STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 38-2005:

WIBAUX EDUCATION ASSOCIATION, MEA-MFT, NEA, AFT, AFL-CIO,	)	Case No. 2180-2005
Complainant,	)	**ON REMAND: REVISED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER**
vs.	)	
WIBAUX BOARD OF TRUSTEES, K12 SCHOOLS, DISTRICT NO. 6,	)	
Defendant.	)	

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I. INTRODUCTION

On April 25, 2005, the Wibaux Education Association, MEA-MFT, NEA, AFT, AFL-CIO, filed an unfair labor charge asserting that the Wibaux Board of Trustees, K-12 Schools, District No. 6, violated Mont. Code Ann. §§ 39-31-305(1) and 39-31-401(5) by unilaterally deciding, without bargaining, to reduce staff by one certified position and adopting criteria for the reduction in force. The district denied any unfair labor practice. On July 7, 2005, the Board of Personnel Appeals (BOPA), acting through its investigator, completed investigation, found probable merit, and referred the case to the Hearings Bureau for a hearing.

Hearing Officer Terry Spear set a schedule in this contested case proceeding. Richard Larson, Harlen, Chronister, Parish & Larson, P.C., represented the association. Tony C. Koenig, counsel for the Montana School Boards Association, represented the district. The district filed a motion for summary judgment and objections to some of the association's contentions. After fully briefing the motion and objections, the parties, through counsel, agreed to submit the case for adjudication based upon stipulated facts and exhibits and the briefing already presented. On November 14, 2005, the parties jointly filed their "Statement of Agreed Facts and Exhibits" and submitted the case for a proposed decision.

On January 7, 2006, the Hearing Officer issued a proposed decision herein. The district filed exceptions to the proposed decision. On September 22, 2006, the Board heard the exceptions and, noting the district court's recent decision in *Bonner Ed. Assoc. v. Bonner S. D.* (8/21/06), ADV-2005-719, First Judicial District (currently on appeal to the Montana Supreme Court), remanded for the Hearing Officer to reconsider the proposed decision in light of *Bonner*

on October 3, 2006. The parties briefed and submitted the issue for a further proposed decision. The Hearing Officer now concludes that *Bonner* is not applicable to this case, for the reasons stated in the beginning of the "Discussion" herein, and issues this decision unchanged except in this introductory paragraph, in the "REMAND ISSUE" portion of "II. Issue" and in the "REMAND DISCUSSION" portion of "IV. Discussion" (with changes in the date of issuance, the date of appeal and the date in Appendix A).

II. ISSUE

REMAND ISSUE: Is the district court decision in *Bonner* binding upon the Board in this case, and, if so, does it apply to change the result in this case?

ORIGINAL ISSUES: Did the board violate a duty to bargain in good faith with the association regarding a reduction in force procedure when it unilaterally decided, without bargaining, to reduce certified staff by one position and to adopt criteria for that reduction in force, and thereby commit an unfair labor practice, in violation of Mont. Code Ann. § 39-31-401? If so, what relief is appropriate, in the circumstance where the board proceeded to apply its decision and criteria and discharge a member of the bargaining unit while this ULP complaint was in investigation?

III. FINDINGS OF FACT

1. The Wibaux Board of Trustees, K-12 Schools, District No. 6, is a "public employer" as defined in Mont. Code Ann. § 39-31-103(10).

2. The Wibaux Education Association is a "labor organization" as defined in Mont. Code Ann. § 39-31-103(6).

3. The district and the association entered into a Collective Bargaining Agreement (the CBA), which was in effect from July 1, 2003 through June 30, 2005.

4. On September 11, 2001, the district adopted District Policy No. 5256, regarding reduction in force (RIF) decisions. The policy stated that the district's board of trustees "has the exclusive authority to determine the appropriate number of employees." It stated that reduction of force of certified employees "may occur as a result of, but not limited to, changes in the education program, staff realignment, changes in the size or nature of the student population, financial situation considerations, or other reasons deemed relevant by the Board" (emphasis added). The policy stated that the district will "follow the procedure in the current collective bargaining agreement" in considering a reduction in force and notes that if "normal attrition does not meet the necessary reduction in force required, the Board may terminate certified employees." Finally, the policy stated that the district's board of trustees "shall consider performance evaluations, staff needs and other reasons deemed relevant by the Board in order to determine the order of dismissal if it reduces classified staff . . . ." Exhibit 2.

5. The CBA, p. 1, "Article I–Recognition," provided, in Section 1.1:

> The Board hereby recognizes the Association as the exclusive and sole representative for collective bargaining concerning wages, hours, fringe benefits, and other conditions of employment as provided by law and will meet and confer on such other matters as the parties deem appropriate.

Exhibit 1.

6. The CBA, p. 1, "Article III–Board Rights," provided:

> The Association recognizes that the Board has the responsibility and authority to manage and direct, on behalf of the public, all the operations and activities of the school district to the full extent authorized by law. The Association further recognizes that all management rights, functions, and prerogatives, not expressly delegated by this agreement, are reserved to the school district.

Exhibit 1.

7. The CBA contained no RIF procedure. The CBA contained no references to RIF decisions.

8. At a meeting of the district's board of trustees on January 11, 2005, District Superintendent Kirby Eisenhauer discussed with the board several circumstances which could result in the district needing to reduce staff in the future. Declining enrollment, insufficient budget growth and failure to pass mill levies could all create such a need. Exhibit 3, p. 3, Item 7.

9. At a district board meeting on February 8, 2005, Eisenhauer reported that reducing the budget (as might be required by the financial situation) by $50,000.00 would, with projected increases in expenditures, "require the district to cut about $110,000.00." He then reported that he had been working on various scenarios to reduce the budget and would present them at the March board meeting. Budget cuts could lead to a reduction in force (RIF) and Eisenhauer discussed the importance of recognizing and respecting teacher rights granted through tenure. He told the board that he would be researching possible criteria to identify positions that could be eliminated and that he had discussed the possibility of a RIF with certified staff. Exhibit 4, pp. 2-3, Item 9.

10. Eisenhauer had discussed the possibility of a RIF in meetings with association members held on January 13, January 20, and February 2, 2005.

11. On February 14, 2005, Eisenhauer sent a memo to association president Linda Rogers, telling her that the board had directed him to identify areas where budget cuts might be

made. He told her that he "would like to seek input from the certified staff" and that he would like to meet with her to discuss the matter. Exhibit 5.

12. On February 17, 2005, Maggie Copeland, the MEA-MFT East Office Field Consultant, responded on behalf of the association to Eisenhauer's memo. Copeland made a written "demand to bargain over a Reduction in Force procedure." She specified that this was a "demand over the District's recently announced intent to reduce the teaching force." The balance of the letter asked for information the association needed for upcoming bargaining on the CBA. Exhibit 6.

13. On March 18, 2005, association Negotiations Chair Heidi Petermann, in a memo regarding negotiations over the CBA, acknowledged that "The District has informed the WEA of their intent to RIF, so we assume a proposal will be presented on this issue." Exhibit 7.

14. The district declined to bargain over RIF procedures.

15. At a special meeting held April 8, 2005, the board voted unanimously to reduce certified staff by 1 full time employee.

16. At a meeting held April 12, 2005, the board voted unanimously to adopt a process for implementing a reduction in force by which a "teacher who holds a Montana teaching certificate with multiple endorsements would bump a teacher who holds a certificate with a single endorsement where appropriate."

17. Superintendent Eisenhauer recommended the termination of Linda Rogers, a tenured teacher, in a letter to the board dated April 22, 2005.

18. On April 25, 2005, the association filed its Unfair Labor Practice (ULP) charge against the district, alleging district failure to bargain over a mandatory subject of bargaining, on the basis of the February 17, 2005, letter (Exhibit 6, ***cf.*** Finding 11, ***supra***), and identifying the subject of the demand to bargain as "any proposed Reduction in Force." The association requested that the district "be ordered to cease and desist in the implementation of" both "a reduction of force" and "Reduction of Force criteria" and "be ordered to begin bargaining [with the association] over" both "conditions under which a Reduction of Force may be initiated" and "criteria to be used in the event of a Reduction in Force." The association also requested that the Board of Personnel Appeals reinstate any members of the bargaining unit subjected to a RIF termination under the district's unilaterally adopted RIF criteria, with fringe benefits and lost wages with interest.

19. On April 28, 2005, BOPA's investigator served (by mail) the district with a copy of the ULP, giving notice that the district's response to the charges was due within 10 days after receipt of the charges.

20. On May 11, 2005, the district filed an initial response with BOPA, taking the position it had power unilaterally to decide to RIF certified staff, to adopt procedures to select what certified staff to RIF, to implement those procedures and to effectuate the RIF.

21. On May 24, 2005, the association filed a letter (dated May 21, 2005) responding to "statements made" in the district's initial response, alleging that because the current CBA contained no provisions regarding any RIF of certified staff and the existing district policy required the district "to follow the procedure stated in the current collection bargaining agreement when considering a reduction in force," the district was required to bargain with the association under the "other conditions of employment" language in Article I of the CBA before adopting RIF criteria applicable to teachers within the bargaining unit.

22. On May 27, 2005, the district's board of trustees voted to accept Superintendent Eisenhauer's recommendation. Eisenhauer advised Rogers of her termination in a letter to her dated May 27, 2005.

23. On June 2, 2005, the district filed its response to the association's filing of May 24, 2005, requesting that the filing be struck from the file for failure to follow the proper procedure. On June 10, current counsel for the district appeared on its behalf.

24. On June 17, 2005, the association responded to the request that its previous filing be struck from the file, arguing that no rule or statute prohibited the filing and that no rule or statute empowered BOPA's investigator to "strike from the record" any correspondence received during the course of investigation.

25. On June 22, 2005, the district, through its current counsel, confirmed withdrawal of the request to strike the association's May 24, 2005, filing, and argued that because the CBA had no provisions relating to RIFs, the district had no duty to bargain about RIF procedures for certified staff because Article III of the CBA recognized the management rights of the district's board of trustees, which, by statute, included the power to hire and fire.

26. The investigator's report and determination issued on July 7, 2005, after which the district timely filed an answer on July 14, 2005.

IV. DISCUSSION[1]

REMAND DISCUSSION

The Board remanded the proposed decision in this matter "for reconsideration in light of the decision in the case of [*Bonner*]." The first point of reconsideration is whether the district

[1]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.

court decision in *Bonner* is binding upon the Board in this case. It is not. *State v. Dietz* (1959), 135 Mont. 496, 343 P.2d 539, 541 (emphasis added):

> *Stare decisis* is a Latin phrase. It is the principle that the decisions of this court should stand as precedents for future guidance. It means to stand by decided cases; to uphold precedents; to maintain former adjudications. *In law, it means that when the highest appellate court of the jurisdiction has once laid down a principle applicable to a particular given state of facts, it will adhere to that principle and apply it to all future cases, irrespective of whether the parties and property are the same.*

Judge McCarter's decision in *Bonner* was that the language of statutes and the language of the Bonner management rights clause in that CBA together meant that the district was not required to bargain over teacher transfers. That decision controls that case unless and until the Montana Supreme Court modifies it. That decision is not itself binding precedent, because it is not a decision of highest appellate court of the jurisdiction.

On the pending appeal, if the Montana Supreme Court broadens the decision and holds that Mont. Code Ann. § 39-31-303 plus a general management rights clause reserves exclusively to school district discretion any and all decisions involving any aspect of hiring, promotion, transfer, assignment and retention of employees eliminating any duty of the district to bargain on such matters, that would be binding precedent. Currently, there is no such binding precedent to apply to the present case.

The second point of reconsideration is whether the reasoning of *Bonner* is so persuasive that it seems clear that the Montana Supreme Court must not only affirm the district court but also broadly apply *Bonner* to the present one. It is not, for the reasons stated, in the union's briefs.

Even if *Bonner* is affirmed as written, the facts are distinguishable from this case. Here, unlike *Bonner*, the Hearing Officer's proposed decision does not hold that the school district committed an unfair labor practice in making a decision about retention without bargaining. Instead, the Hearing Officer's proposed decision holds that having made that unilateral decision, which is unobjectionable in this case, the district had to bargain about the procedure by which to select which employee to RIF. Taking away a teacher's job is far more serious than transferring a teacher. The union's right to bargain about the process by which to pick which teacher will lose a job is further removed from management rights under the statute than the union's right to bargain over whether there will be a reduction in force (or whether there will be teacher transfers, as in *Bonner*).

Therefore, the Hearing Officer concludes that although any final appellate decision in *Bonner* will be binding precedent if and when applicable, the current district court decision in *Bonner* is not binding on the Board except in *Bonner* itself, on the issues that final appellate decision addresses. Further, the Hearing Officer concludes that the current district court

decision in *Bonner* is not applicable to this case. Therefore, the original decision, including the original discussion (after this remand discussion) is retained and resubmitted to the Board, for its consideration.

ORIGINAL DISCUSSION

A. Under the Montana Public Employees Collective Bargaining Act, a Fiscally Motivated Decision to RIF a Teacher Was Not the Subject of Mandatory Collective Bargaining and Was Waived by Inaction.

Because of the similarity between the National Labor Relations Act (NLRA) and Montana's public employees' collective bargaining law, federal administrative and judicial construction of the NLRA is instructive and often persuasive regarding the meaning of Montana's labor relations law. ***E.g.***, *Great Falls v. Young* (1984) (*Young III*), 211 Mont. 13, 686 P.2d 185; *State ex rel. B.P.A. v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117. The Montana Supreme Court looks to the construction placed on the National Labor Relations Act (NLRA) by the federal courts as an aid in interpretation of the Montana Public Employees Collective Bargaining Act. *Small v. McRae* (1982), 200 Mont. 497, 651 P.2d 982; ***followed in*** *Brinkman v. State* (1986), 224 Mont. 238, 729 P.2d 1301.

Lay offs (including RIFs) and lay off procedures can be subjects of mandatory bargaining under the NLRA, because loss of employment impacts "other conditions of employment" under Section 9(a) of the Act. *Odebrecht Contractors of Calif., Inc.* (1997), 324 N.L.R.B. 396, 397; ***see also***, *Falcon Wheel Division L.L.C.* (2002), 338 N.L.R.B. 576.[2] Under the Montana Public Employees Collective Bargaining Act, the same analysis might apply to decisions about both lay offs (including RIFs) and adoption of lay off procedures, for public employees having collective bargaining exclusive representatives, absent Montana authority addressing the question.

The Montana Public Employees Collective Bargaining Act makes it an unfair labor practice for a public employer, such as the district, to refuse to bargain collectively in good faith with an exclusive representative, such as the association. Mont. Code Ann. § 39-31-401(5). The duty to bargain collectively extends to meeting at reasonable times and negotiating in good faith with respect to "wages . . . and other conditions of employment or the negotiation of an agreement or any question arising thereunder." Mont. Code Ann. § 39-31-305(2), incorporated into the duty to bargain collectively by Mont. Code Ann. § 39-31-305(1).

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[2] *Falcon Wheel* ***at*** 576, ***quoting*** *Odebrecht Contractors*: "It is well established that 'a layoff of employees effects a material, substantial, and significant change in the affected employees' working conditions,'" ***citing*** *NLRB v. Katz* (1962), 369 U.S. 736, 747; *Ladies Garm.Wrkrs Loc. 512 v. NLRB* (9th Cir. 1986), 795 F.2d 705, 710-711; *Rangaire Co.* (1992), 309 NLRB 1043, 1047; ***and quoting*** *NLRB v. Advertisers Mfg. Co.*, (7th Cir. 1987) 823 F.2d 1086, 1090 ("Laying off workers works a dramatic change in their working conditions (to say the least). . . .").

On its face, continued employment of an employee is a condition of employment, which therefore would be a mandatory subject of bargaining for purposes of Mont. Code Ann. § 39-31-305(2). 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: (2) hire, promote, transfer, assign, and retain employees; (3) relieve employees from duties because of lack of . . . funds . . . .

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

Montana law also provides that the trustees of each district "shall (1) employ or dismiss a teacher, principal, or other assistant upon the recommendation of the district superintendent, the county high school principal, or other principal as the board considers necessary, accepting or rejecting any recommendation as the trustees in their sole discretion determine, in accordance with the provisions of Title 20, chapter 4 . . . ." Mont. Code Ann. § 20-3-324(1) (emphasis added).

These management rights statutes flow from Art. X, Sec. 8, Mont. Con. 1972:

> The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.

Federal decisions are of limited value in addressing this question because the National Labor Relations Act does not have comparable statutory management rights language. Other states have split on whether lay offs of teachers and other public employees for fiscal reasons are properly subjects of mandatory bargaining, depending on the relative weight each jurisdiction's law gives to school board discretion versus commitment to collective bargaining for public employees. ***See*** 9 A.L.R.4th 20, "What Constitutes Unfair Labor Practice under State Public Employee Relations Acts" (Sheafer), §7; 84 A.L.R.3d 242, "Bargainable or Negotiable Issues in State Public Employment Labor Relations" (Tussey), §20.

The Montana Supreme Court previously determined that the selection of teachers and the "concomitant right of nonrenewal" is "exclusively the province of the school boards." *Wibaux Ed. Assoc. v. Wibaux County High School.* (1978), 175 Mont. 331, 573 P.2d 1162, 1165. The Court concluded, under the then applicable law, that "the legislature had given school boards the exclusive right to hire and terminate teachers." ***Id. at*** 1164. Based upon this decision, the Montana Attorney General later issued an opinion that a school board could not delegate its power to hire and fire principals to its superintendent. 37 Op. Atty Gen. Mont. 560 (1978), Opinion 133.

A similar issue resurfaced in *Savage Public Schools v. Savage Ed. A.* (1982), 199 Mont. 39, 647 P.2d 833, 833-34. However, the Montana Supreme Court noted, "Because the question is not properly before us, we do not address the other issue raised by appellants: Whether a school

district may agree to arbitrate the substantive basis of nonrenewal of a nontenured teacher." The Court held that the district could agree to procedures necessary before nonrenewal of a nontenured teacher and that with a CBA clause that applied arbitration to disputes about compliance with the CBA, refusal by the district to arbitrate whether it followed the specific contractual procedures to terminate a nontenured teacher (by not rehiring the teacher for another year) was an unfair labor practice. *Savage* (1982) ***at*** 833-34. Following remand of *Savage* (1982), the arbitrator ordered reinstatement of the teacher as the remedy for failure to follow the agreed procedures, and the Court ultimately reinstated that ruling. ***Savage Ed. A. v. Trustees*** (1984), 214 Mont. 289, 692 P.2d 1237, 1239-40.

The Court did not distinguish or apply *Wibaux* in *Savage* (1982) and again refused to consider that issue in *Savage* (1984).

Neither *Wibaux* nor the attorney general's opinion based upon it directly address whether a school board can or must bargain about the fiscal lay off of a tenured teacher. Both authorities do hold that a public school board has (absent anti-union animus) unfettered discretion in substantive hiring and firing decisions for nontenured teachers. Logically, a public school board exercises the same unfettered discretion in deciding to RIF a tenured teacher for budgetary reasons.

Delineating the boundaries of a school board's exclusive province for exercising its unfettered discretion regarding operations is not easy. As the Connecticut Supreme Court remarked:

> To decide whether [particular] . . items . . . 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.
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> *West Hartford Ed. A., Inc. v. DeCourcy* (Conn. 1972), 295 A.2d 526, 534-35.

In the present case, the district exercised its responsibility and authority pursuant to Art. X, Sec. 8, Mont. Con. 1972 and Mont. Code Ann. § 20-3-324(1) when it decided (acting through its duly elected school board), without any illegal anti-union animus, that its budgetary constraints required it to lay off a tenured teacher. The Hearing Officer concludes that BOPA should hold, if it were to reach the issue, that the substantive basis for this specific RIF decision was not subject to mandatory bargaining.

In this particular case, the Hearing Officer does not believe BOPA needs to reach the issue at all.[3]

The association did not seek bargaining on the decision to RIF a certified teacher until after the district had already made that decision. It gave the district no timely notice that it viewed a RIF decision based on budget problems as a subject of bargaining, mandatory or otherwise. Instead, in response to the district's written request to "discuss this matter further" (areas where cuts may be made) with the association, the association responded with a bargaining demand regarding "a Reduction in Force procedure" (emphasis added). Therefore, the association waived any claim that this particular RIF decision was subject to bargaining. ***See generally***, *The Developing Labor Law* (BNA, 4th Ed., 2001 ***and*** 2004 Supp., Chap. 13, Sec. VII.A.3.), "Waiver by Inaction," pp. 946-50 and p. 291 (2004 Supp.), ***and NLRB cases cited therein***; ***see also*** *Foley Ed. A. v Indep. Sch. D.* (1984, Minn) 353 NW2d 917, ***later proceeding***, 354 NW2d 9; ***see also*** the discussion in section B3 of this discussion, ***infra***.

This is not a matter of a contractual relinquishment of a bargaining right, under the express terms of the CBA, but rather a clear failure timely to demand bargaining on the issue, despite making a timely demand to bargain about the procedures applicable to the RIF. Under these circumstances, the association waived any right to bargain regarding the decision to RIF a teacher by failing to preserve the issue for BOPA consideration in this specific instance. The Hearing Officer therefore concludes that BOPA should hold that the association waived its alleged bargaining right regarding the substantive basis for the RIF of a tenured teacher, and not rule upon whether the district would otherwise have had an obligation to bargain.

B. The District Engaged in an Unfair Labor Practice by Refusing to Bargain and Acting Unilaterally to Establish and to Implement a New Lay Off Procedure.

There is no dispute in this case that the district ignored a request to bargain about the adoption of a RIF procedure and, after deciding (for budgetary reasons) to lay off 1 teacher, unilaterally established and subsequently implemented a new lay off procedure to choose and lay off a teacher. The issue is whether the district was obligated to bargain (to agreement or impasse) before taking the actions. Answering this question requires a three-part analysis. (1) Are the actions a mandatory subject of bargaining; (2) If so, did the association exercise its right to bargain by agreeing in the CBA to a provision that gave the district the right to take the actions without any further bargaining and (3) If not, did the association waive its rights to

[3] The 3-part test applicable, discussed ***infra*** in section B, normally ends if the refusal to bargain was not over a matter subject to mandatory bargaining, without addressing the other 2 parts (contractual relinquishment of the right to bargain further over the issue and waiver). However, this is a proposed decision for BOPA. Even if BOPA were to conclude that this was a matter subject to mandatory bargaining, the association's waiver of its asserted right to bargain would still lead to the same proposed decision. That being the case, BOPA can defer, for a case that more squarely presents the issue, the question of whether a budgetary decision to lay off a tenured teacher is subject to mandatory bargaining by a public school district.

bargain over adoption and implementation of a new RIF policy regarding budgetary lay off of a teacher? *NLRB v. U.S. Postal Service* (D.C. Cir. 1993), 8 F.3d 832.[4]

B1. Under the Montana Public Employees Collective Bargaining Act, the Adoption and Implementation of a Procedure to Effectuate a Fiscally Motivated Decision to RIF a Tenured Teacher Was a Subject of Mandatory Collective Bargaining.

Once the school board exercised its power to supervise and control the district by concluding the RIF of 1 teacher was necessary because of budgetary constraints, it reached the border of that area in which collective bargaining was "undesirable." *Savage* (1982) and *Savage* (1984), ***op. cit.***, specifically involved arbitration, under the CBA, of whether the district followed its contractual procedures prior to nonrenewal of the nontenured teacher. Clearly, since that school district could (and did) agree with the bargaining unit's representative to adopt and follow particular procedures before such a nonrenewal, the issue of what procedures to follow to arrive at a nonrenewal decision for an untenured teacher was not reserved to the unfettered discretion of the district and the same logic applies to the RIF of a tenured teacher.[5]

For example, teacher transfer, particularly involuntary transfer, is a mandatory subject of bargaining. *Florence-Carlton Unit v. Trustees, Sch. D. No. 15-6* (1979), ULP 5-77. To harmonize the Montana statutes that govern both the obligation to bargain and management rights, the Board, in *Florence-Carlton*, adopted a balancing test, holding that whether an issue was a mandatory bargaining subject depended on "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[6] ***at*** 6, ***citing*** *NEA Shawnee Mission. v. Bd of Ed.* (Kan. 1973), 512 P.2d 426; ***superceded by statute***, *Unf. Sch. D. No. 501 v. D.H.R.* (Kan. 1985), 685 P.2d 874; *Penn. Labor Rel. Bd v. State College Area Sch. D.* (Pa. 1975), 337 A.2d 262.

As the Board noted in *Florence-Carlton*:

> 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

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[4] In most circumstances, NLRA decisions can be instructive in applying Montana collective bargaining law.

[5] The A.G. opinion that a school district could not delegate its power to hire and fire to the superintendent shows that a district cannot contract away what unfettered discretion it possesses. 37 Op. Atty Gen. Mont. 560 (1978), Opinion 133. Since a school district could contract to follow specific procedures for nonrenewal of nontenured teachers, it had no unfettered discretion over such procedures, and must likewise lack unfettered discretion in choosing what tenured teacher to RIF.

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

> load for social workers, for example, although theoretically related to the level of 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.

In some jurisdictions[7], choosing procedures to pick which public employees to lay off is a subject of mandatory bargaining, although the budgetary decision to lay off public employees is not. *Ferree v. Bd. of Ed.* (Iowa 1983), 338 N.W.2d 870*; Saydel Ed. Assoc. v. Pup. Employment Rel. Bd.* (Iowa 1983), 333 N.W.2d 486; *School Comm. of Newton v Labor Rel. Com.* (Mass. 1983), 447 N.E.2d 1201; *Fire Fighters Union v. Vallejo* (Cal. 1974), 526 P.2d 971. The same reasoning applies here. The elected representatives of the school district, the trustees, are charged with the duty to decide how the Wibaux school district best can spend the public funds available for education. However, having decided in their unfettered discretion that it was necessary to RIF a tenured teacher, they could not exercise that same unfettered discretion in adopting a procedure by which to pick which tenured teacher to discharge.[8] That was properly a subject of mandatory bargaining regarding the most basic condition of employment–remaining employed. Putting it in simple terms, choosing which teacher to fire to cut costs had a far heavier direct impact on the individual teacher's well being than on the operation of the school system as a whole. The Hearing Officer concludes that the Board of Personnel Appeals should hold that the adoption and implementation of a procedure to effectuate the RIF was a subject of mandatory collective bargaining.

B2. The Absence of Any Specific RIF Provisions in the CBA Did Not Relieve the District of the Duty to Bargain Regarding the Procedure to Effectuate the RIF.[9]

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 the district to make unilateral changes concerning mandatory subjects of bargaining is a violation of the requirement of good faith bargaining. *NLRB v. Katz* (1962), 369 U.S. 736. Absent, among other things, a contractual relinquishment of the right to bargain, the obligation to bargain before making such changes continues during the term of the collective bargaining agreement. *NLRB v. Sands Manufacturing Co.* (1939), 306 U.S. 332, 342.

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[7] As already noted, some jurisdictions, making a greater commitment to collective bargaining as opposed to school board discretion than appears in current Montana law, hold that the decision to lay off public employees for fiscal reasons is a subject of mandatory bargaining.

[8] The district's preexisting policy on RIFs, which committed to following the CBA, actually admits as much. If the school board exercised unfettered discretion in procedures for RIF decisions, it could not contract to follow the CBA for such procedures.

[9] Much of the case law addressing interpretation of a management rights clause is written in terms of "waiver." In this case, "waiver" refers instead to the district's assertion that the association failed timely to request bargaining. The Hearing Officer has omitted the word "waiver" in discussing the authorities in this section of the discussion. The holdings are accurately described in other words, to avoid unnecessary confusion.

The question presented in this case is whether the CBA, by omission and by its management rights clause, changed picking which teacher to RIF from being a subject for mandatory bargaining to being within the unfettered discretion of the school board. The CBA did not.

The obligation to bargain was not altered by the absence of RIF provisions in the existing CBA. ***Cf.*** *School Comm. of Newton*, ***supra*** (fact that dispute arose during midterm of collective bargaining agreement still required bargaining over layoff procedures where subject of reduction in force had been neither negotiated nor bargained over prior to execution of agreement).

The Wibaux CBA expressly incorporated the general panoply of statutory management rights and incorporated the statutory collective bargaining mandate by repetition of the pertinent language ("collective bargaining concerning wages, hours, fringe benefits and other conditions of employment"). The CBA, as it applies to RIFs, is necessarily ambiguous, because it never mentioned RIFs. Even if the reservation of management rights was intended to incorporate the rights reserved under the particular provisions of Mont. Code Ann. § 39-31-303 cited in A, ***supra***, it does not follow that the district thereby acquired unfettered discretion to choose which teacher to RIF. Rather, after the district exercised its discretion by making a budgetary decision to RIF 1 teacher, the district's right to pick which teacher to RIF had to be balanced against the obligation to bargain regarding conditions of employment.

The obligation to bargain collectively can only be relinquished by clear and unmistakable language in the CBA. *Metropolitan Edison Co. v. NLRB* (1983), 460 U.S. 693. A general management rights clause with no reference to any particular subject area does not suffice to establish such a relinquishment. ***E.g.***, *Michigan Bell Telephone Co.* (1992), 306 NLRB 281. The management rights clause of the Wibaux CBA is general and makes no express reference to RIFs.

The reference to the CBA in the existing district policy on RIFs did not elevate the management rights clause above the collective bargaining clause in that same CBA. The Hearing Officer concludes that BOPA should hold that the CBA did not relieve the district from the duty to bargain over adoption and implementation of a procedure to effectuate a fiscally motivated RIF of a tenured teacher.

B3. The Association Did Not Waive its Rights to Bargain by Failing Sooner to Demand Bargaining over Adoption and Implementation of a New RIF Policy Regarding Budgetary Lay off of a Tenured Teacher.

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. The record here shows only that prior to the district's February 14, 2005, memo to the association, 2 things had happened: (1) the superintendent had presented, at district trustees' meetings in January and February, the possibility of a reduction in staff due to budget constraints and (2) the superintendent had discussed the possibility of RIFs with the association in January and February. Thus, the possibility that the district might undertake a RIF was known to the association for approximately 5 weeks prior to the February 14, 2005, memo requesting input about a possible RIF.

BOPA has found waivers of rights to bargain when complainants had actual knowledge of the actions of the defendants and did not request bargaining. In *Beaverhead Fed. of Teachers v. Beaverhead County High School*, ULP 10-2001 (Oct. 29, 2002), federation members and district management discussed possible rescheduling of a driver's education course during November and December. In January through April of the next calendar year, there were multiple meetings (including 2 public meetings of the board of trustees attended by federation members), leading to a decision by the district in May to reschedule the course, all without any request to bargain from the federation. *Beaverhead* cited an earlier BOPA case, *Browning Fed. of Teachers v. Browning Public Schools*, ULP 17-2001 (Nov. 26, 2001). In *Browning*, the federation knew that the district had been paying pre-employment incentives to prospective employees for several years, before the unfair labor practice charge. Both *Beaverhead* and *Browning* involved far longer time periods, and far more concrete notice of impending (or past and continuing) action than the present case.

When the association demanded bargaining on the RIF procedures, the district had not taken any action and had just asked the association for its input. The parties stipulated that the superintendent discussed the possibility of a RIF at meetings with association members held on January 13, January 20, and February 2, 2005, a period of 5 weeks ending with the demand to bargain.[10] The specificity of those discussions is unclear. According to the February 14 memo that triggered the demand to bargain, at those meetings the superintendent "addressed" issues of "budget concerns and factors which may make it necessary for significant restructuring of district programs and staff realignment." The memo did not directly refer to RIF of a teacher.

[10] By contrast, the association raised bargaining about the RIF itself an additional 9 weeks after the demand to bargain about RIF procedures, after several further meetings and memo exchanges between district and association, and after the district decided to RIF a teacher, adopted a policy to select the teacher and implemented the procedure by selecting the teacher to be RIFed. ***See*** section A of the discussion.

The district did not prove any waiver of the right to bargain about RIF procedures. The Hearing Officer concludes that BOPA should rule that the association did not waive its right to demand collective bargaining on the procedures for selecting a teacher to RIF for budgetary reasons, and therefore that the district committed an unfair labor practice by refusing to bargain and unilaterally adopting and implementing a procedure to identify and RIF a tenured teacher.

C. The Appropriate Remedy for the District's Unfair Labor Practice Is for BOPA to Declare the District's RIF Criteria Void and to Order the District (a) To Cease and Desist in Implementation of its RIF Criteria; (b) To Begin Bargaining with the Association over Appropriate RIF Criteria and (c) To Offer Full Reinstatement to Linda Rogers to Her Former or Comparable Position, with Fringe Benefits and Lost Wages (Less All Interim Earnings from the Effective Date of Termination to the Date of Reinstatement or Refusal of Reinstatement) with Interest.

Upon determining by a preponderance of the evidence that an unfair labor practice has occurred, BOPA shall issue and serve an order requiring the defendant in the complaint to cease and desist from the unfair labor practice it committed. Mont. Code Ann. § 39-31-406(4). BOPA shall further require the defendant to take such affirmative action, which may include restoration to the *status quo ante*, "as will effectuate the policies of the chapter." ***Id.***; ***see also***, *Keeler Die Cast* (1999), 327 NLRB 585, 590-91; *Los Angeles Daily News* (1994), 315 NLRB 1236, 1241; ***cf.*** *Savage* (1984), ***op. cit. at*** 1239 (reversing district court and affirming arbitrator's order requiring full reinstatement of nontenured teachers to their former or comparable positions, together with back pay less all interim earnings from the effective date of termination to the date of reinstatement or refusal of reinstatement).

The district argued (without any authority) that since it had taken no action to change the status quo when the association filed its ULP complaint, the complaint failed to state a claim for which relief was proper. By the time the association filed its ULP, the district had decided to RIF a tenured teacher, adopted a procedure to select the teacher and applied the procedure, selecting the individual teacher to RIF. The district's argument lacks merit.

The relief requested in the ULP complaint was, in essence, restoration of the *status quo ante*. The Hearing Officer concludes that BOPA should declare the district's RIF criteria void, order the district to cease and desist implementation of its RIF criteria, begin bargaining with the association over appropriate RIF criteria and offer full reinstatement to Linda Rogers to her former or a comparable position, with fringe benefits and lost wages (less all interim earnings from the effective date of termination to the date of reinstatement or refusal of reinstatement) with interest (10% annual simple interest, Mont. Code Ann. §§ 27-1-211 and 25-9-204), and impose a posting requirement. Interest awards encourage prompt compliance with BOPA orders and discourage unfair labor practices, effectuating the legitimate ends of labor legislation. *Young III*, ***op. cit.***, ***citing*** *Florida Steel* (1977), 231 NLRB 651. No recovery of lost time of association members to participate in the hearing is proper, because there was no evidentiary hearing.

V. CONCLUSIONS OF LAW[11]

1. BOPA has jurisdiction over this case and controversy.

2. The association waived any right to bargain regarding the decision to RIF a teacher by failing timely to demand such bargaining.

3. The district's adoption and implementation of a procedure to effectuate a fiscally motivated decision to RIF a teacher was a subject of mandatory collective bargaining.

4. The absence of any specific RIF provisions in the CBA did not relieve the district of the duty to bargain regarding the procedure to effectuate the RIF.

5. The association did not waive its rights to bargain by failing sooner to demand bargaining over adoption and implementation of the new RIF policy.

6. The district committed an unfair labor practice by unilaterally adopting and implementing a procedure to identify and RIF a tenured teacher, Linda Rogers.

7. The proper remedy for the unfair labor practice is an order from BOPA that declares the district's RIF criteria void, orders the district (a) to cease and desist implementation of its RIF criteria; (b) to begin bargaining with the association over appropriate RIF criteria and (c) to reinstate Linda Rogers, with fringe benefits and lost wages with interest, and imposes a posting requirement.

VI. RECOMMENDED ORDER

Wibaux Board of Trustees, K12 Schools, District No. 6, is hereby **ORDERED**:

1. Immediately to cease unilaterally adopting reduction of force criteria applicable to tenured teachers within the bargaining unit represented by the Wibaux Education Association, MEA-MFT, NEA, AFT, AFL-CIO, eliminate as void the RIF criteria unilaterally adopted on April 12, 2005, and cease otherwise altering terms and conditions of employment subject to the collective bargaining agreement without bargaining;

2. Within 30 days of this order:

(a) To begin bargaining with the WEA over appropriate RIF criteria;

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[11] The authorities and reasoning in support of the Conclusions appear in the Discussion and are hereby incorporated by reference.

(b) To offer full reinstatement to Linda Rogers to her former or a comparable position, with fringe benefits and lost wages (less all interim earnings from the effective date of termination to the date of reinstatement or refusal of reinstatement) with interest at 10% per annum (simple); and

(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 Wibaux Schools for 60 days and to take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material.

DATED this 19th day of March, 2007.

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR
Terry Spear
Hearing Officer

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 April 11, 2007. 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 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 Wibaux Teachers' Association;

We will cease unilaterally adopting RIF criteria applicable to tenured teachers within the bargaining unit represented by the WEA, eliminate as void the RIF criteria unilaterally adopted on April 12, 2005, and cease otherwise altering terms and conditions of employment subject to the collective bargaining agreement with the WEA without prior bargaining with the WEA;

We will engage in negotiations with the Wibaux Teachers' Association over RIF criteria applicable to members of the bargaining unit.

DATED this _____ day of _____, 2007.

Wibaux Board of Trustees, K12 Schools, District No. 6

By:_____
Board Chair:

_____
Office: