative findings regarding the question of whether
25 or not the engineers shared seniority between campuses under the
26 terms of the bargaining agreement. He advised the representatives
27 that they would have to fully consider all of the factors in
28

1 separate units of operators existed at each campus under the terms
2 and conditions of the bargaining agreement. Therefore, if the
3 Department were to lay off the Warm Springs operating engineers,
4 the Union would proceed to arbitration on behalf of the Warm
5 Springs engineers because they believe that such action would be in
6 violation of Article VII, Section 6 of the agreement. Under that
7 interpretation, the Union also informed the Department that they
8 would not proceed to arbitration on behalf of the Galen engineers
9 since they were not entitled to bumping rights.

10 21. Upon such notice from the Union, the Department said they
11 would defer to the Union's interpretation of the contract, and that
12 the Department had no interest in favoring one unit of engineers
13 over the other unit. On or about June 11, 1993, the Department
14 issued Gress and Buhl layoff notices effective June 30, 1993,
15 consistent with the Union's position.

16 22. Gress and Buhl filed grievances on June 15, 1993,
17 alleging their terminations constituted a violation of the terms
18 set forth in the collective bargaining agreement. They were laid
19 off as scheduled effective June 30, 1993.

20 23. Upon filing of the grievance by the Galen engineers, the
21 Union decided to extend their investigation. The Union learned
22 from interviews with the engineers from both campuses that the
23 seniority issue had been periodically discussed following the
24 Montana State Hospital reorganization in 1983. While some
25 engineers believe they were not entitled to bumping rights, other
26 engineers thought they were entitled to bumping privileges. One
27 individual indicated that he had worked as an engineer at Warm
28 Springs for more than 16 years. Each time it was rumored that one

1 of the campuses would close, he said the engineers at Warm Springs
2 and Galen always objected to being combined with the other campus.

3 24. Sometime after the 1983 hospital merger, Teamsters
4 employed at the Warm Springs and Galen campuses were faced with
5 nearly the same problem of deciding whether there were separate
6 seniority lists or a combined seniority list for purposes of
7 layoffs. To resolve the problem, the Teamsters took a vote in
8 order to establish seniority of the craft workers for the purpose
9 of controlling the order of any future layoffs with a possible
10 closing of a campus.

11 25. At one point in the hearing, Gary Wheeler (Local 400
12 business manager, 1984 to 1989) had indicated that he was under the
13 assumption that the Galen and Warm Springs units had a combined
14 seniority list following the hospital merger in 1993. Wheeler was
15 not contacted by the Union during its investigation. Complainants
16 believe Wheeler was not contacted because of his position that
17 there was a combined seniority list. However, when questioned
18 about voting on the matter at the hearing, he said he agreed that
19 it would probably take a vote of the Union members to change the
20 seniority clause expressed in the contract.

21 26. Tom Gooch was employed as Director of Personnel and
22 Administrator of the Centralized Services Division with the
23 Department's Labor Relations Unit. He was involved in negotiating
24 a series of contracts between Local 400 engineers and the
25 Department following the 1983 hospital merger. He became
26 increasingly concerned in 1991 over the seniority issue because he
27 believed it had never been resolved. It was his opinion that the
28 engineer units at both campuses had been combined after the

1 hospital reorganization in 1983. However, he could not recall a
2 vote ever being taken by the engineers to combine the units in
3 order to change seniority.

4 27. The Union found that the series of collective bargaining
5 agreements in existence since 1983 continued to refer to separate
6 units under the seniority clause at Article VII, Section 6. In
7 addition, addendums to the series of contracts concerning pensions
8 for engineers still refers to separate units. The Union further
9 determined that the list could not be combined without a vote of
10 the members in order to change the seniority provision.

11 28. On August 6, 1993, the Union notified the Department that
12 they had completed their investigation and found that in addition
13 to their previous findings, they had learned that a vote had never
14 been taken by the engineers employed at Galen and Warm Springs to
15 combine seniority between campuses. As a result, the Union
16 concluded that there two units existed and that the grievance of
17 the Galen engineers lacked merit.

18 29. The Union reached their investigation conclusions based
19 on the following:

20 Since the 1983 hospital merger, all the master contracts
21 in addition to the addendum to the collective bargaining
22 agreement refer to separate units for the engineers at Galen
23 and Warm Springs; no vote has ever been taken by the Union
24 members to consolidate the Galen and Warm Springs units; the
25 Galen engineers carry a separate pension plan under the
26 stipulated terms of the collective bargaining agreement; the
27 State maintains separate supervisors for the engineers for
28 each location; each location has separate and distinct work

1 schedules; no interchange of engineers took place between
2 campuses; engineers had a general understanding that if they
3 transferred between campuses, they could not carry seniority
4 with them; and job openings at the Galen campus were filled by
5 Galen engineers without the vacancies being posted at the Warm
6 Springs campus or allowing Warm Springs engineers an
7 opportunity to bid for the positions.

8 30. On August 9, 1993, the Department responded by letter to
9 the Union suggesting that the issue proceed to arbitration.

10 31. On August 17, 1993, the Union, through their attorney,
11 informed the Department that the seniority issue had been fully
12 investigated and it was the Union's position that the units at
13 Galen and Warm Springs did not share seniority. Therefore, the
14 Union would not proceed to arbitration concerning the matter. The
15 Union also informed the Department that they had taken a previous
16 position to support the Union's investigative findings concerning
17 order of layoff between the campuses and that it was only under the
18 Union's authority to carry the matter to arbitration.

19 32. On August 30, 1993, the Department sent a letter to the
20 Union indicating that they were frustrated with the process but
21 believed they acted in good faith concerning the grievance
22 proceedings under the collective bargaining agreement.

23 33. The Complainants filed unfair labor practice charges
24 against both the State and the Union as a result of the June 30,
25 1993 layoffs of the Galen engineers rather than the Warm Springs
26 engineers.

27 34. Complainant Buhl was unemployed for one month following
28 the layoff from the Montana State Hospital. He worked for two

1 months at \$10.00 per hour for the Anaconda School District. He was
2 then out of work for one week. He attended truck driver training
3 school in Billings, Montana for the next five weeks. He has been
4 employed by the State of Montana since he completed his truck
5 driver training.

6 35. Complainant Gress was out of work and received
7 unemployment insurance benefits for six months following his layoff
8 from the Montana State Hospital. He obtained employment with the
9 State of Montana at the Boulder School Powerhouse on January 10,
10 1994. Since that time, he continues to commute from his home in
11 Anaconda to his job 65 miles each way every day he works at
12 Boulder.

13 All proposed findings, conclusions, and supporting arguments
14 of the parties have been considered. To the extent that the
15 proposed findings and conclusions submitted by the parties, and the
16 arguments made by them, are in accordance with the findings,
17 conclusions, and views stated herein, they have been accepted, and
18 to the extent they are inconsistent therewith, they have been
19 rejected. Certain proposed findings and conclusions may have been
20 omitted as not relevant or as not necessary to a property
21 termination of the material issues presented. To the extent that
22 the testimony of various witnesses is not in accordance with the
23 findings herein, it is not credited.

24 IV. CONCLUSIONS OF LAW

25 1. The Board of Personnel Appeals has jurisdiction over this
26 unfair labor practice charge by a labor organization against a
27 public employer. Section 39-31-405, MCA.

28

1 2. The Complainants filed unfair labor practice charges
2 against the State alleging the Department violated Section 39-31-
3 401(1) in that it discriminated against the Complainants by
4 acquiescing to the Union's position on seniority rights and
5 layoffs. Furthermore, the Complainants alleged the Department
6 failed to bargain in good faith, a violation of Section 39-31-
7 405(5), MCA. Additionally, the Complainants filed unfair labor
8 practice charges against their exclusive bargaining representative
9 alleging a breach of duty of fair representation.

10 **Section 39-31-401. Unfair labor practices of public employer.**

11 It is an unfair labor practice for a public employer to:

12 (1) interfere with, restrain, or coerce employees in the
13 exercise of the rights guaranteed in 39-31-201;

14 (5) refuse to bargain collectively in good faith with an
15 exclusive representative.

16 The United States Supreme Court in the leading case in the
17 area of employer liability for unfair labor practices is Vaca vs.
18 Sipes (1967) 386 U.S. 171. In Vaca, supra, the Supreme Court
19 raised a shield to protect an employer in unfair labor practice
20 cases from liability by requiring that the employee prevail in
21 their unfair labor practice charges against the Union first. To
22 prevail, the employee must prove that the Union failed to fairly
23 represent their interest. An employer's liability is contingent on
24 a finding that the Union breached their duty. Once success against
25 the Union has been established, the employer's liability is based
26 upon a finding of conspiracy to have wilfully acted in a concerted
27 manner to further the Union's plan, intentional discrimination
28 against the employees or finding that the employer breached the
collective bargaining agreement in taking action against the

1 employee. Vaca, supra; Humphrey vs. Moore (1963) 375 U.S. 335;
2 Steele vs. Louisville and N. & R. Company (1944) 323 U.S. 192.

3 In Bowan vs. United States Postal Service (1983) 459 U.S. 212,
4 the Court ruled that once a Union's liability was established, the
5 employer's liability is contingent on finding that the employer
6 acted in callous and reckless disregard for the employer's rights
7 or that the contract itself was breached.

8 Therefore, in compliance with the above, the first issue to be
9 decided is whether or not the Union breached their duty of fair
10 representation.

11 3. Complainants' unfair labor practice charges against the
12 Union alleged that it breached its duty of fair representation to
13 the Complainant in violation of Section 39-31-402.

14 **39-31-402. Unfair labor practices of labor organization.** It
15 is an unfair labor practice for a labor organization or its
16 agents to:
17 (2) refuse to bargain collectively in good faith with a public
18 employer if it has been designated as the exclusive
19 representative of employees;

20 The unfair labor practice charge against the Union in this
21 case is essentially a charge of breach of the Union's duty of fair
22 representation. A union violates the duty of fair representation
23 when its "conduct toward a member is arbitrary, discriminatory, or
24 in bad faith." Vaca vs. Sipes, 386 U.S. 171, 191 (1967) A union
25 has wide discretion in determining whether a grievance has merit.
26 The U.S. Supreme Court ruled, "although we accept the proposition
27 that a union may not arbitrarily ignore a meritorious grievance or
28 process it in a perfunctory fashion, we do not agree that the
individual employee has an absolute right to have his grievance
taken to arbitration." Id.

1 The inquiry in a fair representation case is whether the
2 Union's acts or omissions show "hostile discrimination" based on
3 "irrelevant and invidious" considerations. **Ford Motor Company v.**
4 **Huffman**, 345 U.S. 330, 338 (1953) A person charging breach of duty
5 must "adduce substantial evidence of discrimination that is
6 intentional, severe, and unrelated to legitimate Union objectives."
7 **Motor Coach Employees v. Lockridge**, 403 U.S. 274, 301 (1971) Put
8 another way, the burden of proving breach of the duty "involves
9 more than demonstrating mere errors in judgement." **Hines v. Anchor**
10 **Motor Freight**, 424 U.S. 554, 571 (1976).

11 In a U.S. Supreme Court decision dealing with integration of
12 seniority lists, the court determined that the Union must act in
13 good faith and base its decision upon relevant considerations and
14 not upon capricious or arbitrary factors. **Humphrey v. Moore**, 374
15 U.S. 335, 11 L.Ed.2d 370, 84 S. Ct. 363 (1963).

16 Essential to the seniority issue is what the 1991 collective
17 bargaining agreement calls for under Article 7, Section 6 (Exhibit
18 21) which states:

19 Maintenance Engineers going from one bargaining unit to
20 another bargaining unit of the union shall not carry their
seniority with them.

21 Such contractual language is specific in each of the
22 collective bargaining agreements negotiated since 1983 in that it
23 refers to two separate bargaining units of engineers within the
24 Union. While the contract allows for separate units within the
25 Union, the question critical for the Union to decide in their
26 investigation was whether the two groups of engineers at Galen and
27 Warm Springs had functioned as separate units or one unit after the
28 merger of the hospitals in 1983. As the exclusive representative

1 for the Complainants, it was also incumbent upon the Union to carry
2 out its investigation in a reasonable manner that would not violate
3 its duty of fair representation towards the Complainants.

4 The record shows that the Union did process the Complainants'
5 grievances thoroughly by using a number of considerations during
6 its investigation that are relative to the accepted standards used
7 to determine seniority issues. Throughout the extensive
8 investigative period, the Union continued to weigh factors which
9 revealed that historically the Galen and Warm Springs engineers had
10 primarily been treated as two separate and distinct units. The
11 series of collective bargaining agreements always referred to
12 separate engineer bargaining units of the Union which specifically
13 states that the engineers who transferred from one bargaining unit
14 to the other bargaining unit cannot carry seniority rights with
15 them. The fact that one campus of engineers carried a separate
16 pension plan, as stipulated in the addendum to the collective
17 bargaining agreement, is certainly a strong indication that the
18 units were treated separately. The Galen and Warm Springs
19 engineers did not share common work schedules or share common
20 supervision and there was no interchange of engineers between
21 campuses. Furthermore, when engineer job vacancies occurred at
22 Galen, the positions were filled exclusively from within the Galen
23 unit without engineers from Warm Springs being provided an
24 opportunity to bid for the opening. Such key factors are not
25 indicative of a combined unit. It is also worthy to note that when
26 the Teamsters at the Montana State Hospital faced a similar
27 seniority issue, they took a vote of its members in order to
28 combine the seniority and determine the order of layoffs between

1 campuses. No such vote was ever taken by the Galen and Warm
2 Springs engineers in order to establish a combined seniority. The
3 above factors considered in the Union's investigation are
4 significantly relevant in establishing the seniority issues between
5 campus.

6 The evidence further reveals that the Union did not
7 arbitrarily ignore the complainants' grievances or process the
8 grievances in a perfunctory or discriminatory fashion. It was the
9 Union's sole objective to resolve the issue of seniority between
10 the Galen and Warm Springs engineers when it commenced its
11 investigation in 1991. With the announcement that Galen would be
12 closed and the grievances filed by the Galen and Warm Springs
13 engineers, the Union elected to proceed with extra care because of
14 the sensitivity and complexity of the issue and the Union's
15 differences of opinion with the Department. As a result, the Union
16 reopened its investigation on two occasions, in May and June 1993,
17 in order to obtain as much information as they could to arrive at
18 a resolution to what they considered to be a most difficult issue.
19 The Union used extensive resources to find a resolution. They
20 interviewed the engineers from each campus; they gathered and
21 reviewed past records available concerning contract negotiations
22 between the Department and the Union; they attained an attorney for
23 legal guidance; they requested assistance from an experienced labor
24 mediator; they held meetings with Department officials; and they
25 applied provisions with the results of the information they
26 gathered with the collective bargaining agreement.

27 The Complainants further argue that the only primary findings
28 used by the Union in determining there were two separate units were

1 the topics included in the three column diagram that had been
2 discussed with the mediator (Exhibit 16). They contend that such
3 topics are not relevant because any matters involving seniority
4 fall under the exclusive control of the Department management
5 pursuant to Article 1, Management Rights of the work agreement
6 which is identical with Section 39-31-303, (1), (2), & (5), MCA.

7 **39-31-303. Management rights of public employers.** Public
8 employees and their representatives shall recognize the
9 prerogatives of public employers to operate and manage their
10 affairs in such areas as, but not limited to:

- 11 (1) direct employees;
12 (2) hire, promote, transfer, assign, and retain
13 employees;
14 (5) determine the methods, means, job classifications,
15 and personnel by which government operations are to be
16 conducted;

17 This Hearing Officer does not find the Complainant's argument
18 to be convincing. The record lacks conclusive evidence to make a
19 finding that the Union and Department negotiated and ratified the
20 terms of the work contracts in violation of any statutory
21 provisions which regulate collective bargaining for public
22 employees of the State of Montana including Section 39-31-303, MCA.
23 It is a standard rule of contract interpretation in accordance with
24 Section 28-3-202, MCA, that effect be given to every clause of the
25 contract.

26 **Section 28-3-202. Effect to be given to every part of
27 contract.** The whole of a contract is to be taken together so
28 as to give effect to every part if reasonably practicable,
each clause helping to interpret the other.

Article 7, Section 6 of the collective bargaining agreement
clearly defines the guidelines as to how seniority will be treated
between two bargaining units of the Union. That section of the
contract cannot be ignored pursuant to Section 28-3-202. Effect

1 must be given to that provision in conformance with the above law.
2 It can only be concluded that the parties to the contract
3 incorporated such a provision for the specific purpose of
4 establishing the seniority rights of the engineers if they
5 transferred from one bargaining unit to another. It is found that
6 Article 7, Section 6 does control the manner in which engineers
7 transfer from one bargaining unit to another bargaining unit under
8 the terms of the collective bargaining agreement.

9 It is held that the Union conducted their investigation in a
10 reasoned and undiscriminatory manner. A consideration of the above
11 leads to the conclusion that the Union acted in good faith during
12 its investigation and based its decision upon considerations that
13 were not arbitrary or capricious.

14 4. It is concluded that the Union did not violate Section
15 39-31-402, MCA.

16 5. To prevail in their unfair labor practice charges against
17 the Department, the Complainants had the initial burden of proving
18 that the Union failed to fairly represent their interest. The
19 Complainants failed to sustain their burden. Therefore, the
20 evidence does not support a finding that the Department violated
21 Section 39-31-401(1) and (5), MCA.

22 6. The Complainants are not entitled to relief pursuant to
23 Section 39-31-403, MCA.

24 **V. RECOMMENDED ORDER**

25 It is hereby ordered that the unfair labor practice charges
26 filed by the Complainants against the Union and Department be
27 dismissed.

28

1 DATED this 31st day of October, 1996.

2 BOARD OF PERSONNEL APPEALS

3 By: Michael T. Furlong
4 Michael T. Furlong
5 Hearing Officer

6 NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER
7 shall become the Final Order of this Board unless written
8 exceptions are postmarked no later than November 25, 1996.
9 This time period includes the 20 days provided for in ARM
10 24.26.215, and the additional 3 days mandated by Rule 6(e),
11 M.R.Civ.P., as service of this Order is by mail.
12 notice of appeal shall consist of a written appeal of the decision
13 of the hearing officer which sets forth the specific errors of the
14 hearing officer and the issues to be raised on appeal. Notice of
15 appeal must be mailed to:

16 Board of Personnel Appeals
17 Department of Labor and Industry
18 P.O. Box 6518
19 Helena, MT 59604
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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Peter Michael Meloy
Attorney at Law
The Blue Stone
80 South Warren
P.O. Box 1241
Helena, MT 59624

James B. Lippert, Esq.
P.O. Box 1715
Helena, MT 59624-1715

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day, served upon the following parties or such parties' attorneys of record by means of the State of Montana's Deadhead mail service.

Vivian Hammill, Legal Counsel
Classification Bureau
State Personnel Division
Room 130 - Mitchell Building
Helena, MT 59620

DATED this 31st day of October, 1996.

Christine A. Roland