STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 23-2004:

EKALAKA TEACHERS' ASSOCIATION, MEA-MFT, NEA,	)	Case No. 1475-2004
Complainant,	)	
vs.	)	
EKALAKA UNIFIED BOARD OF TRUSTEES AND WADE NORTHROP, SUPERINTENDENT (ELEMENTARY DISTRICT AND HIGH SCHOOL DISTRICT),	)	
Defendants.	)	

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

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I. INTRODUCTION

On January 5, 2004, the Ekalaka Teachers' Association filed a charge with the Board alleging that the Ekalaka Unified Board of Trustees and Wade Northrop had failed to bargain in good faith when they paid Jeff Savage $2,000.00 for moving expenses without bargaining with the association. On February 13, 2004, the defendants filed a response to the charge denying that their actions constituted an unfair labor practice.

On April 29, 2004, an investigator for the Board issued a finding that the charges had probable merit and transferred the case to the Hearings Bureau for a hearing on the charges.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on August 12, 2004. Richard Larson represented the association. Debra A. Silk represented the defendants. Wade Northrop, Lora Tauck, Sherry Roberts, Sharon Carroll, Valerie O'Connell, and Maggie Copeland testified as witnesses in the case. Exhibits J-1 through J-5 were admitted into evidence, pursuant to the stipulation of the parties. The association's exhibits 1- 3 were admitted over defendant's objection that they were not timely filed.

The parties filed post-hearing briefs on September 21, 2004. At that time, the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether Ekalaka Unified Board of Trustees and Wade Northrop, Superintendent, committed unfair labor practices in violation of Mont. Code Ann. § 39-31-401, as alleged in the complaint filed by Ekalaka Teachers' Association, MEA-MFT, NEA.

III. FINDINGS OF FACT

1. Ekalaka Teachers' Association, MEA-MFT/NEA is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6).

2. Ekalaka Unified Board of Trustees (the districts) and Wade Northrop are "public employers" within the meaning of Mont. Code Ann. § 39-31-103(10).

3. The association is the exclusive representative of teachers in the Ekalaka Public Schools.

4. At all relevant times, Northrop was the superintendent of Ekalaka Public Schools.

5. The association and the districts have had an enforceable collective bargaining agreement in effect at all relevant times.

6. Jeff Savage was employed as a teacher/coach by the districts for the 2003-04 school year.

7. Savage was living in Washington state when he applied for the position in Ekalaka. Sometime prior to the districts' formal offer of employment to Savage, Northrop had a conversation with him about his interest in the position. He told Northrop that relocating to Ekalaka would cost him $2,000.00 and he asked to be reimbursed for those costs.

8. Northrop directed the district clerk, Lora Tauck, to issue a check to Savage in the amount of $2,000.00, for his moving expenses. Tauck prepared the check, which was dated June 29, 2003.

9. The Board of Trustees of the districts met for a special board meeting on June 30, 2003.

10. Upon the recommendation of Northrop, the Board of Trustees moved to offer Savage a teaching position and other extra-duty assignments as reflected in the June 30, 2003, board minutes.

11. Savage accepted the offer of employment and signed a teacher's employment contract with the district on July 1, 2003.

12. Neither Northrop or any other representative of the districts notified the association that the districts planned to pay Savage for his moving expenses prior to delivering the check to him. The association learned of the payment to Savage in approximately mid-October 2003.

13. On or about July 15, 2003, Northrop made a tentative offer of employment to Sherry Roberts. Roberts visited Ekalaka and during her visit, asked Northrop whether the districts might reimburse her moving expenses from Minnesota to accept the position in Ekalaka. Northrop declined her request for moving expenses on the ground that he could not pay her more than the salary provided for in the collective bargaining agreement.

14. On July 28, 2003, the Board of Trustees held a special meeting to consider the recommendation of the interview committee to hire Roberts. The Board voted to hire her, contingent on a successful background investigation and acquisition of a Montana teaching license.

IV. **DISCUSSION**[1]

The association contends that the payment of $2,000.00 to Jeff Savage constituted a unilateral change in working conditions as embodied in the collective bargaining agreement between the association and the Unified Board of Trustees of Ekalaka Elementary School District #15 and Carter County High School and reflected direct dealing (or individual bargaining) between the districts and Savage.
The defendants contend that the payment to Savage was a pre-employment incentive and that districts are not required to bargain over pre-employment conditions or incentives. The defendants further contend that the association waived its right to bargain over the issue by failing to request bargaining, and that pre-employment conditions are inherent management rights. Therefore, the districts request that the unfair labor practice charge brought by association be dismissed with prejudice.

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) precedent as guidance in interpreting 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 basic, fundamental purpose of labor relations is good faith negotiation of the mandatory subjects of bargaining--wages, hours, and other terms and conditions of employment. For an employer to make unilateral changes during the course of a collective bargaining relationship concerning mandatory subjects of bargaining is considered a violation of the requirement of good faith bargaining. *NLRB v. Katz* (1962), 369 U.S. 736. Absent waiver or other relief from the obligation, it continues during the term of the collective bargaining agreement. *NLRB v. Sands Mnftng. Co.* (1939), 306 U.S. 332, 342. Engaging in direct dealings with members of a collective bargaining unit also constitutes a refusal to bargain collectively in good faith. *Medo Photo Supply v. NLRB* (1944), 321 U.S. 678, 683-85.

The defendants contend that at the point they paid the $2,000.00 in moving expenses to Savage, he was not an employee. Thus, the defendants were not required to bargain with the union concerning the payment to Savage. Defendants rely on *Allied Chemical & Alkalai Workers v. Pittsburgh Plate Glass Co.* (1971), 404 U.S. 157 and *Star Tribune Division* (1989), 295 NLRB 543 and its progeny in support of the argument that it did not have to bargain the pre-employment payment of moving expenses to Savage. These were the exact arguments presented by the defendants in their motion for summary judgment, and rejected by the hearing officer in ruling on that motion.

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

In *Pittsburgh Plate Glass*, the Supreme Court held that retirees' health insurance benefits were not a mandatory subject of bargaining as "terms and conditions of employment" of the retirees themselves, and the employer's unilateral midterm modification of the health plan for already retired employees was not an unfair labor practice. In *Star Tribune* and its progeny, the NLRB held that the employer was not required to bargain with the union over pre-employment drug and alcohol testing. The defendants contend these cases establish that employers need not bargain over issues related to non-employees. However, the critical question in these cases was whether the subject was a term or condition of employment, not whether the individuals affected were employees. The payment in this case is comparable neither to retiree medical benefits nor to a hiring process for applicants.

In this case, for purposes of determining if a bargaining obligation existed, whether Savage was an employee at the point the defendants paid him the $2,000.00 is irrelevant. Had the districts agreed to pay Savage a higher salary than that called for in the collective bargaining agreement prior to him becoming an employee, the timing of the agreement or the payment would not insulate the action of the districts. ***Cf.***, *Monterey Newspapers, Inc.* (2001), 334 NLRB 1019, 1020, in which the Board stated: "We agree with the judge that the wage rates that job applicants were offered (and, thus, that newly hired employees were paid) are mandatory subjects of bargaining."[2] The question is whether the payment to Savage constituted wages, fringe benefits, or other conditions of employment, because these are the issues about which employers are required to bargain under state law.

The payment was additional compensation to Savage, a soon-to-be employee. The districts paid him this additional compensation because the salary available under the collective bargaining agreement was insufficient to attract him to the districts without an additional incentive. Whether the districts characterize the payment as moving expenses or as a pre-employment incentive, they offered it because the bargained-for salaries were insufficient to insure Savage would accept the job. Because the payment to Savage represented compensation, it was clearly a term or condition of employment, and a subject of mandatory bargaining.

The defendants made much of the timing of the payment to Savage. Northrop testified that he had not offered employment to Savage at the time he gave him the check, and that the payment was in the nature of a gift that the districts would not have been able to recover if Savage decided not to take the job. He testified he was not authorized to offer employment to a candidate until the Board acted, and so could not have offered employment before June 30, 2003.

Northrop's testimony on this point is not credible. Savage did not testify, but it is inherently incredible that Northrop agreed to give $2,000.00 of the money of cash-strapped school districts to an applicant for employment without some understanding, however implicit, that he would actually come to work for the districts. Further, Roberts credibly testified that after her telephone interview with Northrop and several board members, Northrop called her back and told her that the districts were offering her the position, but that they would like her to

[2]The Board reversed the judge on other grounds specifically relating to the bargaining obligations of a successor employer.

come to the town and see it. Also, the district prepared Roberts' contract of employment on September 15, 2003, but the Board did not approve her hire until September 28, 2003.

It is a much more probable scenario for both Savage and Roberts that Northrop made a tentative offer of employment to these applicants, contingent on them coming to Ekalaka to see the town and on approval by the Board. Because it was made in connection with a tentative offer of employment, the payment to Savage represented additional compensation to him.[3]

Even when the payment to a non-employee is not itself a term or condition of employment, if the payment vitally affects the terms and conditions of bargaining unit member employment, the employer is obligated to bargain with the union. *Pittsburgh Plate Glass, **supra***, at 179. There are very few reported cases on the issue of bargaining pre-employment incentives. However, in a recent case, an NLRB administrative law judge expressly held that an employer is obligated to bargain over sign-on and relocation bonuses, stating:

> Although applicants are not "employees" for purposes of Section 8(a)(5) of the Act, the sign-on and relocation bonuses paid to applicants, when they become employees, are wages. Thus, the sign-on and relocation bonuses have more than an "indirect or incidental impact on unit employees." Because the subject of new hire wages "materially or significantly affects unit employees' terms and conditions of employment," Respondent was required to bargain regarding the sign-on and relocation bonuses. Finally, the Union did not clearly and unmistakably waive the right to bargain by agreeing to management rights clauses that ceded generally to Respondent the right to hire. Thus I find that Respondent violated the Act by unilaterally granting sign-on and relocation bonuses to applicants for employment without prior notice to the Union, by dealing directly with employees regarding these sign-on and relocation bonuses, and by refusing to bargain with the Union regarding sign-on bonuses and relocation bonuses to be offered to applicants for employment. Finally, I find that Respondent bypassed the Union and dealt directly with unit employees regarding the sign-on bonuses and relocation bonuses and a transfer bonus.

St. Vincent Hospital, 2004 NLRB LEXIS 442, 11-12 (footnotes omitted).

St. Vincent Hospital is directly on point, both for the bargaining question and for the management rights question. Since this was a matter over which the districts were obligated to bargain, they did not have an inherent management right based either on statute or the general management rights language of the collective bargaining agreement.

The defendants also contend that the association waived its right to bargain over the issue of this pre-employment incentive. They cited no additional authority for this contention beyond that rejected by the hearing officer in ruling on the motion for summary judgment.

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[3]The defendants also argued that the payment was not wages because they did not report it as wages for tax purposes. This argument is irrelevant to how the payment is properly characterized.

It is true that when an employer notifies the union of a proposed change, and the union fails to request bargaining, the union has waived bargaining on the issue. ***See***, ***e.g.***, *Haddon Craftsmen, Inc.* (1990), 300 NLRB 789, 790, ***review den. sub nom.*** *Graphic Communications Internat., Local Union No. 97B v. NLRB* (3rd Cir. 1991), 937 F.2d 597. However, there is no evidence that the districts or Northrop notified the association of their intent to pay an additional $2,000.00 to Savage at any time before Northrop delivered the payment to Savage. The association did not learn of the payment until sometime in October. Because defendants gave no notice of a proposed change, the association could not have and did not waive its right to bargain the issue.

The defendants cite several decisions of the Board on the issue of waiver, *Beaverhead Federation of Teachers v. Beaverhead County High School*, ULP 10-2001 (October 29, 2002) and *Browning Federation of Teachers v. Browning Public Schools*, ULP 17-2001 (November 26, 2001). The facts of these cases are significantly different from the present case. In both cases, the complainants had actual knowledge of the actions of the defendants, and did not request bargaining. In *Browning*, the defendant had paid pre-employment incentives to prospective employees over a period of several years with actual knowledge of bargaining unit members before the union filed its unfair labor practice charge.[4] In *Beaverhead*, the defendant had public discussions of its proposal to change the schedule of the traffic education course. These discussions occurred at Board meetings at which union members were present. No similar facts supporting a finding of a waiver are present in this case.

Mont. Code Ann. § 39-31-406(4) provides that when the Board finds an employer has engaged in an unfair labor practice, the Board shall order the employer to cease and desist from the unfair labor practice, and to take such affirmative action as will effectuate the policies of the Collective Bargaining Act. Thus the appropriate remedy for the districts' failure to bargain in good faith is an injunction against making unilateral changes in terms and conditions of employment, an order to bargain with the association about pre-employment incentives, and a posting requirement.

The association requested that the Board order the districts to pay $2,000.00 to each of the bargaining unit members. The defendants contend that since the $2,000.00 in this case was intended to reimburse Savage for his moving expenses, such an order would be inappropriate and not supported by the record. Neither party presented any authority on whether an equivalent payment is appropriate for each bargaining unit member when the employer has bargained directly with an employee. The hearing officer has found no authority to support such an award. However, an award of $2,000.00 is appropriate for Roberts, the other prospective employee who requested reimbursement of moving expenses in the same time frame as Savage and was thus similarly situated to him.

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[4]On the question of the duty to bargain pre-employment incentives, the Board in the *Browning* case expressly rejected a finding of the Board's investigator that the Board had no duty to bargain such incentives.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over 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). An employer that makes unilateral changes during the course of a collective bargaining relationship concerning wages, hours, fringe benefits, and other conditions of employment has refused to bargain in good faith. *NLRB v. Katz* (1962), 369 U.S. 736.

3. The pre-employment incentive paid to Jeff Savage was additional compensation to him and a condition of employment about which the Ekalaka Unified Board of Trustees and Wade Northrop were required to bargain with the Ekalaka Teachers' Association prior to agreeing to pay the incentive to Savage.

4. By agreeing to pay the pre-employment incentive to Savage without bargaining with the Ekalaka Teachers' Association, the Ekalaka Unified Board of Trustees and Wade Northrop unilaterally changed Savage's compensation under the collective bargaining agreement, engaging in direct dealing with Savage. They committed an unfair labor practice in violation of Mont. Code Ann. § 39-31-401(5).

5. As a result, the Ekalaka Teachers' Association is entitled to cease and desist orders, an order directing the defendants to bargain with the association about pre-employment incentives for employees, an order to post and publish the notice set forth in Appendix A, and an order to pay Sherry Roberts the sum of $2,000.00.

VI. RECOMMENDED ORDER

Ekalaka Unified Board of Trustees and Wade Northrup are hereby **ORDERED**:

1. Immediately to cease the practice of offering pre-employment incentives for employees or otherwise unilaterally altering terms and conditions of employment subject to the collective bargaining agreement without bargaining with the Ekalaka Teachers' Association;

2. Within 30 days of this order:

   a. To initiate collective bargaining with the Ekalaka Teachers' Association, about pre-employment incentives for employees; and

   b. To pay Sherry Roberts the sum of $2,000.00;

   c. 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 Ekalaka Schools 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 4th day of January, 2005.

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 January 27, 2005. 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

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

Richard Larson
Attorney at Law
P.O. Box 1152
Helena, MT 59624

Debra Silk
Montana School Boards Association
One South Montana Avenue
Helena, MT 59601

DATED this 4th day of January, 2005.

/s/ SANDY DUNCAN

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 Ekalaka Teachers' Association;

We will not offer pre-employment incentives or otherwise unilaterally change the terms and conditions of employment of employees covered by the collective bargaining agreement with the Ekalaka Teachers' Association without prior negotiations with the Association;

We will engage in negotiations with the Ekalaka Teachers' Association over pre-employment incentives for employees.

DATED this _____ day of January, 2005.

Ekalaka Unified Board of Trustees

By:_____

Wade Northrop

_____

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