

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 4-2017:

POLSON CLASSIFIED EMPLOYEES)	Case No. 758-2017	
ASSOCIATION, MEA-MFT,))	
))	
Complainant,)	FINDINGS OF FACT;	
)	CONCLUSIONS OF LAW;	
vs.)	AND RECOMMENDED ORDER	
))	
POLSON SCHOOL DISTRICT,))	
))	
Defendant.))	

* * * * *

I. INTRODUCTION

On November 16, 2016, the Polson Classified Employees Association, MEA-MFT (Association) filed a charge with the Board of Personnel Appeals (Board) alleging that the Polson School District (District) committed an unfair labor practice by refusing to bargain after the Association identified an issue in the collective bargaining agreement signed in August 2016 that resulted in Association members who were not on the highest deductible health insurance plan paying more for health insurance. The Association also alleged the District's refusal to provide the bargaining notes taken by Andy Sever, Montana School Boards Association (MSBA) Director of Personnel Services, requested by the Association in October 2016, constituted an unfair labor practice.

On December 19, 2016, the District filed a response to the charge denying that its actions constituted an unfair labor practice.

On February 8, 2017, an investigator for the Board issued a finding that the charges had probable merit and transferred the case to the Office of Administrative Hearings.

Hearing Officer Caroline A. Holien conducted a hearing in the case on June 7, 2017 in Polson, Montana. Karl J. England, attorney at law, represented the

Association. Patrick T. Fleming, attorney at law, represented the District. Heather Diehl, MEA-MFT Field Consultant, Andy Sever, Director of Labor Relations, Montana School Boards Association, Kelly Grisak, the Association President, and Caroline McDonald, School Board Chair and School Board Trustee, all testified under oath.

Association Exhibits 1 through 23 and District Exhibits A through D were all admitted into the record. Association Exhibits 26 and 27 were also admitted. Association Exhibits 24 and 25, which included portions of Sever's bargaining notes, were marked as proposed exhibits but were not offered.

II. ISSUE

The issue in this case is whether the District committed unfair labor practices against the Association in violation of Mont. Code Ann. § 39-31-401, as alleged in the Association's complaint, and if so, what remedy is appropriate. The Montana Board of Personnel Appeals (BOPA) has authority over this issue pursuant to Mont. Code Ann. § 39-31-401 et seq.

III. FACTS STIPULATED TO BY THE PARTIES

1. The Polson School District (the District) is a "public employer" within the meaning of Mont. Code Ann § 39-31-103(10), acting through its Board of Trustees (Trustees).

2. The Polson Classified Employees Association (Association) is a labor organization within the meaning of Mont. Code Ann. § 39-31-103(6).

3. The District and the Association have been parties to a series of collective bargaining agreements (CBA), the latest of which is for the 2016-17 and 2017-18 school years (2016-18 CBA). Ex. B. The 2016-18 CBA replaced the previous CBA, which was effective the 2014-15 and 2015-16 school years (2014-16 CBA).

4. The bargaining unit covered by the CBA includes custodians, maintenance workers, bus drivers, mechanics, secretaries (and others performing clerical work, but not the superintendent's secretary), and para-professionals. The bargaining unit does not include cooks, dishwashers, food servers, supervisors, and short-term workers.

5. The 2014-16 CBA contained, among other provisions, a pay scale for the various classifications of employees in the bargaining unit, and a provision requiring

the District to participate in a group health insurance plan that made coverage available to each employee in the bargaining unit and setting the amount of the District's monthly contribution for health insurance premiums. Under the insurance provision, the District, through a third-party insurer, offered employees various health insurance plans with various levels of coverage and deductible amounts. Ex. 2.

6. The parties negotiated the 2016-18 CBA in the spring of 2016 in three bargaining sessions held on May 2, May 23, and June 13, 2016.

7. The District's bargaining team included Rex Weltz, who at the time was the interim superintendent, Pamela Clary, District Business Manager, Carl Elliott, Human Resources Director, Caroline McDonald, School Board Chair, Chanel Lake, School Board Vice Chair, and Andy Sever, MSBA Director of Personnel Services. Not all of the members of the District's bargaining team were present during all of the bargaining sessions.

8. The Association's bargaining team consisted of Kelly Grisak, Association President and District secretary, Trude Hunsucker, Association Vice President and District para-educator, Debi Knutson Carruth, para-educator, and Heather Diehl, MEA-MFT Field Consultant. Not all of the members of the Association's bargaining team were present during all of the bargaining sessions. Diehl, who was present for all bargaining sessions, served as the Association's chief spokesperson.

9. In late-June, early-July 2016, both the District's board of trustees and the Association's membership voted to accept the 2016-18 CBA. The 2016-18 CBA was signed by the parties on or about August 8, 2016. The insurance provision of the ratified agreement (Article VIII, Section 8.4) states, in relevant part:

The District will contribute funds monthly up to the following amounts for an employee who chooses to participate in the following coverage plans:

District Monthly Contribution

School Year	Single	Two Party	Parent & Child	Family
2016-17	\$404.23	\$829.56	\$789.62	\$1024.99

10. In an email dated September 27, 2016, Diehl requested a copy of Sever's bargaining notes.

11. In an email dated October 10, 2016, Sever refused to produce his bargaining notes.

12. In its December 19, 2016 Response to Unfair Labor Practice Complaint, the District asserted that it did not possess copies of Sever's bargaining notes and "[i]t is impossible for the School District to produce copies of notes it does not possess." In discovery, the District was asked to produce its bargaining notes (which it did for its employees), was asked whether those notes included Sever's notes (which were not provided), and was asked, in Interrogatory No. 4, to detail the efforts it undertook to secure a copy of Sever's notes. The District responded, "The District has taken no steps to secure a copy of the notes of Mr. Sever."

IV. FINDINGS OF FACT

1. During the course of bargaining for the 2016-18 CBA, the parties negotiated and agreed upon several changes to the 2014-16 CBA. Ex. 23.

2. Andy Sever, who was present for all bargaining sessions, served as the District's primary spokesperson. Ex. 3 at ¶1(g) (contract between the District and the Montana School Boards Association (MSBA) stating that MSBA staff 'will act as the District's representative at the bargaining table').

3. At the third and final bargaining session conducted on June 13, 2016, the parties discussed and orally agreed upon the last two major issues that had been raised in bargaining but unresolved - insurance and pay. Ex. 23.

4. At the time of the negotiations, Caroline McDonald, School Board Chair and School Board Trustee, understood insurance premiums were to increase by 17% to 20%. McDonald understood the District could potentially cover that additional cost for some employees. McDonald was concerned that it would not be possible for the District to cover that additional cost for all employees. McDonald Tes'y.

5. The parties agree that in a conversation between Sever and the Association's bargaining team, the District offered and the Association agreed in principle to a two-year contract, with a 2.75% wage increase for the 2016-17 school year and that the parties would re-open bargaining in Spring 2017 for negotiations on wages and insurance contributions for the 2017-18 school year. Ex. 23.

6. The parties disagree as to their agreement regarding the District's insurance premium contributions for the 2016-17 school year. The Association's bargaining

team understood that the offer made by the District and accepted by the Association was that all employees would pay the same amount for insurance in the 2016-17 school year as they had paid in the 2015-16 school year.

7. Sever testified that his offer was that the amount of the District's contribution in the 2016-17 school year for insurance coverage for all employees would increase by an amount equal to the increase in insurance premiums for the highest deductible plan only. When the parties ended the bargaining session on June 13, 2016, they did not prepare and execute a document (a tentative agreement or "TA") based on the oral agreement - they shook hands and went their separate ways with an understanding that the Association would draft and circulate contract language reflecting their oral agreement.

8. At the end of the June 13, 2016 negotiations, Heather Diehl, MEA-MFT Field Consultant, volunteered to draft the new/revised collective bargaining agreement reached by the parties for the 2016-17 and 2017-18 school years. Ex. 5 at p. 2 (email from Sever to Diehl and members of the District's bargaining team acknowledging that Diehl was "kind enough to put together a draft" of the contract). Ex. C, at pp. 2-38.

9. Diehl drafted the language concerning insurance by updating the dollar amounts of the District's insurance contributions that were in the 2014-16 CBA (for single employee, two-party, parent and child, and family coverages). Ex. C at 25. Diehl changed the District's contribution amounts that were listed in the 2014-16 CBA to reflect what she had been informed by the District would be the premiums for the 2016-17 school year.

10. Diehl prepared a "redline" of the agreement reached by the parties using the 2014-16 CBA between the parties as her base. See Ex. A. Diehl's "redline" was then created by noting the changes she understood the parties had agreed to at the various bargaining sessions. Ex. C, pp. 2-38.

11. By simply updating the insurance numbers in the 2014-16 CBA, Diehl only updated the District's contribution for one of the insurance plans offered by the District's third party carrier to the employees - the highest deductible plan. Diehl testified at hearing that she made a mistake in that her draft only dealt with changing the District's contribution for the highest deductible plan, but it did not include any changes in the District's contribution amount for the other plans by the insurance carrier to District employees.

12. On June 15, 2016, Diehl emailed the draft of the proposed changes to the 2014-16 CBA to Sever for his review. Diehl was not aware of her error at the time she sent the draft to Sever. Diehl's draft ultimately formed the basis of the PCEA Tentative Agreement presented to the Trustees for approval.

13. On June 22, 2016, Sever responded in an email to the District's bargaining team and to Diehl, which said that he had "looked over" her draft; "it looks good to me;" and "I do not have the exact insurance figures, but we agreed to have the same out of pocket for the employees as last year and they look right to me."¹ Ex. 5 at p. 2.

14. On or about June 29, 2016, Clary and Diehl exchanged emails in which they agreed on corrected numbers for the District's insurance contribution amounts that reflected the changes in the premium amounts for the highest deductible insurance plan. Ex. 4. In that exchange, Diehl wrote:

Please do check my math! We agreed to maintain the current employee contribution - no increased cost to employees. I used the following current contribution amounts for employees against the new plan:

Single	\$35.39	\$35.89 a monthly coverage of \$403.73
Two Party	\$49.67	
Parent/Child	\$45.32	\$47.32 a monthly coverage of \$787.62
Family	\$74.61	

Please let me know if you think I have erred in my calculations.
Thanks!

Ex. 4.

15. On July 5, 2016, Elliott set a memorandum to Wertz re: "PCEA Tentative Agreement," in which the financial terms of the tentative agreement reached during the course of bargaining between the parties were outlined.

¹ Throughout the exchanges between the parties during and after the 2016 contract negotiations, those involved often misused the term "out of pocket" to refer to the employee's share of health insurance premiums. "Out of pocket" costs are usually those paid by the insured after premiums are paid such as co-pays and deductibles. Because the issue here centers around the employer's and employee's contributions to health insurance premiums, the hearing officer has interpreted "out of pocket" in this case to refer to the employee's contributions to healthcare insurance premiums.

16. Section 8.4 of the PCEA Tentative Agreement, p. 25 of 38, contained the following information:

School Year	Single	Two Party	Parent & Child	Family
2014-15	\$422.89	\$734.33	\$698.68	\$908.39
2015-16	\$432.89 404.23	\$744.33 829.56	\$708.68 789.62	\$918.39 1024.99

17. Grisak reviewed the PCEA Tentative Agreement prior to its submission to Association members for ratification. Grisak, as a member of the Association’s negotiation team, approved the PCEA Tentative Agreement in all respects and authorized it being presented to the Association members for ratification.

18. The PCEA Tentative Agreement was presented to Association members and was approved and ratified by the individual Association members without modification.

19. On July 5, 2016, Elliott transmitted the PCEA Tentative Agreement to the Trustees by a memo that stated the following:

The District is covering the cost of the premium increase based on the highest deductible plan. The employee’s premium contribution will be the same out of pocket amount for the highest deductible plan, \$6,000.00 HDHP, in 2016-17 as it was for the highest deductible plan, \$5,000.00 HDHP, for 2015-2016.

Ex. C, p. 1.

20. On July 11, 2016, the PCEA Tentative Agreement was presented to the Trustees at its regular board meeting. The Trustees voted unanimously to approve and ratify the PCEA Tentative Agreement without modification. The tentative agreement then formed the basis for the 2016-18 CBA. Ex. B.

21. The 2016-18 CBA was signed by the parties on or about August 8, 2016. The insurance provision of the ratified agreement (Article VIII, Section 8.4)² states, in relevant part:

² The amount listed in the “Single” column of the table in § 8.4 contained an error, which was corrected when brought to the District’s attention, with the consent of the Association. The District agreed that it had committed to contribute \$442.23/month for single individuals.

The District will participate in an employee group health insurance plan that makes health insurance coverage available to each employee. Each employee at her/his sole discretion, may choose whether s/he will participate in the employee group health insurance plan. The District will contribute funds to the provider of the health insurance plan on behalf of each employee who elects to participate and who is regularly scheduled to work thirty (30) hours or more per week during the school year. The District will contribute funds monthly up to the following amounts for an employee who chooses to participate in the following coverage plans:

School Year	Single	Two Party	Parent & Child	Family
2016-17	\$404.23	\$829.56	\$789.62	\$1024.99

22. The 2016-18 CBA also included the following provisions:

12.1 Effective Period

This Agreement shall be effective as of the first date following the day on which this Agreement is ratified by the Association, approved by the Board, and assigned, by each party and shall continue in effect through June 30, 2018, except that either party may give notice to the other to no later than March 1, 2017 to negotiate over wages and health insurance. The economic benefits provided for in this Agreement in the form of increases in wages and health insurance contributions shall be effective as of July 1, 2016 and the District will pay those portions of said economic benefits that are effective retroactively in one lump sum to each respective employee within thirty (30) days of the effective date of this Agreement.

12.2 Renewal and Reopening Agreement

Either party may give notice to the other party between January 1 and March 1, 2018 of the party's desire to negotiate a new agreement, except as provided for in Article 12.1. If neither party gives such notice, then this Agreement will continue for an additional period of one (1) year.

23. In August 2016 (when the new insurance rates went into effect), a bargaining unit employee who elected insurance coverage other than the highest deductible plan noticed that his cost for insurance had increased significantly over what he had paid the previous year. When he and Association bargainer Knutson inquired of the District as to why his insurance cost had gone up when they understood that employee costs would remain the same as the previous year, the

District's business manager informed them that the agreement reached at the table was to freeze employee costs only for the highest deductible plan. Ex. 7. In response, Knutson asserted that this was not her understanding of the agreement reached at the bargaining table, but rather she understood the employee insurance costs for all plans offered by the carrier would remain the same in 2016-17 as they were in 2015-16. Ex. 8 at pp. 1-2 (August 30 email from Knutson to Clary stating that an employee on a plan other than the highest deductible plan "is not supposed to pay more than he did last year").

24. That email exchange was forwarded from Clary to Elliott, who, on or about August 31, 2016, forwarded it to Sever and asked, "Do you recall what we agreed to with the classified for insurance?" Ex. 7. Sever responded, "If I remember correctly we agreed that out of pocket would remain the same as last year." Id.

25. On or about August 31, 2016, Diehl and Grisak met with Wertz and Elliott to discuss an unrelated employee grievance not at issue in this case. At the end of that meeting, Diehl and Grisak raised the issue of health insurance premium costs for those employees covered by insurance plans other than the highest deductible plan, and asserted that the parties had agreed in negotiations that all employees would pay the same out of pocket in 2016-17 that they had paid in 2015-16. Diehl understood Wertz would investigate the matter and get back in touch with the Association.

26. On September 9, 2016, Diehl sent an email to Wertz to follow up on the August 31, 2016 meeting asking, "What have you been able to dig up on health insurance negotiated deal?" She wrote that she and the "entire union bargaining team" had reviewed their bargaining notes and "stand by our recollection/understanding of what the parties bargained and agreed to, which was to maintain current employee contribution levels with no increased out of pocket costs to employees." Ex. 9.

27. On September 9, 2016, Diehl received an email from Sever (acting on behalf of the District) stating that he had been asked by Wertz to "review my recollection of this (insurance) issue and to assist providing a response." Ex. 12 at pp. 2-3. Sever wrote that he was "surprised this is an issue" because the contract language is "clear and unambiguous." Id. at p. 3. He asserted that "my notes" reflect that the insurance rate discussion at the end of the bargaining process concerned only the highest deductible plan and "we never discussed, entertained, costed out the model of having everyone's out of pocket remain the same regardless of the plan." Id. Thus, he wrote, the District agreed only "to the concept that the amounts listed in

the contract would be updated by calculating the current out of pocket employees experienced for the 2015-16 high deductible plan would be the same for the 2016-17 high deductible plan.” Id. He concluded, “While we feel bad about this situation, I believe the language (of the 2016-18 CBA) is clear and unambiguous.” Id.

28. On September 12, 2016, Diehl and Sever exchanged emails concerning their respective but differing understanding of what was agreed to at the bargaining table. Ex. 12 at pp. 1-2 (Diehl to Sever email stating, “Your recollection varies greatly from ours” and Sever’s response to Diehl stating that because “the language of the contract is clear and unambiguous . . . that ship has sailed”).

29. On September 20, 2016, Diehl and Grisak met with Weltz and Sever concerning the employee grievance that was the subject of the meeting on August 31, 2016 (and is not at issue here). At the end of that discussion, the Association again raised the issue of the insurance cost borne by the employees. By this time, the Association had learned that even employees on the highest deductible plan were experiencing greater out of pocket costs for health insurance than they had paid in the previous year. Grisak and Diehl raised that issue at the September 20 meeting. Grisak and Diehl also requested a list of the bargaining unit members, their insurance plan (or coverage amount), and the amounts of the employer and employee contributions to pay for that plan. In a follow-up email on September 27, 2016 to Sever and Weltz, Diehl reiterated that information request and also requested a copy of the District’s bargaining notes to corroborate Sever’s previous assertion that bargaining only concerned the increased costs of the highest deductible plan. Ex. 14.

30. In an email dated September 28, 2016, Sever acknowledged to Diehl that the dollar amount stated in the signed contract for the employer’s contribution for single-employee coverage was in “error,” “the correct rate should be an amount that ensures the out of pocket for employees on the highest deductible plan remains the same as it was for the 2015-16 school year,” and the District should actually pay \$42.47 per month more than the amount stated in the 2016-18 CBA. Ex. 15. Sever promised that the District would pay the correct amount going forward and he proposed the parties enter into a memorandum of understanding (MOU) to correct this error in the 2016-18 CBA. Id.

31. In response to the Association’s request for the District’s notes from bargaining, Sever attached to his September 29 email a copy of the public notice of the July school board (at which the board approved the draft 2016-18 CBA) and a copy of the proposed agreement the board approved. Id. He flatly refused to provide his notes, Id. (“My rough notes will not be provided”), and he did not acknowledge

the existence of (or provide a copy of) any notes taken by any of the other members of the District's bargaining team. *Id.*

32. In an email dated October 10, 2016, Diehl requested the parties bargain face-to-face regarding the insurance issue. Ex. 16 at p. 4 [(T)he PCEA is officially requesting to continue bargaining over health insurance for the 2016-2017 school year"]. Diehl also reiterated her request for the District's bargaining notes. *Id.* ("I am also reiterating our request for the District's notes from negotiations . . . We are happy to share our notes should the district request them").

33. In response, Sever wrote in his email to Diehl that, while the 2016-18 CBA needed a "tweak to the figures," it was otherwise clear and unambiguous, "[t]hese issues should have been brought up prior to ratification/signing of the final document," and he had not "had the chance to discuss your formal request to bargain with the District" but would "get back to you with our response." *Id.* at pp. 2-3. As to the Association's information request for bargaining notes, Sever wrote that he had "nothing to hide" but "[t]hat said, I am not going to share my notes as I often write notes to myself in with the notes taken during the bargaining sessions" which could be embarrassing. He stated further, "While I have nothing like that in my Polson notes but [sic] I am not going to set the precedent of providing my notes." *Id.*

34. In an email dated October 14, 2016, Sever refused Diehl's request to bargain regarding the insurance issues and her request to produce his bargaining notes. Sever wrote that the District did not have "the authority" to bargain and besides, he did not believe there was any reason to bargain because he understood what the Association was going to say if there was bargaining and even if the parties met and bargained, the District could not afford to do what he believed the Association wanted it to do - pay more for employee insurance. *Id.* at 2-3.

35. Diehl's October 10, 2016 email requesting to bargain the insurance issue was also sent to McDonald, who had been advised by Sever not to bargain the issue. McDonald did not have the authority to act without the approval of the board. McDonald did not refer Diehl's request to the board for a decision. Prior to receiving Diehl's request, McDonald had met informally with board member Chanel Lake, Grisak, and Board Vice President Hunsucker (at the request of Weltz) during which they discussed their recollections of the verbal agreement reached during the final bargaining session in June 2016.

36. In an email sent later in the day on October 10, 2016, Sever outlined the following as the District's position:

The CBA with the tweak to the figures referenced above contains clear and unambiguous language that both parties formally ratified and subsequently signed thus the language in the CBA is controlling. At this point who said what, why, or when before or after negotiations is a moot point. These issues should have been brought up prior to ratification/signing of the final document.

Sever went on to indicate that he would discuss the Association's formal request to bargain with the District. Sever also refused to produce his bargaining notes. Ex. 16., pp. 3-4.

37. On November 16, 2016, the Association filed an Unfair Labor Practice Charge with the Board of Personnel Appeals alleging the District had committed an unfair labor practice when it refused to bargain the issue regarding health insurance rates and it refused to produce its bargaining notes in October 2016.

V. DISCUSSION

In its complaint, the Association contends the District engaged in an unfair labor practice in two ways. First, the Association contends the District engaged in an unfair labor practice by denying its request to bargain when the insurance issues first arose. Second, the Association argues the District, by refusing to turn over notes from bargaining, committed an unfair labor practice.

The District argues the language included in the CBA, which was executed by the parties without any significant modifications, was clear and unambiguous regarding insurance and binding upon both parties. The District further argues the Association waived its right to renegotiate the District's health insurance obligation until March 1, 2017, at the earliest. Finally, the District contends that its refusal to produce notes from bargaining prior to hearing does not constitute an unfair labor practice because his notes were not necessary to effectively administer the CBA. The District points out that Sever produced his notes at hearing in response to a subpoena served upon him by the Association, which it was free to do once it had filed its unfair labor practice charge.

At issue in this case is not the contract itself. The hearing officer is not being called upon to interpret the written and signed CBA or to determine whether either party has acted in violation of that agreement. The hearing officer understands she is being asked to determine two things: (1) did the District's refusal to meet and negotiate about the insurance issue after the ratification of the CBA constitute an

unfair labor practice; and (2) did the District's refusal to produce Sever's notes at the request of the Association constitute a violation of the duty to bargain in good faith.

The Montana Public Employees Collective Bargaining Act, Mont. Code Ann., Title 39, Chapter 31, requires the District, a public employer, and the Association, the exclusive representative for a bargaining unit of the District's public employees, to meet at reasonable times and negotiate in good faith about the Association members' wages, hours, fringe benefits, and other conditions of employment . . . or "any question arising under an agreement. . . ." Mont. Code Ann. § 39-31-305(2). A refusal to bargain collectively in good faith with an exclusive representative constitutes an unfair labor practice. Mont. Code. Ann. § 39-31-401(5).

The purpose of the Montana statutory provisions governing collective bargaining for public employees is to remove certain recognized sources of labor strife and unrest by encouraging "the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees." Mont. Code Ann. § 39-31-101; *Bonner School District No. 14 v. Bonner Education Association*, 2008 MT 9, ¶32, 341 Mont. 97, 176 P.2d 262. Public employers are obligated "to bargain in good faith with respect to wages, hours, fringe benefits and other conditions of employment." Mont. Code Ann. § 39-31-305(2). The duty to bargain is the heart of the law, which has as its primary purpose "to encourage meaningful discussion between employers and employee representatives." *NLRB v. McClatchy Newspapers, Inc. Publisher of Sacramento Bee*, 964 F.2d 1153, 1163 (D.C. Cir. 1992). The process of bargaining "does not compel either party to agree to a proposal or require the making of a concession." Mont. Code Ann. § 39-31-305(2).

The duty to bargain generally continues through the term of the agreement. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 436 (1967) ("the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement").

- A. The District's refusal to meet and negotiate after the ratification of the CBA constituted an unfair labor practice.

The Association argues the District committed an unfair labor practice when it refused its request to bargain the issue of the insurance costs borne by the employee once it became clear that the terms of the CBA pertaining to the employer's insurance contribution did not accurately reflect the Association's understanding of the informal agreement entered into by the parties during their negotiations. The

District counters there was no mistake as suggested by the Association but rather the request to bargain was merely a ploy to obtain renegotiation of § 8.4 of the CBA.

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.

In *NLRB v. Acme Indus. Co.*, the U.S. Supreme Court held that “the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement. 385 U.S. 432, 436 (1967). Collective bargaining is a continuous process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract.” *Conley v. Gibson*, 355 U.S. 41, 46 (1957), overruled in part by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, (2007). See also, *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *Tide Water Associated Oil Co.*, 85 N.L.R.B. 1096 (1949); *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 683 (2nd Cir. 1952) (the “general purpose of the Act . . . is to require employers to bargain as to employees demands whenever made to the end that industrial disputes may be resolved peacefully”).

As noted by the Association in its opening brief, Montana law does not include language found in federal law limiting the obligation to bargain while a contract is in effect. Under Section (d) of the Taft-Hartley Act, the duty to bargain “shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.” 29 U.S.C. § 158(d). Rather, Montana law stresses “the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees.” Mont. Code Ann. § 39-31-101. As the Montana Supreme Court noted in *Bonner Sch. District No. 14.*, bargaining “has no effect on the employer’s fundamental right to manage and operate. Collective bargaining does not impose on management the duty to concede to union demands . . . It obligates the employer to no particular outcome. It merely obligates the employer to participate in good faith in the actual collective bargaining process.” *Id.* at ¶ 44. And that process “places little actual burden on the employer,

but can do so much to ‘defuse[]and channel[]conflict.’ Id. at ¶45, quoting *First Nat’l Main. Corp. v. NLRB*, 452 U.S. 666, 674 (1981).

The Association’s argument that an employer is duty bound to bargain with a union, upon request, while a contract is in effect is well taken. Federal law provides such a duty is imposed “whether or not an existing collective bargaining agreement bound the parties as to the subject matter to be discussed.” *Jacobs Mfg. Co.*, 196 F2d at 683, citing *NLRB v. Sands Mfg. Co.* 306 U.S. 332, 342 (1939) (holding that the law imposes the duty to bargain “to the end that employment contracts binding on both parties should be made” and the law also “imposes upon the employer the further obligation to meet and bargain with his employees’ representatives respecting proposed changes of an existing contract and also to discuss with them its true interpretation, if there is any doubt as to its meaning”).

Further, the evidence in this case shows some confusion as to the parties’ actual intentions regarding the insurance costs to be borne by the employees. Diehl testified she discovered that she had only updated the District’s contribution for one of the insurance plans offered by the District’s third party carrier to the employees - the highest deductible plan - in error, and she should have updated the insurance figures for all insurance plans. Diehl testified she had understood that the parties had agreed to keep the employees’ insurance costs the same as in the previous CBA, and her failure to include those updates in her proposed draft was simply a mistake on her part.

Sever testified that his offer during negotiations included increasing the amount of the District’s contribution in the 2016-17 school year for insurance coverage for all employees by an amount equal to the increase in insurance premiums for the highest deductible plan only. His communications after Diehl informed him of her error in preparing the draft 2016-18 CBA was consistent with that testimony. For instance, Sever wrote in a response to Diehl’s email that included a draft of the proposed changes to the CBA, “I do not have the exact insurance figures, but we agreed to have the same out of pocket for the employees as last year and [the insurance figures] look right to me.” Ex. 5 at p. 2. Similarly, Sever responded to the email exchange regarding an employee’s complaint about the increase in his insurance costs forwarded to him by Elliott, “If I remember correctly we agreed that out of pocket would remain the same as last year.” Ex. 7. However, that understanding regarding the employees’ insurance costs seems not to have been shared by Elliott as evidenced by the memo he included with a draft of the PCEA Tentative Agreement sent to the Trustees on July 5, 2016. Elliott noted the following in his memo:

The District is covering the cost of the premium increase based on the highest deductible plan. The employee's premium contribution will be the same out of pocket amount for the highest deductible plan, \$6,000.00 HDHP, in 2016-17 as it was for the highest deductible plan, \$5,000.00 HDHP, for 2015-2016.

Ex. C, p. 1.

Given there appears to be some confusion as to what the parties intended regarding the insurance costs to be borne by each party during the term of the 2016-18 CBA, requiring the parties to bargain the issue is justified. The hearing officer takes no position as to which party would prevail if bargaining was to have occurred in this case. Very possibly the matter would continue to be unsettled despite the parties had engaged in good faith negotiations. However, it is the hearing officer's opinion that the spirit of the collective bargaining laws of the State of Montana mandate the parties attempt to bargain when an issue arises as to the interpretation or application of a ratified CBA. Therefore, the hearing officer finds the District committed an unfair labor practice when it refused the Association's request to bargain the insurance issue.

B. The Association did not waive its right to bargain under the CBA.

The District argues the Association waived its right to bargain due to the clear and unambiguous language included in §§ 8.4, 12.1, and 12.2. The District argues the language in §§ 12.1 and 12.2, read in conjunction with 8.4, makes it clear the parties agreed § 8.4 would be effective and binding until at least March 1, 2017, at which time either party could give notice to the other of a desire to negotiate over "wages and health benefits."

The Association argues that no waiver can be found absent a clear and unmistakable waiver of the right to bargain. The Association concedes that parties are free to waive bargaining rights but argues that "clear and unmistakable" is an exacting standard that requires the waiver to be explicitly stated. See *Provena St. Joseph Medical Center*, 350 NLRB 808, 801-801 (2007) (the clear and unmistakable waiver standards is "one of the oldest and most familiar Board doctrines" that is "firmly grounded in the policy of the National Labor Relations Act promoting bargaining . . . has been applied consistently by the Board for more than 50 years, and it has been approved by the Supreme Court").

In arguing a waiver, the District bears the burden of proof to show that the Association has plainly and unmistakably waived its right to bargain over the subject. *Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562, 1567 (10th Cir. 1993); *The Developing Labor Law*, supra, Ch. 13 II. A. “Proof of a contractual waiver is an affirmative defense and it is the Respondent’s burden to show that the contractual waiver is explicitly stated, clear, and unmistakable.” *American Benefit Corp.*, 354 NLRB No. 159, slip op. At 10 (2010). A waiver can occur either by express provisions in the CBA, by the parties’ bargaining history, or by a combination of both. *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072, 1079, footnote 10, (9th Cir. 2008), citing *Am. Distributing Co. v. NLRB*, 715 F.2d 446 (9th Cir. 1983). A waiver will not be inferred from general contractual provisions unless it is “expressly stated” that the parties intended to waive a statutory protected right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). “More succinctly, the waiver must be clear and unmistakable.” *Id.*

The Association’s argument that it did not waive its right to bargain after the ratification of the CBA is well taken. It cannot be said that §§ 8.4, 11.1, 11.4, 12.1, and 12.2 constitute an express waiver of the right to bargain. Waiver of this right cannot be assumed. *Metromedia, Inc., KMBC-TV v. NLRB*, 586 F.2d 1182 (8th Cir. Oct. 12, 1978). Nor can such a waiver be inferred without an express statement the parties intended to waive their right to bargain. Therefore, the District has failed to show an “explicitly stated, clear and unmistakable” waiver of the right to bargain exists in the 2016-18 CBA.

- C. The District committed an unfair labor practice in refusing to turn over the notes of its negotiation committee members.

The Supreme Court has rejected a rule that would automatically result in a finding of bad-faith bargaining whenever an employer rejects a request from a union for information related to collective negotiation. *Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 712, 716. Rather, the Court has held that “(e)ach case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.” *Id.* quoting *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 153, 76 S. Ct. 753, 756, 100 L. Ed. 1027 (1956). It is well-accepted that, “if (an) employer is in possession of information which is necessary or relevant to the union in discharging its function as bargaining representative, the employer will normally be required to turn over that information upon request of the union.” *Id.* quoting *Gorman*, *Basic Text on Labor Law* 409 (1976). If information is requested that is not possessed by the employer, the employer must make a good faith effort to obtain

the information. *Pittson Coal*, 334 NLRB 690 (2001); *Firemen & Oilers Local 288*, 302 NLRB 1008, 1009 (1991) (a party has a duty to provide information that may not be in its possession, but likely can be obtained from a third party with whom the party had a business relationship).

The employer's duty to furnish information extends beyond the period of contract negotiations and applies during the term of the agreement. *Acme Industrial Co.*, 385 U.S. at 437. A broad, discovery-type standard is used to determine the relevance of requested information. Potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). The information, however, must be relevant to a legitimate union collective bargaining need. *San Diego Newspaper Guild, etc. v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977), 548 F.2d at 867. "Disclosure of relevant information is integral to the bargaining process." Higgins, John E., *The Developing Labor Law*, 977 (6th ed. 2012).

Much of the argument offered by the District is based upon the contention that the notes requested by the Association were the notes prepared by Sever. The District has claimed at various points that it did not have control over Sever's notes and no means of cajoling Sever to produce the notes. Missing from the District's argument is the fact that Sever acted as its agent during the course of bargaining and whatever notes he prepared would have been prepared in that capacity.

The Association notes that its request was not limited to only a request for Sever's notes but for all of the District's "notes from bargaining." Ex. 14. The District ultimately produced a set of notes prepared by someone other than Sever during the course of discovery. Ass'n Brief at p. 6, fn. 3. (filed Aug. 2, 2017). These notes were produced more than six months after the Association's initial request. Sever produced his notes at the time of hearing, which was more than eight months after the Association's initial request.

The production of Sever's notes does not render the issue moot as suggested by the District. The issue remains whether the District committed an unfair labor practice when it failed to produce information relevant to the bargaining process when requested by the Association. Using a broad, discovery type standard of relevance, the information sought by the Association was relevant to the issue of what had been agreed upon by the parties regarding the employer insurance contribution. The requested bargaining notes would have either proven or disproven Diehl's contention that the parties had an agreement different than what was outlined in the PCEA Tentative Agreement drafted by Diehl, which ultimately

formed the basis of the 2016-18 CBA. While the hearing officer is cognizant of the parol evidence rule and its application in contract disputes, the fact of the matter is that the continuing duty to bargain in good faith required the production of the bargaining notes. Producing the notes at the request of the Association would have satisfied the requirement that the parties bargain in good faith and may have resulted in a resolution without resorting to a contested case hearing. Again, the parties bargaining in good faith upon the Association's request in October 2016 may have resulted in nothing more than the parties still disputing what was agreed upon in terms of the employer's insurance contributions and a hearing may still have been required. However, the issue is not whether success would have been achieved with bargaining but only whether bargaining was required. The issue is whether the parties had a duty to bargain upon notice of the insurance contribution issues in October 2016, and whether that duty required the District to produce relevant information upon request of the Association. In this case, both issues have been answered in the affirmative.

The District did not argue specifically any right to privacy Sever or any other note taker may have had in his or her notes. The hearing officer is aware of the probability of the inclusion of embarrassing or unrelated information being included in an individual's bargaining notes. However, such information could easily be redacted and save the author from any embarrassment. If the notes could potentially aid in the resolution of a dispute between the parties, those notes are "relevant to a legitimate union collective bargaining need," which in this case was whether the information included in the 2016-18 CBA was a correct statement of what had been agreed to by the parties. Therefore, the District committed an unfair labor practice when it failed to timely produce notes from any member of its bargaining group upon request by the Association.

D. The Remedy for the Unfair Labor Practices.

It is determined by a preponderance of the evidence that an unfair labor practice has occurred based upon the District's refusal to bargain with the Association when requested to do so regarding the issue of the District's share of the cost of employee insurance and its refusal to produce information relevant to the CBA and its application when requested by the Association. See Mont. Code Ann. § 39-31-401(5). Further, a violation of Mont. Code Ann. § 39-31-401(5) constitutes a derivative violation of Mont. Code. Ann. § 39-31-401(1). *Teamsters Local No. 2 v. City of Missoula*, ULP No. 6-86.

The appropriate remedy in this matter is for the Board of Personnel Appeals to issue and serve an order requiring the District to cease and desist from refusing to bargain with the Association regarding the issue of the District's share of the cost of employee insurance. Further, the Board of Personnel Appeals should issue and serve an order requiring the District to provide relevant information when requested to do so by the Association and to cease and desist from, in any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights pursuant to Mont. Code Ann. § 39-31-201. Additionally, the Board of Personnel Appeals should issue and serve an order requiring the District to post the notice included in Appendix A in conspicuous places, including all places where notices to employees are customarily posted at the District for a period of sixty (60) days and to take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

VI. CONCLUSIONS OF LAW

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

2. The Polson Classified Employees Association, MEA-MFT has demonstrated by a preponderance of the evidence that the Polson School District's refusal to bargain over the employer insurance contribution issue and produce its bargaining notes constituted unfair labor practices that violated Mont. Code Ann. § 39-31-401(5) as alleged in the complaint.

VII. RECOMMENDED ORDER

1. The Board of Personnel Appeals shall issue and serve an order requiring the District to cease and desist from refusing to bargain with the Association regarding the issue of the District's share of the cost of employee insurance.

2. The Board of Personnel Appeals shall issue and serve an order requiring the District to provide relevant information when requested to do so by the Association.

3. The Board of Personnel Appeals should issue and serve an order requiring the District to cease and desist from, in any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights pursuant to Mont. Code Ann. § 39-31-201.

4. The Board of Personnel Appeals should issue and serve an order requiring the District to post the notice included in Appendix A in conspicuous places, including all places where notices to employees are customarily posted at the District for a period of sixty (60) days and to take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

DATED this 14th day of September, 2017.

BOARD OF PERSONNEL APPEALS

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to Admin. R. Mont. 24.26.222 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 201503
Helena, MT 59620-1503

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 shall cease and desist from refusing to bargain with the Association regarding the issue of the District's share of the cost of employee insurance.

We shall provide relevant information when requested to do so by the Association.

We shall cease and desist from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights pursuant to Mont. Code. Ann. § 39-31-201.

DATED this ____ day of _____, 2017.

Polson School District Board of Trustees

By: _____

Office: _____