

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 11-2005:

ELDER GROVE EDUCATION)	Case No. 395-2005
ASSOCIATION, MEA-MFT, NEA,)	
AFT, AFL-CIO,)	
)	
Complainant,)	
)	
vs.)	
)	
ELDER GROVE ELEMENTARY)	
SCHOOL DISTRICT NO. 8,)	
)	
Defendant.)	

* * * * *
**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
RECOMMENDED ORDER**
* * * * *

I. INTRODUCTION

On August 19, 2004, the Elder Grove Education Association, MEA/MFT, filed a charge with the Board alleging that the Elder Grove Elementary School District No. 8 had committed an unfair labor practice by implementing unilateral changes to the status quo of working conditions prior to the conclusion of bargaining. On September 17, 2004, the district filed a response to the charge denying that its actions constituted an unfair labor practice.

On November 5, 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 March 15, 2005. Richard Larson represented the association. Tony C. Koenig represented the district. Vicky Hayes, Lori Frank, Tammy Grothe, Karen Laborda,

Tammy Robertus, Mona Stevens, and Ron Bender testified. Exhibits 1 - 7, A, B, and C were admitted by stipulation of the parties.

The parties filed post-hearing briefs on June 17, 2005. At that time, the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether the Elder Grove Elementary School District No. 8 committed unfair labor practices in violation of Mont. Code Ann. § 39-31-401, as alleged in the complaint filed by the Elder Grove Education Association, MEA/MFT.

III. MOTION FOR SUMMARY JUDGMENT

On February 14, 2005, the district filed a motion for summary judgment and a brief in support of its motion. The association filed a reply brief in opposition to the motion on February 23, 2004. The district filed a response brief on March 7, 2005. The parties presented oral argument on the motion for summary judgment at the final pre-hearing conference on March 10, 2005.

The hearing officer orally denied the motion for summary judgment at the pre-hearing conference, setting forth the reasons for the ruling. In view of the decision in this case in favor of the district, a separate written ruling on the motion is unnecessary.

IV. FINDINGS OF FACT

1. Elder Grove Education Association, MEA-MFT, is a “labor organization” within the meaning of Mont. Code Ann. § 39-31-103(6), and is the certified exclusive bargaining representative for the certified staff employed by the Elder Grove Elementary School District No. 8.

2. Elder Grove Elementary School District No. 8 is a “public employer” within the meaning of Mont. Code Ann. § 39-31-103(10).

3. The association and the district were parties to a series of collective bargaining agreements. They had a one-year agreement for the 2002-03 school year, and executed a one-year agreement for 2003-04 in August 2003.

4. Elder Grove teachers had a duty-free lunch period prior to the 2003-04 school year. The association did not agree to any change in that employment condition in any collective bargaining agreement.

5. On May 27, 2003, the districts's Board of Trustees resolved to institute a policy of having teachers do playground duty during the lunch hour of the 2003-04 school year. The decision was part of an overall change in the manner that the school would approach the lunch break for students. But because the district was experiencing budgetary problems, the proposal anticipated having teachers, instead of an aide, supervise students during the recess that would precede the lunch.

6. Although the subject of lunch hour playground duty had been the subject of discussion and speculation among the teachers and by the superintendent prior to the May 27, 2003 board meeting, the district had not notified the association of the proposed change or bargained concerning it.

7. Tammy Robertus, a member of the bargaining unit, was present at the May 27, 2003 board meeting, and informed the board "that she felt the action constituted a unilateral change in working conditions and could possibly result in a demand to bargain over the impact of that unilateral change."

8. In response to the statement made by Robertus, the board chair, Mona Stevens, stated that the teachers could put together a proposal and work with the superintendent to solve the recess problem.

9. The district implemented lunch recess duty assignments for teachers at the outset of the 2003-04 school year. In late August of 2003, all members in the bargaining unit were formally notified of the district's intent to assign teachers to playground duty during the teachers' lunch break.

10. Members of the bargaining unit began performing lunchtime playground duty at the beginning of the 2003-04 school year in August of 2003.

11. On or about October 8, 2003, the president of the association informed the board in writing that:

The Elder Grove Education Association agrees to provide this service for the 2003-2004 school year only. At the end of this time period should the district wish to continue this, the School Board must bring the issue before the Elder Grove Education Association.

12. The district neither responded to the October 8, 2003 letter, agreed in any fashion to the restrictions stated in the letter, nor agreed not to require teachers to perform playground duties beyond the 2003-2004 school year.

13. In March of 2004, the district informed the association of its intent to continue to require teachers to perform lunchtime playground duties during the 2004-05 school year.

14. On March 17, 2004, the association made a written demand to bargain over the impact of the district's decision to require teachers to perform lunchtime playground duty.

15. The association requested that the bargaining on the lunch duty issue proceed separately from the bargaining on the master collective bargaining agreement. The district acceded to this request.

16. The parties met multiple times and negotiated with respect to lunch recess duty for the 2004-05 school year beginning in the last week of March, 2004. They were unable to reach agreement.

17. On August 3, 2004, the association submitted a written proposal by which the teachers would agree to continue to perform lunchtime playground duty in exchange for a \$1,000.00 raise for each member of the bargaining unit. The board responded in writing on August 11, 2004, declining to accept the association's proposal, but also indicating that "the Board has been and remains more than willing to continue to negotiate. . ." and that "we remain willing to meet and bargain in good faith . . . please notify us if you wish to do so."

18. On August 19, 2004, the association filed its unfair labor practice charge, alleging that the district willfully modified "the status quo of working conditions prior to the conclusion of bargaining over impact of unilateral changes in said working conditions."

19. The district has required teachers to perform lunch recess duty during the 2004-05 school year.

20. The parties concluded negotiations for a two-year collective bargaining agreement for the 2005-06 school year about one month before the hearing, or in mid-February 2005. Because the bargaining concerning lunch duty had been conducted separately, the agreement did not address the issue.

V. DISCUSSION¹

The association contends that by implementing lunch recess duty for the 2004-05 school year without obtaining the association's agreement or bargaining to impasse, the district unilaterally modified the status quo of working conditions, contrary to Mont. Code Ann. §§ 39-31-305(1) and (2) and 39-31-401(5).

The district denies modifying the status quo of working conditions during the course of negotiations, or otherwise committing an unfair labor practice under Mont. Code Ann. § 39-31-401.

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). 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.

¹Statements 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.

The district contends it had no obligation to bargain over lunch period duty assignments, citing the management rights provisions of the collective bargaining agreement and Mont. Code Ann. § 39-31-303. However, the proposition that breaks and assignments are conditions of employment is not open to serious debate. They are therefore mandatory subjects 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.”

Nearly all conditions of employment implicate one or more of the management rights listed in Mont. Code Ann. § 39-31-303. To adopt the district’s interpretation of the management rights provision of the collective bargaining law would vitiate the requirement of the statute that public employers bargain in good faith. 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.” *Florence-Carlton Unit v. Board of Trustees of School District No. 15-6* (1979), ULP 5-77, hearing officer’s recommended order dated December 13, 1978,² at 6, *citing* *National Education Association of Shawnee Mission v. Board of Education* (1973), 212 Kan. 741, 512 P.2d 426, *superseded 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. The ability to have a duty-free lunch period has a significant impact on the well-being of the teachers in the district. The district was therefore obligated to bargain the issue.

By instituting a policy of requiring teachers to supervise students during the lunch hour, the district made a unilateral change in a condition of employment of its teachers. However, the district adopted this change in May 2003 and implemented it in August 2003. The association did not file an unfair labor practice charge concerning that change, and the question of whether it was an unfair labor practice charge is not before the Board. Indeed, the law requires that an unfair labor practice charge be filed within 6 months of the date of the alleged violation. Mont. Code Ann. § 39-31-404. The association filed this charge on August 19, 2004, and the Board is therefore precluded from considering whether the district’s actions in 2003 constituted unfair labor practices.

²The Board adopted the recommended order as its final order on June 11, 1979.

The association's charge contends that the district committed an unfair labor practice by continuing the requirement that the teacher perform lunch duty into the 2004-05 school year. But the district made no change in the terms and conditions of employment from those that existed in the 2003-04 year. In the absence of a unilateral change, there is no unfair labor practice under these facts.

The association contends that the October 8, 2003, letter to the district somehow reserved the rights of the association to a return to the previous working conditions after the 2003-04 school year. The association cited no authority to support this contention, and the hearing officer was unable to identify any authority on this question. The most that can be said for the letter is that it constitutes a demand to bargain on the issue for future years. When the association requested bargaining on the subject in March 2004, the district engaged in that bargaining. However, the obligation to bargain does not compel either party to agree to a proposal or require the making of a concession. *Barry-Wehmiller Co.* (1984), 271 NLRB 471, 472. The association has failed to establish that the district committed an unfair labor practice in this case.

The parties have also raised issues concerning whether the association waived its right to bargain over the change or the impact of the change, and whether the district can be estopped from raising the waiver issue. To the extent that the question of waiver relates to the change made in 2003, that question is not before the Board. To the extent that it relates to the obligation to bargain for the 2004-05 school year, it is clear that the association did not waive its right to bargain for the 2004-05 school year. The association asserted that right, and the district acceded to it. As noted above, however, the fact that the district was obligated to bargain does not mean it was obligated to accept the association's proposal on the issue.

VI. 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. The issue of lunch recess duty for teachers is a condition of employment about which an employer is required to bargain with the teachers' exclusive bargaining representative.

4. The question of whether Elder Grove Elementary School District No. 8 committed an unfair labor practice by unilaterally imposing a requirement for lunch recess duty in 2003 is not before the Board in this case.

5. Elder Grove Elementary School District No. 8 made no change in the requirement for lunch recess duty in 2004. It therefore did not commit an unfair labor practice in violation of Mont. Code Ann. 39-31-401.

VII. RECOMMENDED ORDER

The unfair labor practice charge is hereby dismissed.

DATED this 8th day of July, 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 August 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