

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 13-2012 - 18-2012,
CONSOLIDATED AS UNFAIR LABOR PRACTICE CHARGE NO. 14-2012:

MEA-MFT,)	Case Nos. 1098-2012, 1096-2012,
)	1099-2012, 1100-2012, 1101-2012,
Complainant,)	1102-2012
vs.)	
)	FINDINGS OF FACT;
STATE OF MONTANA,)	CONCLUSIONS OF LAW;
DEPARTMENT OF CORRECTIONS,)	AND RECOMMENDED ORDER
)	
Defendant.)	

* * * * *

I. INTRODUCTION

The parties submitted this matter upon a stipulated set of facts and exhibits. Those exhibits are Complainant’s Exhibits A through G (attached to the complaint in this matter) and Defendant’s Exhibits 1 and 2. In addition, the parties submitted the affidavits of Paula Stoll and Larry Nielson. Having considered the stipulated facts, stipulated exhibits, and argument of the parties contained in their respective briefs, the following findings of fact, conclusions of law, and recommended order are made.

II. ISSUE

Did the employer’s refusal to provide a pay advancement, in conformity with the terms of an expired collective bargaining agreement, during negotiations on a successor agreement constitute a failure to maintain the status quo on a mandatory term of bargaining such that the employer’s conduct amounts to an unfair labor practice?

III. STIPULATED FACTS¹

The parties have stipulated to the following facts:

1. Certain MEA-MFT affiliated local unions (union) are the recognized and/or certified exclusive representatives of certain employees of the Montana State Prison, the Montana Women's Prison, the Pine Hills Youth Correctional Facility, the Riverside Youth Correction Facility, and certain Probation and Parole employees are "labor organizations" within the meaning of Mont. Code Ann. § 39-31-103(6).

2. The State of Montana Department of Corrections (DOC) is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10).

3. The Governor or his designee has the statutory authority to represent all executive branch agencies for the purpose of collective bargaining with public employee unions. Mont. Code Ann. § 39-31-301; 37 Op. Att'y Gen. No. 168. The Governor designated Paula Stoll as the representative of the State of Montana. Exec. Order No. 40-2008.

4. The Board of Personnel Appeals has jurisdiction over this matter.

5. The union and DOC have been bargaining successor agreements to the respective 2009-2011 collective bargaining agreements which expired June 30, 2011.

6. Certain provisions of the expired collective bargaining agreements are preserved as "status quo" during negotiations for a successor agreement.

7. Neither impasse nor waiver exists here.

8. DOC is not advancing those employees with less than six years experience towards market on the pay progression salary schedules included in their respective expired collective bargaining agreements.

9. DOC has not advanced employees with incremental pay increases included in their collective bargaining agreements beyond the expiration of the agreements

¹ With the exception of a few stylistic changes, the hearings officer has reprinted the parties' stipulated facts verbatim. In making these stylistic changes, it is not the hearings officer's intent to change in any substantive manner the stipulated facts provide by the parties.

when a new agreement is not negotiated and ratified in the past or with any other bargaining unit negotiating with the executive branch.

10. Although the verbiage differs in the various expired agreements, the intent and procedure for advancement is clear and unambiguous.

11. All of the expired collective bargaining agreements require that an employee with less than six years experience complete a required number of hours in training for advancement. If the training is not available, then the employee shall advance automatically. (See Exhibits A-F).

12. Three of the expired collective bargaining agreements, namely, Montana State Prison, Montana Women's Prison, and Pine Hills Youth Correctional Facility agreements, have an additional requirement that the employee may not advance if they are on a performance or corrective plan.

13. The union sent a letter to Warden Mahoney on January 31, 2011 that indicated the union fully expected the DOC to abide by the collective bargaining agreement, as set out in Exhibit G.

14. Incremental pay increase provisions have been included in the collective bargaining agreements (Exhibits A-E) since 2005.

15. In 2009, the CBAs expired before new agreements were reached. The DOC did not advance employees' incremental pay increases beyond the expiration of the collective bargaining agreements in 2009. The CBAs that were negotiated for the 2009-2011 biennium included the incremental pay increase provision; as explained in ¶17 below, those increases were paid.

16. Montana Public Employees Association also represents two bargaining units at the Pine Hills Youth Correctional Facility that have similar incremental increase provisions in their collective bargaining agreements. The DOC has not paid the incremental pay increases pursuant to those CBAs since they expired.

17. The union employees and the bargaining unit employees with the Office of Public Defender negotiated incremental pay increases in their collective bargaining agreements for the 2009-2011 biennium and these incremental increases were paid during this time period. This occurred at the same time that an increase in pay was not approved by the Legislature and Governor Schweitzer prohibited any pay adjustments under the Broadband Pay Plan. The Department of Revenue and the

Department of Labor and Industry bargaining unit employees were not able to negotiate incremental pay provisions into their collective bargaining agreements for the same biennium. The Department of Revenue has employees in a bargaining unit who are represented by the union.

18. The funds required to continue incremental pay increases included in the expired collective bargaining agreements have not been appropriated by the Legislature.

19. In addition to the above stipulated facts, the hearing officer notes that Addendum A to the Montana Women's Prison Custody Employees Collective Bargaining Agreement (attached to the union's complaint) is representative of the language employed regarding the fact set forth in Stipulated Fact 11. That provision states:

7. Any employee who does not successfully complete the training requirements(s) for progression to the next pay increment will be denied movement until such time as he/she does complete the requirements unless the failure to complete is a result of the training not being offered, and/or other reason which is not the fault of the employee.

There is no qualifier language in the CBA such as a requirement that the union ratify a successor CBA prior to the pay raise taking place. Provided that the inability to obtain the required training is not due to the fault of the employee, the advancement under the terms of the CBA is required.

IV. DISCUSSION²

A. The Department of Corrections Has Failed to Negotiate in Good Faith By Failing to Implement the Automatic Pay Increment.

The union asserts that the employer has engaged in a ULP by refusing to advance certain employees on a pay scale until a successor CBA is negotiated even though the expired CBA required the employer to advance such employees. It reaches this conclusion by arguing that the requirement to advance as set forth in the expired CBA is a mandatory subject of bargaining and as such represents the status

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

quo for purposes of bargaining until such time as the parties either reach agreement or impasse on a successor CBA. The union relies on the Montana Board of Personnel Appeals' decision in *Forsyth Education Assoc. v. Rosebud Co. School Dist.*, ULP No. 37-81 (1983).

The employer argues that DOC is prevented by statute from advancing these employees until such time as a successor CBA is agreed upon by the union. The employer further argues that the parties have taken this position for several years and that the union has never objected to the requirement that the union members have ratified a successor agreement prior to receiving the pay advancements. From this, the employer posits that there is no change in the status quo of a mandatory term of bargaining such that an unfair labor practice could have occurred in this case. As the ERD investigator pithily stated, the question here is "What is the status quo?"

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals 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.

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. Katz*, 369 U.S. 736 (1962); *NLRB v. McClatchy Newspapers*, 964 F. 2d 1153, 1162 (D.C. Cir. 1992). After a collective bargaining agreement has expired and while the parties are still negotiating for a successor agreement, an employer violates the duty to bargain if, without bargaining to impasse, it changes unilaterally a term or condition of employment that existed prior to the expiration of the contract. *NLRB v. McClatchy Newspapers, supra* (an employer and union who are bargaining without a collective bargaining agreement in effect generally must maintain the status quo with regard to mandatory subjects of bargaining). *See also, Forsyth School Dist. No. 4 v. Board of Personnel Appeals*, (1984), 214 Mont. 361, 692 P.2d 1261.

A unilateral change by the employer in a mandatory term of bargaining during contract negotiation is regarded as a per se refusal to bargain which amounts to an unfair labor practice. *Katz, supra, Litton Fin., Printing v. NLRB*, 501 U.S. 190, 198 (1991); *The Developing Labor Law*, Ch. 13.II A (5th Ed. 2006). The rationale behind the requirement that an employer maintain the status quo of a mandatory term of bargaining emanates from the realization that permitting an employer to unilaterally

change such terms fundamentally disrupts the bargaining process and, ultimately, “the statutory objective of establishing working conditions through bargaining.” *Forsyth*, page 7, citing, *Katz, supra*.

The hearing officer agrees with the union that the Board’s decision in *Forsyth* is controlling here. That decision compels a finding that an unfair labor practice occurred in this case due to DOC’s failure to provide the pay advancements during the time that the CBA is being negotiated. In *Forsyth*, the school district had a collective bargaining agreement that expired on June 30, 1981. The parties continued to negotiate for a successor agreement but had not reached agreement when the 1981-1982 school year began. The expired collective bargaining agreement contained a salary schedule calling for incremental pay raises based solely upon experience and on the attainment of additional education requirements. The school district paid members of that union based upon their 1980-1981 salaries but refused to pay any additional amounts based upon experience or educational attainment as required by the expired collective bargaining agreement.

The Board found that an unfair labor practice had occurred when the school board failed to advance the teacher’s pay based on experience and educational training. In doing so, it stated unequivocally that “[t]he Board believes that the proper implementation of the status quo ante in a situation involving an expired cba which contains a pay matrix is to pay according to the schedule set forth for determining wages.” *Id.* at pp. 12-13. The Board also rejected efforts to analogize to other states’ public employee bargaining statutes, finding instead that NLRB and federal court precedent was the only place to look for guidance on the issue. *Id.* at Page 4. Relying solely on the holdings in NLRB and federal court decisions, the Board came to its conclusion in no uncertain terms.

The rationale underlying the *Forsyth* decision and the policy behind the duty not to implement changes in mandatory terms of bargaining during the negotiation of a successor bargaining agreement are applicable in the case before this tribunal. The pay advancement at issue here is not in any sense discretionary with the employer. If the CBA were in force, the advancement would have been required. To permit the employer to cease providing the pay advancement during bargaining for a successor agreement would provide the employer with the very type of bargaining leverage that is detrimental to the collective bargaining process and which is inimical to the policies behind Montana’s public employee collective bargaining statutes. Under the rationale of *Forsyth*, such an outcome is prohibited.

In an effort to overcome the apparent force of the *Forsyth* decision, DOC has argued that *Forsyth* is not controlling because in this case, unlike *Forsyth*, there are statutes that require legislatively authorized pay increases to be negotiated prior to implementation of such a pay advancement. DOC relies on Mont. Code Ann. § 2-18-301(3), § 2-18-301(4), and various subsections of Mont. Code Ann. §§ 2-18-302 and 303 for this argument. The union counters, correctly so, that those statutes do not control the pay advancement issue here. The pay raise controlled by the statutes DOC cites is a **legislatively authorized** pay increase tied to a **base** salary. As the union correctly notes, the pay increase at issue here does not appear to spring from or amount to the legislatively authorized pay increases discussed in the statutes cited by DOC. Certainly nothing in the expired CBA or in any other evidence presented to this tribunal suggests that the funds for the pay advancement must come through legislatively appropriated funds. Because of this, the statutes have no bearing on the outcome of this case. *Cf., Forsyth, supra*, page 17 (noting that proposed legislation that would have prohibited school districts from paying automatic step increments upon the expiration of the collective bargaining agreement had no bearing on the Board's determination).

DOC also contends that the past practice of not providing the automatic increases until the union agrees to a successor agreement constitutes the status quo against which DOC's conduct must be measured. Department of Corrections' opening brief, page 11. In response, the union points out that the parties agreed to the pay advancement in clear and unambiguous terms that were not "renegotiated" at any time since the implementation of the automatic increase beginning with the 2005 collective bargaining agreement. Union's response brief, page 3.

Nothing in the expired CBA conditions the implementation of the pay advancement upon the union's agreement to a successor bargaining agreement. Nonetheless, DOC argues that a long standing course of conduct whereby a successor bargaining agreement has been entered into prior to implementing automatic pay increases demonstrates the union's acquiescence in such an arrangement. Because there is no such limiting language in the CBA, DOC must prove that the union's conduct amounts to a waiver as demonstrated by past bargaining practice.

In arguing a waiver, the employer bears the burden of proof to show that the union has plainly and unmistakably waived its right to bargain over the subject. *Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562, 1567 (10th Cir. 1993); *The Developing Labor Law, supra*, Ch. 13 II. A. 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).

Nothing in the facts presented by the parties in this stipulated record demonstrates the union's plain and unmistakable waiver. There is no indication, for example, that in any of the previous bargaining sessions (and certainly not since the implementation of the pay advancement language in the 2005-2007 CBA) that the union and DOC have ever had a situation arise where the union rejected a proposal or that the bargaining was so drawn out that the automatic pay advancement became an issue. In view of the clear language of the CBA regarding the automatic pay advancement, the hearing officer cannot say that DOC has demonstrated the union's acquiescence in obtaining a successor agreement prior to instituting the automatic pay raise.

As the automatic pay raise is a subject of mandatory bargaining, it is the status quo that must be maintained during the time that the successor bargaining agreement is being negotiated. The DOC's failure to do so in this case constitutes a violation of Mont. Code Ann. § 39-31-401(5).

B. *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, as requested by the union, is to order DOC to cease and desist not paying the automatic pay increases at issue here and to order DOC to make whole those bargaining unit members who have become eligible for the increments since the expiration of the CBA.

V. CONCLUSIONS OF LAW

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

2. A preponderance of the evidence establishes that DOC's refusal to implement the pay advancement at issue in this case during the pendency of bargaining for a successor agreement violates Mont. Code Ann. § 39-31-401(5).

3. Imposition of an order requiring DOC to cease and desist not paying the pay advancement at issue in this case and to make whole all bargaining unit employees who have become eligible for the advancement since the expiration of the 2009-2011 CBA is appropriate pursuant to Mont. Code Ann. § 39-31-406(4).

VI. RECOMMENDED ORDER

The hearing officer recommends that the Board of Personnel Appeals enter its order directing DOC:

1. To immediately cease and desist not paying the pay advancement at issue in this case and to make whole all bargaining unit members eligible for the pay advancement;

2. To henceforth bargain in good faith with the union.

DATED this 6th day of April, 2012.

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. 24.26.222 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 201503
Helena, MT 59620-1503