BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 41-76:

MONTANA PUBLIC EMPLOYEES ASSOCIATION, Complainant, -VS- EMPLOYMENT SECURITY DIVISION, DEPARTMENT OF LABOR AND INDUSTRY, STATE OF MONTANA, Respondent.	FINDINGS OF FACT CONCLUSIONS OF LAW AND RECOMMENDED ORDER

* *

STATEMENT OF CASE

On December 21, 1976, the Montana Public Employees Association (hereafter referred to as the Association) filed an unfair labor practice charge with the Montana Board of Personnel Appeals against the Employment Security Division, Department of Labor & Industry, State of Montana (hereafter referred to as the Respondent). At the pre-hearing conference, 23 February 1977, the complainant filed an amended charge. The Association charged violations of employees' rights (59-1603(1) and 59-1605(a) and (c))in that "the office manager and certain supervisory employees of the Great Falls Employment Security office have engaged in a course of conduct designed to interfere with, restrain, coerce, intimidate and harass employees because of their membership in and participation in activities of the Association". Specific instances cited by the Complainant are:

"1. Job reassignment to create employee dissatisfaction;

2. Harassment of the Association's local employee representative;

3. Selective enforcement of sick leave policies set forth in an office manual which is superseded by the terms of the existing collective bargaining agreements;

4. The placement of warning letters in employee personnel files based upon alleged violations of said invalid sick leave policy;

5. Interrogation of employees concerning association activities, meetings and membership;

6. Verbal threats directed towards those association members actively participating in association affairs;

7. Reducing the semiannual job evaluation scores of persons who are active supporters and participants in the association;

8. Denying a leave of absence to an employee because of association membership;

9. Surveillance of an off-premises association meeting; and

10. Physical violence directed against association members."

On 3 March 1977, the employer filed a Motion to Dismiss. The motion was denied at the commencement of the hearing; subsequently, the employer orally answered the 23 February 1977 amended complaint with a general denial.

A hearing on the above-captioned matter was held on 9, 10, 11 March 1977, at the Employment Security Division offices in Great Falls. The Association was represented by Mr. Barry L. Hjort, Attorney at Law, Helena, Montana. Mr. David W. Stiteler of the Department of Administration, Personnel Division, and Mr. Moody Brickett of the Department of Labor & Industry, Employment Security Division, Attorneys at Law, represented the Respondent.

As the duly appointed hearing examiner of the Board of Personnel Appeals, I conducted the hearing in accordance with the provisions of the Montana Administrative Procedures Act (Section 82-4201 to 82-4225, R.C.M., 1947).

After a thorough review of the entire record of this case, including briefs of the parties concerned, sworn testimony, and from my observation of the witnesses, and their demeanor on the witness stand, and upon substantial, reliable evidence, I make the following:

FINDINGS OF FACT

1. The Association charges that the Respondent has violated the following sections of the Montana Public Employees Collective Bargaining Act:

> "59-1603. Employees' right to join or form labor organization and engage in collective bargaining activities. (1) Public employees shall have, and shall be protected in the exercise of, the right of self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion."
>
> "59-1605. Unfair labor practices of employer or labor organization. (1) It is an unfair labor practice for a public employer to:
>
> (a) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 59-1603 of this act;
>
> (c) discriminate in regard to hire or tenure of employment to encourage or discourage membership in any labor organization;..."

2. Respondent admits that some of the specific instances did occur, but that none of the actions taken by local management were taken with the intent or motive to harass, coerce, interfere, intimidate or discriminate against any employees because of their Association membership or activity.

Job Reassignments

3. The Complainant alleged that the job reassignments of Ms.Sharon L. Anderson and Ms. Glenda Smith were discriminatory and motivated to create employee dissatisfaction.

4. Ms. Anderson is classified as an Interviewer II. Prior to her reassignment to the first floor, January, 1977, she was assigned to the Claims Room and later to the Aptitude Testing Program.

5. The Complainant alleged that she was reassigned to the less desirable position of interviewing clients looking for

industrial jobs as laborers, craftsmen, farm and ranch hands - generally "blue collar" positions because:

(a) She dropped her membership in the International Association of Personnel and Employment Security (IAPES) organization, after Mr. Cady encouraged her not to do so for several weeks. (tr. 164)

(b) She testified that in relation to her IAPES action Mr. Cady asked her if she wasn't concerned about her professional career (tr. 164) and during a later conversation on this matter she informed him (Mr. Cady) that she was "going to drop the IAPES and join MPEA and at that time he said 'I don't know why, it won't do you any good.'" (tr. 165, 172)

Under cross examination, Ms. Anderson testified that she felt that Mr. Cady's efforts to encourage her to maintain membership in IAPES was more harassment. (tr. 171a) She thought it was harassment because:

> "Everyday and everyday and everyday for three weeks is harassment, not persistence. Not saying it on a nice vein, at the beginning it was nice; after that it wasn't, it was pushy and that is harassment." (tr. 171a)

6. Ms. Anderson attended the 16 December MPEA meeting and voiced certain complaints about various matters concerning the Management's operation of the Great Falls office.

7. Ms. Anderson accompanied Ms. Terry Langan to Mr. Chuck Dyer's (the Assistant Manager) office on 23 December as an MPEA witness. This meeting concerned the denial of Ms. Langan's request for a leave of absence. Mr. Dyer testified that he "made some comment to the effect that they must not have a very high opinion of me if they felt they had to have a witness at the time they asked me a question". (tr. 233)

8. Ms. Anderson and her immediate supervisor, Mr. Farmer, met with Mr. Cady about the denial of a leave of absence she requested. (tr. 168) It was during this meeting that she was

informed of her reassignment with the explanation that he (Mr. Cady) was not just moving people around.

9. Ms. Anderson testified that she did not complain about the reassignment "Because if I had complained, I would be there for the rest of my life, and I knew it, so I decided to try it and see how it worked." She added that she reached that conclusion "Because in the past that's the way Mr. Cady has done things."

10. In response to Counselor Stiteler's question and observation about such transfers not being good for morale and the motivation, Ms. Anderson responded, "I feel that in my particular situation, the motivation was to get rid of me, find a job that she dislikes the most and she'll leave." (tr. 173, 174)

11. She also testified, "I'm not prejudiced [against laborers and farm hands] but I'm not comfortable with them either."

12. Ms. Anderson requested to take the Interviewer III Merit test. She testified, "I talked to my supervisor and asked him if he would talk with Mr. Cady and see if I could take the exam. He went and talked to him and Mr. Cady turned it down twice." (tr. 169) (tr. 176, 177) She later wrote the State Merit System, who allowed her to take the exam on 26 February.

13. During December and January there were several other employee reassignments. The Respondent claims these reassignments, including Ms. Anderson's, were made because the office needed to establish a CETA section. According to Mr. Cady about fifteen people were moved, reassigned for the CETA section, in December. He added, "Generally there were a lot of changes."

14. Mr. Cady testified that his discussion with Ms. Anderson concerning IAPES pertained to getting her dues back for a month or two. (tr. 29) He did not think she could get two months dues back (annual $6.00) and she could drop her membership by not paying dues.

15. Mr. Cady denies talking to Ms. Anderson about MPEA. (tr. 30)

He further denies he ever made a statement to an employee that it would do them no good to join MPEA because all the non-supervisory employees have to join. (tr. 251)

16. In answer to a question by Counselor Stiteler,

> "We heard yesterday some testimony that Sherry Anderson had been placed, she was originally in Claims, spent sometime in Testing and then she's moved to her present location on the first floor. Is this common that different individuals do testing?"

Mr. Cady replied,

> "Yes....We feel that it's the method of training them so that they can have better knowledge of the overall operations....About twenty-five different individuals have done testing since 1974." (tr. 250)

17. Ms. Smith was reassigned to the CETA section in January as a Clerk-Typist. She did not request that reassignment nor did she object.

18. Ms. Smith testified that Mr. Cady asked her on 21 December if she had attended the 16 December MPEA meeting. She informed Mr. Cady that she hadn't and that she had never attended an MPEA meeting before. (tr. 80, 85)

19. Mr. Cady testified that Ms. Smith was tranferred to the CETA section because of her abilities and proficiencies (good typist), not because of Association activities nor events pertaining to a 17 December office party. (tr. 28-29)

20. Mr. Cady denied that he asked Ms. Smith whether or not she had attended the MPEA meeting of 16 December. (tr. 27)

Local Association Representative

21. Mr. Joe Hueth, Counselor II for the past eight years, was elected the Association's local Employment Security Division representative at the 16 or 21 December meeting. (tr. 208)

22. Mr. Hueth received a letter of reprimand from his immediate supervisor, Mr. Clare Jensen, on 20 January (Complainant's Exhibit 6). The Complainant alleged this letter was an effort to harass its local representative because it was exaggerated and unwarranted.

23. The following testimony was elicited pertaining to the content of the letter. (See Complainant's Exhibit 6)

(a) Mr. Clare Jensen, Counseling Supervisor, testified he wrote the letter of reprimand to Mr. Joe Hueth on 20 January because of a re-occuring problem of employees congregating on the floor. Prior to that Mr. Jensen had given general warnings or cautions to all the employees, on his floor, about this problem. As Mr. Jensen stated "...this is something that kind of comes. We seem to get it worked out and it maybe comes back up again. On this occasion it just seemed like it didn't settle like it should." (tr. 179)

(b) Prior memoranda on this matter were directed generally to everyone.

Mr. Hueth testified that Mr. Jensen never admonished him individually but that Mr. Jensen had admonished him and other employees collectively about activities alluded to in Complainant's Exhibit 6.

(c) Under extensive examination by Counselor Hjort, it was established that the only person who directly complained to Mr. Jensen was Mr. Chigbrow and Interviewer Supervisor, Mr. Sutliff, who did not supply specific names of those who may have complained to him.

(d) Mr. Jensen's response to questions pertaining to complaints on numerous occasions totaled two. (tr. 181)

(e) Mr. Hueth testified that the only person he talked to about "who's side they're on" was Mr. Chigbrow, (tr. 210, 211) and that was only once. (3rd paragraph)

(f) Mr. Jensen stated in his letter "this verbal pressure on several of our ES members as to whose side they are on has brought about complaints also from these co-workers that it has affected their work both from the standpoint of time and from emotional factors."

(g) According to Mr. Jensen's testimony these "ES members and co-workers" comes down to Mr. Chigbrow because he didn't definitely know who else specifically lodged complaints. (tr. 181)

(h) Mr. Jensen had verbally admonished most of the other employees about this matter, but according to his testimony Mr. Hueth was "the greatest violator of this within the last couple of weeks prior to my writing this letter." Therefore, only Mr. Hueth received a letter of reprimand.

Mr. Jensen testified that no one directed him to write the letter, but that he did consult with Mr. Dyer and Mr. Cady on everything he did. (tr. 185)

(i) Mr. Jensen further testified that since he became a supervisor in 1969, this is the first letter of reprimand he had written to an individual. Previous notices or memoranda have been addressed to all personnel. (tr. 186)

His explanation for writing this first letter of reprimand to an individual was "I guess this just as to be a first time and I felt that it was appropriate." (tr. 188)

(j) Mr. Jensen testified that he was not aware that Mr. Hueth had been elected the local MPEA representative at the time he wrote the letter. Nevertheless, from the content of the letter it is obvious that he at least know that Mr. Hueth was an active Association member.

(k) Mr. Jensen was formally notified that Mr. Hueth was the elected MPEA representative on 4 February. (See Respondent's Exhibit D)

Sick Leave Policies

24. Ms. Terry Langan and Mr. William Zupan received letters pertaining to alleged violations of sick leave policies from their immediate supervisor, Mr. Tom Sutliff (See Complainant's Exhibits 4 and 5).

25. Neither the Montana Operations Manual for Employment Security Division nor the MPEA Master Collective Bargaining Contract states that an employee must personally notify the immediate supervisor in case of illness. (See Complainant's Exhibits 1 and 3)

26. Referring to paragraph 0 of Complainant's Exhibit 3 (Operation's Manual), Mr. Cady replied to Counselor Bjort's questions as follows:

> "MR. BJORT: Now is there any requirement there that notification be given by the individuals who intend to be absent because of illness?
>
> MR. CADY: No.
>
> MR. BJORT: In other words is there any unwritten policy or some other written policy which we have not dealt with here that requires employees to personally report that they intend to take a day's absence because of illness?
>
> MR. CADY: There is an office policy that has been followed since my starting with the state and receiving my appointment, that the individual do his best to notify his immediate supervisor in case of illness.... (tr. 38)
>
> MR. BJORT: Does it make any difference who makes the notification as long as the supervisor receives that notification or information?
>
> MR. CADY: I think the main thing is, yes, as long as we know that person is not going to be there and the reason.
>
> MR. BJORT: It would be acceptable then if another employee notifies the supervisor affected that that particular employee is going to be absent?
>
> MR. CADY: I think it would be...." (tr. 39)

27. The letter to Mr. Zupan is a letter of reprimand and is part of his personnel file. The note to Ms. Langan is not. Also

because Ms. Langan does not have a phone, she has made arrangements with her immediate supervisor to have someone else report her off. This arrangement indicates that an immediate supervisor has some discretion on employees reporting in sick or off. This seems to be more in compliance with the sick leave clause of the contract.

28. Both, Mr. Rupan and Ms. Langan had criticized management policies and personnel at MPEA meetings and to fellow employees.

Interrogation

29. Article VII Supplement to Master Contract for Employment Security Division, Department of Labor states:

> "The Association shall be able to hold regular and special Association meetings during off duty time in the facilities of the Employer if a request is made and granted for such use." (Complainant's Exhibit 2)

Article VII of the Master Contract states:

> "Association Activities
>
> Staff of the Association will be allowed to visit work areas of the employees during work hours and confer on employment relations matters, provided that such visitations shall be coordinated in advance with management, and shall not unduly disrupt work in progress." (Complainant's Exhibit 1)

30. Mr. Tom Schneider held a noon MPEA meeting on 23 November in the Great Falls Employment Security Division Library.

Mr. Cady was concerned about the MPEA meeting because it was not cleared with him first, but then wasn't sure if he (Mr. Schneider) had to clear it with him or the Helena office. He did go to the third floor and saw a group waiting to go into the library. He distinctly remembered Mr. Hueth waiting. (tr. 243)

Whether or not Mr. Schneider had the approval per the contracts is not at issue in this instant case. But what is at issue is the interrogation of employees concerning their attendance at the meeting.

31. The following testimony was elicited concerning interrogation of who attended MPEA meetings:

(a) Ms. Jan Goulet, the Secretary who worked for Mr. Cady, testified that he did question her about the above meeting. She stated:

> "Yes, Mr. Schneider came in the office and held a noon MPEA meeting in the library upstairs. Mr. Cady was waiting for me at 1:00 P.M. at my desk when I came back and he asked me if I had attended and I said no. He has an MPEA contract in his hand and there was something underlined in red there and he said Schneider had no business being in the office conducting MPEA business." (tr. 114)

Mr. Cady did not ask Ms. Goulet for the names of any persons who attended the meeting, but he subsequently asked others.

(b) After the 23 November MPEA meeting, Mr. Cady asked three employees (Mr. Clark, Richards, and Hueth) if they attended the previous meeting. (tr. 212, 215)

(c) Mr. Samuel Lucero, Interviewer II, testified that Mr. Cady asked him in the hallway on 24 November if he attended the meeting the day before. Mr. Lucero first denied that he had attended the meeting. He was later called into Mr. Cady's office where he denied attending the meeting for the second time. Sometime during the meeting, Mr. Cady called Mr. Clare Jensen, Supervisor on the third floor, to sit in. Mr. Lucero, in fact, did attend the meeting. (tr. 44, 45)

Mr. Lucero testified that Mr. Cady stated at the 24 November meeting with him that he (Cady) knew Joe Hueth was there. (tr. 45)

> "MR. STITELER: And, when Mr. Jensen came in did Mr. Cady repeat those questions?
>
> MR. LUCERO: He did ask me again if I had attended the meeting after Jensen was in there, I felt that Mr. Cady knew that I had because I am sure that Clare Jensen told him I had attended the meeting so I looked at Clare Jensen and I said, 'No, I didn't attend the meeting'.

MR. STITELER: How would Mr. Clare Jensen know that you had attended the meeting?

MR. LUCERO: Because he was on the third floor when the meeting was held.

MR. STITELER: Did you consider that this was an interrogation?

MR. LUCERO: Well, yes, in a sense, I though it was an infringement on my rights." (tr. 48-49)

During the meeting Mr. Cady and Mr. Lucero also discussed some merit testing and promotional problems that Mr. Lucero had experienced. Mr. Lucero did not view the discussion about the MPEA meeting and promotions as having an effect on promotions. (tr. 51)

(d) As the Respondent's witness, Mr. Cady testified that he didn't recall talking to Mr. Lucero about attending a 23 November MPEA meeting. "I may or may not have. I don't recall."

(e) Mr. James Clark, Counselor I, attended the 23 December (Holiday Inn) and the 23 November (Library) MPEA.

Mr. Clark testified that after the 23 November meeting he was questioned by Mr. Jensen as to the names of people who attended the meeting. Later Mr. Clark was called down to Mr. Cady's office. As to that conversation Mr. Clark testified:

"MR. CLARK: Mr. Cady in effect told me that it was my responsibility to control the third floor at that time because I was to be on the receptionist desk and my loyalty would be to management - something to that effect.

MR. BJORT: Did he question you about the meeting, whether you had attended or what other people had attended?

MR. CLARK: Yes, he felt somewhat, I can't remember exactly but it was to the effect that I should have given Mr. Jensen the names of the people that had attended the meeting because I should be loyal to management in that particular case..." (tr. 57)

32. The Association held a meeting at the Holiday Inn on 16 December. Items discussed were promotions, merit system, management problems, personalities, and other matters.

(a) Mr. Chigbrow, met voluntarily with Mr. Cady on December 17th to primarily discuss two concerns from the previous night's MPEA meeting. One - promotions; two - safety of Mr. Cady and Mr. Dyer. Mr. Chigbrow testified that he did not report any specific employees' remarks made at the 16 December meeting to Mr. Cady. Nor did he mention names of individuals who attended.

(b) Mr. Cady gave the following relevant testimony pertaining to the conversation with Mr. Chigbrow:

> "MR. BJORT: During the course of the conversation with Mr. Chigbrow, did you ask him who was present at the meeting?
>
> MR. CADY: He just kind of ran down who exactly was there." (tr. 17)
>
> "MR. BJORT: Did Mr. Chigbrow elaborate on just what exactly the immediate plan was to remove you and whoever else by whatever means?"
>
> "MR. CADY: I don't think so, I kind of thought that, well I said it's possible and he said, well can they take our promotions away and I said well I would hope not but I really don't know."
>
> "MR. BJORT: Has anyone to your knowledge in your nine years of association as a supervisor in this office, had a promotion taken away other than by yourself, or as a result of the normal process involving the head office in Helena?"
>
> "MR. CADY: No, there was, as I recall, earlier this past fall, there was a grievance filed to take a promotion away from Tom Sutliff. I think it was filed by Bill Zupan who had applied for the job and did not get it so, uh, so, believing in MPEA I'd say they have a lot of clout. It would be possible."

(c) Mr. Chigbrow also related the employee grievances (tr. 18) [in a general manner] voiced at the 16 December meeting.

(d) Mr. Chigbrow remarks concerned Mr. Cady and Mr. Dyer to the point of debating whether or not they should attend that evening's Christmas party. (tr. 18)

(e) Mr. Cady denied having asked Mr. Clark about Association meetings between 23 November to 23 December.

> "MR. STITELER: Do you recall discussing that particular meeting with any other employees individually?"
>
> "MR. CADY: I discussed it with Mr. Jensen. I might have subsequently discussed it with Richards and Clark and, I'm not just sure."

Verbal Threats

33. I find that Mr. Cady's remarks to Mr. Hutchinson (tr. p. 74, lines 13-19) and to Mr. Willey (tr. p. 71, l. 6-21) on 17 December are verbal threats directed against Association members. It was also a form of interrogation about the extent of their activities in the Association, especially in view of the information Mr. Cady had about the previous evening's Association meeting. A meeting where several employees expressed a number of complaints against management practices.

Job Evaluation

34. Mr. Tom Sutliff, Interviewer Supervisor since August, completed a job evaluation form on Mr. William Zupan and other employees he supervises in October.

35. The evaluation scores given to Mr. Zupan were below any scores he received in job evaluations the past six years.

(a) Mr. Zupan had complained, prior to October, about the promotional method used to promote Mr. Sutliff to the Interviewer Supervisor position. Mr. Zupan, an Interviewer III, was also interested in the Interviewer Supervisor position but was denied an opportunity to apply.

(b) Mr. Zupan testified that he very strenuously objected to the low scores, at the time of Mr. Sutliff's evaluation. He also felt that Mr. Cady influenced Mr. Sutliff on the evaluation scores (tr. 157-158).

36. (a) Mr. Sutliff testified that no one influenced his evaluation of Mr. Zupan or any other employee. He also stated that he did not have the prior evaluation marks.

Mr. Sutliff testified that Mr. Zupan did not ask him to change the evaluation scores, but did complain about the low scores. (tr. 239)

(b) In reference to job evaluations Counselor Stiteler asked:

> "There was some testimony yesterday that Mr. Sutliff had been influenced in his performance evaluation of a particular employee. Do you get involved at all in these performance evaluations of the employees who are not under your direct supervision?" (tr. 244)

Mr. Cady's reply was:

> "No, I would become involved if the person had told Supervisor that he wasn't satisfied, he thought he was getting a dirty deal and he wanted to go talk to the manager. I may or may not become involved." (tr. 258)

> "MR. STITELER: Supervisors don't have to clear these performance evaluation ratings through you?"

> "MR. CADY: No, we feel that they should be done by the individual that's doing the supervision...."

Leave of Absence

37. (a) On 17 or 18 December Ms. Langan applied for a leave of absence without pay for 23 December from 3 P.M. to 5 P.M. Ms. Langan testified that her immediate supervisor told her that he didn't see any problem in granting it and as far as he was concerned it was okay. (tr. 141) She later asked to have the leave extended to 1 P.M. At that time she was informed by Mr. Sutliff that all the leave was denied and that she could ask Mr. Dyer (Assistant Manager) about the matter.

(b) Ms. Langan, accompanied by Ms. Anderson went to Mr. Dyer's office. Ms. Langan testified as follows about that conversation:

"I asked Mr. Dyer why my leave was denied and would he please give me a reason if he was going to deny me my leave time from 1:00 to 3:00 off, why I couldn't have my time I had been given from 3:00 to 5:00 off.

He hesitated around, he said that he didn't have the power to give me this time off, if he could that he would, and then he also brought up that some phone calls had been made and MPEA was brought up and that he wanted to know what Cordell said to my Supervisor, Tom Sutliff....

MR. HJORT: Now in connection with Mr. Dyer's statements about MPEA, did he indicate to you that your leave was going to be denied because of your association with MPEA?

MS. LANGAN: He didn't directly say it was going to be denied by this but he just kept mentioning MPEA, so I assumed by his mentioning this, kept mentioning it, that MPEA was this and that, it was denied because of it." (tr. 143)

Mr. Brown called Mr. Sutliff about the leave matter. Ms. Langan testified that was part of the reason for the denial.

(c) Ms. Langan participated in the 16 December MPEA meeting and stated some of the difficulties she had encountered as a new employee.

(d) Prior to the 23 December denial of leave, Mr. Sutliff had granted leave requests for Ms. Langan.

"MR. STITELER: ...in the past Mr. Sutliff had the power to give you time off without pay, do you have any idea or weren't you curious as to why Mr. Dyer wouldn't have that power?

MS. LANGAN: I asked Mr. Sutliff what this meant and he said that this had been almost the first time that he has not been able to grant leave himself. ...he says this is one of the times that he could not grant it because it was denied by the Assistant Manager or the Manager, whichever. I was told by Mr. Dyer that he didn't have the authority and never went into it further." (tr. 145)

38. (a) In reference to the Langan leave matter, Ms. Anderson testified that Mr. Dyer informed Ms. Langan that he did not have the authority to grant the leave. Ms. Anderson also felt that Mr. Dyer was attempting to obtain information about MPEA activities by the nature of his questions and comments during this meeting. (tr. 171)

Mr. Dyer testified that Mr. Sutliff had declined to approve the leave...and that he (Mr. Dyer) concurred....(tr. 236)

Pertaining to authority to approve or deny the leave, Mr. Dyer testified that he "had perfect full authority to approve it or disapprove it". Because at the time (23 December) he was the office manager in the absence of Mr. Cady, who delegates that authority when he's absent. (tr. 237)

(b) Pertaining to MPEA activities Mr. Dyer testified as follows:

> "MR. STITELER: Do you recall asking either Terry Langan or Sherry Anderson any questions that day about that meeting, about MPEA?
>
> MR.DYER: Yes, after I'd finished the discussion with Terry, I turned to Sherry Anderson and asked what she wanted to talk to me about and she said that she didn't want to talk to me, she was there as the MPEA witness.
>
> MR. STITELER: And did you ask her anything more about that or was that the end of the conversation?
>
> MR. DYER: I believe that I made some comment to the effect that they must not have a very high opinion of me if they felt they had to have a witness at the time they asked me a question." (tr. 237)

(c) Under cross-examination, Mr. Dyer testified that the section supervisors (Mr. Sutliff) have basic approval authority. "It is recommended by them and they coordinate it with Bill (Cady) or myself to make sure there's no conflicting situations that they're not aware of or whatever at the moment."

(d) Mr. Cady denied that a leave of absence was denied to anyone because they were association members. (tr. 41)

Mr. Cady testified that there is a heavy claims load between 15 of November to 1st of April and he would be hesitant to grant leave to full-time claims people during that time....especially the receptionist.

Surveillance

39. Ms. Smith (tr. 82-83) and Mr. Jarvis (tr. 150) testified that Mr. Chigbrow told them that Mr. Cady was near the Holiday Inn checking on who was in attendance at the Association meeting. I find that this testimony is based on conclusions reached by Mr. Chigbrow and passed on to the two witnesses in conversations. I do not give much creditability to Mr. Chigbrow's testimony nor conclusions he passed on to anyone about any activity, Association or management. Furthermore, Mr. Chigbrow denied having said that to the two employees and Mr. Cady denied he drove by the Holiday Inn for surveillance purposes.

Physical Violence

40. (a) Mr. Cady and Mr. Al Davis were involved in an altercation at the office Christmas party on 17 December.

(b) Mr. Davis has been employed at the Great Falls office for fifteen years and presently is classified as an Interviewer III. He attended and participated in some of the discussions at the 16 December MPEA meeting. (tr. 102, 103).

(c) Mr. Devalt testified that prior to going to the party, he and Mr. Davis "just [talked] about playing it cool and staying out of the way and no trouble". They anticipated trouble "because of actions involved with the night of the 16th, we had an MPEA meeting and the actions all day long in the office were not normal". In reference to actions in the office on 17 December Mr. DeValt stated: I am referring to the traffic of Interviewers going into his [Cady's] office and the action of Bill going into his office and, well, things weren't normal, that's all I can say." (tr. 106)

Mr. DeValt heard no words about the arguments prior to the altercation. (tr. 108)

(d) At the 17 December party, 15 minutes prior to the altercation, Mr. Cady asked Mr. Edwin D. Willey, an Interviewer III, if he voted against him. (tr. 71, 72)

(e) Mr. William Hutchinson, Employment Counselor I, was questioned by Mr. Cady as to whether he went to the 16 December MPEA meeting. (tr. 74, 75) This questioning took place five minutes prior to the altercation.

(f) Mr. Davis testified that he attended the 17 December Christmas party and he and Mr. Cady were involved in an altercation. Mr. Davis testified that he doesn't remember much about the altercation, except that "he [Mr. Cady] was coming towards me." Mr. Davis did not testify as to the motive nor what may have precipitated the action. Mr. Davis' testimony did not shed much light on the events which led up to specific instance number ten.

DISCUSSION

I find that the office manager and certain other supervisory officials at the Great Falls Employment Security Division office have engaged in a course of conduct designed to interfere with, restrain, coerce, intimidate and harass employees of said office in violation of Section 59-1603(1) and 59-1605(a) and (c).

The Respondents violated the above mentioned sections of the Montana Public Employees Collective Bargaining Act by committing unfair labor practices in the following specific instances:

Job Reassignments

I find that the job reassignment of Ms. Anderson was designed to harass and intimidate her because of her Association activities. Mr. Cady's alleged reason for the reassignment was wanting and pretextual (Findings 8). I gave weight to the following considerations:

1. The events leading to the reassignment (Findings 5a, 5b, 8). I find it difficult to assume that Mr. Cady's and Ms. Anderson's discussion about IAPES merely involved the difficulty of getting a $1.00 refund in dues. The IAPES matter was part of a series of conflicts between Mr. Cady and Ms. Anderson, some of which involved Ms. Anderson's Association support.

2. The Respondent was aware of Ms. Anderson's Association activities and support. She presented herself as an MPEA witness at a meeting involving Mr. Dyer, the Assistant Manager, and another employee (Finding 7).

3. I find credible Ms. Anderson's testimony as to why she was reassigned to a less desirable position, and why she did not complain about it (Findings 9 & 10), especially in view of the events leading to the reassignment and the reason given to her for it.

The Complainant alleges that Ms. Smith was reassigned basically because of her affiliation with the Association. I find the Respondent did not violate the Montana Act in this specific instance for the following reasons:

(a) the transfer was reasonable in view of the apparent need for a Clerk-Typist in the CETA section;

(b) Ms. Smith was logical choice for this position because of her qualifications;

(c) Ms. Smith had not attended nor participated in Association meetings or activities;

(d) Mr. Cady's reason for the reassignment did not indicate an anti-association motive, nor was there evidence that Ms. Smith perceived such a motive.

Local Representative

Though local management was not officially notified until the first week in February that Mr. Hueth was elected the local Association representative; it was well aware of his active

participation in the Association, and may even have known about his election at a December meeting. In fact, Mr. Cady referred to Mr. Hueth in his testimony several times when alluding to some Association activities.

I do not find Mr. Jensen's testimony, as a whole, highly credible. His testimony often seemed evasive and on other occasions he could not remember events, dates or facts. Even if credit had been given to Mr. Jensen's testimony, it would still have been hard to understand. Most importantly, his testimony did not support the content nor the reasons for the letter of reprimand to Mr. Hueth (Complainant's Exhibit 6).

In testimony, Mr. Jensen put great weight on the fact that the subject of the reprimand was a re-occuring problem. However, the fact of the matter is that only Mr. Hueth received a letter of reprimand; there were no other employees individually reprimanded.

After a very careful review of Mr. Jensen's and Mr. Hueth's testimony and of Complainant's Exhibit 6, I conclude that the letter of reprimand was unwarranted and was an effort to harass an active Association leader for his Association activities. I find the letter, considering the above circumstances and motivation, to have been in violation of Mr. Hueth's rights as guaranteed in the Montana Act.

Sick Leave

Whether or not there is a definite policy requiring an employee to personally report sick leave to the immediate supervisor is clear in the MPEA Master Contract (Complainant's Exhibit 1), it is notstated in the Employment Security Division operation manual (Complainant's Exhibit 3), and was not supported by Mr. Cady's testimony.

The warning note to Ms. Langan and the letter of reprimand to Mr. Zupan, referring to an unwritten policy which was enforced by one supervisor, (Mr. Sutliff), was discriminatory under the Act.

Interrogation

The testimony and evidence is not clear as to whether or not Mr. Schneider had clearance, nor is it clear who would give clearance, to conduct such an on-premise Association meeting. But the testimony was overwhelming that local management did interrogate several employees as to whether or not they attended the meeting in question. I can understand Mr. Cady's and Mr. Jenson's concerns about activities at the local office, but in this instance if Mr. Schneider did not have clearance per the contract terms then Mr. Cady or his supervisors should have taken the matter up with Mr. Schneider. It should not have been taken as an opportunity to question individual employees as to whether or not they attended the meeting. In fact, one employee, Mr. Lucero, testified that he denied attending the meeting even though he had done so.

The testimony from several witnesses that Mr. Cady and other supervisors had inquired about subsequent Association meetings and activities was also overwhelming. These interrogations, questions, inquiries, etc., of Association members about their labor organization activities were clearly in violation of the Montana Act.

Verbal Threats

I credit the testimony of Mr. Hutchinson, Mr. Willey, and Mr. DeValt as to the atmosphere at the Christmas party on 17 December. The language and manner that Mr. Cady used in inquiring as to who "was out to get him" were of such a nature as to convey a verbal threat to the employees involved in the conversations and also to other employees. (Finding 33).

Job Evaluation

I find that Mr. Zupan's job evaluation scores were discriminatory for reasons which included his known Association activities. I have given weight to the following considerations:

(a) Mr. Zupan, in the past, critized management policies and promotional procedures.

(b) Mr. Zupan filed a complaint because he (for some unknown reason) was not allowed to take the merit test for the position to which Mr. Sutliff was promoted.

(c) Mr. Zupan asserted that Mr. Sutliff's promotion was not in accordance with Merit System rules.

(d) Mr. Zupan's job evaluation scores for the past six years were higher than this evaluation.

(e) Not only had a new immediate supervisor observed Mr. Zupan's performance for only two months, but it was this same immediate supervisor who was promoted to the supervising position Mr. Zupan had expressed a strong interest in.

(f) The new supervisor did not have knowledge of prior evaluations.

(g) Only Mr. Zupan received lower job evaluation scores than he had received previously.

(h) After the job evaluation Mr. Zupan filed a grievance per the contract.

(i) Mr. Zupan complained about promotions and other management activities at Association meetings.

(j) Mr. Zupan later received a letter of reprimand (Complainant's Exhibit 4).

I do credit Mr. Zupan's testimony about his difficulties involving his job evaluation, especially in view of the following circumstances: Without casting any doubts on Mr. Sutliff's efforts to do a honest and proper evaluation, I do find it a problem that local management would allow a new supervisor to evaluate an employee under the circumstances mentioned under (b)(c) and (e). Furthermore, the purpose of a job evaluation is to show the employee his strengths, weakness, and areas of improvement. This was a most difficult task for a supervisor not having access to prior evaluations.

Leave of Absence

Based on Findings 37a, 37b, 37c, 37d, and 38a, I conclude that Ms. Langan was denied a leave of absence because of her Association activities. The reason for the denial is pretextual.

Surveillance

I do not find that Mr. Cady engaged in surveillance of Association meetings at the Holiday Inn. I do not credit Mr. Chigbrow's statements to Ms. Smith or to Mr. Jervais, nor is there evidence that Mr. Cady was near the Holiday Inn for the specific purpose of determining who was in attendance.

Physical Violence

The activities prior to the Cady-Davis altercation are not easily dismissed. However, neither Mr. Cady or Mr. Davis nor any other witness testified that there was a direct link between the altercation and association activities. Of course, Mr. Davis is an Association member per the Agency Shop provision of the contract, but again there was no direct evidence that the violence was directed at or from Mr. Davis because of his Association membership.

CONCLUSION OF LAW

1. That Respondents violated provisions of 59-1603(1), 59-1605(1)(a) and (b), R.C.M. 1947 by having engaged in actions which interfered with, restrained, coerced, discriminated, intimidated and harassed employees.

RECOMMENDED ORDER

It is hereby ordered that the Department of Labor & Industry, Division of Employment Security, its managers and supervisors specifically at the Great Falls office:

1. Cease and desist from interrogating employees, individually or collectively, about Association meetings or activities.

2. Cease and desist from interfering with, restraining, coercing employees in the exercise of their rights to assist this or any other labor organization.

3. Cease and desist from discriminating in regard to job reassignments, letters of reprimand, job evaluations and leave of absences.

It is further ordered that the Department of Labor & Industry, Division of Employment Security, its managers and supervisor, specifically at the Great Falls office take the following affirmative action:

A.1. Remove the letter of reprimand written to Mr. Joe Hueth, dated 20 January 1977, and any other correspondence pertaining to that letter, from his personnel file.

2. Remove the letter of reprimand to Mr. Zupan (Complainant's Exhibit 4) and the warning note to Ms. Langan (Complainant's Exhibit 5) from their respective personnel files.

3. Perform a non-discriminatory job evaluation for Mr. Zupan.

B. Notify the Administrator of the Board of Personnel Appeals, in writing, within thirty (30) days from the receipt of this decision, what steps have been taken to comply herewith.

NOTICE: Exceptions may be filed to these Findings of Fact, Conclusions of Law, and Recommended Order within twenty (20) days service thereof. If no exceptions are filed with the Board within the period of time, the Recommended Order shall become a Final Order. Exceptions shall be addressed to the Board of Personnel Appeals, 1417 Helena Avenue, Helena, Montana 59601.

DATED this 6th day of June, 1977.

BOARD OF PERSONNEL APPEALS

BY Ray Berman
Ray Berman
Hearing Examiner