

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 5-2007:

ELDER GROVE EDUCATION)	Case No. 401-2007
ASSOCIATION, MEA-MFT, NEA,)	
AFT, AFL-CIO,)	
)	
Complainant,))	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND RECOMMENDED ORDER
)	
ELDER GROVE ELEMENTARY))	
SCHOOL DISTRICT,)	
)	
Defendant.)	

* * * * *

I. INTRODUCTION

In August 2006, the Elder Grove Education Association, which represents the teachers of the Elder Grove Elementary School District, filed a complaint against the Elder Grove Elementary School District alleging that the district's action unilaterally implementing a requirement that the teachers work an extra ½ hour each day without bargaining to impasse constituted an unfair labor practice. Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on April 17 and 18, 2007 in Billings, Montana. Vicki McDonald, attorney at law, represented the Elder Grove Education Association. Tony Koenig, attorney at law, represented the Elder Grove Elementary School District. Monica Pugh, Rob McDonald, Karen LaBorda, Mona Stevens, Steve Henry, and Amy Schumacher all testified under oath in this matter. Complainant Exhibits 1-37, 44-48, 50-82, 89-92, 107 and 108 and Defendants Exhibits A through E and G were admitted into evidence.

The parties were given the opportunity to present post-hearing briefs which briefs were timely received and the record was then closed. Based on the evidence adduced at hearing and the closing briefs of the parties, the following findings of fact, conclusions of law, and recommended order are made.

II. ISSUE

Did the school district commit an unfair labor practice in requiring the teachers to work an additional ½ hour each day even though the school district did not bargain that issue to impasse?

III. FINDINGS OF FACT

1. The Elder Grove Elementary School District is a public employer under Montana Code Annotated § 39-31-103(10). The District is managed by a Board of Trustees.
2. The recognized bargaining unit for teachers in the Elder Grove School District is the Elder Grove Education Association (EGEA) which is affiliated with MEA-MFT.
3. Teaching contracts are negotiated between the school district and EGEA on an annual basis.
4. Elder Grove School District provides education to students in grades 1 through 8. In the 2005-2006 school year, Monica Pugh took over as the principal for Elder Grove School. Prior to that time, she had been a teacher in the Columbus School District. At all times pertinent to this case, Rob McDonald has acted as school superintendent of the district.
5. As principal, Pugh was responsible for overseeing the day to day administrative matters for the school.
6. Montana Code Annotated § 20-1-301 requires that schools in Montana provide students in grades 1 through 3 with 720 hours of structured education during each fiscal year. Students in grades 4 through 12 must receive 1080 hours of structured education during each fiscal year. That statute further provides that “for any elementary or high school district that fails to provide for at least the minimum aggregate hours, . . ., the superintendent of public instruction shall reduce the direct state aid for the district for that school year by two times the hourly rate, . . ., for the aggregate hours missed.”
7. At the time Pugh began her job as principal, the school district had for some years been failing to meet the annual hourly requirements for the “contact hours” mandated by Montana Code Annotated § 20-1-301.¹ No one in the district was aware of the problem, however, not even Pugh. Superintendent McDonald’s predecessor had been erroneously reporting to the Office of Public Instruction that the school district had been meeting the statutorily mandated hourly requirements.

¹ At hearing, both the teachers and administrators referred to the hours as “contact hours.” For purposes of continuity and to avoid confusion, the hearing officer will use this terminology to refer to the hours mandated by Montana Code Annotated § 20-1-301.

8. Pugh was unaware that the school district was failing to meet the annual hour requirements because she apparently was unaware of the actual hourly requirements. By January 2006, however, she became concerned that something was amiss with the hours.

9. On April 19, 2006, EGEA sent a letter to the school board indicating its desire to negotiate over the 2006-2007 teaching contracts. Exhibit 2. EGEA suggested dates to meet to begin bargaining.

10. After speaking with the superintendent of the Columbus School District in late April 2006, Pugh finally realized that Elder Grove students in grades 4 through 8 were deficient in structured education hours. On May 22, 2006, Pugh contacted the Montana Office of Public Instruction (OPI) to obtain guidance. OPI responded with a facsimile setting forth the hours required for instruction of the students. The information contained in the facsimile showed that Elder Grove's hours of structured education provided to the 4th through 8th grade students were deficient. Pugh then telephoned OPI and was also informed that school funding for the district could be reduced or lost if the hourly requirements were not met.

11. Pugh immediately reported her findings to Superintendent McDonald. In addition, on May 23, 2006, a schedule reflecting changes to the length of the student's day which would rectify the deficiency in the structured education hours was passed out to the teachers.

12. On May 26, 2006, the teachers, Pugh, and McDonald briefly discussed the problem with the contact hours prior to attending a luncheon. At that time, McDonald informed the teachers in attendance that the district "needed to meet contact time with the students." McDonald's hearing testimony.

13. On June 1, 2006, EGEA President Karen Laborda wrote a letter to Elder Grove School Board Chairperson Mona Stevens indicating that the schedule provided to the teachers on May 23, 2006 reflected a "loss of prep time for some of the teaching staff." Exhibit 7. The letter further informed Stevens that the union viewed the loss of preparation as a change of working conditions that had to be bargained to impasse.

14. On June 12, 2006, Stevens sent an e-mail to the union's negotiating team (Exhibit 8) indicating that the Board's negotiating team would like to meet with Tammy Olsen and the union's negotiating team before the June 27, 2006 school board meeting to talk about the changes to the school day schedule necessitated by the need for increased contact hours with the students. The purpose of the e-mail was to get negotiations started because Stevens knew that the changes to the day which the school might impose had to be negotiated. The e-mail specifically noted that "we are ready to present a package to the teachers to negotiate for those changes that will occur, including changing the teacher workday to 7:45 a.m. to 3:45 p.m."

15. On that same day, Stevens responded by letter to Laborda, reiterating essentially the points she had made in the e-mail. Stevens informed LaBorda that the school board would meet on June 27, 2006 to discuss proposed changes in the school day to compensate for the deficient hours. The letter further explained that a letter was going out from Superintendent McDonald to staff and parents explaining the need for increasing the contact time. The letter

reiterated that it was the school board's hope to be able to meet with the union's negotiating team prior to the June 27 school board meeting "to negotiate a package to compensate staff, taking into account the change." Exhibit 9.

16. On June 15, 2006, the school board and EGEA met to negotiate for the 2006-2007 school year contracts. At that time, the district presented the EGEA a proposal (Exhibit 16) which provided that the teachers' work day would increase from 7½ hours to 8 hours each day. The proposal also included a 4% increase to the teachers' base salary. The parties discussed at length the problem of the contact hours deficiency and methods to remedy the deficiency. The parties were unable to resolve that issue at that time.

17. At the negotiating session, the teachers could have accepted parts of the proposal and rejected others. This was true even though the heading to the proposal indicated that proposal was a package proposal. This language had been inserted in the proposal years before by the union. The custom and practice of the bargaining sessions over the years, however, had been to permit each side to accept or reject portions of the proposal.

18. At the conclusion of the June 15 meeting, the school board asked the union to schedule the next negotiation session. This was in conformity with the past practices of the parties whereby the parties would alternate the responsibility for initiating the following bargaining sessions. The union agreed to do so.

19. The union did not suggest any dates for negotiating between June 15 and June 27, 2006. On June 27, 2006, the school board voted unanimously to increase the work day from 7½ hours to 8 hours.

20. Prior to taking its action on June 27, 2006, the school board considered alternative options to lengthening the school day. One option which the school board explored was reduction or elimination of the kids' recesses. The school board felt that would not work because it was bad for the kids and it would eliminate the teachers' use of that recess time as preparation time. The school board also talked about using the recess time as structured education by having the teachers present with their classes. The school board considered that option too, but again felt that requiring the teachers to monitor their classes at recess would deprive the teachers of much needed preparation time.

21. In fact, however, a structured recess would not have deprived the teachers of preparation time for their classes. Testimony of Jessica McMorris. Moreover, there was no need to increase the contact time for the 1st through 3rd grade students and thus there was no need to increase the 1st through 3rd grade teachers' work day. The structured recess concept was a viable alternative for grades 1 through 8. Despite this, the school board unilaterally implemented a requirement that all teachers at Elder Grove Elementary work an additional ½ hour per day during the 2006-2007 school year.

22. On June 29, 2006, Laborda sent a letter to Stevens advising Stevens that EGEA was aware of the Board's decision to extend the teaching day and that EGEA expected to bargain over this change. The letter also informed Stevens that "It is the assumption of EGEA that it

would be an unfair labor practice if these unilateral changes in working conditions are implemented before the conclusion of bargaining.” Exhibit 25.

23. On July 7, 2007, Stevens got a letter from EGEA informing the school board that Steve Henry would represent EGEA in all further bargaining sessions with the district. The school district was fully aware at this time that they had to bargain over the increased school day.

24. Having been notified that Henry now represented the union, Stevens made efforts to contact Henry to arrange for additional bargaining sessions. She first contacted Henry by telephone on July 12, 2006. Stevens got Henry’s voice message which indicated that he would be out of town until July 30, 2006. Stevens left a message indicating that the school board and the union needed to set up further negotiations. Stevens then contacted another member of the union’s team, Jackie Clement, to tell her that Henry was out of town, that she had asked for dates from the board but that Steve was still unavailable. The purpose of Stevens’ message was to convey to the union that the school board was willing to meet “wherever, whenever,” because the school board knew that the negotiations had to occur.

25. When Henry returned on August 1, 2006, he contacted Stevens to suggest bargaining dates of August 8 or 9, 2006 or August 15 and 16, 2006. Stevens told Henry that she would check with the other board members to see if those dates would work.

26. While waiting to hear back from Stevens, Henry had to give what had otherwise been three open dates for negotiating with Elder Grove to Livingston, Montana, teachers in their negotiations with their employer. This prevented Henry from negotiating on the Elder Grove case on the proposed August 15 and 16, 2006 dates.

27. Stevens subsequently notified Henry that the board could not negotiate on August 8 and 9, 2006 but that they could engage in negotiations on August 15 and 16, 2006. At that time, Henry notified Stevens that he could not negotiate on the August 15 and August 16, 2006 dates.

28. Eventually, Henry and Stevens were able to agree on a negotiating date of August 24, 2006. Negotiations began on that date, including negotiations to provide the teachers additional compensation (an additional 4%) to compensate the teachers for the extended time they would be spending in school with a proviso that the increase would be retroactive to the beginning of the 2006-2007 school year. To date, the negotiations have continued, with the union requesting additional compensation of 15% for the additional time spent in school and to cover other things. The parties have been unable to reach agreement as of the date of this decision.

29. The 2006-2007 school year began shortly after the August 24, 2006 bargaining session occurred. All teachers, including the 1st through 3rd grade teachers, were required to work an extra ½ hour each day for the entire 2006-2007 school year even though the school board and the union had not reached agreement nor bargained to impasse over that issue.

IV. DISCUSSION²

A. *The School Board Committed An Unfair Labor Practice.*

The union contends that the school board engaged in an unfair labor practice when it unilaterally implemented a ½ hour increase in the school day for all teachers in the Elder Grove Elementary School District. The school district contends that its statutorily mandated obligations regarding minimum contact hours required the implementation of the additional ½ hour long work day in order to cover the shortage. The hearing officer agrees with the school district that the need to meet statutorily required hours of minimum contact hours could, under certain circumstances, create an exception to the requirement to bargain to impasse. There are not, however, sufficient exigencies in this case to excuse the school district from the requirement to bargain to impasse, and accordingly the hearing officer must find that the school board committed an unfair labor practice.

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals of using federal court and National Labor Relations Board (NLRB) precedents as guidance in interpreting the Montana collective bargaining laws. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

There is no dispute in this case that an increase in hours is a subject of mandatory bargaining. Mont. Code Ann. § 39-31-305(2). Likewise, it is apparent from the district's responsive brief that there is no dispute that the school district's decision to unilaterally increase the teacher's hours was not bargained to impasse. See District's response, page 7.

An employer violates its duty to bargain in good faith when it unilaterally changes an existing term or condition of employment without bargaining that change to impasse. *NLRB v. McClatchy Newspapers* (D.C. Cir. 1992), 964 F. 2d 1153, 1162. When a collective bargaining agreement is in place, an employer must obtain the union's consent before implementing any change to the agreement. If the employment conditions which the employer seeks to change are not in the agreement, the employer must notify the union of its intent to make a change and, upon the union's request, bargain the change in good faith to impasse. *Communications Workers* (1986), 280 NLRB 78, 82, *aff'd* 765 F.2d 175 (D.C. Cir. 1985). After a collective bargaining agreement has expired and while the parties are still negotiating for a successor agreement, an employer violates the duty to bargain if, without bargaining to impasse, it changes unilaterally a term or condition of employment that existed prior to the expiration of the contract. *NLRB v. McClatchy Newspapers*, *supra* (under the past practices rule, an employer and union who are bargaining without a collective bargaining agreement in effect generally must maintain the status quo with regard to mandatory subjects of bargaining). See also, *Forsyth School District No. 4 v. Board of Personnel Appeals*, (1984), 214 Mont. 361, 692 P.2d 1261.

²Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

There is a recognized exception to the duty to bargain to impasse where the employer faces “economic exigencies that compel immediate action.” *Bottom Line Enterprises*, (1991), 302 N.L.R.B. 373, 374. See also, *The Developing Labor Law*, p. 989 (5th Ed. 2006). The proponent of the exception bears “a heavy burden” in proving the exception. *RBE Electronics*, (1995), 320 N.L.R.B. 80, 81. In *RBE*, the NLRB set out both the purpose and the parameters of the defense, noting that the defense as articulated by the NLRB:

Attempts to maintain the delicate balance between a union’s right to bargain and an employer’s need to run its business. We recognize that an analysis accommodating these interests of both the union and employer is not easily susceptible to bright line rules. In defining the type of economic exigency susceptible to bargaining, however, we start from the premise, derived from the case discussed above, that not every change proposed for business reasons would meet our *Bottom Line* limited exception. Thus, because the exception is limited only to those exigencies in which time is of the essence and which demand prompt action, we will require an employer to show a need that ***the particular action proposed*** be implemented promptly.

Id. (Emphasis added).

The foregoing excerpt reveals that not only must an exigent circumstance exist, but also the particular action to be implemented must be required. Here, it is quite plausible that the school district has shown that an adequate exigency existed to implement some type of action. Facing the threat of loss of funding (as required by Montana Code Annotated § 20-1-301 for schools that fail to meet the minimum contact hours) could be enough to create an exigency that would permit unilateral action on the part of the school district. The school district’s defense falters, however, in the consideration of the particular action it took.

The school district has utterly failed to show that all teachers in grades 1 through 8 needed to work an additional ½ hour each day in order to meet the minimum contact hours. There was no basis for requiring the 1st through 3rd grade teachers to work an additional ½ hour each day when the students in those grades were already meeting state requirements for minimum contact hours. Likewise, there has been no adequate showing of a need to compel the 4th through 8th grade teachers to work an extra ½ hour per day in order to resolve the exigency. The students in grades 6, 7 and 8 were only deficient eight minutes per day in their minimum contact hours. And, while the 4th through 8th grade students were deficient 40 minutes per day in their structured contact time, there has been no showing that the deficiency could not have been remedied through some type of structured recess as suggested by the union.

The school district appears to argue that it was concerned both about preserving the teachers’ preparation time and ensuring minimum contact requirements were met and the tension between these two concerns caused it to conclude that structured recess could not solve the problem. This assertion is not borne out by the facts of this case. Jessica McMorris testified definitively that having a structured recess would not have taken away from the teachers’ preparation time. Those persons in the best position to know whether their preparation time would be unduly impacted by conducting structured recess-the teachers doing the teaching-

concluded that no such detriment would occur. The hearing officer places great weight on this evidence and concludes that structured recess was in fact a viable alternative that could have been implemented before unilaterally changing the teachers' hours.

And in any event, the action implemented far exceeded the action required to deal with any perceived deficiency. The district choose to increase by ½ hour each day the work hours for all the teachers, even the hours of the 1st through 3rd grade teachers where no additional contact hours were needed and the 6th through 8th grade teachers where only 8 additional minutes were needed. A remedy which was appropriately tailored to the perceived exigency would not have included the 1st and 3rd grade teachers or the 6th through 8th grade teachers working an extra ½ hour each day under any of the circumstances delineated in this case. This evidence in and of itself is enough to show that the school district has failed in its burden to show that its action in this case was necessitated by any exigency of increasing the minimum contact hours.

B. *The Remedy For the Violation.*

Upon determining by a preponderance of the evidence that an unfair labor practice has occurred, the Board of Personnel Appeals shall issue and serve an order requiring the entity named in the complaint to cease and desist from the unfair labor practice. Mont. Code Ann. § 39-31-406(4). The Board shall further require the offending entity to take such affirmative action, which may include restoration to the *status quo ante*, "as will effectuate the policies of the chapter." *Id.* See also, *Keeler Die Cast* (1999), 327 NLRB 585, 590-91; *Los Angeles Daily News* (1994), 315 NLRB 1236, 1241.

As the union correctly points out, the proper remedy here is to order the district to cease and desist implementation of the teachers' lengthened work day and to restore the status quo ante. The district should also be ordered to reimburse the teachers back pay retroactive to August 23, 2006. Finally, they should be awarded interest on that back pay at 10% per annum. The award of interest encourages more prompt compliance with Board orders and discourages the commission of unfair labor practices, thereby effectuating the legitimate ends of labor legislation. *Young III, supra*, citing *Florida Steel* (1977), 231 NLRB 651.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to Mont. Code Ann. § 39-31-405.

2. The Union has demonstrated by a preponderance of the evidence that the school board's decision to unilaterally implement a requirement for the teachers to work an additional ½ hour each day for the 2006-2007 school year was an unfair labor practice that violated Mont. Code Ann. § 39-31-401(1) and (5).

3. Imposition of an order requiring the school district to cease and desist from requiring the teachers to work the additional ½ hour each day and to restore the status quo ante, to require the district to pay back pay to the teachers, to pay interest on the back pay at a rate of

10% per annum, and to post the notice provided for in Appendix A is appropriate pursuant to Mont. Code Ann. § 39-31-406(4).

VI. RECOMMENDED ORDER

Elder Grove Elementary School District is hereby ORDERED:

1. To cease immediately from requiring the teachers of the EGEA to work an additional ½ hour per day; and

2. Within 30 days of this order:

a. To accord back pay to all teachers affected by the increased work hours for the 2006-2007 school year in an amount to be determined by dividing each teacher's annual salary by 187 days divided by 7½ hours (annual salary/187/7½ hours) for all time worked in excess of 7½ hours per day and to pay each teacher 10% interest per annum on the back pay.

b. To post copies of the notice contained in Appendix A at conspicuous places, including all places where notices to employees are customarily posted at the school for a period of 60 days and to take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material.

DATED this 16th day of July, 2007.

BOARD OF PERSONNEL APPEALS

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to Admin. R. Mont. 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. Mont. Code Ann. § 39-31-406(6). Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

APPENDIX A

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE STATE OF MONTANA
BOARD OF PERSONNEL APPEALS**

The Montana Board of Personnel Appeals has found that we violated the Montana Collective Bargaining for Public Employees Act and has ordered us to post and abide by this notice.

We will not fail to bargain in good faith with the Elder Grove Education Association, MEA-MFT, NEA, AFT, AFL-CIO;

We will cease immediately from requiring the teachers of the Elder Grove Education Association to work an additional ½ hour per day; and cease otherwise altering terms and conditions of employment subject to the collective bargaining agreement with the Elder Grove Education Association, MEA-MFT, NEA, AFT, AFL-CIO without prior bargaining with the Elder Grove Education Association, MEA-MFT, NEA, AFT, AFL-CIO;

We will engage in negotiations with the Elder Grove Education Association, MEA-MFT, NEA, AFT, AFL-CIO applicable to members of the bargaining unit.

DATED this _____ day of _____, 2007.

Elder Grove Elementary School District

By: _____

Board Chair:

Office: