STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 10-86:

LOCAL NO. 854, LABORERS INTERNATIONAL UNION OF NORTH AMERICA,	
Complainant,	
- vs -	FINAL ORDER
DEPARTMENT OF ADMINISTRATION, STATE OF MONTANA,	
Defendant.	

The Findings of Fact, Conclusions of Law and Recommended Order was issued by Hearing Examiner Stan Gerke on September 19, 1988.

Exceptions of the Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order were filed by Kathleen F. Holden on behalf of the Defendant, Department of Administration, State of Montana, on October 11, 1988.

Oral argument was scheduled before the Board of Personnel Appeals on Friday, December 9, 1988.

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

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

2. IT IS ORDERED that this Board therefore adopt the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Stan Gerke as the Final Order of this Board.

DATED this 6th day of January, 1989.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn
Alan L. Joscelyn
Chairman

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
EMPLOYMENT RELATIONS DIVISION
APPEALS BUREAU

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE 10-86

LOCAL NO. 254, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, Complainant, -vs- DEPARTMENT OF ADMINISTRATION, STATE OF MONTANA, Defendant.	FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER

* * * * * * * * * * *

On April 29, 1986, the Complainant filed an unfair labor practice charge with this Board alleging the Defendant had violated Section 39-31-401(5) MCA by refusing to bargain in good faith. More specifically, the Complainant alleged the Defendant violated the Act by its action of refusing to bargain on the subject of transferring bargaining unit members from the Statewide Classification and Pay Plan to the Blue Collar Classification and Pay Plan.

In ANSWER filed with this Board on May 15, 1986, the Defendant denied any violations of Section 39-31-401(5) MCA. The Defendant further requested the unfair labor practice charge be dismissed on the grounds it was not timely filed.

This Board conducted an investigation in the matter and issued an Investigation Report and Determination on July 22, 1986. The Report found probable merit for the charge and concluded that a formal hearing was appropriate to address the merits of the charge and the timeliness issue.

A formal hearing in this matter was conducted on February 24, 1988, in the Department of Labor and Industry Building, Helena, Montana. The formal hearing was held under authority of Section 39-31-406 MCA and in accordance

with the Administrative Procedure Act, Title 2, Chapter 4, MCA. John B. Whiston, Attorney at Law, Missoula, Montana, represented the Complainant. The Defendant was represented by Kathleen Holden, Associate Counsel, State Personnel Division, Helena, Montana.

ISSUES

1. Whether unfair labor practice 18-86 was filed within the statutory 6 month time period of 39-31-404 MCA.

2. Whether the Defendant's refusal to bargain on the transfer of unit members from the Statewide Classification and Pay Plan to the Blue Collar Classification and Pay Plan was a violation of Section 39-31-401(5) MCA.

Additionally, the Parties stipulated that during the course of the formal hearing, the Parties could present evidence and testimony to the following question: Whether or not the Board of Personnel Appeals has authority to transfer employees from the Statewide Classification and Pay Plan to the Blue Collar Classification and Pay Plan as part of a classification appeal pursuant to Section 2-18-1011 MCA. The Hearing Examiner may use any such evidence and testimony presented in addressing issues raised in the Group Classification Appeal Number 14-86. Robert Muir, Timothy Popp, Eugene Lonz, and Danny Emerson classified as Maintenance Worker III's; Stephen Wilson and Leland Gober classified as Maintenance Worker IV's versus the State Personnel Division, Department of Administration. Additionally, if it is found the Board has authority to transfer employees from the Statewide Classification and Pay Plan to the Blue Collar Classification and Pay Plan, a hearing will be held in the merits of the Group Classification Appeal Number 14-86.

STIPULATED FACT

1. Negotiations for the new contract began on June 26, 1985.

2. At the fifth negotiation meeting on September 12, 1985, the Department of Administration refused to negotiate the issue of transferring the bargaining unit employees to the Blue Collar Classification and Pay Plan.

3. On September 20, 1985, the Parties jointly requested mediation and two mediation meetings were held on October 22, 1985, and November 8, 1985.

4. On November 8, 1985, the Union ratified the labor contract and the Letter of Agreement, Defendant's Exhibit 2.

5. ULP 10-86 was filed April 29, 1986.

FINDINGS OF FACT

6. On September 12, 1985, the Parties tentatively entered into a Letter of Agreement which temporarily removed the issue of transferring bargaining unit members to the Blue Collar Classification and Pay Plan from the bargaining table. The Letter of Agreement provided that the labor contract could be reopened mid-term if the Board of Personnel Appeals, or subsequent court, should make a final decision that transferring between classification and pay plans was a mandatory subject of bargaining. The Letter of Agreement was only tentative and was contingent upon the Parties reaching final agreement on the labor contract. The Letter of Agreement was formally accepted on November 8, 1985, with ratification of the labor contract.

7. The initial blue collar pay matrix was negotiated by the State of Montana and a council of traditional craft unions during the period of 1976-1977. A system was established whereby employees belonging to bargaining units represented by craft unions or the American Federation of

State, County and Municipal Employees and engaged in occupations typically associated with blue collar crafts were included under the Blue Collar Classification and Pay Plan.

8. Since the 1976-1977 negotiations concerning the Blue Collar Classification and Pay Plan and the adoption of the Blue Collar Classification and Pay Plan into law by the 1979 Legislature (Sec. 4, Ch. 678, L. 1979) at least two additional bargaining units performing typically blue collar craft work have been included under the Blue Collar Classification and Pay Plan.

9. The bargaining unit members represented by the Complainant in this matter are employed in traditional blue collar crafts. The bargaining unit was certified by this Board on May 20, 1985.

DISCUSSION

WHETHER UNFAIR LABOR PRACTICE 10-86 WAS FILED WITHIN THE STATUTORY SIX MONTH TIME PERIOD OF SECTION 39-31-404 MCA.

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using federal court and NLRB precedents as guidelines in interpreting the Public Employees Collective Bargaining Act. State Department of Highways v. Public Employees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974), 87 LRRM 2101; AFSCME Local 2390 v. City of Billings, 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753 (1976); State ex rel. Board of Personnel Appeals v. District Court, 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297 (1979); Teamsters Local 45 v. State ex rel. Board of Personnel Appeals, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981), City of Great Falls v. Young (Young III), _____ Mont. ____, 686 P.2d 185, 119 LRRM 2602 (1984).

The record shows the Defendant first refused to negotiate the transferring unit members between pay plans on

September 12, 1985. On that same date, the Parties entered into a tentative agreement to temporarily remove the issue of transferring unit members from the bargaining table. The tentative agreement was contingent upon ratification of the total labor contract which occurred on November 8, 1985. The unfair labor practice charge was filed on April 29, 1986. Logically, the six month appeal period should have began on November 8, 1985, the date when the Defendant's position of refusing to negotiate on the transfer issue was solidified. Ignoring this logic, we can examine the Court's handling of timeliness matters. In J. Ray McDermott & Company v. NLRB, ____F.2d____, 98 LRRM 2191 (5th Cir. 1978), the Appeals Court held when faced with an identical question in identical circumstances:

> This circuit has twice held that each refusal to bargain by an employer under a duty to bargain is a violation of the employer's duty, and that the passage of more than six months time from one such refusal does to bar action by the NLRB on a timely complain based on a subsequent refusal. NLRB v. Louisiana Bunkers, Inc., 5 Cir. 1969, 409 F.2d 1295, 1299-1300, 70 LRRM 3363; NLRM v. White Construction & Engineering Co., 5 Cir. 1953, 204 F.2d 950, 952-953, 32 LRRM 2198. Our reasoning is not controlled by a conclusory labeling of the employer's duty or of his violation as a "continuing" one. Rather, we recognize that the primary purpose of the six-month rule is to assure prompt adjudications of disputes based on fresh evidence. McDermott's refusal to bargain was based on motives contemporaneous with its refusal to bargain on April 21, 1976. The filing of a complaint on April 29, 1988 brought those motives into question, and was timely with regard to the unfair labor charge alleged. Cf., Local Lodge 1424 v. NLRB, 1960, 352 U.S. 411, 416-422, 80 S.Ct. 822, 4 L.Ed.2d 832, 45 LRRm 3213; NLRB v. McCready and Sons Inc., 6 Cir. 1973, 482 F.2d 872, 83 LRRM 2674.

I find the unfair labor practice charge was timely filed.

WHETHER THE DEFENDANT'S REFUSAL TO BARGAIN ON THE TRANSFER OF UNION MEMBERS FROM THE STATEWIDE CLASSIFICATION PAY PLAN TO THE BLUE COLLAR CLASSIFICATION AND PAY PLAN WAS A VIOLATION OF SECTION #39-31-401(5) MCA.

This identical question was addressed in Local Union 254, Laborers International Union v. Ellen Feaver, in her capacity as Director, Department of Administration, State of Montana, Cause No. ADV 85-043, District Court, First Judicial District, State of Montana in and for the County of Lewis and Clark (Feb., 1985). The question rose in a petition for alternative writ of mandate and for declaratory relief filed by the Petitioner, Local Union 254. The Petitioner sought an alternative writ of mandate ordering the Respondent, Department of Administration, to immediately negotiate the transfer of bargaining unit members from the Statewide Classification and Pay Plan to the Blue Collar Classification and Pay Plan. Upon review, the Court found that the construction of the State statutes in question (Collective Bargaining Act for Public Employees; State Employees Classification and Pay Act) involved a "profound exercise of discretion" and no clear legal duty exists. The court dismissed the Petitioner's request for alternative writ of mandate and observed the decision on construction of the statute should be left to the agency responsible for the decision.

The Defendant, in this instant matter, argues the transferring of bargaining unit members from the Statewide Classification and Pay Plan to the Blue Collar Classification and Pay Plan is a permissive subject of bargaining. Relative to the Group Classification Appeal associated with this matter, the Defendant further argues this Board lacks jurisdiction to hear a classification appeal requesting that it transfer employees from the Statewide Classification and Pay Plan to the Blue Collar Classification and Pay Plan. If allowed to do so, the Defendant argues, this Board would be interfering with the

collective bargaining process by permitting the Parties to achieve concessions through the appeals procedure which were not achievable through collective bargaining. Conversely, the Complainant argues the transfer of employees between pay plans is a mandatory subject of bargaining and the Defendant's refusal to bargain the subject is a violation of Section 39-31-401(5) MCA. The Parties do agree that the proper method of moving employees from the Statewide Classification and Pay Plan to the Blue Collar Classification and Pay Plan is through the collective bargaining process.

Ignoring, for the moment, any possible conflict between the Collective Bargaining Act for Public Employees and the State Employees Classification and Pay Act, a fundamental review and determination of the negotiable status of the transfer of employees between classification and pay plans is in order.

To determine which subjects are mandatory subjects of the bargaining this Board has utilized the balancing test adopted by the Kansas Supreme Court in 1973 (N.E.A. v. Shawnee Mission Board of Education, 512 P.2d 426, 84 LRRM 2223) and followed by the Pennsylvania Supreme Court (Pennsylvania Labor Relations Board v. State College Area School District, 337 A2d 262, 90 LRRM 2081). The Kansas Supreme Court said:

> It does little good, we think, to speak in terms of "policy" versus something which is not policy. Salaries are a matter of policy, and so are vacation and sick leaves. Yet we cannot doubt the authority of the Board to negotiate and bind itself on these questions. The key, as we see it, is how direct the impact of an issue is on the well being of the individual teacher, as opposed to its effect on the operation of the school system as a whole. (Emphasis added) The line may be hard to draw, but in the absence of more assistance from the legislature the courts must do the best they can.
> The similar phraseology of the N.L.R.A. has had a similar history of judicial definition. See

> Fibreboard Corporation v. Labor Board., 379 U.S. 203, 13 L.ED. 2d 233, 85 S. Ct. 398, 57 LRRM 2609 and especially the concurring opinion of Steward, J. at pp. 221-222.

See also ULP #5-77, Florence-Carlton Unit of the Montana Education Association v. McCone County School District #1.

Wages, hours and working conditions represent the foundation of all collective bargaining. The impact of wages on an individual employee is ultimate. The placement of an employee on a pay plan or matrix must be negotiable. Considerations for the effect on the employer's operations must be set aside.

Related State statutes must now be reviewed to determine if the mandatory negotiability status of transferring employees between pay plans should be tampered or conditioned.

The Collective Bargaining Act for Public Employees provides (Section 39-31-305 (2) MCA):

> For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or his designated representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

The act also provides in Section 39-31-401(5)MCA that it is an unfair labor practice for the employer to:

> refuse to bargain collectively in good faith with an exclusive representative.

These provisions of the Act have not been modified since the enactment of the Act in 1973. Also in 1973, the Legislature passed Senate Bill No. 411, Ch. 440, Laws of Montana (1973) which directed the Department of Administra-

tion to develop a Statewide Classification and Pay Plan for state employees. The 1975 Legislature adopted the Classification and Pay Plan developed by the Department of Administration as Section 59-907 R.C.M. 1947, the predecessor to Section 2-18-203 MCA. The 1975 measure specifically required that the Department of Administration would bargain on classification matters and wages:

> Review of positions-change in classification. The department shall continuously review all positions on a regular basis and adjust classifications to reflect significant changes in duties and responsibilities; provided, however, employees and employee organizations will be given the opportunity to appeal any changes in classifications or positions. Anything relevant to the determination or reasonable classifications and grade levels for state employees shall be a negotiable item appropriate for the consideration of the state and exclusive representatives under the provisions of Title 59, chapter 16, R.C.M. 1947.

Since the enactment of both the Collective Bargaining Act for Public Employees and the Classification and Pay Act, some tension developed concerning the negotiating of wages for organized employees under Section 39-31-305 MCA and the setting of wages for nonorganized employees through classification methodology adopted by the 1975 Legislature. One philosophy advocated salaries for all state employees should be exempt from the collective bargaining process and be determined by the classification methodology administered by the Department of Administration. The opposing philosophy strongly advocated that wages of organized employees should be established through the collective bargaining process.

The concerns of the negotiability of wages and the administration of the Statewide Classification and Pay Plan were discussed. However, the 1977 Legislature, in their modification of Section 1, Section 59-907, R.C.M., 1947 (now Section 2-18-203 MCA) again specifically required that classification matters and wages be negotiated:

"59-907. Review of positions-changes in classification. (1) The department shall continuously review all positions on a regular basis and adjust classifications to reflect significant changes in duties and responsibilities.

(2) Employees and employee organization will be given the opportunity to appeal any changes in classifications or positions.

(3) The period of time for which retroactive pay for a classification pr position appeal may be awarded under this chapter or under 82A-1014 may not extend beyond 30 days prior to the date the appeal was filed. This provision shall not affect a classification or position appeal already in process on the effective date of this act.

(4) Anything relevant to the determination of reasonable classifications and grade levels for state employees shall be a negotiable item appropriate for the consideration of the state and exclusive representative.

During the same period of time, negotiations had began for the development of a Blue Collar Classification and Pay Plan (see Findings of Fact Nos. 7 & 8). The Blue Collar Classification and Pay Plan was recognized in law by the 1979 Legislature (Sec. 4, Ch. 698, L. 1979). This Act established the separate pay matrixes and the implementation language now found in Section 2-18-303 MCA.

The 1979 Legislature also modified language in the Statewide Classification and Pay Plan Act by eliminating the negotiability of classification matters and wages pertaining to those employees included in the Statewide Classification and Pay Plan. The same modifications retained the negotiability of classification matters and wages for those employees included in the Blue Collar Classification and Pay Plan. Thus two separate and distinct classification and pay plans were established.

2-18-203. Review of positions -- change in classification. (1) THE department shall continuously review all positions on a regular basis and adjust classifications to reflect significant changes in duties and responsibilities. In the event adjustments are to be made to the classification specifications or criteria

utilized for allocating positions in the classification specifications affecting employees within a bargaining unit, the department shall consult with the representative of the bargaining unit prior to implementation of the adjustments, except for blue-collar, teachers, and liquor store clerks classification plans, which shall remain mandatory negotiable items under the Collective Bargaining Act.

(2) Employees and employee organizations will be given the opportunity to appeal the allocation or reallocation of a position to a class. The grade assigned to a class is not an appealable subject under 2-18-1011 through 2-18-1013.

(3) The period of time for which retroactive pay for a classification appeal may be awarded under parts 1 through 3 of this chapter or under 2-18-1011 through 2-18-1013 may not extend beyond 30 days prior to the date the appeal was filed. This provision shall not affect a classification or position appeal already in process on April 26, 1977.

(Note: Since the 1979 Legislature, separate classification and pay plans have been established for teachers, employed at State institutions, and liquor store clerks.)

It is clear that beginning in 1979 an employee who is <u>within</u> the Statewide Classification and Pay Plan will have his classification and corresponding grade level, or wage rate, determined by the adopted classification methodology. The employee can appeal his designated classification <u>within</u> the classification plan through the established appeal procedure administered by this Board. An employee <u>within</u> the Blue Collar Classification and Pay Plan has his classification and pay rate established by the collective bargaining process. Modifications to his classification and/or pay rate is also accomplished through collective bargaining.

In this instant matter, the Complainant is not attempting to change an assigned classification or wage rate nor is the Complainant attempting to modify the criteria utilized for allocating positions <u>within</u> the Statewide Classification and Pay Plan. The Complainant is attempting to transfer from the Statewide Classification and Pay Plan

to the Blue Collar Classification and Pay Plan. The Blue Collar Classification and Pay Plan was established for employees belonging to bargaining units and engaged in traditional blue collar work. The Complainant, a group of state employees employed in the State Capitol Complex area, do belong to a bargaining unit and are engaged in traditional blue collar crafts. The Complainant meets those qualifications for entry into the Blue Collar Classification and Pay Plan established by state statute. State statute does not prohibit or condition a transfer from the Statewide Classification and Pay Plan to the Blue Collar Classification and Pay Plan. The transfer may affect an employee's classification and pay rate and, as found above, would be a mandatory subject of bargaining.

CONCLUSIONS OF LAW

Unfair Labor Practice Charge No. 10-86 was filed in a timely manner. The Defendant has violated Section 39-31-401(5) MCA by refusing to negotiate a mandatory subject of bargaining.

RECOMMENDED ORDER

The Defendant shall immediately cease and desist from refusing to negotiate the transfer of state employees from the Statewide Classification and Pay Plan to the Blue Collar Classification and Pay Plan.

SPECIAL NOTE

In accordance with Board's Rule ARM 24.25.187(2), the above RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless written exceptions are filed within 20 days after service of these FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER upon the Parties.

DATED this 19th day of September, 1988.

BOARD OF PERSONNEL APPEALS

By: Stan Gerke
Stan Gerke
Hearing Examiner

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CERTIFICATE OF SERVICE

I, Jaka Christianson, do hereby certify that a true and correct copy of this document was mailed to the following on the 20th day of September, 1988.

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