STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 6-2009 AND 8-2009:

LAUREL UNIFIED EDUCATION ASSOCIATION, MEA-MFT,	) Case Nos. 558-2009 and 666-2009	
Complainant,	)	**FINDINGS OF FACT;**
vs.	)	**CONCLUSIONS OF LAW;**
	)	**AND RECOMMENDED ORDER**
YELLOWSTONE COUNTY SCHOOL DISTRICT NOS. 7 & 70,	)	
Defendant.	)	

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I. INTRODUCTION

In September 2008, the Laurel Unified Education Association (Association) filed two unfair labor practice charges against Yellowstone County School District Nos. 7 & 70 (hereinafter "school district"). Both charges, one which involved the Graff Elementary School, and the other which involved the Laurel Middle School, alleged that the school district committed an unfair labor practice by unilaterally increasing the assigned teacher-student contact time without bargaining with the Association over the impact those changes would have on the teachers' unassigned teaching time. Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on May 12 and 13, 2009 in Laurel, Montana. Vicki McDonald, attorney at law, represented the Association. Lawrence Martin, attorney at law, represented the school district. Brent Scott, president of the Association, Patty Muir, teacher and member of the Association, Jamie Garvey, teacher and member of the Association, Trudy Downer, teacher and member of the Association, Laurie Michunovich, teacher and member of the Association, Doug Hagen, third grade teacher at Graff School and Association member, Tim McKinney, fourth grade teacher at Graff School and Association member, Andrea Fischer, former Graff School principal, Troy Zickafoose, 2008-2009 principal at Graff Elementary School, and Linda Filpula, principal at Laurel Middle School, all testified under oath in this matter.

Complainant Exhibits 1-6 and Defendant Exhibits A through G, K, M, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, II, JJ, KK, LL, MM, NN, OO, PP, QQ, RR (except District Bates Stamp numbers 65 and 66), SS, and BBB were admitted into the record with some exhibits being admitted for limited purposes as denominated in the digital recording of the

proceeding. In addition, after reviewing the parties' respective arguments regarding the admissibility of Defendant's Exhibits UU and VV, those documents are now admitted into the record. These two documents will, as suggested by the defendant, be sealed, not to be made available for inspection by the public nor disseminated by the parties to any entity not a party to these proceedings except upon order of this tribunal or by any tribunal exercising jurisdiction over this matter.

The parties were given the opportunity to present post-hearing briefs, the last of which were timely received on July 31, 2009 at which time the matter was deemed submitted for decision. Based on the evidence adduced at hearing and the closing briefs of the parties, the following findings of fact, conclusions of law, and recommended order are made.

II. ISSUE

Did the school district commit an unfair labor practice in requiring the teachers to undertake additional assigned teacher-student contact time without bargaining the impact of that change to impasse?

III. FINDINGS OF FACT

1. The school district operates three schools, two of which, the Graff Elementary School and Laurel Middle School, are of pertinence to this decision. The Graff Elementary School serves third and fourth grade students and the Laurel Middle School serves the school district's fifth through eighth grade students. The school district is a public employer within the meaning of Montana Code Annotated § 39-31-103(10).

2. The Association is a labor organization within the meaning of Montana Code Annotated § 39-31-103(6) and is the exclusive bargaining representative for the certified staff employed at the Graff Elementary School and the Laurel Middle School. The Association and the school district have been parties to collective bargaining agreements going back through 1999. The most recent agreement, reached in 2008, covers the time period between 2008 and 2011.

3. The provisions of the 2008-2011 bargaining agreement (hereinafter 2008-2011 CBA) covers the certified staff employed at the Graff School and the Laurel Middle School. The portions of the agreement which are salient to the contention in this case provide:

> **ARTICLE II - RIGHTS OF THE BOARD**
>
> The Board has, and shall retain, without limitation, all rights, authority, duties and responsibilities conferred upon and vested in it by law.
>
> The Board retains all rights which are not specifically restricted by this agreement.

* * *

ARTICLE IX - WORK LOAD

* * *

C. Definitions of School Day

1. Normal School Day. The normal school day will be 8:00 a.m. to 4:00 p.m. Teachers should be available to the pupils, upon their request, by 8:00 a.m., as well as after dismissal time.

D. Lunch Period All teachers shall receive a daily, uninterrupted, duty-free lunch period of 45 minutes.

ARTICLE X - WORK LOAD

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E. Preparation Periods

1. Elementary Teachers. Elementary classroom teachers will be provided no less than 200 minutes of preparation time in a normal week. This preparation time will be scheduled between 8:30 a.m. and 3:30 p.m., excluding the duty-free lunch period.

2. Middle School. Middle school teachers who are on a team will be guaranteed a minimum of 400 minutes prep time over a two week period (not counting team time). Middle school teachers who are not on a team will be guaranteed a prep time daily, the same minimum of 400 minutes in a two week period.

* * *

J. Wednesday Early Student Release

Thirteen early-out Wednesdays will be scheduled throughout the school year by the superintendent for classroom work to be determined by individual teachers. The time allotted under this provision shall be in addition to the regular teacher preparation time provided in Article X.E.

ARTICLE XV - EFFECT OF AGREEMENT

* * *

D. Scope of Agreement. This agreement constitutes the entire Agreement between the parties. Any amendment supplemental hereto shall not be binding upon either party unless executed by the parties hereto. The parties further acknowledge that during the course of collective bargaining each party has had the unlimited right to offer, discuss, accept or reject proposals. Therefore, for the term of this Agreement, no further collective bargaining shall be had upon any provision of this Agreement, nor upon any subject of collective bargaining unless by mutual consent of the parties hereto.

4. For the 2008-2009 school year, teachers at Graff and the Laurel Middle School received a daily, recess duty-free, uninterrupted lunch period of 45 minutes in conformity with the 2008-2011 CBA. During that year they also received no less than the amount of preparation time provided for in the 2008-2011 CBA.

5. Prior to 2007, grades 1 through 5 were taught at the Graff School and grades 6 through 8 were taught at the Laurel Middle School. Beginning with the 2007-2008 school year, grades 3 and 4 were taught at Graff and grades 5 through 8 were taught at the Laurel Middle School.

6. For the 2007-2008 school year at the Graff school, the third and fourth graders had a 15 minute afternoon recess on Monday and Friday. There was no afternoon recess for third and fourth grade students on Wednesday. During the 2008-2009 school year, only the afternoon recess for the fourth graders was eliminated.

7. For the 2007-2008 school year, the certified personnel received a 50 minute long, recess duty-free, uninterrupted lunch period. In addition, the certified personnel received no less than the amount of preparation time required by the applicable CBA.

8. The CBAs prior to the 2005-2006 year provided that the certified personnel's school day began at 8:15 a.m. and ended at 4:00 p.m. Beginning with the 2005-2006 CBA, the certified personnel's school day was extended to 8:00 a.m. to 4:00 p.m. Article IX-C, 2005-2006 CBA, Exhibit 13.

9. The negotiations for the 2005-2006 year were undertaken under the procedural requirements of interest based bargaining (IBB). During the negotiations, the Association's team indicated that its membership "is more receptive now to the idea of an 8-4 workday, with the clarification that an ad hoc committee would be formed to address how the day would be structured for all levels." Exhibit VV. The records of that bargaining show that the Association proposed an 8:00 to 4:00 workday with an ad hoc committee. The school district's counter offer to that offer was an 8:00 to 4:00 workday without the ad hoc committee. The Association ultimately accepted the school district's last offer which implemented the 8:00 to 4:00 workday but did not include the ad hoc committee.

10. The work day of the certified personnel is broken up into various types of time. Time during which the teachers are required to teach students is the required teacher-student contact time. Teachers also have teacher preparation time as prescribed by the CBAs (200 minutes per week for the Graff school teachers and 400 minutes per two week period for the Laurel Middle School teachers). There is also the recess duty-free time for lunch. Finally, there is a fourth type of time which is understood to be unassigned time which teachers may use for such things as preparing their class rooms but which is not part of, and which is not to be counted against, the CBA set preparation time. Likewise, it is not part of and not to be counted against the teacher's recess duty-free lunch period.

11. It is clear from the working relationship and the conduct of the parties over the past several years that the parties have implicitly recognized that a portion of the teachers' day between the contractually defined arrival time of 8:00 a.m. and leave time of 4:00 p.m. is and may be devoted to unassigned teaching time. The unassigned teaching time is an important part of the teachers' day. As the complainant argues, and the hearing officer finds as a matter of fact, the 8:00 a.m. to 4:00 p.m. time frame of the collective bargaining agreement represents the parameter of the teachers' contractual workday. The time between 8:00 a.m. and the first class bell and the time between the dismissal bell and 4:00 p.m. has traditionally been preserved as unassigned teaching time. It is an important part of the teachers' work day and the teachers have never and would never agree without first bargaining to any arrangement that would do away with the unassigned teaching time that the teachers enjoyed until the 2008-2009 school year.

12. As a result of the increased assigned student contact time and the resultant loss of unassigned time, teachers at both Graff and Laurel Middle School have been forced to do additional work on weekends and after 4:00 p.m. In addition, they have been forced to arrive at work and begin daily class preparation long before the 8:00 a.m. arrival time required by the 2008-2011 CBA.

13. At no time during the negotiations over the 2008-2011CBA did the school district ever broach the possibility of extending the assigned teacher-student contact time. Other subjects, such as the school district's concern that the teachers' 50 minute lunch period was too long and deleteriously affecting student discipline issues, were discussed. The parties were able to reach an understanding on this issue which resulted in the Association agreeing to reduce the required recess duty-free lunch period from 50 to 45 minutes. In return, an equal amount of unassigned time was given back to the teachers on Wednesday afternoons.

14. After the completion of negotiation on the 2008-2011 CBA and prior to the commencement of the 2008-2009 school year, the school district decided that it needed to increase the amount of assigned student contact time between the certified personnel and the students. The school district unilaterally implemented an increase in the assigned student contact time by extending the class start times and end times at both the Graff School and the Laurel Middle School.

15. The administration at both the Graff School and the Laurel Middle School did seek some individual teacher input on some of the proposed changes. However, the input system was informal and teachers were not required to give their input. Of greater consequence to this proceeding is the fact that neither the administrators nor the school district sought the input of the Association. Indeed, there is no evidence that the school district even made the Association aware that it was seeking the input of individual teachers.

16. During the 2008-2009 school year, the school district's unilateral change resulted in an increase in the teacher-student contact time and a concomitant substantial loss of unassigned time. At Graff School, the third grade teachers lost 15 minutes per day or 75 minutes per week in unassigned time. Fourth grade teachers lost 30 minutes per day or a total of 135 minutes per week. At the Laurel Middle School, teachers lost 17 minutes per day or a total of 85 minutes per week.

17. A comparison of the 2008-2009 changes at the Laurel Middle School to earlier year's changes demonstrates that the school district's unilateral changes had a substantial negative impact on the teachers' unassigned time. For the 2007-2008 school year, for example, the assigned time (the time that the students were in class) changed from an 8:20 a.m. start time during the preceding year to an 8:35 a.m. start time for 2007-2008. The student dismissal time changed from 3:28 p.m. to 3:35 p.m. The result was a net 8 minute ***increase*** per day in unassigned time of 8 minutes. In 2005-2006 and again in 2006-2007, classes began five minutes earlier than they had in the 2004-2005 school year but ended 12 minutes earlier than they had during the 2004-2005 school year. The result was a net ***increase*** in teacher unassigned time of seven minutes per day for the 2005-2006 and 2006-2007 school years. As stated above, the unilateral changes for the 2008-2009 school year resulted in a substantial ***decrease*** in the teachers' unassigned teaching time.

18. A similar comparison at the Graff school likewise demonstrates a substantial negative impact on teacher unassigned time that came about as a result of the school district's unilateral scheduling change. For the 2007-2008 school year, classes began five minutes later and ended ten minutes earlier per week for the third grade teachers. With the implementation of the recess changes, the third grade teachers taught only an additional 10 minutes each week. The fourth grade teachers saw a net reduction in their assigned teaching time of 50 minutes per week (with a corresponding increase in their unassigned time). In contrast, in 2008-2009, the third grade teachers saw a 50 minute increase in their assigned teaching time (and a corresponding 50 minute reduction in their unassigned teaching time). Unquestionably, the teachers at both Laurel Middle School and Graff suffered a substantial reduction of their unassigned time during the 2008-2009 school year as a result of the district's unilateral changes.

19. Upon learning of the school district's decision to increase the assigned teacher-student time, and prior to the implementation of the increased assigned teacher-student time, Association President Brent Scott wrote to Superintendent Josh Middleton on May 12 and May 29, 2009 about the proposed changes for both the Graff School and the Laurel Middle School.

Exhibit 1. Scott informed the district that several teachers had contacted him with concerns over the impact of the changes on those teachers' schedules and the loss of unassigned time. He pointed out that while the district had the power to implement changes, the district was required to bargain over the impact of those changes upon the teachers. He then requested that the school district engage in bargaining over those changes.

20. In response, Middleton flatly refused to engage in any bargaining. Middleton further noted in his letter that he was "troubled and offended by both letters with implied malfeasance by the district." Association Exhibit 2.

21. On September 5, 2009, Scott sent Middleton a renewed demand to bargain over the proposed changes. This time, he pointed out that the unilateral implementation of the additional student contact time would effectively result in adding two weeks of additional teaching time for the teachers. Association Exhibit 3. Middleton again refused to negotiate over the changes, positing that the changes fit within the language of the 2008-2011 CBA.

22. As a result of the school district's refusal to bargain over the impact on the teachers' unassigned time, the Association brought the instant unfair labor practices against the school district. Association Exhibits 4 and 5.

IV. DISCUSSION[1]

A. Preliminary Evidentiary Issues

1. *Preclusion of the witnesses and exhibits in the May 7, 2009 order was appropriate.*

From the outset of this case, the parties sought to have the matter litigated, briefed and decided prior to the start of the 2009-2010 school year. With this important parameter in mind, the hearing officer carefully weighed the various discovery violations as well as the imposition of the least onerous remedy that would rectify the violations.

At the scheduling conference originally held on January 12, 2009, the parties specifically agreed to a hearing schedule that required the parties to complete all discovery by April 14, 2009 and to file their respective list of witnesses, exhibits, and motions no later than April 16, 2009. A final pre-hearing conference was set for May 7, 2009 and the hearing was set for May 12 and 13, 2009.

The parties undertook discovery. Within 8 days after the scheduling order went out, the Association propounded interrogatories. These interrogatories plainly sought the names of all persons whom the school district knew to have knowledge of the issues of the case and sought

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

disclosure of all the exhibits the district had in its possession. See pages 3 and 4 of the Association's motion to quash subpoenas dated May 4, 2009. Information about the witnesses and exhibits ultimately excluded by this tribunal's order on May 7, 2009 were clearly within the scope of the information sought by the Association's interrogatories. Despite this, no information about these witnesses or exhibits was produced.

In April, a discovery dispute arose about the school district's belated request to depose two of the Association's witnesses. The district's last minute request to depose these witnesses created a difficult scheduling problem for the witnesses. The district had ample time to schedule the witnesses but waited for over two months until just a few days before the close of discovery to arrange the depositions. As a result, the hearing officer intervened and reset the depositions. In addition, to permit the district to utilize the information it received from the depositions, the hearing officer extended the date for exchange of witnesses to April 22, 2009, but did not extend the discovery deadline.

On April 22, 2009, seven days after the discovery deadline closed, the school district served supplemental discovery responses upon the Association identifying for the first time witnesses Vi Hill, Amy Caldiera, Val Naumen, and Richard Trerise. The school district also disclosed for the first time Exhibits H, I, J, L, N, EE, FF, GG, and HH. The Association brought this discovery violation to the attention of the hearing officer in a motion filed on May 4, 2009. At the final pre-hearing conference, the motion to preclude was argued and the witnesses and exhibits noted above were excluded for failure to timely disclose them.

It is patently obvious in that the school district, despite requesting that the matter be set for the hearing dates and discovery deadlines in order to achieve the parties' mutual goal of resolving this dispute before the commencement of the school year, did nothing to engage in meaningful discovery until very late in the discovery period. The school district created the situation of which it now complains. Despite agreeing to the April 14, 2009 deadline in order to accomplish its own goal of a timely hearing, the school district failed to disclose any of these precluded witnesses or exhibits until one week after the discovery period had closed. By the time the witnesses and exhibits were disclosed, there was no way that the Association could have been prepared to meet that evidence. In addition, because the parties wanted to have the matter settled before the 2009-2010 school year began, there was no viable way to permit a continuance. For all three of these reasons, the hearing officer concludes that the exclusion of witnesses Vi Hill, Amy Caldiera, Val Naumen, and Richard Trerise and Exhibits H, I, J, L, N, EE, FF, GG, and HH was appropriate under the applicable rules. *See, e.g., Montana Rail Link v. Byard* (1993), 260 Mont. 331, 344, 860 P.2d 121, 129 (holding that the hearing examiner properly precluded witness's testimony where the witness was not disclosed in response to interrogatories).

2. *Preclusion of Andrea Fischer's and Randy Peers' testimony is not appropriate.*

The Association requests that Amy Fischer and Randy Peers' testimony be precluded because they violated the rule of exclusion of witnesses. For the reasons stated during the hearing, the hearing officer declines to preclude the testimony of Andrea Fischer. Despite the Association's perceptions to the contrary, the hearing officer is satisfied that Fischer did not hear and could not hear other witnesses' testimony while she was in the enclosed office space. Therefore, no factual basis exists for precluding her testimony since she did not violate the rule of exclusion.

Unlike Fischer, Randy Peers was present during a portion of the testimony of Brent Scott. Peers indicated, and the hearing officer has no reason to believe otherwise, that Peers was not present during the order excluding witnesses and was not aware of the order. Counsel for the school district was not aware that Peers was in the room during Scott's testimony. The only portion of Scott's testimony that Peers heard was Scott's discussion about what Scott did when he arrived at school in the morning and things that he did during the day.

Peers only testified about his involvement in the 2005-2006 CBA negotiations and nothing else. Scott's testimony did not involve anything about the 2005-2006 negotiations.

The rule of exclusion of witnesses is designed to prevent a witness's testimony from being influenced by another witness's testimony. Here, that could not happen since Scott's testimony did not touch upon the issues that Peers testified about. Hence, the rationale of *U.S v. Hobbs*, 31 F.3d 918(9th Cir. 1994) applies to this case. Peers' testimony should not be excluded.

3. *Admission of Documents UU and VV is proper.*

It is a basic legal axiom that when a party places a matter in issue, that party waives any privilege associated with that issue. The reason is simple. Due process requires an opposing party to be able to adequately defend against a claim. Balancing the privilege against the due process rights of the school district, admission of the evidence is required in order to accord the defendant the process it is due in this case. *Cf., Winslow v. Montana Rail Link*, 2001 MT 269, 307 Mont. 269, 38 P.3d 148.

Here, the Association has sued the school district claiming that it engaged in an unfair labor practice. Evidence of the bargaining history of the parties is essential to defend against that type of charge. Here, the Association seeks to assert an unfair labor practice and at the same time seeks to use mediation privilege as a sword to prevent the school district from fully and fairly litigating that issue. Due process does not permit that and on that basis alone, the hearing officer would deny the Association's motion to exclude Exhibits UU and VV.

Beyond this, the hearing officer agrees with the school district that the privilege does not apply to this evidence because labor negotiations between a public school district and its employee Association is not confidential. Therefore, the requisites of Mont. Code Ann. § 26-1-

813 do not exist in this case for enforcing the privilege. *Great Falls Tribune Co., Inc. V. Great Falls Public Schools* (1992), 255 Mont. 125, 841 P.2d 502.

The Association also argues that Rules 403 and 408 of the Rules of Evidence apply to preclude the admission of these two documents. The hearing officer does not agree. Rule 403 applies to prohibit introduction of otherwise relevant evidence if its probative value is ***substantially*** outweighed by the danger of ***unfair*** prejudice, confusion of the issues, or based on considerations of undue delay or waste of time. Evidence showing the nature of past bargaining practice is essential to the determination of any unfair labor practice. It, therefore, is not unfair prejudice.

Rule 408 has no application because it only applies when the evidence is offered to prove a party's liability by showing that the party offered to compromise the dispute prior to litigation. It does not preclude such evidence where the offer is for some other relevant purpose. *Kiely Construction, LLC v. City of Red Lodge*, 2002 MT 241, ¶95, 312 Mont. 52, 57 P.3d 836. Here, the school district is not using the evidence to show liability by an offer to compromise. Therefore, Rule 408 has no bearing on the admissibility of Exhibits UU and VV. Accordingly, admission of Documents UU and VV is proper.

B. ***The School Board Engaged In An Unfair Labor Practice.***

The Association contends that the school district engaged in an unfair labor practice when it unilaterally implemented an increase in the assigned teacher-student contact time without bargaining over the impact that change would have on the teachers' working conditions. Complainant's opening brief, page 2. The Association does not quarrel with the school district's management right to change the teachers' schedule during their contractual workday.

The school district argues that the collective bargaining agreement gives the school district the right to implement the unilateral change without bargaining over the impact of the changes and that in any event the Association waived its right to bargain over the impact of the changes because it had in the past acquiesced in de minimus changes in the schedule. The school district further argues that the district had already carried out its duty to bargain with the Association over the structure of the teachers' workday as evidenced by the negotiations over the 2005-2006 bargaining agreement. With respect to this facet of the school district's argument, the school district contends that the evidence shows that during that negotiating session, the Association attempted to insert itself in structuring the teachers' workday but that through negotiation and agreement of the 2005-2006 CBA, the Association in effect gave up that right.[2]

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals of using federal court and National Labor Relations Board (NLRB) precedents as guidance in interpreting the Montana collective bargaining laws. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

The purpose of the Montana statutory provisions governing collective bargaining for public employees is to remove certain recognized sources of labor strife and unrest by encouraging "the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees." Mont. Code Ann. § 39-31-101; *Bonner School District No. 14 v. Bonner Education Association*, 2008 MT 9, ¶32, 341 Mont. 97, 176 P.2d 262. Public employers are obligated "to bargain in good faith with respect to wages, hours, fringe benefits and other conditions of employment." Mont. Code Ann. § 39-31-305(2). An employer commits an unfair labor practice under Mont. Code Ann. § 39-31-401(5) if it fails to bargain on mandatory subjects of bargaining. *Bonner*, ¶17.

An employer violates its duty to bargain in good faith when it unilaterally changes an existing term or condition of employment without bargaining that change to impasse. *NLRB v.*

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[2] In its answer to the unfair labor practice, the school district also defended its unilateral increase in assigned teacher-student contact time on the basis of exigent circumstances. Prior to hearing, the district withdrew this defense.

McClatchy Newspapers (D.C. Cir. 1992), 964 F. 2d 1153, 1162. When a collective bargaining agreement is in place, an employer must obtain the union's consent before implementing any change to the agreement. Where a mandatory subject of bargaining is not covered by the collective bargaining agreement, an employer must bargain the issue to impasse before it can implement a unilateral change. *International Union (UAW) v. NLRB*, 765 F.2d 175, 179 (D.C. Cir. 1985).

The impact of the changes here upon the teachers' schedules is a mandatory subject of bargaining. Indeed, the school district all but concedes this in light of the Montana Supreme Court's decision in *Bonner, supra*, by noting that *Bonner* "suggests that the schedule changes implemented by the school district are mandatory conditions . . ." Defendant's opening brief, page 24. In fact, the principles of *Bonner* demonstrate that the substantial change in the teachers' previously understood unassigned prep time, a change which added at least 75 minutes of required contact time at Graff and at least 85 minutes at the Laurel Middle School, was a change in the terms and conditions of employment, the impact of which upon the teachers was subject to bargaining unless waived either by past bargaining history or by the language of the 2008-2011 CBA itself. *Bonner,* ¶32. *See also*, *Indian River School Board v. Indian River County Education Association*, 373 So. 2d 412 (Fla App. 1979) (holding that changing a teaching day which consisted of seven class periods, five of which were 50 minutes long, one of which was 25 minutes long, and one of which was 10 minutes long, for a total teaching time of 285 minutes per day, to a seven class period day of six 47 minute periods and one 15 minute period, for a total of 287 minutes per day of teaching time, was a change subject of mandatory bargaining) and *Taylor Federation of Teachers v. Board of Education*, 255 N.W. 2d 651 (Mich App. 1977) (additional 15 minutes of student contact time that the school board unilaterally imposed upon teachers was a condition of employment subject to mandatory bargaining).

As the impact of the schedule changes was a mandatory subject of bargaining, the school district is relegated to arguing that the Association waived its right to bargain over this issue. A waiver can occur either by express provisions in the CBA, by the parties' bargaining history, or by a combination of both. *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072, 1079, footnote 10, (9th Cir. 2008), citing *Am. Distributing Co. v. NLRB*, 715 F.2d 446 (9th Cir. 1983). The school district must prove the waiver. An express contractual waiver must be "explicitly stated, clear and unmistakable." *Local Joint Executive Board*, *supra,* 540 F.2d at 1079. In order to demonstrate a waiver by bargaining history, the matter at issue must have been "fully discussed, and consciously explored during negotiations and the union [must] have consciously yielded or clearly and unmistakably waived its interest in the matter." *Id.*, citing *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989). Taken as a whole, the evidence in this case does not support the school district's argument either that the language of the 2008-2011 CBA constitutes a waiver of the right to bargain over the impact of the reduction of the unassigned time or that past negotiations demonstrate a waiver of the right to bargain over the impact.

The hearing officer agrees with the Association's argument that nothing in the 2008-2011 CBA language amounts to an explicit, stated, clear, and unmistakable waiver of the right

to bargain over the impact of the reduced unassigned time. As the Association points out, the language of the CBA is silent on the issue of bargaining the impact over an increase in assigned teacher-student time. It does not give the school district the right to schedule assigned teacher-student contact time without bargaining over the impact of doing so. Indeed, the language of the contract indicates to the contrary, stating that the teachers "should be available to the pupils, **upon their request**, by 8:00 a.m. as well as after dismissal time." (Emphasis added). Implicit in this language is the notion that the teachers are in fact entitled to unassigned teaching, provided that they are available to the students upon the ***student's*** request. Certainly, the language does not require the teachers to be available at the school district's request. Had the parties intended to make the teachers subject to assigned teaching duties at all times between 8:00 a.m. and 4:00 p.m., the language of the CBA would have said as much. This specific provision does not amount to a plain and unmistakable waiver of the right to bargain over the impact of increases in assigned teaching time.

The school district's argument that the management rights clause and integration clause constitutes a waiver is unpersuasive. As the Association correctly notes, the National Labor Relations Board 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. The management rights clause in the 2008-2011 CBA does not authorize the school district to make unilateral changes in conditions of employment without collective bargaining and, therefore, does not demonstrate a waiver.

The hearing officer also agrees with the Association that 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*. An employer cannot implement a unilateral change in working conditions and then use the zipper clause as a sword to justify its refusal to discuss a unilateral change in the *status quo*. *Pepsi Cola Distributing Co.*, 241 NLRB 869 (1979). 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*. *See also*, *Michigan Bell Telephone Co.*, *supra*.

Likewise, nothing in the bargaining history of the parties suggests a clear and unmistakable waiver of the mandatory bargaining subject at issue in this case. The school district's contention that the lack of the inclusion of an ad hoc committee into the 2005-2006 CBA somehow shows a waiver is unconvincing. As the Association aptly points out in its post-hearing responsive brief, there is nothing but purest speculation in the record as to why that ad hoc committee was not included in the final CBA. More importantly, even if the reasons were known for not including the ad hoc committee, there is no way to know what the ad hoc committee might or might not have done had it come into existence. The deletion of the ad

hoc committee from the 2005-2006 CBA negotiations does not plainly and unmistakably show that the Association waived its right to bargain over the impact of the changes.

The changes in the 2005-2006 CBA which resulted in changing the beginning of the teachers' workday from 8:15 a.m. to 8:00 a.m. does not clearly point to a waiver. At most, it signifies that the teachers agreed to begin their contractual day at 8:00 a.m. and nothing more. It does not at all speak to whether the teachers gave up their right to bargain over the impact of the addition of assigned teacher-student contact time.

Finally, to suggest that the past practice of soliciting input from individual teachers somehow waives the right of the Association to bargain flys in the face of the very principles underlying collective bargaining. Here, there is no indication that the teachers' acknowledged representative, the Association, either explicitly or tacitly condoned such input as a substitute for the power of the Association to bargain on behalf of the teachers. Also, as the Association correctly notes, in order to be waived, the issue must have been fully discussed and consciously explored **during negotiations**. *Local Joint Executive Board, supra,* 540 F.2d at 1079. Any input received from the teachers was individual input which was not received in negotiations. To permit the school district to prevail on this argument would result in an "end run" around the purposes of the public employees collective bargaining.

In sum, the school district has failed to meet its burden to show that either the language of the 2008-2011 CBA or the bargaining history of the parties demonstrates that the Association waived its right to bargain over the mandatory subject of the impact of the increase in assigned teacher-student contact time. The Association has thus proven the unfair labor practice charges against the school district.

C. *The Remedy For the Violation.*

Upon determining by a preponderance of the evidence that an unfair labor practice has occurred, the Board of Personnel Appeals shall issue and serve an order requiring the entity named in the complaint to cease and desist from the unfair labor practice. Mont. Code Ann. § 39-31-406(4). The Board shall further require the offending entity 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.

The proper remedy here is to order the school district to cease and desist implementation of the increased assigned teacher-student contact time, to restore the status quo ante, and to require the school district to engage in good faith bargaining with the Association if the school district seeks to increase the assigned teacher-student contact time. In addition, an order requiring the school district to reinstate all leave taken by members of the Association in order to participate in the proceedings held on May 12 and 13, 2009 is appropriate.

The evidence is inconclusive as to whether any teacher's additional work outside his or her 8:00 a.m. to 4:00 p.m. time actually resulted from the school district's unfair labor practice. No witness articulated specific examples of increased work load outside the regular contract hours that resulted from the unilateral increase in the assigned teacher-student contact time. There was also credible evidence that, because of the teachers' obvious dedication to their work, they might in any event be working outside the 8:00 to 4:00 hours. In light of the inability to establish a direct link between the unfair labor practice and any loss of wages, the hearing officer agrees with the school district that imposition of back pay is inappropriate.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to Mont. Code Ann. § 39-31-405.

2. The Association has demonstrated by a preponderance of the evidence that the school district's refusal to bargain over the impact of the district's decision to increase the assigned teaching time for the 2008-2009 school year was an unfair labor practice that violated Mont. Code Ann. § 39-31-401(1) and (5).

3. Imposition of an order requiring the school district to cease and desist implementation of the increased assigned teacher-student contact, to restore the status quo ante, and to require the district to bargain to impasse the impact of any changes in assigned teaching time prior to implementing such changes is appropriate pursuant to Mont. Code Ann. § 39-31-406(4).

4. An award of back pay is not supported by the facts of this case and, therefore, is not an appropriate remedy.

VI. RECOMMENDED ORDER

Yellowstone County School District Nos. 7 & 70 are hereby ORDERED:

1. To immediately cease and desist implementation of the increased assigned teacher-student contact and to restore the status quo ante;

2. To bargain in good faith with the Association if the school district seeks to increase the assigned teacher-student contact time; and

3. No later than 30 days after the entry of the Board's final order in this matter:

a. To reinstate all leave taken by members of the Association in order to participate in the proceedings held on May 12 and 13, 2009, and

b. 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 school for a period of 60 days and to take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

DATED this 14th day of August, 2009.

BOARD OF PERSONNEL APPEALS

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to Admin. R. Mont. 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. Mont. Code Ann. § 39-31-406(6). Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall 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 Laurel Unified Education Association, MEA-MFT;

We will cease immediately from requiring the additional teacher-student contact time that was implemented during the 2008-2009 school year and cease otherwise altering terms and conditions of employment subject to the collective bargaining agreement with the Laurel Unified Education Association, MEA-MFT without prior bargaining with the Laurel Education Association, MEA-MFT;

We will engage in negotiations with the Laurel Unified Education Association, MEA-MFT applicable to members of the bargaining unit.

DATED this _____ day of _____, 2009.

Laurel Unified Education Association, MEA-MFT

By:_____
Board Chair:

_____
Office: