STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 31-82:

MONTANA PUBLIC EMPLOYEES ASSOCIATION,	)	
Complainant,	)	
- vs -	)	FINAL ORDER
LEWIS AND CLARK COUNTY BOARD OF COMMISSIONERS,	)	
Defendant.	)	

* *

No exceptions having been filed, pursuant to ARM 24.26.215, to the Findings of Fact, Conclusions of Law and Recommended Order issued on April 29, 1983, by Hearing Examiner Rick D'Hooge;

THEREFORE, this Board adopts that Recommended Order in this matter as its FINAL ORDFR.

DATED this 27th day of July, 1983.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn
Alan L. Joscelyn
Chairman

* *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 2nd day of ~~July~~ August, 1983:

Duane Johnson
MANAGEMENT ASSOCIATES
P.O. Box 781
Helena, MT 59624

Montana Public Employees Association
P.O. Box 5600
Helena, MT 59604

Jennifer Jacobson.

THORBER'S HELENA

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE 31-82

MONTANA PUBLIC EMPLOYEES ASSOCIATION,	)
	)
Complainant,	)
	)
vs.	)
	)
LEWIS AND CLARK COUNTY BOARD OF COMMISSIONERS,	)
	)
Defendant.	)

* * * * * * * * * * * * *

FINDINGS OF FACT
CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER

* * * * * * * * * * * * *

On September 9, 1982, the Complainant filed the following unfair labor practice charges:

> The defendant has violated 39-31-401(5) by deliberately misrepresenting certain facts at the bargaining table, which misrepresentations materially affected the bargaining position of the Complainant. Their misrepresentations were put forth on several occasions by the chief spokesman for Defendant, Duane Johnson, and by the Assistant to the Defendant, Greg Jackson. The misrepresentations dealt with salary increases for certain management officials, including Mr. Jackson. Based on the misrepresentations that these officials were receiving no salary increase, the Complainant modified its position in bargaining. After the Complainant had ratified a tentative agreement, it was discovered that the Defendants' spokesman had deliberately misrepresented salary information pertaining to these management officials. Absent such misrepresentations the Complaint would not have entered into and ratified the tentative agreement it did. Complainant seeks an Order from the Board condemning such deliberate misrepresentations, Ordering the Defendant to cease and desist from any such conduct in future negotiations, and requiring the Defendant to post a notice of apology to its employees regarding its unlawful and deceitful behavior.

On September 22, 1982, the Defendant answered the charges. The Defendant denied any violation of Section 39-31-401(5), MCA and the Defendant denied that its representative deliberately misrepresented any facts at the bargaining table.

On December 6, 1982, a hearing was held under the authority of Section 39-31-406, MCA and the Administrative Procedure Act (Title 2, Chapter 4 MCA). At the hearing, the parties stipulated that the Defendant is a public employer as defined by the Collective Bargaining for Public Employees Act, Section 39-31-101, MCA seq; that the Complainant is a labor orgainization as defined by the Collective Bargaining for Public Employees Act; and that the parties have no question concerning the jurisdiction of the Board of Personnel Appeals.

I. FINDINGS OF FACT

After a thorough review of the transcript, exhibit, and post hearing briefs, I make the following findings of fact:

1. The parties were engaged in mid-contract economic negotiations of a two year labor agreement. (tr. 10). The members of the management negotiating team were Duane Johnson, chief spokesman and a contracted labor negotiator from the firm Management Associates, Greg Jackson, assistant to the County Commissioners, and Paula Stoll, personnel specialist for Lewis and Clark County. (tr. 4, 46, 51, 57). Some of the members of the Union negotiating team were Mel Wojcik, chief spokesman and field representative for Montana Public Employees Association (MPEA) and Nancy Jones, employee of Lewis and Clark County and the Lewis and Clark county chapter president for MPEA. (tr. 4, 32, 33).

2. Sometime before the first negotiations between the parties, Mr. Duane Johnson met three or four times with the County Commissioners to formulate a general negotiating policy including a policy on economic items. During the negotiations between the parties Mr. Duane Johnson met a couple of times with the County Commissioners to update them

concerning the negotiations process. Duane Johnson was also the spokesman for the county in collective bargaining negotiations with other unions that were representing other county employees. At the time of negotiations between the parties, Mr. Duane Johnson was aware of the county's collective bargaining position with the other unions. (tr. 54, 55).

3. During the five or six bargaining sessions starting at the end of May or the first part of June 1982, the parties discussed such things as the change in Montana's statute requiring that elected officials receive a 7.28 percentage increase in salary and management's plea that the county was short of money. (tr. 5, 9, 10, 11, 28, 33, 36).

4. Because of management's plea of poverty, the Union asked what sort of belt tightening management would be taking. The Union asked management's position relative to other bargaining units that were at the bargaining table. The Union questioned whether the mill value was going to be devalued. The Union questioned management relative to management salary increases on a percentage basis and on a flat dollar basis versus the percentage salary increase offered the union membership. (tr. 5, 15, 25, 26, 27, 28, 29, 56,).

5. Because of the importance of the above questions, because of the limited money and because he wanted some assurances that the Union was not going to be singled out for low wage increases, Duane Johnson questioned Greg Jackson who directly represents the County Commissioners. Mr. Jackson gave Mr. Johnson a list of events that were scheduled to occur because of the money shortage.

6. During several negotiation meetings, Duane Johnson indicated, among other things, that the county was tightening

belts all the way around even in administrative salaries; that Greg Jackson would not be receiving any sort of pay increase in the upcoming fiscal year; that Paula Stoll's position would be cut from full-time to three-fifths time; that the county was going to be stingy with the other bargaining unions and non-organized employees; that the county had laid off other employees; and that the Justice of the Peace would not be getting any raise. (tr. 5, 6, 15, 16, 26, 31, 33, 34, 57). The above items were among about ten or twelve items that Duane Johnson received from the county. The above items were given to the union to assure them that they would not be singled out to bear the brunt of a budget shortage.

7. Mr. Mel Wojcik was unable to attend negotiation meeting of June 28, 1982. The Union's spokesman was Mr. Jim Adams, Director of field operations, MPEA. During this meeting the parties shared certain information and agreed that retroactivity, in the short run, would be no problem. (tr. 11, 25, 27).

Duane Johnson produced some prepared information on mill levy and the mill value for the last several years. The Union wished to wait for information about the future mill value. At this meeting, Duane Johnson could only anticipate future mill value. (tr. 25, 26, 27,).

8. At the June 15th meeting, the parties reached a point where they requested the assistance of a labor mediator. About 15 MPEA members and employees of the county were in attendance at this meeting. (tr. 11, 12).

9. On June 26th, labor mediator Jack Calhoun joined the negotiations. Management made their last, best and final offer with two options. (tr. 7, 11, 52).

10. On June 29, 1982, the Union held a ratification vote. The ratification vote was close with about five votes difference. (tr. 5, 11, 13, 35,).

Mr. Mel Wojcik is of the opinion that the union membership would have not ratified the proposed collective bargaining agreement if they had known of the large wage increase to be given Greg Jackson. Nancy Jones is of the opinion that management's representation that Greg Jackson would not get any wage increase probably played a major part in at least her decision to vote for the proposed collective bargaining agreement. (tr. 12, 34,).

11. On August 3, the Union sent written notice to Duane Johnson stating that the union had ratified management's last, best and final offer option #2. (tr. 9, 11).

12. A week or ten days before August 9, 1982, Mr. Ed Blackman, the county bookkeeper, approached the County Commissioners and explained that he had a job offer from School District #1. The school district offered him a salary of about $26,000. The county was paying Mr. Blackman about $20,000. Mr. Blackman also told the County Commissioners that the school districts offer was attractive but he would prefer to work for the county. Mr. Blackman asked to be informed of the county's response so that he could accept or reject the school district's offer. Not wishing to lose a valuable employee, the County Commissioners met and discussed the possibility of giving Mr. Ed Blackman a raise. Because historically Greg Jackson has always been paid slightly more than Mr. Blackman, the County Commissioners realized that if they gave a raise to Mr. Blackman, they would have to consider a raise for Greg Jackson. The County Commissioners asked Mr. Jackson to do a quick wage survey of

the other large counties. The wage survey covered Greg Jackson's position, Ed Blackman's position, the Deputy County Attorny's position, and other county staff positions. The wage survey results indicated an upgrade was in order for Greg Jackson and Ed Blackman's positions. (tr. 68, 69, 71).

The County Commissioners did not discuss that if the County Commissioners gave Greg Jackson and Ed Blackman a raise, the County Commissioners would be irritating all the people the County Commissioners had been telling they were short of money. In the mind of one County Commissioner, there was no connection at all between the collective bargaining and the issue of whether Greg Jackson and Ed Blackman should be given a raise. (tr. 72, 61,).

13. Paula Stoll first heard hints about a salary increase for Greg Jackson about three or four days before August 9, 1982. (tr. 49, 50).

Paula Stoll informed Duane Johnson that the County Commissioners were considering a raise for Greg Jackson on or about August 6 or 7, 1982. Duane Johnson's reaction was "Jesus, the timing on this is not very good... this can make... me look bad". Duane Johnson does not know when the County Commissioners first started considering a raise for Greg Jackson. (tr. 59).

14. On August 9, 1982 the County Commissioners instituted the following paper work:

LEWIS AND CLARK COUNTY
Employee Change of Status Form

EMPLOYEE NAME: Jackson, Greg EMPLOYEE NUMBER: 780
DEPARTMENT: Asst. to the Commissioner EFFECTIVE DATE OF CHANGE August 15, 1982
THE CHANGE(S):

CHECK ALL APPLICABLE BOXES	FROM	TO
Department		
Job/Position		
Rate of Pay (Monthly & Hourly)	$1,847/month (25D)	$1,996/month (27C)
Other		

REASON FOR CHANGE(S):

Probationary Period Completed	xPromotion	Transfer
Anniversary Increase	Demotion	Termination
Longevity Increase	Reclassification	

Other (explain): Promotional increase per commission action on August 9, 1982.

CHANGE AUTHORIZED BY: Paula Stoll DATE: August 10, 1982
CHANGE APPROVED BY: _____ DATE: _____

(Management Exhibit A).

15. On August 9, 1982, the County Commissioners adopted the final budget for the county. (tr. 67).

16. Between August 9, 1982 and August 24, 1982, Duane Johnson met with the County Commissioners to question why they increased Greg Jackson's wages. Duane Johnson was concerned that he had told the Union one thing at the collective bargaining table and the employer had done another thing. Mr. Duane Johnson was of the opinion that the County Commissioners did not fully appreciate the problem they had created; and that the County Commissioners sort of overlooked the fact that Duane Johnson told the Union during negotiations that Greg Jackson was not anticipating a salary increase. At this meeting, Duane Johnson suggested the County Commissioners withdraw or change their action on Greg Jackson and Ed Blackman's salary. The County Commissioners rejected the suggestion because they had not deliberately lied to Duane

Johnson. But, the County Commissioners realized how important it is for the negotiator to deal honestly with the unions. Duane Johnson states that when the statement about Greg Jackson's raise was made, the county did not anticipate a wage increase for Greg Jackson or any other management employee. (tr. 60, 61, 62, 70, 71).

17. From the time the Union first became knowledgeable of Greg Jackson's salary increase until August 24, Mel Wojcik did not discuss the salary increase with any county official.

Mel Wojcik did attempt to contact Duane Johnson during this time. (tr. 10, 14).

18. On August 24, 1982, the parties signed a new collective bargaining agreement. The Union knew that Greg Jackson had received about a fifteen percent increase in wages before signing the new collective bargaining ageement. (tr. 12, 13 52).

19. Mel Wojcik testified that he is familiar with the classification plan for county employees; that MPEA represents employees covered by the classification plan; that MPEA had a large role in negotiating the classification plan; that reclassification of county employees is done by Paula Stoll and Greg Jackson's office with no input from the Union; that MPEA has been notified of reclassifications; that MPEA never complained about reclassification; and that reclassifications had been both upward and downward. (tr. 23, 24,).

20. Duane Johnson testified that he had not played either an active or passive role in the promotion or reclassification of any county personnel; that he absolutely did not deliberately misrepresent any facts at the collective bargaining table; that he absolutely did not lie in presenting any

justification for a formal proposal at the collective bargaining table; and that he did not have any knowledge of the salary promotions or reclassification of the management employee when he made the statement about Greg Jackson's raise at the collective bargaining table. (tr. 53, 64, 65, 71).

21. The following portion of the transcript from the hearing contains no direct questions concerning whether Duane Johnson was directly or indirectly authorized to tell the Union that Greg Jackson was not going to get a raise.

The transcript states in part:

STITELER: When you made that statement [about Greg Jackson's wage increase], had you been told, by the County Commissioners, that that was the position that they were going to take, or were you just 'hip shooting' here?

JOHNSON: Ah, let me, let me explain how that happened. Okay, on, and at the, well, first of all it was the concern of the Union on, during the several meetings that we had, I think beginning with the first meeting, that, ah, obviously our position, or the County's proposals with regard to economic issues, was very low, in fact, starting out at zero. (tr. 55-56).

. . . .

It was at that point, when they first pursued that ah, that thinking that I felt that it was important that I ought to discuss their concerns with the County officials, including the, the County Commissioners, and I did. I expressed, to the Commissioners, that MPEA felt that there was a possibility that they were in line for some punishment that others weren't going to get and, and I wanted some assurances myself, in fact, that that was not the case so that I could comfortably pursue what was a pretty limited position in money at the table. Ah, at that time I was told ah, well, I first expressed these things to Mr. Jackson, who directly represents the County Commissioners. And, Mr. Jackson indicated a number of areas outside of, of the MPEA unit that were earmarked for a sev, pretty severe austerity..... There was whole list of things that were given to me by ah, Mr. Jackson and, and ah, I think, in the presence at one time or another of at least one or more of the County Commissioners, of things that ah, that were going to happen. Ah, now, ah, probably, let me tell you the way it was stated to me, okay, maybe this will help. Ah, Mr. Jackson, himself, told me

that ah, that he was going to not ask for a salary increase. That, that he didn't think that he would get one anyway and that therefore, ah, he, he just felt that things were so tight that he probably wouldn't get a salary increase and he was going to simply suggest that, that his position be overlooked for a salary increase, which he did and I heard him personally do that. (tr. 56-58).

. . . .

STITELER: So, if, in fact, the Board of County Commissioners had been considering since you began negotiations with MPEA ah, that they were ultimately going to give Greg Jackson's position a, an increase along with several other positions. You wouldn't have had any way of knowing that, but it's possible that they may have been considering that?

JOHNSON: Well, I, if you want, I can only give you an opinion.

STITELER: Okay.

JOHNSON: Because I can't give you an honest to God ah, answer. My opinion is that no, they weren't considering because I doubt very much that they would have sat there and lied to me realizing how important it was that I tell the Union the truth. Ah, they never made a big deal out of it ah, it was just one of the things that was ticked off to me. I think it was, they were sincerely ah, considering less. (tr. 59-60) (Also see tr. 61, 62 and Finding #16.).

Not only from the above sections of the transcript but also from my judgment of the demeanor of the witnesses at the hearing, this hearing examiner believes that Duane Johnson did have authority from the County Commissioners to make the statement about Greg Jackson's salary increase.

22. Paula Stoll's position, Personnel Specialist, was vacant at the time of the hearing. The position was being recruited as a half-time position. (tr. 46, 47).

II. DISCUSSION

In reviewing the transcript, Exhibit and posthearing briefs to produce the above detailed Findings of Facts, this Hearing Examiner is of the opinion there is no disagreement over the facts in this case and no need for a credibility

resolution. The charges, transcript, Exhibit and posthearing briefs produced the following questions that must be addressed:

1. Whether Greg Jackson's wage increase was due to reclassification?
2. Did MPEA waive the rights to file this unfair labor practice charge because MPEA did not object to Greg Jackson's salary increase before signing the new Collective Bargaining Agreement on August 24, 1982?
3. Is the word "deliberate" critical to the charge?
4. Did Duane Johnson independently misrepresent any facts at the collective bargaining table?
5. Did the County misrepresent any facts at the collective bargaining table?
6. Did the misrepresentation of facts at the collective bargaining table constitute a violation of Section 39-31-401(5), MCA?

1. Whether Greg jackson's wage increase was due to reclassification?

The Defendant argues that the action of increasing Greg Jackson's wages by the County Commissioners was a solution to a classification problem. The Defendant's Brief states that "the Complainant should realize better than anyone that management must be free to act when circumstances dictate a review of classification and pay." Looking at Finding Number 14, Management's Exhibit A, I find the Exhibit shows the reason for the change of Greg Jackson's salary from $1,847 per month to $1,996 per month was marked "promotion" not "reclassification". The Exhibit also explains the reason for the change as "promotional increase". If the action by the County Commissioners was for a classification reason why was promotion marked and not reclassification?

If this Hearing Examiner was to agree with the Defendant's arguments, the Defendant could make broad base changes in all employees' pay for "classification reasons". This argument would make negotiations of wages under Montana's Collective Bargaining for Public Employees Act useless. The employer is allowed to make unilateral changes in wages

provided the changes are within the understandings between the parties. (C & C Plywood, 385 US 421, 64 LRRM 2065, 1967 and Katz, 369 US 736, 50 LRRM 2177, 1962). By looking at Findings Number 6, 10, 12, 13, 16, 17, 18 and 21, this Hearing Examiner believes that the parties had an understanding that Greg Jackson was not going to get a raise. By looking at Finding Number 19, this Hearing Examiner believes the County and MPEA had an understanding that the County had certain flexibility in reclassifying employees provided the County notified MPEA. The understanding between the parties about reclassification is a general understanding. The understanding between the parties about Greg Jackson's raise was a specific understanding. A specific understanding has control over a general understanding. For the reasons set forth above, I give no weight to the argument that the County was free to increase Greg Jackson's wages for "a classification reason".

2. Did MPEA waive their rights to file this unfair labor practice charge because MPEA did not object to Greg Jackson's salary increase before signing the new Collective Bargaining Agreement on August 24, 1982?

The Defendant's Brief states:

> The chronological events of this matter which are documented on the record show that Complainant rested on its rights for a period from August 9, 1982, until August 24, 1982, when the parties formally executed the extant labor agreement between the parties. Testimony taken at the hearing by Complainant's witnesses shows no contact or complaint to Defendant about this matter prior to August 24, 1982. No attempt was made to seek an explanation of this matter. No opportunity was provided the Defendant to give an explanation. Complainant's explanation that "they had made a tentative agreement and intended to stick to it" has a hollow ring. It is clear that Complainant is attempting to use the Board of Personnel Appeals to take care of something that they should have attempted to take care of themselves. At the very least, Complainant was obligated to convey these

concerns and seek remedy from the only party that could properly address the matter - the Lewis and Clark County Commission. Instead, Complainant stood mute and therefore by their silence waived their right to complain about this matter. This charge represents nothing more than after the fact harassment, vexatious ligitation and an unfair burden upon the taxpayers of Lewis and Clark County.

The Second Circuit Court of Appeals in Local 743, International Association of Machinists, AFL-CIO v. United Aircraft Corporation, 337 F.2d 5, 57 LRRM 2245, 1964, set forth the following lesson on waivers:

> The standard rule in cases such as this, enunciated in numerous decisions of the Supreme Court, this court, and the courts of other circuits, is that the right to resort to the Board [NLRB] for relief against unfair labor practices cannot be foreclosed by private contract. For example, see J. I. Case Co. v. NLRB, 321 U.S. 332, 336-39, 14 LRRM 501 (1944); National Licorice Co. v. NLRB, 309, U.S. 350, 359-61, 6 LRRM 2103 (s Cir. 1952), aff'd, 347 U.S. 17, 33 LRRM 2417 (1954); NLRB v. E. A. Laboratories, Inc., 188 F.2d 885, 887 28 LRRM 2043 (2 Cir. 1951), cert. denied. 342 U.S. 871 29 LRRM 2022 (1951); International Union of Elc. Workers v. NLRB, 328 F.2d 723, 727, 55 LRRM 2659 (3 Cir. 1964); NLRB v. Threads, Inc., 308 F.2d 1, 8, 51 LRRM 2074 (4 Cir. 1962). Nor is an arbitration award of any greater effect in this respect. NLRB v. bell Aircraft Corp., 206 F.2d 235, 237, 32 LRRM 2550 (2 Cir. 1953); NLRB v. Hershey Chocolate Corp., 297 F.2d 286, 293, 49 LRRM 2173 (3 Cir. 1961); NLRB v. International Union, UAW, 194 F.2d 698, 702, 29 LRRM 2433 (7 Cir. 1952).
>
> These decisions are based on the express language of Section 10(a) of the National labor Relations Act [NLRA], 29 U.S.C. Section 160(a), which provides in part:
>
> "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: . . ."
>
> This express statutory mandate, in turn, reflects the theory enunciated by the Supreme Court in National Licorice Co. v. NLRB: "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." 309 U.S. at 364, 6 LRRM 674. This public interest in preventing unfair labor practices cannot be entirely foreclosed by a purely private arrangement, no matter how

> attractive the arrangement may appear to be to the individual participants. Moreover, as the court below pointed out, "The Board was designed to prevent any unfair economic pressure or expedient arrangements condoning unfair labor practices." 220 F.Supp. at 24. The aim of the act to give special protection to the economically vulnerable would be defeated if contracts entered into because of that very vulnerability were enough to preclude enforcement of the act. (57 LRRM at 2247 emphasis added).

The above case fails to meet the facts of the case at hand because the case at hand contains no written waiver but an allegation of waiver by inaction and because the Collective Bargaining for Public Employees Act has no equivalent section to compare with the limitations on private agreements contained in Section 10(a) of the NLRA.

But, the Montana Supreme Court in State of Montana Ex rel, Neiss v. District Court of the Thirteenth Judicial District, 511 P.2d 979, 1973 states:

. . . .

> However, since we are dealing with a public right, public policy demands the minimum wage shall be paid. Minimum wage provisions exist for the benefit of the whole public and a claimant of his own accord may not bargain away his statutory minimum wage. It is elementary that a law established for a public reason cannot be compromised by private agreement. Section 49-105, R.C.M. 1947 [Section 1-3-204 MCA].

Because the court in Local 743, supra, states public interest prevents the waiver of unfair labor practice charges and because the court in Neiss, supra, states law established for a public reason cannot be compromised, I cannot see why the Board of Personnel Appeals should not adopt the teachings of the court in Local 743, supra, when addressing a written unfair labor practice waiver. Then, it should follow that if the Board of Personnel Appeals applies the above standard to a written waiver, the Board of Personnel Appeals should have a standard that a waiver by inaction is also useless.

The inaction of a party is not limitless. The Complainant must comply with the six (6) months limitation as set forth in Section 39-31-404 MCA. The application of Section 39-31-404 MCA was explained in Plumbers and IBEW v. City of Great Falls, ULP#26, 27-1979 which adopted the rationale of Local Lodge #1424 (Bryan and Mfg. Co.), 362 U.S. 411, 45 LRRM 2312, 1960 and Auto Warehousers Inc., 571 F.2d 860, 98 LRRM 2230, 1978.

Because a party cannot waive the filing of an unfair labor practice charge and because the Complainant's unfair labor practice charge was filed timely, I do not believe that MPEA waived their right to file this unfair labor practice charge.

3. Is the word "deliberate" critical to the charge?

A careful examination of the charge produces a verdict that variations of "deliberate misrepresentation" was used three times in the charge while variations of "misrepresentation" was used five times in the charge.

MPEA's Brief sets forth the following argument:

> At the outset it should be noted that the Defendant's representative, Mr. Johnson, made much at the hearing of the use of the word "deliberate" in conjunction with "misrepresentation" in the unfair labor practice charge. It is the position of MPEA that the word "deliberate is not the key or operative word. The key word is "misrepresentation." A brief discussion of the definitions will demonstrate this point.
>
> "Deliberate" is defined as "characterized by or resulting from careful or thorough consideration" or "willful". Webster's Seventh New Collegiate Dictionary, 1965. It is further defined as "well advised"; carefully considered' not sudden or rash; circumspect". Black's Law Dictionary, 4th ed., 1951. The thrust of the word is that a deliberate action is one which is well-thought out and not rashly undertaken.
>
> The word "misrepresentation", however, speaks to a wholly different thing. "Misrepresentation" is defined by Webster's as "to give false or misleading representation of". It is defined by Black's as "any manifestation by words or other conduct by

> one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts." The plain, clear and simple meaning of the unfair labor practice charge, taken in conjunction with these definitions, is that, assertions were made which were not in accordance with the facts. The key to the charges is that misrepresentations were made, and that they had a material effect on the bargaining position of MPEA. Whether or not these misrepresentations were "deliberate" is immaterial; the end result of the misrepresentations is material.
>
> In further support of the proposition that "deliberate" is not the operative word, one merely has to examine how and where the word is used. The word "deliberate" is used as a modifier for emphasis in several locations. It is not used in conjunction with "misrepresentations" throughout.

Arguing from the premise that the Defendant does not have the pleasure of drafting the charge, the Defendant states that the Complainant did not prove that "deliberate misrepresentation" as charged.

I believe the word "deliberate" is a modifier and not critical to the charge.

4. Did Duane Johnson independently misrepresent any facts at the collective bargaining table?

By looking at Findings Numbers 6, 16, 21 and 22, a verdict that Duane Johnson was only relaying or quoting the information he had received from the County is in order. The record in this case does not contain any evidence that Duane Johnson acted outside the County's negotiating policies.

5. Did the County misrepresent any facts at the collective bargaining table.

Looking at Findings Numbers 12, 13, 14, 20 and 21, this Hearing Examiner is of the opinion that the County did not deliberately misrepresent any facts at the collective bargaining table. This opinion is based on the fact that Mr. Blackman first talked to the County Commissioners about a week or ten (10) days before August 9, 1982; that Paula Stoll and Duane

Johnson first heard about Greg Jackson's salary increase on or about August 6, 1982; and that the record lacks any evidence that the County Commissioners were contemplating a raise for Greg Jackson while stating the opposite at the collective bargaining table. Looking at Findings Numbers 6, 10, 12, 13, 16, 17, 18 and 21 a verdict that the County Commissioners told MPEA that Greg Jackson was not going to get a raise is in order. Looking at the same findings, we can also conclude that the County's statements about Greg Jackson's salary increase was true at the time but later, turned out to be false.

6. Did the misrepresentation of facts at the collective bargaining table constitute a violation of Section 39-31-401(5) MCA?

The facts of the case at hand are:

a. The county, in answer to the union's questions and to support a low wage offer, stated Greg Jackson, a non-bargaining unit employee, would not get a raise.

b. At the time the above statement was made, the statement was true.

c. The union ratified the counties' last, best and final offer.

d. Later, Greg Jackson received a raise.

The thrust of the arguments in MPEA's Brief is the doctrine established in NLRB V. Truitt Manufacturing Co., 351 U.S. 149, 38 LRM 2042, 1956, and like cases. In Truitt, supra, and like cases, the courts have held the employer must provide the union with some information. In addition, the court in Truitt, supra, also states:

> Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of

> bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim. Such has been the holding of the Labor Board since shortly after the passage of the Wagner Act. (38 LRRM at 2043).

Based on the above, the union would like this hearing examiner to believe that all of Management's statements or claims about the future must be true. The District of Columbia Circuit Court of Appeals in Steelworkers vs NLRB, 390 F. 2d 846, 67 LRRM 2450, 1967, setforth the following application of Truitt:

> .... Here there was a finding that the complete rejection of the Union's request for a checkoff or other dues collection assistance was not a bargaining in good faith. The Board's crucial findings negativing good faith was amply supported by the evidence: the 1964 campaign literature wherein the company itself identified refusal of checkoff with undermining this union's position; the 1961 action wherein the Company granted the checkoff to the more favored local union; the lack of reliance on inconvenience or other business purpose; and the blanket refusal to consider alternatives-all in a context of vigorous anti-union animus.
>
> The Company put forward on argument the possibility that a company may hold back a checkoff for trading purposes. Assuming that the disclosure of such business purpose would have enabled the Company to avoid the condemnation of bad faith. The simple fact is that in the case before us no such point was put forward to the Union in the bargaining sessions. Instead the Company hardened on an alleged point of principle-a claim at odds with both its conduct, including the checkoff granted in 1961 to another union, and its concession that checkoff is a mandatory subject of bargaining. An employer disingenuous in its bargaining sessions must take the risk of being taken at face value and being held to have violated its duty, for good-faith bargaining requires "honest claims." NLRB v. Truitt Mfg. Co, supra, 351 U.S. at 152. (67 LRRM at 2453-54).

The above case involves mandatory subject of bargaining and a comparison between past actions and present actions. Also see Queen Mary Restaurants vs NLRB, 560 F. 2d 403, 96 LRRM 2456, CA9, 1977. The Ninth Circuit Court of Appeals in NLRB vs MacMillan Ring-Free Oil Co., 394 F. 2d 26, 68 LRRM 2004, 1968, set forth the following application of Truitt:

> Third, the company's negotiators were found to be to some extent contradictory and evasive when responding to questions concerning the reasons for some of their more severe proposals. This reaction was taken by the trial examiner as at least some indication that MacMillan's motives in making certain of those proposals were consistent with the attidude required by section 8(a)(5). "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims." NLRB v. Truitt Mfg. Co. 351 U.S. 149, 152,38 LRRM 2042 (1956) (68 LRRM at 2008).

The above case involes a question of the present actions of the employer. Also see NLRB vs Arkansas Rice Growers, 400 F. 2d 565 69 LRRM 2119, CA 8, 1968.

The Defendant's Brief states:

> The duty to furnish information is not present in the instant case nor was it an issue raised in the hearing. No claim of financial inability was raised by the employer during the negotiations process. The union did not request information. It is clear from the record that the employer voluntarily submit their intentions for austerity. The Second Circuit in NLRB v. Jacobs Mfg. Co. [196 F 2d 680, 30 LRRM 2098] (1952) stated that compliance with the statute does not require that an employer produce proof that its business decision as to what it can afford to do is correct, but only that it produce whatever relevant information it has "to indicate whether it can or cannot afford" to meet union demands. Information supplied voluntarily in this case was not to show that the employer could not meet the union's demands. The employer made no refusal to provide information and the union did not request information.
>
> A union is not entitled to informaton for the purpose of arguing with an employer over whether or not its expenditures are justied (see Metlox Mfg. Co., 153 NLRB 1388 (1965) enforced, 378 F 2d 728, 65 LRRm 2637 (CA 9, 1967) cent. denied, 389 U.S. 1037, 67 LRRM 2231 (1967).

Looking at findings #3, 4, 6, 13 and 14, we find that the employer said that the county was short of money; that the union, among other things, asked about management belt tightening; that the county, among other things,stated that Greg Jackson would not get a raise; and that Greg Jackson did get a raise. Parts of the Defendant's Brief, above, are in conflict with the above findings and transcript. The

findings and transcript are controlling. There is no question that the employer did provide informaton to the union in response to the union's questions. The question is about the honesty of the county information concerning future events.

The Board of Personnel Appeals first addressed misrepresentation at the collective bargaining table in Bigfork Area Education Association v. Flathead and Lake County School District #38, ULP #20, 22, 25, 26 and 33-1978. In Bigfork, supra, the Board of Personnel Appeals with District Court approval took a very dim view of the Defendant's actions. The Defendant told the Complainant such things as they had the ability to pay a base salary of $9,227.00 without another mill levy but at the next meeting the Defendant told the Complainant the opposite. (Recommended Order P.57, 58). The Board of Personnel Appeals also addressed misrepresentation and concealment of facts in AfSCME v. Havre School District, ULP #30-1981. In Havre Schools, supra, the Board of Personnel Appeals relied on the teachings of NLRB v. My Store, Inc., 345 F.2d 494, 58 LRRM 2775, CA 7, 1965, NLRB v. Mayes Bros. Inc., 383 F.2d 242, 66 LRRM 2031, CA 5, 1967, and Mount Hope Finishing Co. v. NLRB, 211 F.2d 365, 33 LRRM 2742, CA 4, 1954. The Seventh Circuit Court of Appeals in My Store, supra, noting Truitt, supra, found the employer violated Section 8(a)(5) of the NLRA by refusing to bargain on wages based on a job classification on the grounds that there was none when the respondent's records showed otherwise. The Fifth Circuit Court of Appeals in Mayes Bros., supra, modified and enforced a finding that the employer violated Section 8(a)(5) of the NLRA by misleading the union into believing that the complete terms of a collective bargaining

contract had been agreed upon. In Mount Hope Finishing Co., supra, the Fourth Circuit Court of Appeals denied enforcement of an NLRB order on the grounds that the NLRB order lacked substantial evidence. The NLRB order had found that the employer violated Section 8(a)(5) of the NLRA by misleading the union into believing that the plant shut down was temporary rather than permanent. All the above cases involve mandatory subjects of bargaining and a comparison of past and/or present actions, not future intentions.

Neither the union's arguments, management argurments, nor the Board of Personnel Appeals past rulings apply to the case at hand. None of the arguments or cases cited by the parties addressed the question of the employer's statement about future raises for non-bargaining unit employees. From the above and other NLRB cases, this hearing examiner understands that it is an unfair labor practice for an employer to knowingly misrepresent any facts about a mandatory subject of bargaining. The employer also has an obligation to correct any facts about a mandatory subject of bargaining which the employer later finds incorrect.

Looking at other state jurisdictions for guidance, we find the Massachusetts Labor Relations Commission in City of Springfield and Massachusetts Nurses Association MUP-3720, 3 NPER 22-12059, 1981, set forth the following:

> On September 28, 1979 emergency legislation to provide for the observance of the visit of the Pope on October 1, 1979 was signed into law by Governor King. Following notification of this enactment on September 28, 1979, Springfield Municipal Hospital Director George H. Lane issued the following memorandum to all department heads:
>
> > "as of 12:15 p.m., September 28, 1979 the Mayor of Springfield has indicated that October 1, 1979 will be a paid holiday.
> >
> > Please schedule your department's [sic] on a holiday schedule or because of the short notice to meet the scheduled commitments of your department.

> The October 1, 1979 holiday is to be treated the same as the holidays listed in the contracts."
>
> The city did not confer with the Association prior to issuing the above-mentioned memorandum. Anticipating financial advantages which would accrue to bargaining unit members, the Association chose not to discuss the mandate imposed by the City.
>
> On October 1, 1979 thirty-four registered nurses worked at the hospital in reliance upon Lane's memorandum. All non-essential employees of the City were granted the day off with pay.
>
> On October 11, 1979, the nurses received their first paychecks which would have reflected holiday compensation from October 1, 1979. The paychecks did not contain wages at time and one-half for October 1, 1979. The nurses immediately complained to the Association regarding this matter.
>
> On October 12, 1979, at a collective bargaining session regarding a successor agreement, the Association representatives asked the City why it failed to abide by its announced intention to pay registered nurses for holiday benefits for working on October 1, 1979. The City's negotiator, James Dowd, responded that due to the approximately one-quarter of a million dollar cost for all units of City employees there was a funding problem. Dowd said that the Mayor was going to wait and see what action the unions in the City would take.
>
> The hearing officer determined that the totality of the City's conduct regarding the Papal Holiday constituted a refusal to bargain in good faith. We agree. There was an existing collective bargaining agreement between the parties. The City failed to confer with the Association before making the September 28 announcement which changed the terms of that agreement. See, Boston School Committee, 4 MLC 1912 (1978). Moreover, the City demonstrated bad faith when, in the midst of negotiations concerning a successor agreement, it reneged on its announced intention to treat the October 1, 1979 holiday as a paid holiday. See, NLRB v. Katz, 369 U.S. 736 (1962). In addition, the City's position that it would wait and see what the Association would do in response to its failure to pay the employees' holiday benefits demonstrates that the City did not intend to bargain in good faith. We therefore conclude that the totality of the City's conduct constitutes bad faith bargaining over compensation for the Papal Holiday.

In Springfield, supra, the employers announced intentions to pay holiday benefits for bargaining unit members for working

October 1,1979. The employer reneged on its announced intentions. The announced intentions dealt with a mandatory subject of bargaining.

The parties have not cited a case that addresses a question of a stated future intentions of an employer during negotiations to pay non-bargaining unit employees. After an extensive research of NLRB cases and other state jurisdictions, I have been unable to find a case in point.

Because the Board of Personnel Appeals is guided by Section 39-31-101 MCA which states: "In order to promote public business by removing certain recognized sources of strife and unrest, it is the policy of the state of Montana to encourage the practice and procedure of collective bargaining to arrive at a friendly adjustment of all disputes between public employers and their employees", we must look at the effect at this case on the parties. The affect of this case on the union is one of frustration and undermining by making the union feel ineffective. The union's chapter president, Nancy Jones, felt as if she bought a sack of hot air because management did not live up to their announced intentions.

In this case, if I ruled that the employer violated section 39-31-401(5 MCA), I may be hampering the collective bargaining process. The ruling may have the effect of saying that <u>all</u> the give and take of the collective bargaining process may be subject to a question of misrepresentation. A ruling of this nature would have both parties closely watching all of their statements. In effect, a ruling of this type would have the same end result on negotiations as a tape recorder or a court reporter has on negotiations. See <u>NLRBvs. Bartlett-Collins Co., 639 F. 2d 652,106 LRRM2272, Ca 10, 1981.</u>

If I ruled the employer violated section 39-31-401(5), MCA, I may be giving the union something they did not ask

for or could not get at the collective bargaining table. Did the union think of a "me too" clause and did not pursue it, or did the union try unsuccessfully to negotiate a "me too" clause are all questions on my mind. The record is silent in this area. A "me too" clause can take several froms such as: if any other county employees receive a larger raise than the employees of this bargaining unit, then the employees of this bargaining unit shall also receive the larger raise, or such as: if any other county employees receive a larger raise than the employees of this bargaining unit, then the union has a right to reopen this collective bargaining agreement to renegotiate wages. I believe a hearing examiner should never a give a party to an unfair labor practice charge proceeding anything the party did not receive at the collective bargaining table. In this case, I may be publicly chastising management for violating a non-existing "me too" clause. I state "publicly chastising" because the union's prayer is for a cease and desist order plus an apology.

The effects of this case on management are very high regardless of the final ruling. For sometime to come, the employees and the labor organization will not believe management.

When I weigh the negative effects of this case on the union against the other negative affects listed above, I believe the long range effect of this case can best be served by dismissing this charge.

In examining this case we must also look at the "totality of conduct". The union's brief states: "The subject of employer's misrepresentations during bargaining has not been a major topic for the NLRB. Most cases deal with the subject

also cover "totality of conduct" or other charges of bad faith bargaining." By looking at finding #6 we see that Greg Jackson's raise was one of ten or twelve items given to the union to asure them that they would not be singled out to bear the brunt of a budget shortage. Because the record in this case contains no other indication of bad faith bargaining, I must assume that no other bad faith bargaining existed. Therefore, I cannot find a "totality of conduct" charge.

Because the statement in question is about future intentions of the employer not to increase the pay of a non-bargaining unit employee, because I find no guidance in the NLRB and/or other state case law, because the effect of this case would best be served by the dismissal of the charge, and because I cannot base this case on the "totality of conduct" I believe this charge should be dismissed.

I must point out to the future reader of this recommened order that this hearing examiner been has very troubled by the effects of this case. Given a small change in facts, I would have ruled differently. I suggest the reader see the Administrative Law Judges decision in J.P. Stevens, 239 NLRB 738, 1978, for the effect on the union of a Hobson's choice as compared to the Administrative Law Judges decision in Adolph Coors Co., 235 NLRB 271, 1978, for the effect on the union of misrepresentation during implementation. The facts of this case presents a question that is just too close to call. I do not want management to believe that I am blessing their past actions or will bless similar actions by them. In the employer's opening statement, I think Mr. Johnson stated it best when he said that there are only two important fundaments in this process; first, that

the parties tell the trut and second that the parties aviod making statements they can not support. Mr. Johnson also stated that he would apologize to the union and its members for the sequence of events which took place plus any misunderstandings about an increase in pay for any employee. (tr. 44, 45)

III. CONCLUSIONS OF LAW

For the reasons set forth above, a conclusion of law that Lewis and Clark county did not violate section 39-31-401(5), MCA as charged is in order.

IV. RECOMMENDED ORDER

It is recommended that the unfair labor practice charge #31-82 be dismissed.

Dated this 29th day of April, 1983.

BOARD OF PERSONNEL APPEALS

By: Rick D'Hooge
Hearing Examiner

NOTE: As stated in the Board of Personnel Appeals rules, the parties have twenty (20) calendar days to file written exceptions to this Recommended Order. If no written exceptions are filed this Recommended Order becomes the full and final Order of the Board of Personnel Appeals.

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 2nd day of May, 1983:

Duane Johnson
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Helena, MT 59624

Montana Public Employees Association
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PAD6:G

Jennifer Jacobson