STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 32-2004:

BONNER EDUCATION ASSOCIATION, MEA-MFT, NEA, AFT, AFL-CIO,	)	Case No. 2253-2004
Complainant,	)	
vs.	)	
BONNER SCHOOL DISTRICT NO. 14,	)	
Defendant.	)	

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

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I. INTRODUCTION

On April 14, 2004, Bonner Education Association, MEA-MFT, filed a charge with the Board alleging that Bonner School District No. 14 had unilaterally and without bargaining involuntarily transferred certain teachers. On May 7, 2004, the defendant filed a response to the charge denying that its actions constituted an unfair labor practice.

On August 26, 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 December 3, 2004. Karl J. Englund represented the association. Debra A. Silk represented the district. Julie Hasler Foley, Judy Karl, Doug Ardiana, Rosanne Hiday, and Pam Gannon testified as witnesses in the case. Exhibits 1 through 6 were admitted into evidence, pursuant to the stipulation of the parties. Exhibits K, L, M, N, O, P, and Q were admitted over the association's relevance objection. Exhibits R and S were also admitted without objection.

The parties filed post-hearing briefs on January 21 and January 24, 2005. At that time, the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether the Bonner School District No. 14 committed unfair labor practices in violation of Mont. Code Ann. § 39-31-401, as alleged in the complaint filed by the Bonner Education Association.

III. RULINGS ON MOTIONS

On November 12, 2004, the defendant filed a motion for extension of time to file its answer in the case, attaching to the motion its proposed answer for filing. The complainant did not reply to the motion. On November 15, 2004, the complainant filed a motion for summary judgment and a brief in support of its motion. The defendant filed a reply brief in opposition to the motion on November 26, 2004. The complainant filed a response brief on November 30, 2004. The parties presented oral argument on the motion for summary judgment at the final pre-hearing conference on November 29, 2004.

The hearing officer granted the defendant's motion for extension of time to file its answer at the commencement of hearing. The hearing officer deemed the answer that was attached to the motion filed.

The hearing officer orally denied the motion for summary judgment prior to the commencement of hearing by notifying the parties of her ruling telephonically. At the commencement of hearing, the hearing officer told the parties that the ruling on the motion would be incorporated into the hearing officer's recommended order in the case. In view of the decision in this case in favor of the complainant, a separate ruling on the motion is moot, however.

IV. FINDINGS OF FACT

1. Bonner Education Association, MEA-MFT, is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6), and is the duly recognized exclusive representative of the certified personnel in the district.

2. Bonner School District No. 14 is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10).

3. The Board of Trustees of Bonner Public Schools is the governing body of the district and charged with supervision and control of the district.

4. Doug Ardiana was at all relevant times the superintendent of the district.

5. The Bonner Education Association and the Bonner School District have been parties to a series of collective bargaining agreements. The contract that was in effect at the time of this dispute covered the 2002-2003 and 2003-2004 school years.

6. The contract contained a management rights clause at Article IV, Section 4.1, which provided:

> The Association recognizes the prerogatives of the Board to operate and manage the school district and retain, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by law, except as limited by explicit terms of this agreement.

In Article X, the contract contained a provision for the filling of vacant or new positions which gave preference to current bargaining unit members and former bargaining unit members who had been laid-off. Article XI provided that layoffs would be done by seniority. Article XVI, Section 16.1(A) was the contract's re-opener clause stating:

> This Agreement may be opened for re-negotiation, prior to the expiration date [June 30, 2004] with and only with the mutual agreement in writing of the Board and the BEA.

Article XVI, Section 16.2(B) was a prevailing rights clause that provided:

> This agreement shall not be interpreted to deprive teachers of professional advantages heretofore enjoyed, however, this does not incorporate these advantages into this contract.

7. The collective bargaining agreement also contained a clause, commonly known as an integration clause, in Article XVI, Section 16.2(A) that stated:

> This Agreement constitutes the full and complete Agreement between the Board and the BEA. The provisions herein relating to salary, hours, and other terms and conditions of employment supersede any and all prior agreements, resolutions, practices, rules or regulations concerning

salary, hours, and other terms and conditions of employment inconsistent with these provisions.

8. For 10 years prior to the events giving rise to this case, the district did not make involuntary, non-disciplinary transfers of teachers from one assignment to another.[1]

9. Prior to the 2003-2004 school year, the only circumstances in which a teacher was reassigned occurred when the teacher exercised one of the rights under the collective bargaining agreement to fill a vacant position or bump a less senior teacher in the event of a layoff.

10. Ardiana became superintendent of the district prior to the beginning of the 2003-2004 school year. Prior to the beginning of school, Ardiana had several discussions with Julie Foley, the president of the association. In one of these conversations, Ardiana told Foley that he had reassigned teachers in previous positions he held as a school administrator, and would consider doing so in Bonner. Foley told him such reassignments had not been the practice in Bonner and "would cause a fight" if he did so there.

11. On January 5, 2004, Ardiana distributed a memo to the district's teachers that stated:

> In order to plan for the 2004-2005 school year, I would like to have some discussion regarding teacher assignment. I will be meeting with each teacher to discuss placement and possible rotation or change in teaching assignment. Please review and complete the form included with this memo. When I meet with you, I would like to review the form with you, collect the form and answer any questions that you may have. If you have any questions or concerns regarding this process please see me directly.

12. On February 19, 2004, the association wrote to the chair of the school board and requested to bargain about involuntary transfers/reassignments. On March 1, 2004, the district responded to the association's request by asserting that "assignments and transfers are not addressed in the collective-bargaining agreement and fall within management rights under Montana codes [sic] annotated." The district stated that the association was "welcome to bring proposals about

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[1]The evidence established that this had been the practice in the district for at least 33 years. Paragraph 8 of the findings is based on the parties' stipulated fact.

transfers . . ." to the bargaining table when the parties negotiated for a new contract. On March 9, 2004, the school board gave the superintendent the authority to make involuntary transfers of teaching assignments.

13. The parties commenced bargaining on or about March 24, 2004 for a successor agreement.

14. On April 7, 2004, the district announced that effective the start of the 2004-2005 school year, several teachers would be reassigned. Ultimately, the district implemented the following four involuntary reassignments:

Teacher's Name	**Subjects and Grades Taught in 2003-2004**	**Reassigned by School District Administration to Subjects and Grade Being Taught 2004-2005**
Mary Ann Strothman	7th and 8th grade English (6 sections)	Foreign Language (2 sections) Gifted/Talented Education (2 sections) Music Appreciation (1 section) 7th and 8th grade English (2 sections)
Erin Roberts	Special Education (all day)	7th and 8th grade English (2 sections) Art - all grades (5 sections)
Julie Hasler Foley	4th grade (all day)	Special Education (all day)
Jilyn Chandler	7th and 8th grade Math (4 sections) 7th and 8th grade Foreign Cultures (2 sections)	7th and 8th grade Math (4 sections) Computer (2 sections) Math Study Hall (1 section)

15. The reassignments were not disciplinary – none of the teachers were reassigned because of misconduct or poor performance. At the time the district announced the specific reassignments noted in ¶14, above, the parties were bargaining for a successor agreement. They had not reached impasse.

16. The reassignments were not made to achieve reductions in force.

17. Ardiana decided upon the involuntary reassignments unilaterally, taking into consideration the needs of the students, the needs of the district, budgetary considerations, the endorsements, certifications and experience of his current staff,

and the desires of the individual teachers. He believed he had no obligation to bargain with the association in arriving at his decision.

18. One of the reassignments Ardiana initially announced on April 7, 2004, was of Judy Karl. In the 2003-2004 school year, Karl was employed as the computer teacher/technical systems administrator. The district reassigned her teaching duties but eliminated the technical systems administrator duties. The district reassigned Karl to teach fourth grade. The association grieved Karl's reassignment, contending that because her position had been eliminated, she was entitled to exercise her rights under the layoff clause of the collective bargaining agreement. Karl and the association agreed to drop the grievance in exchange for the district's agreement to assign Karl to a third grade teaching position.

19. The association also filed a grievance over the reassignment of Foley. Foley had been teaching fourth grade in the 2003-2004 school year, a position she had acquired under the vacancy provision of the collective bargaining agreement several years earlier. The district initially reassigned her to teach English classes and special education. Ultimately, her reassignment was to special education all day. Her grievance also contended that the reassignment violated the layoff provision of the collective bargaining agreement.

20. In a hearing on Foley's grievance before the board, discussion ensued about whether the layoff provision of the collective bargaining agreement maintained any significance, in view of the rights of management to reassign teachers. Foley agreed that the district had the right to assign teachers.

21. The parties reached a successor collective bargaining agreement in August 2004. During the negotiation process, the association and the board bargained over transfer/reassignment language proposed by the association. Ultimately, the association dropped its proposed reassignment language in order to settle the contract. The language in the 2004-2007 collective bargaining agreement concerning management rights, layoffs, vacancies, and professional advantages was unchanged from the 2002-2004 agreement.

22. The ability to continue to teach in a particular grade or subject area in which a teacher has previously taught is a professional advantage. Teachers gain expertise in the curriculum of their particular grade levels or subjects, acquire supplies and materials that can be used in successive years, sometimes expending their own funds, and obtain continuing education unique to their specific grade levels or subjects.

IV. **DISCUSSION**[2]

The association contends that by involuntarily reassigning members of the bargaining unit on April 7, 2004, the district violated Mont. Code Ann. §§ 39-31-401(1) and (5), in that the district unilaterally changed working conditions that are mandatory subjects of bargaining without first bargaining with (in fact, refusing to bargain with) the association.

The district maintains that its actions do not constitute an unfair labor practice by a public employer as set forth in Mont. Code Ann. §§ 39-31-401(1) and (5). It contends that it has done nothing to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201." Mont. Code Ann. § 39-31-401(1). It contends that the involuntary reassignments were within its management rights both under the statute and the management rights clause of the collective bargaining agreement between the parties. Furthermore, its actions do not constitute a violation of Mont. Code Ann. § 39-31-401(5), in that the district exercised its rights under the re-opener clause. It denies that it has refused to bargain with the association as evidenced by its willingness to negotiate over this matter once the current collective bargaining agreement was subject to renegotiation in accordance with Article 16.1. It also maintains that the charge is subject to dismissal based on principles of mootness and judicial estoppel.

[2]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.

A. Obligation to Bargain

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. § 39-31-305(2). Failure to bargain collectively in good faith is a violation of Mont. Code Ann. § 39-31-401(5). A violation of Mont. Code Ann. § 39-31-401(5) is also considered a "derivative" violation of Mont. Code Ann. § 39-31-401(1). ***See*** Hardin, *The Developing Labor Law*, 3rd Ed. 1992, at 75. The Board of Personnel Appeals can properly use federal court and National Labor Relations Board (NLRB) precedent 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 basic, fundamental purpose of labor relations is the 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 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 Manufacturing Co.* (1939), 306 U.S. 332, 342.

It is undisputed that the district made unilateral involuntary reassignments of teachers on April 7, 2004.[3] The issue is whether the district was obligated to bargain with the association and obtain its agreement before making these reassignments, or bargain to impasse with the association before making them. Answering this question requires a three-part analysis. *NLRB v. U.S. Postal Service* (D.C. Cir. 1993), 8 F.3d 832. First, are the assignments of current employees a mandatory subject of bargaining? Second, if so, did the 2002-2004 collective bargaining agreement give the district the right to change assignments of current employees without bargaining? Third, if not, did the association waive its rights to bargain over the issue of involuntary reassignments?

In its contentions and post-hearing arguments, the district contends that it was not required to bargain because of the management rights provisions of state law set

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[3]In the course of this proceeding, the parties referred to the questioned act variously as assignment, transfer, and reassignment. For purposes of this decision, the hearing officer finds that the subject of bargaining at issue is assignment of current employees, and the alleged unfair labor practice should be characterized as involuntary reassignment.

forth in Mont. Code Ann. § 39-31-303 and of the collective bargaining agreement between the parties. The district does not distinguish between the two different sources of management rights, even though they are analytically distinct. The statutory provision is important for the first part of the analysis, i.e. whether involuntary reassignment is a mandatory subject of bargaining. The provision in the collective bargaining agreement relates to the second part of the analysis, whether the collective bargaining agreement authorized the district to make unilateral involuntary reassignments.

1. Subjects of Bargaining

On its face, the assignment of an employee is a condition of employment. It is therefore a mandatory subject of bargaining for purposes of Mont. Code Ann. § 39-31-305(2), which requires public employers to bargain in good faith with respect to "wages, hours, fringe benefits, and other conditions of employment." However, the Collective Bargaining for Public Employees laws also provide:

> Public employees and their representatives shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to:
>
> (1) direct employees;
>
> (2) *hire, promote, transfer, assign, and retain employees*;
>
> (3) relieve employees from duties because of lack of work or funds or under conditions where continuation of such work be inefficient and nonproductive;
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> (4) maintain the efficiency of government operations;
>
> (5) determine the methods, means, job classifications, and personnel by which government operations are to be conducted;
>
> (6) take whatever actions may be necessary to carry out the missions of the agency in situations of emergency;
>
> (7) establish the methods and processes by which work is performed.

Mont. Code Ann. § 39-31-303 (emphasis added).

If Mont. Code Ann. § 39-31-303 is construed as the district contends it should be, it conflicts with Mont. Code Ann. § 39-31-305(2). The district argues that it was not required to bargain with the association over teacher assignment because it is within the management rights provided for in Mont. Code Ann. § 39-31-303(2). However, Mont. Code Ann. § 39-31-305(2) makes the issue of assignment of incumbent employees a matter over which bargaining is required because it is a

condition of employment. The determination of whether assignment of incumbent employees is a mandatory subject requires that these statutes be harmonized. Federal decisions are of limited value in addressing this question because the National Labor Relations Act does not have statutory management rights language comparable to that contained in state law.

The Board has previously held that teacher transfers, and particularly involuntary transfers, are mandatory subjects of bargaining. *Florence-Carlton Unit v. Board of Trustees of School District No. 15-6* (1979), ULP 5-77. The involuntary transfers addressed in that case are analogous to the involuntary reassignments at issue here. In harmonizing the Montana statutes that govern both the obligation to bargain and management rights, the Board adopted a balancing test based on court decisions from Kansas and Pennsylvania interpreting similar statutory management rights language in state collective bargaining laws. The Board held that the key in deciding whether an issue was a mandatory subject was "how direct the impact of an issue is on the well being of the individual teacher, as opposed to its effect on the operation of the school system as a whole." Hearing officer's recommended order dated December 13, 1978,[4] at 6, ***citing*** *National Education Association of Shawnee Mission v. Board of Education* (1973), 212 Kan. 741, 512 P.2d 426, ***superceded by statute,*** *Unified School District No. 501 v. Department of Human Resources* (1985), 235 Kan. 968, 685 P.2d 874; *Pennsylvania Labor Relations Board v. State College Area School District* (1975), 461 Pa. 494, 337 A.2d 262.

As the Board noted in the *Florence-Carlton* case:

> Topics proposed for negotiation, like words in a sentence, take on color and meaning from their surrounding context. Viewed in the abstract, the demand to negotiate over 'the level of service to be provided' for example, would seem to be a matter . . . not negotiable except at the discretion of the County. . . . In the context of a specific situation, however, a demand for a lower maximum case load for social workers, for example, although theoretically related to the level of

[4]The Board adopted the recommended order as its final order on June 11, 1979.

> service to be provided, might be much more directly related to the terms and conditions of employment.

Id. at 5, citing a document entitled, "Aaron Committee Report," July, 1968.

The Pennsylvania law presents a clearer conflict between a management rights provision and the statutory requirement to bargain than that found in the Montana statute in stating:

> Public employers *shall not be required to bargain* over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel.

Unified School District, ***supra***, 337 A.2d at 265 (emphasis added). Establishing a rule to resolve the conflict, the Pennsylvania court stated:

> [W]e hold that where an item of dispute is a matter of fundamental concern to the employes' [sic] interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under section 701 [which defines collective bargaining] simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employe [sic] in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole. If it is determined that the matter is one of inherent managerial policy but does affect wages, hours and terms and conditions of employment, the public employer shall be required to meet and discuss such subjects upon request by the public employe's [sic] representative pursuant to section 702 [which sets forth both the management rights clause and the obligation to bargain].

337 A.2d at 268. Thus, even in the face of very strong statutory language ("shall not be required to bargain"), the Pennsylvania court held that bargaining was nevertheless required "where an item of dispute is a matter of fundamental concern to the employes' [sic] interest in wages, hours and other terms and conditions of employment."

See also *West Hartford Education Association, Inc. v. DeCourcy* (1972), 162 Conn. 566, 295 A.2d 526, 534-35, in which the Connecticut Supreme Court stated the following in interpreting the term "conditions of employment:"

> To decide whether the rest of the items in question (a) are mandatory subjects of negotiation, we must direct our attention to the phrase "conditions of employment." This problem would be simplified greatly if the phrase "conditions of employment" and its purported antithesis, educational policy, denoted two definite and distinct areas. Unfortunately, this is not the case. Many educational policy decisions make an impact on a teacher's conditions of employment and the converse is equally true. There is no unwavering line separating the two categories. It is clear, nevertheless, that the legislature denoted an area which was appropriate for teacher-school board bargaining and an area in which such a process would be undesirable.

The balancing test the Board adopted in 1978 in reliance on the Kansas and Pennsylvania cases remains appropriate today. As the cases demonstrate, to adopt a more restrictive interpretation of the term "conditions of employment" would vitiate the requirement of the statute that public employer bargain in good faith, since nearly all conditions of employment implicate one or more of the management rights listed in Mont. Code Ann. § 39-31-303.

As the Board held in *Florence-Carlton*, teacher transfers, both voluntary and involuntary, can have a great impact on the well-being of an individual teacher. Hearing officer's recommended order, ***supra***, at 12-13. Therefore, they are mandatory subjects of bargaining.

2. Coverage of the 2002-2004 Collective Bargaining Agreement

The district also contends that the management rights clause of the collective bargaining agreement allows the district to make involuntary reassignments of teachers. The language in question states that the association "recognizes the prerogatives of the Board to operate and manage the school district and retain, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by law. . . ."

The district relies for its position on several cases in which the express terms of a collective bargaining agreement gave the employer a right to assign personnel. In *NLRB v. U.S. Postal Service* (D.C. Cir. 1993), 8 F.3d 832, the court held that language in the collective bargaining agreement giving the employer the "exclusive right" to

"hire, promote, transfer, assign, and retain employees" and to "determine the methods, means, and personnel by which [its] operations are to be conducted" allowed the employer to reduce the hours of certain personnel without further bargaining. In *Uforma/Shelby Business Forms, Inc. v. NLRB* (6th Cir. 1997), 111 F.3d 1284, the court held that language in a collective bargaining giving the employer the "sole right" to "schedule and assign work to employees [and] to establish and determine job duties and the number of employees required" allowed the employer to abolish a shift, transfer several employees to different shifts, and lay off 5 employees without bargaining. Thus, the courts in these cases held that the employers had bargained the issues in question with the representatives of the employees, the issues were covered by the collective bargaining agreements, and no further bargaining was required.

The language in the collective bargaining agreement between the association and the district does not give the district the right to make involuntary reassignments without bargaining. Unlike the agreements in the cases cited by the district, this collective bargaining agreement does not cede the "exclusive" or "sole" right to make assignments of personnel to the district. It makes no specific reference to assignments. The district contends, however, that because the agreement incorporates by reference the management rights provisions of statute, citing particularly Mont. Code Ann. § 39-31-303, the agreement therefore allows involuntary reassignments.

According this language the interpretation advanced by the district poses a number of problems. First, the language itself is ambiguous. It does not specifically incorporate Mont. Code Ann. § 39-31-303. However, even assuming the intent of the language is to incorporate that statutory provision by reference, it does not follow that the district has a sole or exclusive right to make unilateral involuntary reassignments. As noted in the discussion of whether assignments are mandatory subjects of bargaining *supra*, the statute does not give the district absolute discretion in the area of assignments. Rather, the right to make assignments has to be balanced against the obligation to bargain regarding conditions of employment. The statutory provision, if it is indeed incorporated by reference, is a provision that does not accord this absolute right to a public employer.

Second, the collective bargaining agreement contains several express provisions that are rendered meaningless if the district has the right to make involuntary reassignments. It gives preference to unit members who apply for vacancies and allows teachers who are subject to layoff to exercise seniority rights with respect to other positions for which they are qualified. These provisions entitle teachers to preferences for certain positions. However, if the district can make involuntary

transfers of teachers who have exercised their rights under these provisions, the provisions of the agreement have no meaning.

In addition, the agreement provides that it may not be interpreted to "deprive teachers of professional advantages heretofore enjoyed, however, this does not incorporate these advantages into this contract." This language is also ambiguous, and the term "professional advantage" is not defined in the agreement. However, the association presented credible testimony that its members consider the ability to continue to teach in a subject or grade of a member's choice to be a professional advantage, and even Ardiana conceded this to be the case in testimony. To hold that the district can make involuntary reassignments is an interpretation that deprives teachers of a professional advantage previously enjoyed.

The hearing officer asked the parties to brief the question of the meaning of the professional advantages language, but neither party was able to cite any cases specifically on point. The district attempted to analogize to tenure cases, citing *Massey v. Argenbright* (1984), 211 Mont. 331, 683 P.2d 1332 and several other cases for the proposition that state law does not recognize a "professional advantage" to a particular teaching position. These cases, involving the right of tenured teachers to employment in any position for which they were certified when their existing positions were eliminated, are inapposite in the collective bargaining context. The reassignments at issue in this case were purely management initiatives undertaken by the district to reallocate personnel resources. The fact that tenured teachers could avoid layoffs by exercising tenure rights to positions other than the ones they held is irrelevant to the question of whether the district could reassign them without bargaining. The district's assertion that the association's position would restrict the tenure right to a particular position does not follow from holding that the teachers have a professional advantage to teaching in a position they prefer in the absence of layoffs. Procedures designed to apply the legal principles enunciated in *Massey* and the other cases cited by the district are expressly incorporated into the collective bargaining agreement between these parties in any event.

The language of the collective bargaining agreement does not support a holding that involuntary reassignments are permitted without bargaining.

3. Waiver

The third question in the analysis of whether the district had an obligation to bargain over the assignment of current employees is whether the union waived bargaining. The obligation to bargain collectively is an obligation that is subject to waiver by clear and unmistakable language. *Metropolitan Edison Co. v. NLRB* (1983), 460 U.S. 693; *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers v. Southwest Airlines Co.* (5th Cir. 1989), 875 F.2d 1129, 1135; *Honeywell International, Inc. v. NLRB* (D.C. Cir. 2001), 253 F.3d 125. The district cites the integration clause of the agreement in conjunction with the management rights clause to support its contention that the association waived its right to bargain during the term of the agreement.

The integration clause states that the provisions of the collective bargaining agreement supercede "any and all prior agreements, resolutions, practices, rules or regulations concerning salary, hours, and other terms and conditions of employment inconsistent with these provisions." Absent specific language in the collective bargaining agreement allowing the employer to make a unilateral change, a waiver clause does not allow an employer to make unilateral changes without bargaining. Thus, for example, in a case cited by the district, *Columbus and Southern Ohio Electric Co.* (1984), 270 NLRB 686, ***aff'd sub nom*** *International Brotherhood of Electrical Workers Local 1466, AFL-CIO v. NLRB* (D.C. Cir. 1986), 795 F.2d 150, the NLRB held that it was not an unfair labor practice for the employer to eliminate, without bargaining, a Christmas bonus when the parties had included the following waiver clause in the agreement:

> It is the intent of the parties that the provisions of this agreement will supersede all prior agreements and understandings, oral or written, express or implied, between such parties and shall govern their entire relationship and shall be the sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise.
> The Union for the life of this Agreement hereby waives any rights to request to negotiate, or to negotiate or to bargain with respect to any matters contained in this Agreement.

270 NLRB at 688. In holding that the agreement allowed the employer to eliminate the Christmas bonus without bargaining, the NLRB relied chiefly on the first sentence of the waiver clause, the integration clause. It also considered the bargaining history which evidenced a clear intent on the part of the employer, which had proposed the waiver language, to eliminate **all** past practices. ***See also*** *TCI of New York, Inc.* (1991), 301 NLRB 822.

The association argued strenuously that the district had a longstanding practice of not involuntarily reassigning teachers, which could not be unilaterally changed without bargaining. The district contended, based on the integration clause, that the alleged past practice had been eliminated. However, the question of whether there was a "past practice" is ultimately irrelevant to the unfair labor practice charge. The issue in the case is whether the district could change terms and conditions of employment without bargaining, and the assignment of current employees is a term or condition of employment, as discussed *supra*. Unless a specific provision of the collective bargaining agreement authorized a unilateral change in terms or conditions of employment, the integration clause is irrelevant to the analysis.

In this case, there is no evidence of bargaining history and no other language in the agreement that would support the right of the district to make a unilateral change. Although the district points again to the management rights clause as support for its waiver argument, the NLRB has consistently rejected management rights clauses that are couched in general terms and make no reference to any particular subject area as waivers of statutory bargaining rights. *Smurfit-Stone Container Corp.*, 2003 NLRB LEXIS 557, at 23-25; *Michigan Bell Telephone Co.* (1992), 306 NLRB 281. Thus, the management rights clause does not authorize the district to make unilateral changes in conditions of employment without collective bargaining.

Finally, the agreement contains a "zipper" clause that provides, "This Agreement may be opened for re-negotiation, prior to the expiration date, with and only with the mutual agreement in writing of the Board and the BEA." The effect of the zipper clause in this case is to protect employees from unilateral changes in working conditions. By agreeing that one party cannot force another party to bargain, the parties have agreed to maintenance of the *status quo*. Neither party may change the contract or working conditions without first bargaining. Since neither party is obligated to bargain, neither party can change the contract or working conditions. The zipper clause in this case precludes the district from implementing new terms or conditions of employment, in the absence of assent by the association. In other words, an agreement that neither party is obligated to bargain is a double-edged sword. It applies to both parties and because neither can be forced to bargain, neither can force the other to accept a change in the *status quo*. ***See,*** *The Mead Corporation* (1995), 318 NLRB 201; ULP No. 17-98 (1999), *Frenchtown Education Association v. Frenchtown Public Schools*. For additional discussion of these principles, ***see***, *Michigan Bell Telephone Co.* (1992), 306 NLRB 281.

In this case, the district rejected the request of the association to bargain the issue of the reassignments and made unilateral changes in conditions of employment.

The association did not waive its right to bargain, by any language in the collective bargaining agreement or otherwise.

4. Effect of Bargaining for a Successor Agreement

The district also points to its willingness to bargain over the issue of involuntary assignments in the negotiations for the 2004-2007 collective bargaining agreement in support of its position that it did not fail to bargain in good faith. This argument misses the point. The unilateral change in working conditions is the asserted unfair labor practice in this case. The district made the unilateral change in working conditions independent of any negotiations for a successor agreement. It did not address during bargaining the involuntary reassignments announced by Ardiana on April 7, 2004, except to the extent that it changed Karl's assignment in response to her grievance.

5. Conclusion

Applying the principles discussed in this section to the facts of this case results in a determination that the district made a unilateral change in a mandatory subject of bargaining, the assignment of its teachers, and thereby committed an unfair labor practice. The change was inherently destructive of the policy of the Collective Bargaining Act set forth in Mont. Code Ann. § 39-31-101, which is to remove sources of strife and unrest in public sector employment relations by encouraging collective bargaining. The district's action in unilaterally changing teacher assignments constituted an unfair labor practice.

B. Mootness

The district contends that the unfair labor charge is moot based on the fact that the parties have negotiated a successor agreement to the 2002-2004 agreement. Citing *Shamrock Motors, Inc. v. Ford Motor Co.*, 1999 MT 21, 293 Mont. 188, 974 P.2d 1150, the district asserts that the Board is unable to afford the relief sought because the parties have, since the filing of the charge: a) negotiated staffing assignments for the current school year, b) started the current school year with assignments agreed to by both the association members and the district, c) paid and received consideration for staffing assignments for the current school year, and d) acknowledged there are no violations of the 2004-2007 collective bargaining agreement.

With the possible exception of whether consideration has been paid and received for the current year staffing assignments, no credible evidence supports the

district's factual assertions on this point. Although the evidence supports a finding that the district and the association negotiated a successor agreement, there is no evidence they negotiated assignments. In the negotiations for the successor agreement, the association proposed language on involuntary transfers, but the district rejected the language. There is no evidence the association members agreed to the assignments. The district infers acknowledgment that there are no violations of the 2004-2007 agreement from the failure to file grievances. But this hardly constitutes an acknowledgment. Even if it did, the issue in the unfair labor practice charge is whether the district violated the statutory prohibition against refusing to bargain in good faith. Whether the district violated the collective bargaining agreement is irrelevant.

Even if the district had established these contentions as facts, they do not establish that the charge is moot. In the *Shamrock Motors* case, the petitioner sought judicial review of a decision holding that Ford Motor Company had properly terminated its franchise. During the pendency of the appeal, the petitioner sold the franchise to a third party. Because the petitioner was no longer a franchisee, the question of whether the franchise was properly terminated was moot.

In this case, the complainant seeks a return to *status quo ante* and an order to bargain about the assignments, among other things. This relief is not affected in any way by the negotiation of a successor agreement and is clearly available in this case. The facts are in no way analogous to those in the *Shamrock Motors* case. The charge is not moot.

C. Judicial Estoppel

The district also contends that the association should be judicially estopped from pursuing the unfair labor practice charge, based on an asserted concession by representatives of the association in a grievance hearing that the district had a unilateral right to reassign teachers.

The evidence establishes that the association filed a grievance concerning one of the reassignments at issue in this case, that of Julie Foley, who was also the president of the association. The grievance asserted that the reassignment violated the collective bargaining agreement. In the grievance hearing before the school board, Foley made a purported concession that the district had the right to assign teachers.

> A party claiming that judicial estoppel bars another party from re-litigating an issue must show that: (1) the estopped party had knowledge of the facts at the time he or she took the original position;

(2) the estopped party succeeded in maintaining the original position; (3) the position presently taken is inconsistent with the original position; and (4) the original position misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party.

Kauffman-Harmon v. Kauffman, 2001 MT 238, ¶17, 307 Mont. 45, 51, 36 P.3d 408, 412.

The district has failed to establish the elements of judicial estoppel in this case. The purported concession made by Foley, which the district has taken entirely out of context, was not the association's original position; the original position was that the reassignment violated the collective bargaining agreement. Further, the association did not succeed in its original position; the district denied the grievance. The position taken in the grievance is consistent with the position in this proceeding. Finally, even if the purported concession did represent the association's original position, there is no evidence that the district was misled or somehow detrimentally relied on the position. The district did not change its position at all. The association is not judicially estopped from pursuing this unfair labor practice charge.

D. Remedy

Mont. Code Ann. § 39-31-406(4) provides that when the Board finds that 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 district's failure to bargain in good faith is an injunction against making unilateral changes in terms and conditions of employment, a return to the *status quo ante*, an order to bargain should the district seek additional reassignments, and a posting requirement.

A return to the *status quo ante* requires that the district immediately assign the four teachers who are the subject of this case to the assignments they had in the 2003-2004 school year and to bargain with the association if the district seeks to change their assignments.

In its request for relief, the association also requested an order requiring the district to reimburse employees for any lost pay and benefits resulting from the unfair labor practice. There is no evidence that any employee lost pay or benefits as a result of the reassignments. However, individual employees of the district are entitled to have any leave used to participate in the hearing of this matter reinstated.

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). 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. For purposes of Mont. Code Ann. § 39-31-401(5), the assignments of incumbent employees are conditions of employment, and constitute a mandatory subject of bargaining. A public employer cannot unilaterally change the assignments of incumbent employees without bargaining with the exclusive representative of those employees.

4. Neither Mont. Code Ann. § 39-31-303 nor the management rights clause of collective bargaining agreement between the parties gave Bonner School District No. 14 the right to unilaterally and involuntarily reassign incumbent members of its teaching staff without bargaining.

5. By unilaterally and involuntarily reassigning incumbent members of its teaching staff without bargaining, the Bonner School District No. 14 violated Mont. Code Ann. § 39-31-401(1) and (5).[5]

6. The Bonner Education Association did not waive its right to bargain the issue of assignments of its members.

7. The Bonner Education Association's charge is not moot.

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[5]The district contended it had done nothing to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201." However, as noted *supra*, a violation of Mont. Code Ann. § 39-31-401(5) is also considered a "derivative" violation of Mont. Code Ann. § 39-31-401(1). The complainant has made no contention suggesting an independent violation of Mont. Code Ann. § 39-31-401(1) (as opposed to a derivative violation) occurred in this case.

8. The Bonner Education Association is not judicially estopped from pursuing its charge.

9. As a result of the unfair labor practice committed by the Bonner School District No. 14, the Bonner Education Association is entitled to cease and desist orders, a return to the *status quo ante*, an order to make the members of the Bonner Education Association whole for their losses resulting from the unfair labor practice by reinstating any leave used to participate in the hearing of this matter, and an order to post and publish the notice set forth in Appendix A.

VI. **RECOMMENDED ORDER**

Bonner School District No. 14 is hereby **ORDERED**:

1. To immediately cease the practice of unilaterally altering terms and conditions of employment without bargaining with the Bonner Education Association, and in particular to cease the practice of unilaterally and involuntarily reassigning incumbent employees; and

2. Within 30 days of this order:

a. To return Mary Ann Strothman, Erin Roberts, Julie Hasler Foley, and Jilyn Chandler to the positions they held during the 2003-2004 school year;

b. To bargain with the Bonner Education Association about any future involuntary reassignments of incumbent members of the district's teaching staff;

c. To reinstate all leave taken by members of the Bonner Education Association to participate in these proceedings;

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

DATED this 11th day of May, 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 June 3, 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

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 Bonner School District No. 14 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 Bonner Education Association, MEA/MFT;

We will not unilaterally change the terms and conditions of employment of employees covered by the collective bargaining agreement with Bonner Education Association MEA/MFT;

We will return Mary Ann Strothman, Erin Roberts, Julie Hasler Foley, and Jilyn Chandler to the positions they held during the 2003-2004 school year;

We will bargain with the Bonner Education Association, MEA/MFT, about any future involuntary reassignments of incumbent members of the district's teaching staff;

We will reinstate all leave taken by members of the Bonner Education Association, MEA/MFT to participate in the hearing of ULP Case No. 32-2004.

DATED this _____ day of June, 2005.

BONNER SCHOOL DISTRICT NO. 14

By:_____