STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 7-2004:

HEART BUTTE EDUCATION ASSOCIATION, MEA-MFT/AFT/AFL-CIO,	)	Case No. 282-2004
Complainant,	)	FINDINGS OF FACT;
	)	CONCLUSIONS OF LAW;
and	)	AND RECOMMENDED ORDER
HEART BUTTE PUBLIC SCHOOLS,	)	
Defendant,	)	

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

I. INTRODUCTION

On August 6, 2003, the Heart Butte Education Association (HBEA) filed a charge with the Board alleging that Heart Butte Public Schools had failed to bargain in good faith after it refused to ratify an agreement arrived at through the collective bargaining process. On August 28, 2003, Heart Butte Public Schools filed a response to the charge denying that its actions constituted an unfair labor practice.

On October 8, 2003, an investigator for the Board found that the charges had probable merit and transferred the case to the Hearings Bureau for a hearing.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on February 24, 2004. Richard Larson represented the HBEA. Debra A. Silk represented Heart Butte Public Schools. Forestina Calf Boss Ribs, Marty Martin, Fred Valer, Duane Rutherford, Patti Paul, Leonard Guardipee, and Stacy Cummings testified. Exhibits J-1a, J-1b, J-1c, J-1d, and J-2 were admitted into evidence, pursuant to the parties' stipulation. Exhibits HBEA 2 HBEA 3, C, F, J, L, and R, were admitted into evidence. Exhibits M, N, O, P, Q, S, T, and U were excluded based on the February 23, 2004, order granting a motion in limine.

The parties filed post-hearing briefs on March 22, 2004. At that time, the case was deemed submitted for decision.

II. **ISSUE**

The issue in this case is whether the Heart Butte Public Schools committed unfair labor practices in violation of Mont. Code Ann. § 39-31-401, as alleged in the charge filed by the HBEA on August 6, 2003.

III. **FINDINGS OF FACT**

1. Heart Butte Education Association, MEA-MFT/AFT/AFL-CIO (HBEA) is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6).

2. Heart Butte Public Schools (the district) is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10).

3. The district recognizes the HBEA as the exclusive bargaining representative of Heart Butte teachers.

4. The Board of Trustees of the district is made up of five trustees.

5. Between February and June of 2003, the parties met on several occasions in an attempt to reach a successor agreement to the collective bargaining agreement which expired on June 30, 2003.

6. The district's negotiating team consisted of two board members, Darrell Williamson and Duane Rutherford and then-Superintendent Jan Cahill.

7. The HBEA's negotiating team consisted of Forestina Calf Boss Ribs, Hugh Martain, Jr., Fred Valer, Carol Day Rider and one other teacher.

8. The district's present Superintendent Leonard Guardipee was also present during some or all of the negotiations sessions held in May and June. He started attending the sessions after Cahill announced that he was not returning the next year and the school board selected Guardipee as his replacement.

9. Prior to the commencement of the negotiations, all parties were aware that the district was experiencing financial difficulties. It was experiencing declining enrollment and reduction in state impact aid. On January 29, 2003, the state Office of Public Instruction had placed the district on "high risk" status due to its financial condition, including fund balance deficits. The district had reduced the hours of classified staff because it was running out of money. It received its projections for state aid and impact aid sometime in March of 2003 and knew it would have to cut its budget for the 2003-04 school year.

10. At the beginning of the negotiation process, the negotiators established ground rules for the negotiation. They decided not to use outside negotiators and that all negotiators would have input into the process. They decided they would go over every provision of the existing collective bargaining agreement. The sessions were conducted in an open, friendly atmosphere and the district's representatives took turns with the union's representatives in providing meals.

All participants believed that the process was congenial, and that the participants were communicating well with one another.

11. All participants understood from the beginning of the process that any agreement reached would have to be ratified both by the school board and by the membership of the HBEA. The district's representatives did not state or imply to the union's representatives that they had authority to enter into a binding agreement.

12. At the commencement of negotiations, both of the board members on the district's negotiating team told the negotiators that the district could not afford raises for teachers.

13. The HBEA's negotiating team wanted to address the entire collective bargaining agreement between the HBEA and the district. The negotiators considered the agreement to contain too much vague language. The members of the HBEA's team each took a different part of the agreement and developed proposed changes. The HBEA's team then presented its proposal to the district's representatives as a complete package.

14. The HBEA's negotiating team presented its package of proposals at a meeting. The district's negotiators responded that when they started discussing salaries, they were going to have real trouble because of the district's financial problems. The negotiators agreed to reserve discussion of salaries and insurance to the end of the negotiation, and to address the other proposals first. The negotiators agreed to a number of language changes in the collective bargaining agreement prior to turning to the salary issue.

15. The parties discussed salaries at bargaining sessions beginning no later than May 15, 2003. At the bargaining session meeting on May 15, the HBEA's team presented its proposals regarding salary.

16. The 1999-2003 collective bargaining agreement had a salary matrix consisting of steps, representing years of teaching experience, and lanes, representing educational achievement. The HBEA had developed two different salary proposals, one of which would have entailed a 4% across the board increase to the salary matrix. The other proposal increased the entry salary for a new teacher with a bachelor's degree by 4%, then added $1,000.00 to each step and each lane. The second proposal also extended the number of steps for each lane to 20. Both proposals also added a lane for teachers with a bachelors' degrees plus 45 credits (BA45).

17. When the HBEA presented these proposals, the district's team caucused, then indicated to the HBEA that the district would not accept the salary schedule being presented by the HBEA. The district's negotiators told the HBEA representatives that the district would have to develop a counterproposal. Superintendent Cahill told the HBEA representatives that the district would bring a proposal to the next meeting, and that he believed the HBEA negotiators would like the district's proposals.

18. The next bargaining session took place on June 5, 2003. Prior to the session, Cahill developed a proposal to address teacher pay. He told Guardipee that he was working on a proposal that would cost the district $23,000.00, or $1,000.00 for each of the 23 teachers paid

from the school's general fund. Cahill developed his proposal independently without the involvement of any school board member, Guardipee, or the district clerk.

19. Cahill, Martain, Valer, and Day Rider were present for the negotiation session on June 5, 2003, when Rutherford arrived. Cahill took Rutherford into his office for 45 minutes. When they returned to the other negotiators, Cahill presented his proposal. Guardipee arrived at the meeting after Cahill had given each of the HBEA negotiators his proposal.

20. After receiving the proposal, the HBEA's negotiators caucused. Even though it did not add a lane for BA45, they considered it to be a good proposal. However, they did not like how the proposal addressed health insurance. They went back into the negotiation meeting and told the district's negotiators that they liked and accepted the salary proposal, but made a counterproposal on health insurance. The district's negotiators caucused and came back with another counter on health insurance, which the HBEA's negotiators accepted.

21. At the conclusion of negotiations on June 5, 2003, the negotiation teams had arrived at a final agreement, which all of the participants present believed was a good agreement. They shook hands and concluded their negotiations. The district's negotiators did not tell the HBEA's negotiators that they did not support the salary and insurance component of the agreement, or that the district could not afford the agreed upon salary and insurance component.

22. The HBEA's membership ratified the agreement arrived at in the negotiations.

23. The proposal developed by Cahill and accepted by the HBEA was for three years. It added $1,200.00 to the base and added $1,000.00 to each step and lane by in the first year of the agreement.[(1)] In the second year, it added $1,000.00 to the base and added $1,000.00 to each step and lane. It added $700.00 to the base and increased each step and lane by $1,000.00 in the third year. It also added additional steps to some of the lanes. It would have cost the district more than $23,000.00 in the first year because of the progression of incumbent teachers by one step in that year. For example, a teacher at the base entry salary of $22,100.00 in the 2002-03 school year would have received $24,300.00 in the 2003-04 school year, an increase of $2,200.00. This is because the new base for the position would be $23,300.00, and the teacher would move one step because of the year of experience gained. The same teacher would receive an additional $2,000.00 for the 2004-05 school year and a $1,700.00 increase for the 2005-06 school year.[(2)]

24. The school board did not consider the proposed agreement until a meeting on July 14, 2003. They had been unable to take the matter up sooner because problems with the school board election in May 2003 prevented the seating of two members. At the meeting, Guardipee recommended that the board not approve the agreement because of the salary increases. The board voted unanimously to reject the agreement.

IV. **DISCUSSION**[(3)]

Montana law requires public employers and labor organizations representing their employees to bargain in good faith on issues of wages, hours, fringe benefits, and other conditions of employment. Mont. Code Ann. § 39-31-301(5). Failure to bargain collectively in good faith is a

violation of Mont. Code Ann. § 39-31-401(5). 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.

The HBEA contends that district failed to bargain in good faith, and thereby violated Mont. Code Ann. § 39-31-401, by refusing to ratify an agreement made by its representatives, clothed with apparent authority to enter into a binding contract. It cites the Board's decision in *Teamsters Local No. 2 v. Great Falls Transit District* (October 19, 2001) in support of its contention that the refusal to ratify the agreement was an unfair labor practice.

As noted in *Teamsters Local No. 2*, an employer commits an unfair labor practice when it sends representatives to the bargaining table who have no authority to enter into a contract or to advance binding contract proposals. The refusal to execute an agreement made by a representative having apparent authority is unlawful where the employer has not expressly reserved the right to ratify or reject it. A principal may limit its agent's negotiating authority by affirmative, clear, and timely notice to the other party that any tentative agreement is contingent upon subsequent ratification. ***E.g.***, *University of Bridgeport* (1977), 229 NLRB 1074; *Aptos Seascape Corp.* (1971), 194 NLRB 540. An agent whose authority depends upon such a contingency can still have apparent authority to convey its principal's satisfaction with a proposal. *Walnut Hill Convalescent Center* (1982), 260 NLRB 258. "Apparent authority results when the principal does something or permits the agent to do something which reasonably leads another to believe that the agent had the authority he purported to have." *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.* (9th Cir. 1969), 414 F.2d 750, 756. *Ben Franklin National Bank* (1986), 278 NLRB 986, fn. 3.

The decision in *Teamsters Local No. 2* was expressly premised on findings that the employer's negotiators had actual or apparent authority to bind the employer. But in this case, the evidence established that the district reserved the right to ratify or reject the agreement. Although there is no direct evidence of an express reservation, all of the HBEA witnesses who testified stated they understood that whatever agreement was reached at the table was subject to ratification both by the school board and by the membership of the HBEA. This was a clear, mutual understanding on both sides of the negotiation. Based on this reservation, the district's negotiators lacked actual authority to bind the district. Further, there is no evidence that the district's negotiators had apparent authority to bind the district.

Under these facts, it was not an unfair labor practice for the school board to reject the agreement. It is unnecessary to address whether the obligation of the district to bargain in good faith under Mont. Code Ann. § 39-31-305, including the obligation to give its negotiators the ability to advance binding contract proposals, is altered or affected by Mont. Code Ann. § 20-9-213, which gives the board of trustees the authority to execute contracts on behalf of a district and prohibits a person other than the trustees acting as a board from expending money of the district. It is also unnecessary to address whether the district can be ordered to execute the agreement reached on June 5, 2003.

Two factors in this case tend to show bad faith by the district in its dealings with the HBEA. First, the evidence establishes that Board member Rutherford, a negotiator for the district, acquiesced in a comprehensive, unconditional final contract offer, without any intention to be bound by it. Although Rutherford denied meeting with Cahill for 45 minutes immediately before Cahill presented the district's salary proposal, and testified that he told the HBEA's negotiators that he did not support the proposal, this testimony was not credible. The testimony of the HBEA's negotiators was consistent in demonstrating a belief that the negotiators on both sides had reached agreement. It is not reasonable that they would have thought they had an agreement if Rutherford had told them, at the June 5, 2003, meeting, that he did not support the proposal. The second factor suggestive of bad faith is that the district has apparently never offered to return to the bargaining table in the year since its refusal to ratify the agreement.

However, neither of these matters was at issue in the case. The contention of the HBEA in this matter as outlined in the prehearing order was that the district did not bargain in good faith, and thereby violated Mont. Code Ann. § 39-31-401, by refusing to ratify an agreement that was made by its representatives, clothed with apparent authority to enter into a binding contract. As noted above, the evidence does not support a finding that the district's negotiators had apparent authority to bind the district. To go beyond that issue to the other indicators of bad faith would deny the district a fair hearing in this case. On the issue which was squarely presented by the unfair labor practice complaint and the prehearing contentions of the HBEA, the HBEA has not sustained its burden of proof. The unfair labor practice complaint must therefore be dismissed.

V. **CONCLUSIONS OF LAW**

1. The Board of Personnel Appeals has jurisdiction of this case. Mont. Code Ann. § 39-31-207.

2. A public employer may not refuse to bargain collectively in good faith on questions of wages, hours, fringe benefits, and other conditions of employment with an exclusive representative of its employees. Mont. Code Ann. §§ 39-31-305 and 39-31-401(5).

3. The refusal of Heart Butte Public Schools to ratify the collective bargaining agreement arrived at by its negotiators and negotiators for the Heart Butte Education Association on June 5, 2003, was not an unfair labor practice in violation of Mont. Code Ann. §§ 39-31-305 and 39-31-401(5).

VI. **RECOMMENDED ORDER**

The complaint of the Heart Butte Education Association is **DISMISSED.**

DATED this 11th day of June, 2004.

BOARD OF PERSONNEL APPEALS

By: /s/ ANNE L. MACINTYRE
Anne L. MacIntyre, Chief

Hearings Bureau
Department of Labor and Industry

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than July 6, 2004. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

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

1. Based on the record, it is not possible to compare Cahill's proposal precisely to the salary schedule which was in place for the 2002-03 school year to the proposal, because the salary schedules for that year are missing from the collective bargaining agreement (Exhibit A) which was introduced into evidence. However, exhibit F shows what the salaries were for each teacher in 2002-03 and what they would have been in 2003-04 without any change to the schedule.

2. Based on the record, it is not possible to determine exactly how much the agreement would have cost. Exhibit F, introduced by the district to show the costs, contains a number of errors, such as attributing the full salary cost of two newly hired teachers to the new salary schedule and including increases scheduled to take place under the prior year agreement. Its bottom line increase of $109,378.00 in the first year is not accurate. The increased cost attributable to the salary agreement was probably $52,200.00 in the first year, $41,000.00 in the second year, and $33,600.00 in the second year. However, the actual costs of the proposal are ultimately irrelevant to the decision.

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