STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGES NO. 31 & 37-79:

MONTANA PUBLIC EMPLOYEES ASSOCIATION, INC., Complainant, - vs - GEORGIA RUTH RICH, OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION, Defendant.	FINAL ORDER

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The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on April 14, 1980.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Ross W. Cannon and Richard L. Parish, Attorneys for Defendant, on May 5, 1980.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant to the Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order 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 Jack H. Calhoun as the Final Order of this Board.

DATED this 8th day of August, 1980.

BOARD OF PERSONNEL APPEALS

By Brent Cromley
Brent Cromley
Chairman

cc: Richard L. Parish
Barry L. Hjort
Thomas Schneider

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IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGES NO. 31 AND 37-79;

MONTANA PUBLIC EMPLOYEES ASSOCIATION, INC., Complainant, vs. GEORGIA RUTH RICE, OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION, Defendant	FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDED ORDER.

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I. INTRODUCTION

On July 20, and on August 20, 1979, Complainant filed unfair labor practice charges against Defendant alleging, in No. 37, a refusal to negotiate mandatory subjects of bargaining; and, in No. 31, count one, a refusal to meet, in count two, a refusal to negotiate mandatory subjects of bargaining.

At the hearing held on January 29, 1980 counsel for Complainant moved to dismiss all charges except count two of No. 31 - Defendant's alleged refusal to negotiate on a proposed contract clause on dismissal for cause only. The parties stipulated to the facts and to the sole issue remaining as noted below. Mr. Harry L. Hjort represented Complainant; Defendant was represented by Mr. Richard L. Parish and Mr. Ross W. Cannon.

II. ISSUE

Whether the refusal to negotiate on the subject of termination for cause is a violation of 39-31-401 MCA.

III. FINDINGS OF FACT

As noted above, the facts in this matter were stipulated to by the parties. Based on that stipulation and other matters on the record, I find as follows:

1. During the course of negotiations Defendant proposed the following contract language:

"ARTICLE TEN. JOB SECURITY Section 1. The employees shall experience a probationary period of six months from the date of hire with the Employer. During the six months of probation, an employee may be terminated by the Employer when, in the judgment of the Employer, the employee's performance does not meet the required standards. The Employer will present to the employee and to the Association a written notice, by certified mail, stating the reasons for such termination.

Section 2. The Employer may remove an employee with permanent status only for just cause. The Employer shall furnish the Employee and the Association a notice, by certified mail, stating the reasons for such termination. Any disciplinary action taken by the Employer may be processed through the grievance procedure."

2. Defendant refused to negotiate on the proposal.

IV. OPINION

Although the question presented here has not been considered before by the Montana Board of Personnel Appeals, it was decided several years ago by the National Labor Relations Board. Discharge has long been recognized as a mandatory subject of bargaining by the NLRB. National Licorice Co. v. NLRB, 309 U.S. 350 (1940), 6 LRRM 674. The Montana Supreme Court in State Department of Highways v. Public Employees Craft Council, 165 Mont. 349, 529 P. 2d 785 (1974), 87 LRRM 2101 held that private sector precedents are relevant in interpreting our act when its language and that of the Labor Management Relations Act are similar. The two acts are similar in the language they use to provide employees the right to bargain collectively with respect to wages, hours and other conditions of employment. The term "other conditions of employment" encompasses most aspects of the employer union relationships. The requirements of continued employment for one already on the

job are literally "conditions of employment" about which both parties must bargain. The employer may not set unilaterally - or bargain directly with individual employees about - the allowable causes of discharge and the manner in which employer decisions on discharge may be reviewed through a grievance procedure. See Labor Law, Basic Text, by Robert A. Gorman, 1976 ed., pp. 504. Professor Morris in The Developing Labor Law, 1971 ed., at page 404 states, "Numerous topics fall within 'other terms and conditions of employment' as the phrase is used in the Act. Many are now so clearly recognized to be mandatory subjects for bargaining that no discussion is required. Among these topics are provisions for a grievance procedure and arbitration, layoffs, discharge, . . ." It seems to be well settled in the private sector that there is a duty to bargain in good faith concerning whether the employer or the union or both will determine how and what working conditions will be during the term of the labor contract. With that proposition Defendant does not argue.

The position of Defendant in this matter is that it is not within the legal authority of her office to confer tenure upon her employees; that, in fact, it is an illegal subject for bargaining. To support that position a number of cases are cited by Defendant and she refers to certain action by the 1977 Legislature. First, the Legislature defeated a bill which would have created a civil service system for state employees and, at the same time would have given tenure to them. From this Defendant believes legislative intent should be extracted and a conclusion drawn that bargained for tenure by employees covered by the Collective Bargaining for Public Employees Act is against public policy. I do not agree. There may have been myriad reasons why a civil service system bill was not passed, not the least of which may have been that employees, through their exclusive representatives, were already able to obtain via collective bargaining many, and perhaps even more, of the benefits which

such a system could bestow. The Montana Act is modeled so closely after the NLRA that the Legislature could hardly have been ignorant in 1973 of the fact that the private sector had been bargaining over termination for cause (tenure) for years, and that the industries with strong and stable labor relations histories do not summarily dismiss bargaining unit numbers. Had the 1977 Legislature intended that public employers not bargain on the subject, it would not have passed the Act.

Secondly, Beamer et al, v. Georgia Ruth Rice, Civil Action No. 41041, First Judicial District Court (April 27, 1978), was cited to suggest that a decision, by Judge Bennett, that a previous Superintendent lacked authority to adopt an affirmative action plan giving tenure to employees should be conclusive here. Judge Bennett was not addressing public employee rights and public employer responsibilities under Montana's Collective Bargaining for Public Employees Act when he decided Beamer.

Zderick v. Silver Bow County, 154 Mont. 110, 460 P.2d 749 (1969) was decided several years before the Collective Bargaining for Public Employees Act was enacted in 1973. The new law gave public employers the authority and imposed the duty upon them to bargain on wages, hours, fringe benefits and other conditions of employment. To imply there was no authority conferred by the statute would simply be illogical. Finally, Defendant urges that Sibert v. Community College of Flathead County, ____ Mont, ____, 587 P. 2d 26, 35 St. Rep. 1780 (1978) resolves the issue with certainty. I believe the distinction between Sibert and this case is that the College Trustees were attempting to give tenure to administrative persons - persons who clearly would not be covered by the collective bargaining law, but rather, those who are specifically excluded as management officials and/or supervisory personnel. Sibert did not answer the question of whether non-administrative, non-management personnel could be contracted with for termination for cause.

None of the arguments made by Defendant deals with Montana public employees' rights to bargain for tenure under the Act. The issue has not been decided by the Montana Supreme Court before, therefore, an examination of the disposition of the issue by other jurisdictions may be helpful.

A Florida District Court of Appeal held in Lake County Education Association v. The School Board of Lake County Florida (1978), 360 So. 2d 128, 99 LRRM 2493, that the school Board lacked authority under state law to include a provision in a collective bargaining agreement providing tenure to non-tenured teachers where the state law provided that the Board alone had the power and duty to dismiss its employees. Perhaps as important as the court's decision in Lake County was the following: "This is an issue of first impression in Florida, but the matter has been considered in recent years by a number of other states which authorize public employee bargaining. The authorities are divided." (emphasis added.) The court went on to cite a number of cases in which the court reasoned that the school board could not negotiate an agreement that would establish conditions precedent to the dismissal of nontenured teachers which are in excess of the conditions imposed by statute. It also cited a number of cases in which the courts had reached contrary conclusions, i.e., that the school boards did have the power to contract regarding terms and conditions of employment and that the nonrenewal of a teacher's employment contract and the resolution of labor disputes through binding arbitration were matters relating to terms and conditions of employment. See, for example, Cohoes City School District v. Cohoes Teachers Association, 358 N.E. 2d. 878, 94 LRRM 2192 (1976); Wasclih Education Association v. Board of Education, 331 N.E. 2d 335, 90 LRRM 2342 (1975); Lockport Area Sp. Ed. Coop. v. Lockport Area Sp. Ed. Coop. Assoc., 338 N.E. 2d 463, 91 LRRM 2449 (1975); School Committee of Danvers v. Tymen, 360 N.E. 2d 877, 94 LRRM 3182 (1977); Brown v. Holton Public

Schools, 254 N.W. 2d 41, 95 LRRM 3054 (1977); Board of Education v. Philadelphia Federation of Teachers Local No. 3, 346 A.2d 35, 90 LRRM 2879 (1975); Danville Board of School Directors v. Fifield, 315 A.2d 473, 85 LRRM 2939 (1974).

I am not persuaded by Defendant's arguments on this issue nor am I convinced that those jurisdictions which hold their public employers to be without authority to bargain except on specifically authorized subjects should be followed in Montana. When the Collective Bargaining for Public Employees Act was made law, the public policy of the state was ". . . to encourage the practice and procedure of collective bargaining . . ." Further, the Act imposes a duty upon and authorizes both parties to bargain collectively with respect to conditions of employment. Although the Superintendent of Public Instruction may have been without authority to enter into an agreement providing tenure to her employees or to even bargain on the subject prior to the Act, she does have that authority now. Any other decision would render public employee collective bargaining meaningless. The law must mean something when it mandates bargaining on conditions of employment. And, it can hardly be gainsaid that one's right to non-summary dismissal is an important condition of employment.

I am convinced that the Act implies the authority of Defendant to bargain on the subject of termination for job related reasons. It is not illegal for the Superintendent to agree to dismiss employees only for cause and, if there is a dispute as to what good cause is, to go to an arbitrator for a final and binding decision. Such practice has been used in the private sector for a number of years to promote industrial peace. I believe the public's best interests are served if that is the policy of this state.

V. CONCLUSION OF LAW

Defendant violated 39-31-401 MAC by refusing to negotiate the subject of termination for cause with Complainant.

VI. RECOMMENDED ORDER

IT IS ORDERED that the Superintendent of Public Instruction, her officers, agents and representatives shall cease and desist from refusing to negotiate the above subject with the Montana Public Employees Association; that ULP 37-79 and charge number one in ULP 31-79 be dismissed.

NOTICE

Exceptions may be filed to these Findings of Fact, Conclusion of Law and Recommended Order within twenty days of service thereof. If no exceptions are so filed, this Recommended Order shall become the Final Order of the Board. Exceptions shall be addressed to the Board of Personnel Appeals, Capitol Station, Helena, Montana 59601.

Dated this 14th day of April, 1980.

BOARD OF PERSONNEL APPEALS

By [signature]
JACK H. CALHOUN
Hearing Examiner