STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE: RETAIN CLERKS UNION LOCAL NO. 991, Complainant, - vs - MR. WALLY CLARK, POLICE JUDGE, CITY OF MISSOULA, Defendant.	)	ULP #11-1978 FINAL ORDER

* *

Findings of Fact, Conclusions of Law, and Recommended Order were issued by Jerry Painter, Hearing Examiner, on June 19, 1978, in the above captioned matter.

J. Robert Riley, Attorney for Defendant, filed Exceptions to Findings of Fact, Conclusions of Law, and Recommended Order on October 30, 1978, and asked for a hearing before the Board of Personnel Appeals on behalf of Defendant.

Oral argument was presented to the Board on January 16, 1978. After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions to Findings of Fact, Conclusions of Law, and Recommended Order filed on behalf of Defendant are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law, and Recommended Order of Hearing Examiner, Jerry Painter, as the Final Order of this Board.

DATED this 26th day of January, 1979.

BOARD OF PERSONNEL APPEALS

By: Brent Cromley
Brent Cromley, Chairman

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE NO: 11-1978

RETAIL CLERKS UNION LOCAL NO. 991, Complainant,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER
vs.	)	
MR. WALLACE CLARK, MUNICIPAL JUDGE CITY OF MISSOULA, Defendant.	)	

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On April 28, 1978, the Complainant, Retail Clerks Union Local 991, (Union) filed an unfair labor practice charge, alleging that Judge Wallace Clark violated section 59-1605 (1)(a), (b), (c) and (d), R.C.M. 1947 by refusing to abide by the grievance and arbitration procedures established in the collective bargaining agreement between the Union and the City of Missoula; that Judge Clark has refused to recognize the Union as the certified collective bargaining agent for the employees working in his department; and that Judge Clark has refused to bargain with the Union over working conditions of his employees.

On May 9, 1978, an answer was filed by Judge Clark to the Complaint, moving for the dismissal of the charge on the grounds that the Union is an improper party to bring the Complaint since Judge Clark is not the signatory to the contract between the City of Missoula and the Union, and "... that the execution of a Union Contract of the City Administrative Department of the City of Missoula is not binding upon the Judiciary Department"; that the Complainant does not meet the definition of public employee under section (2) of 59-1602 because the act excludes clerks of school districts and therefore the legislature did not intend to include court clerks under that section; and that under the inherent powers of the court, the judge has the authority to employ and discharge clerks and that Judge Clark is not subject to the

agreement entered into by the Administrative Branch of City Government. Finally, Judge Clark's answer denied the allegations contained in sub-paragraphs one and two of paragraph seven.

Judge Clark's answer in essence challenged the jurisdiction of this Board over the Defendant on the ground that the statutes in question (Title 59, Chapter 16) do not apply to the judicial branch of the government.

On August 2, 1978, this Board conducted a hearing in the matter. Post hearing briefs were presented by both parties. After reviewing the evidence and testimony presented by the parties at the hearing, and after reviewing the post hearing briefs, I make the following findings of fact.

FINDINGS OF FACT

1. A collective bargaining agreement was entered into by the City of Missoula and the Retail Clerks Union, Local 991, effective July 1, 1977, and expiring June 30, 1978. The contract was in full force and effect at all times during the events which are in issue in this proceeding. (Complainant's Exhibit 1) Article XXII of that agreement provided a grievance procedure between the parties in case of a dispute. The grievance procedure culminated in binding arbitration, if the parties are unable to resolve the dispute in the other steps of the grievance procedure. Article XXII also provides that the Union shall have the right to prosecute the grievance.

2. Wallace Clark is the municipal judge of the City of Missoula.

3. A position of court clerk opened up and an employee of the court, Eva Felde, applied for the position. She did not receive an interview for the position. The position was awarded to a different applicant.

4. A grievance was then filed. Step two of the grievance procedure provides that if no settlement of the grievance was

reached at step 1 of the grievance procedure then upon finding the grievance justified, the Union shall take the grievance in writing to the respective department and Mayor. The Union wrote a letter to the Mayor.

5. On January 9, 1978, a grievance hearing was conducted. Present at the hearing were the Mayor; Mr. Duffy, Counsel for the Union; Jim Nugent, City Attorney; Larry Heggen, Finance Director for the City; Gayle Sterling, City Treasurer. Testimony shows that Judge Clark did not receive formal notice of the grievance hearing, although Mr. Mayer, Business Agent for the Union, and Mr. Duffy, Counsel for the Union, talked to Judge Clark the day of the grievance and requested his attendance. Mr. Nugent, Counsel for the City, also testified that he discussed the matter of the grievance with Judge Clark at least 2 times during the afternoon of the grievance proceeding.

6. After the grievance hearing, a letter was sent to Judge Clark on January 10, 1978, which stated as follows:

> "As a result of the grievance hearing held on January 9, 1978, it is our opinion that your action of November 9, 1977, in not promoting Eva Felde to Court Clerk I was in violation of the following Union Contract provisions: Article XIV Promotions, Article XX Seniority, and Article X Discrimination. We, therefore, request that Eva Felde be promoted to Court Clerk I effective November 9, 1977."

The letter was signed by Bill Cregg, Mayor, Jim Nugent, City Attorney, and Larry M. Heggen, Finance Director. (Complainant's Exhibit 7)

7. On January 11, 1978, Judge Clark wrote back to the Mayor stating that he was not a signatory to the contract and therefore not held to it. Judge Clark went on to state that he alone shall determine who shall be entrusted with the duties of his court. Finally, Judge Clark stated that the issue was moot in that Eva Felde had already resigned her position with the court. (Complainant's Exhibit 8).

8. The recognition clause of the agreement between the

City of Missoula and the Union states that the City recognizes the Union as the exclusive bargaining agent for purposes of collective bargaining for, "meter maids, meter maintenance men, office and clerical personnel, and animal wardens employed by the City." (Complainant's Exhibit 1).

9. Larry Heggen, Finance Director for the City, testified that the procedure for hiring positions in the past was that the Mayor's office would post the Notice of Vacancy, and applications for that vacancy were accepted by the Mayor's office for all 13 departments. Further, that payroll is handled for all departments through a central payroll. It was Mr. Heggen's understanding that the mayor was the ultimate supervisor for employees. Mr. Heggen also testified that it is the department head who decides who is and who is not to be promoted within the limit of personnel policies established for the City.

DISCUSSION

There appears to be no question concerning the facts of this case. Judge Clark presents two issues in his Proposed Findings of Fact and Conclusion of Law. The main issue is the jurisdiction of this Board. The second issue is who is the employer of Eva Felde, the City of Missoula or the Municipal Court. I will deal with each issue separately.

The first issue is the challenge of this Board's jurisdiction. That challenge is based on a challenge to the constitutionality of the statute granting this Board jurisdiction as applied to Judge Clark. Judge Clark argues that any grant of jurisdiction of this Board over Judge Clark would be an unconstitutional infringement by the Legislative Branch over the Judicial Branch and would be a violation of the separation of powers. No other basis is given for the challenge of jurisdiction by this Board.

It is well established that the function of declaring a

statute or act unconstitutional is the sole province of the Judicial Branch. Although this Board may have quasi-judicial functions, those functions certainly do not allow this Board to consider the constitutionality of the act by which it was created, and under which it functions. (SEE: Public Utilities Commission v. U.S., 355 U.S. 534, 2 L.ed2d 470, 78 S. Ct. 446; State ex rel Atlantic Coast Line Railroad Co. v. Board of Equalizers, 94 S. 681, 84 Fla 592; Baddour v. Long Beach, 279 NY 167, 18 NE2d 18; Clayton v. Bennett, 298 P.2d 531, 5 Ut2d 152, 298 P.2d 531; Carter v. Bluefield, 54 S.E. 2d 747, 132 W. Va. 881) Furthermore, we can look to the words of President Lincoln in his 1st Inaugural address:

> "I do suggest that it will be much safer for all, both in official and private stations, to conform to and abide by all those acts which stand unrepealed, than to violate any of them trusting to find impunity in having them held to be unconstitutional."

Again, Judge Clark giving no other basis for a challenge of this Board's jurisdiction other than a constitutional challenge, I must conclude that this Board has the requisite jurisdiction to act in this matter.[1]

The second issue to be considered is who is the employer of Eva Felda for the purpose of the Public Employee Collective Bargaining Act, the City of Missoula or Judge Clark.

Public Employer is defined in section 59-1602(1), R.C.M. 1947. In Local 2390 of American Federation of State, County, and Municipal Employees, A.F.L.-C.I.O., and Mrs. Ruth Ware v. City of Billings, 555 P2d 507, 33 St. Rep. 1020, the Montana Supreme Court was called upon to define public employer as defined by 59-1602(1). The facts of that case are somewhat analogous to the facts now before us: Mrs. Ruth Ware was employed by the Billings Library. The Billings Library was created under the Library Systems Act, 44-212, et. seq., R.C.M. 1947. Mrs. Ware was

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1. Judge Clark, in his answer filed with this Board suggested that since school clerks were excluded under the definition of public employee that court clerks are also excluded. Judge Clark has since abandoned that argument. Furthermore, this hearing examiner can find no merit to the argument.

dismissed contrary to the collective bargaining agreement that existed between the City of Billings and AFSCME. The City Personnel Office ordered the Library Board to reinstate Mrs. Ware. The Library Board refused asserting it was the employer of Mrs. Ware under Section 44-223, R.C.M. 1947, and that it was not a party to the collective bargaining agreement, and therefore the contract was not controlling in Mrs. Ware's dismissal. The Supreme Court reasoned that if indeed the Library Board was the public employer of Mrs. Ware that the Library Board could not be bound to a contract that it has neither negotiated or ratified, citing Fabijanic v. Sperry Gyroscope Division, 370, F. Supp. 62. The court went on to state that in order to ascertain whether or not the contract in question was controlling, that it was first necessary to determine who is the public employer.

The court adopted the doctrine of the U.S. Supreme Court in defining such terms, as stated in National Labor Rel. Bd. v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170, 1183;

> "* * * In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee', 'employer', and 'labor dispute,' leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.'"

The Montana Supreme Court went on to state at page 508,

> "To properly define 'public employer' we must appreciate the economic realities as well as the aims of the legislature sought by the Collective Bargaining For Public Employees Act and the Library Systems Act, sections 44-212, et. seq., R.C.M. 1947, and reconcile the differences if possible."

The Supreme Court then went on to compare the functions of the City and the Library Board. It then concluded as follows:

> "The economic realities show that the City, not the Board of Library trustees, ultimately provides the salaries and wages of the library personnel. The City has a substantial legitimate interest in the operation of the library, which qualifies the City as the "public employer" of the Billings City Library personnel, including Ruth Ware."

"We hold there is no inconsistency between the Library Systems Act and the Collective Bargaining for Public Employees Act. Under the Library Systems Act, as a whole, the board of trustees is given independent powers to manage and operate the library. However, this does not qualify the Board as a "public employer" within the meaning of the Collective Bargaining for Public Employees Act, but merely as supervisory employees as defined in section 59-1602(3), R.C.M. 1947."

Applying that same rationale to the case at hand we can see that it is the present practice for the City to operate a central personnel office which in the past has taken care of all of the Departments for the City, including the Municipal Judge. Finding of Fact #9 shows that there is a central payroll, and that functions for the hiring of new employees and filling vacant positions has been done by the Central Personnel Office, for the Municipal Judge employees. Although there was no direct testimony on the matter, it certainly can be inferred from Finding of Fact #9 that budgeting is done for the Municipal Court through the City Council since 11-1718, R.C.M. 1947, provides that fees and fines of the Municipal Court shall be paid into the City Treasury, and nowhere is the Municipal Court given taxing powers independent from the City. All of these factors are factors that the Montana Supreme Court used in determining that the Library Board was not the public employer of Ruth Ware, but that the City of Billings was. Likewise, in this matter, considering the "economic realities" of the situation, and applying the definition broadly as the Supreme Court directed should be done, then no other conclusion can be reached but that the City of Missoula is the employer of Eva Felde and not Judge Clark. Again, as in the Ruth Ware case, Judge Clark is given independent powers to manage and operate the Municipal Court. This does not, however, qualify the Judge as the public employer as defined in Section 59-1602(1), R.C.M. 1947.

One last point that should be discussed concerns the City's handling of the grievance and the lack of participation in the

procedure by Judge Clark. This, of course, is a management problem and an employee or an employee representative should not be penalized for a problem of management. I would, however, strongly recommend to the City of Missoula, that in the future if there are any grievances involving an employee in the Municipal Court, that Judge Clark be allowed full participation in the grievance procedure.

CONCLUSIONS OF LAW

1. The issue of the Constitutionality of the Public Employees Collective Bargaining Act as applied to a Municipal Court cannot be decided by this Board. The authority to rule on the constitutionality of an act is solely in the province of the Judicial Branch of government.

2. Under the Public Employees Collective Bargaining Act, 59-1602 et.seq., the employer of Eva Felde is the City of Missoula.

3. The Collective Bargaining Agreement between the City of Missoula and Retail Clerks Union, Local 991, governs the promotion of employees in the Municipal Court.

4. Section XXII of that contract provides a means by which to grieve a dispute between the contracting parties. That procedure was used in resolving the grievance that existed in nonpromotion of Eva Felde.

5. By failing to comply with the results of the grievance procedure of that collective bargaining agreement, Judge Clark has committed an unfair labor practice as defined by section 59-1605, R.C.M. 1947.

RECOMMENDED ORDER

1. Judge Clark shall immediately cease and desist from not complying with the grievance procedure that exists in the contract between the City of Missoula and Retails Clerks Union Local 991.

2. Judge Clark shall comply with the letter to him directing him to promote Eva Felde to Court Clerk I effective November 9, 1977. Judge Wallace must make the offer to Eva Felde. Ms. Felde shall have a reasonable length of time to consider the offer.

3. Judge Clark shall post a notice in a conspicous place for all employees of the Municipal Court to see, stating that all office and clerical personnel of the Municipal Court are covered by the collective bargaining agreement between the City of Missoula and Retail Clerks Union Local 991. The notice shall remain posted for a period of 90 days.

Dated this 19th day of October, 1978.

Jerry L. Painter by MRH
Jerry L. Painter
Hearing Examiner

CERTIFICATE OF MAILING

I, Kay Harrison, hereby certify that on the 19th day of October, 1978, I mailed a true and correct copy of the above FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER to the following:

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