

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 24-2012:

MILES COMMUNITY COLLEGE)	Case No. 2075-2012
FACULTY ASSOCIATION, MEA-MFT,)	
)	
Complainant,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND RECOMMENDED ORDER
)	
MILES COMMUNITY COLLEGE,)	
)	
Defendant.)	

* * * * *

I. INTRODUCTION

The Miles Community College Faculty Association (MCCFA) filed a complaint against Respondent Miles Community College alleging that the College’s unilateral decision to not bargain over the removal of four floating days for faculty members was an unfair labor practice which violated Mont. Code Ann. § 39-31-401(5).

Prior to the hearing, the complainant moved for summary judgment. That motion was denied.

Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on February 4, 2013. Vicki McDonald, Attorney at Law, represented MCCFA. Shane Vannatta, Attorney at Law, represented the College. The parties’ Joint Exhibits A through T and MCCFA’s Exhibits 1 and 2 and the College’s Exhibit 101 were admitted into evidence. Faculty member George Dickie, faculty member Nancy Swope, faculty member Mike Hardy, faculty member Rachel Finn, union field representative Scott McCulloch, Vice President of Academic Affairs Shelly Weight, Vice President of Administrative Services Lisa Watson, Human Resources Administrator Kylene Phipps, and President Stefani Hicswa all testified under oath.

The parties graciously provided the hearing officer with post-hearing briefs, the last of which were timely filed on March 8, 2013. Based on the arguments and evidence adduced at the hearing as well as the arguments presented in the parties’

closing briefs, the following findings of fact, conclusions of law, and recommended order are made.

II. ISSUE

Did Miles Community College commit an unfair labor practice by not negotiating with MCCFA over the removal of four floating days from the academic work year?

III. FINDINGS OF FACT

1. MCCFA is the exclusive representative for the faculty at Miles Community College and is a labor organization within the meaning of Montana Code Annotated § 39-31-103(6). The faculty employees who are members of MCCFA are public employees within the meaning of Montana Code Annotated § 39-31-103(9).

2. Miles Community College (the College) is a State of Montana institution of higher learning located in Miles City, Montana, and is a public employer within the meaning of Montana Code Annotated § 39-31-103(10).

3. Since 2006, MCCFA and the College have been party to a collective bargaining agreement (CBA). It took the parties 88 days to reach agreement on the first CBA (2006-2008). The parties' negotiation techniques in reaching the CBA have employed interest-based bargaining.

4. As part of the 2006-2008 bargaining agreement, the parties agreed to an increase of working days for the MCCFA members from 157 days per academic year to 161 days per academic year. That agreement was reached after the parties bargained and agreed that the additional four days of work by faculty would be comprised of what the parties denominated as "floating days." On those days, the faculty members would be deemed to be working but they could use the days as they wished, for example to complete grading or to attend professional development courses.

5. There was no requirement that the faculty members be on campus during those four days and no requirement that they be available to meet with students during those days. Faculty members were, however, required to report to the College administration those days which they used as floating days. The floating days arrangement was not put into the CBA but was honored by both parties to the CBA. MCCFA members would not have agreed to the increase in the number of days (157 to 161 days) without the College's agreement to implement the floating days.

6. The parties' practice of providing floating days for the faculty was accomplished through the calendaring done by the College's calendaring committee. To provide for the parties' floating days agreement within the academic calendar, the calendar committee would schedule all but four of the contractually agreed upon workdays provided for in the CBA. The four unscheduled days would then become the floating days. The practice of scheduling the four floating days in this manner continued unabated from 2006 through 2011.

7. The 2006-2008 CBA and 2012-2013 CBA each contain an integration clause (Section 18.4, Exhibit A, 2006-2008 CBA, Section 19.4, Exhibit B, 2012-2013 CBA), better known as a "zipper clause" in labor law parlance. The zipper clause language of both CBAs is identical. The zipper clause language of each CBA states:

This agreement contains the entire understanding between the College and the Association after the exercise of the right and opportunity to bargain with respect to any subject matter as to which the Montana Public Employees bargaining law imposes a duty to bargain and contains the entire understanding of the parties. The provisions herein relating to terms and conditions of employment supercede any and all prior agreements, resolutions, practices, College policies, rules or regulations concerning terms and conditions of employment inconsistent with these provisions.

8. The parties did not consciously discuss the zipper clause during any part of the bargaining for the 2012-2013 CBA.

9. Each CBA also contains a management rights clause containing the following language:

Except as expressly modified by a specific provision of this agreement, the College shall have the prerogative to operate and manage its affairs, including but not limited to the following areas:

1. direct employees;
2. hire, promote, transfer, assign, and retain employees;
3. relieve employees from duties because of lack of work or funds or under conditions where continuation of such work be [sic] inefficient and non-productive;
4. maintain the efficiency of College operations;

5. determine the methods, means, job classifications, and personnel by which College operations are conducted;
6. take whatever actions may be necessary to carry out the missions of the College in situations of emergency;
7. establish the methods and processes by which work is performed;
8. issue, amend or revise policies, and rules;
9. control and regulate the use of facilities and equipment and other property of the College.

10. Each CBA also contains a provision entitled "Contract Year Obligations." The language in each CBA is identical, except that the number of days is different. Compare, Exhibit A, Section 10.1, 2006-2008 CBA and Exhibit B, Section 11.1, 2011-2013 CBA. During the 2006-2008 CBA, the number of contract days was 161. In the 2012-1013 CBA, the number of contract days is 163. The language states specifically:

The contract year shall begin the first day of the fall semester when faculty and staff orientation and advising begin. The contract year shall end on the last day of finals for the spring semester. One additional work day for grade reporting will occur the week day following the last day of finals for each semester. If satisfactory to the requirements of the Northwest Commission on Colleges and Universities, faculty will work 161 days per contract year pursuant to an academic calendar developed by the College administration, who agree to creation of a calendar committee, comprised of faculty and classified/exempt staff representatives. These 161 days will include teaching, teaching related activities (i.e., office hours, laboratory preparation, etc.), advising, orientation activities, grade reporting, professional development, and committee/accreditation assignments.

11. Despite the existence of the zipper clause and the management rights clause in the 2006-2008 CBA, the parties both understood and honored the condition of the faculty's four floating days.

12. During bargaining for the 2012-2013 CBA, the parties had no discussion about the floating days. The parties' past practice of recognizing and honoring the faculty's floating days was continued even in the face of the zipper clause. There was no indication from management that they intended to restrict the use of floating

days. Testimony of Mike Hardy. The parties ratified the 2012-2013 CBA on August 22, 2011. The floating days constitute a past practice for purposes of interpreting the 2012-2013 CBA.

13. For the 2012-2013 CBA, the parties agreed to increase the number of faculty working days from 161 to 163 days. MCCFA would not have agreed to increase the days had they been aware that at some point the College would no longer honor the floating days arrangement.

14. At all times pertinent to this case, the College has employed a calendar committee to set number of classroom contact hours and the academic calendar for each school year. The calendar committee is comprised of both College management and some MCCFA members. None of the MCCFA members on the calendar committee is an MCCFA officer. The committee's chairman is Jeff Brabant, an MCCFA member. One other faculty member also serves on the calendar committee. All members of the calendar committee are appointed by the College president without input from MCCFA.

15. On October 5, 2011, George Dickie along with other MCCFA members received an e-mail from Brabant setting forth a proposed 2012-2014 academic year calendar and requesting input from faculty members. Exhibit 1. Brabant's e-mail specifically indicated to Dickie that Brabant did not "know how we need to work with the union on this, so just let me know." *Id.* The calendar Brabant presented was consonant with the practice of permitting faculty to use four floating days during the academic year.

16. On November 4, 2011, Dickie received a copy of the calendar that President Hicswa proposed for the 2012-2014 academic year and which she intended to present the College trustees for their approval. Unlike the calendar attached to Brabant's e-mail, the calendar Hicswa presented required MCCFA faculty to be on campus and available to students for academic advisement on two days at the beginning of the fall semester and two days at the beginning of the spring semester. This effectively wiped out the four floating days by requiring faculty to be on campus during those floating days in order to meet with students.

17. After seeing the revised calendar that Hicswa proposed to present to the trustees, both Dickie and Dr. Mike Hardy, MCCFA vice-president, spoke with Hicswa to register their respective complaints that Hicswa's calendar wiped out the floating days. They also advised her that they believed that the College needed to bargain over removal of the floating days. Hardy's conversation with Hicswa over the union's concerns about the elimination of the floating days lasted about one hour. Hardy made it clear to Hicswa that he felt the calendar that she was going to propose

to the board eviscerated the floating days and Hardy asked Hicswa not to present it to the trustees.

18. At a faculty meeting held on November 2, 2011, Weight presented Hicswa's calendar to faculty members in attendance. Dickie was excused from attendance at the meeting. At that meeting, Kristen Buck, a faculty member of the MCCFA, asked Weight whether the calendar did not in fact violate the CBA because it removed the floating days. Weight responded that the CBA only mentioned that the faculty will work 163 days but said nothing about floating days. Exhibit C, page 2.

19. The board of trustees was scheduled to meet on November 28, 2011 to consider approval of the proposed faculty calendar which included elimination of the floating days. During the afternoon before the meeting, Dickie, who was recovering from an illness, contacted MEA-MFT field representative Scott McCulloch to ask him to speak with Hicswa about the unilateral removal of the floating days. As requested, McCulloch immediately contacted Hicswa by telephone to register the union's objection to the proposed calendar. McCulloch specifically reminded Hicswa that the removal of the floating days had to be bargained for and that the failure to do so would result in the union filing an unfair labor practice.

20. In spite of the admonition from McCulloch, Hicswa nonetheless presented the calendar which eliminated the floating days for approval to the trustees at the trustees' meeting. The trustees approved the calendar.

21. On December 14, 2011, Dickie wrote to Hicswa and reiterated MCCFA's objection to Hicswa's calendar. Exhibit F. He told Hicswa that the College was obligated to bargain over changes in working conditions and advised Hicswa that MCCFA demanded to bargain over this issue.

22. On December 15, 2011, Hicswa responded by e-mail to Dickie's letter, acknowledging that she had received his demand to bargain. Exhibit G. Further confirmation of Hicswa's gesture came in Kylene Phipps' December 27, 2011 letter to Dickie where Phipps stated "regarding your request to bargain, the administrative team is available to discuss this issue on January 16th, 2012 from 9:00 a.m. to 12:00 p.m." Exhibit H.

23. Dickie responded to Phipps' letter on January 4, 2012 indicating that MCCFA was not available to negotiate on the date Phipps had suggested but the other dates the parties had discussed still remained viable. Exhibit I. In reply to Dickie's January 4 letter, Phipps responded on January 5, 2012 indicating that the administration's team was available on January 17, 2012. Exhibit J.

24. The parties were finally able to meet on January 17, 2012. At the meeting, MCCFA informed the College that they wanted their floating days restored, indicating that they are very important to them.

25. The College's team decided that the purpose of this meeting was to provide the College's rationale for removing the floating days. In response, the College drew up the reasons why it removed the floating days. Exhibit M.

26. On February 9, 2012, MCCFA and College administration met again to talk about the elimination of the floating days. At that time, the administration presented its rationale for removing the floating days. Exhibit M. MCCFA was given a copy of the written rationale. Exhibit N.

27. The final meeting between the MCCFA and the College took place on March 14, 2012. During that meeting, the College informed the MCCFA that the College "has decided that we do not feel that we need to bargain on the issue and since management does not believe that the calendar is a change in working conditions then we are not going to accept your request to bargain." Exhibit P, Page 1.

28. As a result of the College's refusal to bargain, MCCFA filed the instant unfair labor practice.

IV. DISCUSSION

A. The School Board Engaged In An Unfair Labor Practice.

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).

Employers are obligated to bargain in good faith with labor organizations representing employees and the failure to do so violates the Montana Public Employees Collective Bargaining Act. Mont. Code Ann. § 39-31-401(5); *Bonner*, ¶17. An employer violates the duty to bargain if, without bargaining to impasse or absent exigent circumstances,¹ it changes unilaterally an existing term or condition of employment which is a mandatory subject of bargaining. *NLRB v. Katz*, (1962), 369 U.S. 736; *NLRB v. McClatchy Newspapers* (D.C. Cir. 1992), 964 F.2d 1153, 1162; *Bigfork Area Education Association v. Board of Flathead and Lake County School College No. 38*, ULP #20-78.

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). *See also, Gallatin County School District #7 v. Bozeman Educ. Assoc.*, ULP #43-79, page 7 (Once it is established that the matter in question is one on which the parties are required to bargain in good faith; unilateral changes cannot be made either in those conditions of employment wages, hours and fringe benefits to which the contract speaks or in those same areas even if they are not contained in the contract; unless, of course, there exists a waiver by the party to whom the duty to bargain is owed).

The principles of *Bonner, supra*, demonstrate that the elimination of the faculty's previously understood and honored four floating days was a change in the terms and conditions of employment which was subject to mandatory bargaining unless waived either by past bargaining history or by the language of the 2006-2008 and 2011-2013 CBAs. *Bonner*, ¶32. *See also, 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). Indeed, the College appears to concede that the loss of the four floating days is a mandatory subject of bargaining. College's reply brief, page 2.

As the elimination of the four floating days was a mandatory subject of bargaining, the College is relegated to arguing that MCCFA waived its right to bargain over this issue. A waiver can occur by express provisions in the CBA. *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). *See also, MPEA v. Department of Justice*, ULP #17-87. The College must prove the waiver. An express contractual waiver must be "explicitly stated, clear and unmistakable." *Local*

¹The College has not argued nor even suggested that any exigent circumstances existed in this matter that would obviate its duty to bargain to impasse over a mandatory subject of bargaining.

Joint Executive Board, supra, 540 F.2d at 1079. In fact, 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 complainant cites *Ohio Power and Local Union No. 478, Utility Workers Union of America*, (1995), 317 NLRB 135 in support of its position that the College's unilateral elimination of the floating days amounts to an unfair labor practice. In that case, the NLRB found the employer to have committed an unfair labor practice when it unilaterally, and without affording the union notice and an opportunity to bargain, ended the longstanding practice of allowing certain union officers to take time off work without pay to attend workers' compensation hearings where employee claims were being presented. The NLRB found that the employer had failed to bargain in good faith to impasse, and that the union had not waived its statutory right to bargain over the issue by agreeing to the management rights and zipper clauses contained in the resulting collective bargaining agreement. The management rights clause provided that "the company ... shall have the right to ... determine the hours of work and schedules" and further, that "the scheduling of employees' daily and weekly working hours ... shall be determined solely by the company." *Id.* at 135. The zipper clause in that case read:

The parties agree that this contract incorporates their full and complete understanding and that any prior written or oral agreements or practices are superseded by the terms of this Agreement. The parties further agree that no such written or oral understandings or practices will be recognized in the future unless committed to writing and signed by the parties as a Supplement to this Agreement. This Agreement shall govern the parties' entire relationship and shall be the sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise. The parties for the life of this Agreement hereby waive any rights to request to negotiate, or to negotiate or to bargain with respect to any matters contained in this Agreement except as specifically noted otherwise herein.

Id.

Like the Master Agreements between the parties here, the language in the management rights clause in *Ohio Power* and the zipper clause was identical to that of prior contracts between the parties in that case. In affirming the ALJ's findings and conclusions, the Board relied on several factors. First, although the parties discussed the practice during their 1993 negotiations and the employer's negotiator expressed dissatisfaction with it, the employer failed to advise the union that it intended or had

decided to terminate the practice. *Id.* The nearly identical situation occurred here, except that the employer in this case, the College, failed to mention “floating days” during the 2011 negotiations or to even express dissatisfaction with it. In fact, the College never even hinted to the faculty that floating days were an issue at anytime leading up to the negotiations of 2011. On this point, MCCFA’s case is even more compelling than that of the union’s in *Ohio Power*.

Moreover, the contract in *Ohio Power* did not specifically mention the practice in question (allowing officers time off without pay to attend workers’ compensation hearings) and so the general language of the management rights clause referring to the employer’s right to determine hours of work and schedules was held not to be “a clear and unmistakable” indication that the union intended to waive its right to bargain over the elimination of that practice. *Id.* at 136. Furthermore, the fact that the practice continued under the two previous contracts, both of which contained identical provisions, further evidenced that the management rights clause in the 1993 contract was not intended to change the practice. *Id.* The Board also held that the union did not waive its bargaining rights by agreeing to the zipper clause in the 1993 contract. Although that clause stated that the contract supersedes all prior agreements and practices and was to be the parties’ complete understanding and sole source of all rights or claims arising out of the parties’ relationship, the Board found that the contract did not address the practice, and that the practice continued under prior contracts with the same language. *Id.*

The facts in the case before this tribunal are indeed, as noted by the complainant, nearly identical to those in *Ohio Power* and the rationale and reasoning of that case are compelling. Here, despite the existence of the management rights clause, the zipper clause, and the Contract Year Obligations language in the 2006-2008 CBA, the College with full knowledge acquiesced in the faculty’s use of the four days of the calendar year as floating days from 2006 through 2011. The College failed to raise the issue of floating days during negotiations for the 2012-2013 CBA. MCCFA had no reason to suspect its floating days were in jeopardy. The 2012-2013 CBA does not specifically address the practice of floating days. Under the authority of *Ohio Power*, the combination of the management rights clause, the zipper clause, and the Contract year Obligations clause does not constitute a clear and unmistakable waiver of MCCFA’s right to bargain over the elimination of the faculty’s floating days. *See also, Pepsi-Cola Distributing Co.* (1979), 241 NLRB 869 (NLRB found that the union had not waived its right to bargain over the elimination of an annual bonus that was not mentioned in the collective bargaining agreements, even though the agreement contained a zipper clause similar to the one in *Ohio Power*, where nothing was said during contract negotiations that would have caused the union to believe that its failure to include the bonus practice in the contract would preclude it from further bargaining on the subject).

The College's response to the complainant's argument is succinctly stated in its responsive brief. The College relies on the language of the Contract Year Obligations, the management rights clause, and the zipper clause of the CBA.² The College argues that because the 2012-2013 CBA makes no mention of floating days and the zipper clause states that the "provisions herein relating to terms and conditions of employment supersede any and all prior agreements, resolutions, practices, College policies, rules or regulations concerning terms and conditions of employment inconsistent with these provisions," as a matter of contract interpretation the union must be deemed to have waived its right to bargain over the issue. College's responsive brief, page 2-3. These arguments are not persuasive.

In the first place, the lessons of *Ohio Power, supra*, and *Pepsi Cola, supra*, dictate a different conclusion. In the second place, the language of the CBA is not so clear that it can be deemed to demonstrate a clear and unmistakable waiver of the right to bargain over the issue of the floating days, particularly in light of the parties' practice of honoring floating days in the face of identical language in the 2006-2008 CBA. The zipper clause does not state absolutely that it supercedes all prior agreements, resolutions, practices, College policies, etc. Rather, it qualifiedly states that it does so only if those prior agreements, resolutions, practices, College policies, etc., are "*inconsistent with these provisions.*" Given the parties' five year practice of honoring the floating days even in the face of identical language in the 2006-2008 CBA's zipper clause, management rights clause, and Contract Year Obligations clause, and coupled with the fact that the parties had no discussion whatsoever about the floating days during the negotiations for the 2012-2013 CBA, the practice of providing for the floating days is not inconsistent with the provisions of the CBA. To the contrary, it is wholly consistent with the CBA.

²The hearing officer does not understand the College to rely solely on the language of the zipper clause for its waiver argument and indeed, the College could not. The Board of Personnel Appeals has identified the specificity necessary for a zipper clause by itself to constitute a waiver and the zipper clause at issue in the case before this hearing officer does not approach the specificity required. *See, e.g., MPEA v. Montana Dep't of Justice*, ULP #17-87, page 2-3 (finding that the language of a zipper clause amounted to a waiver of the right to bargain on matters not contained within the collective bargaining agreement where the language stated "the parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Association for the duration of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter specifically referred to or covered in this Agreement, or not specifically referred to or covered in this Agreement, even though such subjects or matters may, or may not, have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.").

For this same reason, the parol evidence rule has no application to this case since the evidence of the parties' past practice is not being introduced to contradict the language of the CBA. The respondent's citation to Montana's parol evidence statute and one case relating to a commercial contract does not persuade the hearing officer that the parol evidence rule should as a matter of either logic or policy be applied to the collective bargaining case before this tribunal. The Ninth Circuit under circumstances similar to the case before this tribunal has refused to apply the parol evidence rule in the context of collective bargaining. *See, e.g., Syufu Enterprises v. Northern California Assoc. of IATSE Locals*, 613 F.2d 124, 126 (9th Cir. 1980) (noting that a collective bargaining agreement is different in nature, scope and purpose from the ordinary commercial contract and finding that it was entirely proper for the decision maker to consider relevant bargaining history despite objection that such evidence was barred by the parol evidence rule); *Pace et al. v. Honolulu Disposal Service, Inc.*, 227 F.3d 1150, 1158 (9th Cir 2000) (noting that the parol evidence rule operates to bar extrinsic evidence of an agreement where the proffered evidence is offered to contradict the written agreement). The presence of the limiting language "inconsistent with these provisions" in both the 2006-2008 CBA and 2012-2013 CBA, taken in conjunction with the College's practice of honoring the floating days even in the face of the CBA language demonstrates that the evidence of the parties' conduct with respect to the floating days is not inconsistent with the terms of the CBA. Admitting evidence regarding the past practice of the parties is not an effort to contradict the language of the CBA and the parol evidence rule should have no application to this case.

Finding that the language of the CBA resulted in MCCFA waiving its right to bargain over the floating days under the circumstances surrounding this case would effectively result in a game of "gotcha" against MCCFA.³ The College acquiesced in the faculty's use of floating days during the 2006-2008 CBA and up until the time President Hicswa presented the 2012-2014 academic year calendar that eliminated the floating days. MCCFA agreed to an extension of days in the academic calendar only under the proviso that those additional calendar days could be used as floating days. In bargaining for the 2012-2013 CBA, there was no bargaining nor even any discussion about the floating days and the union had no idea that the floating days would be eliminated. To accept the College's invitation and uphold its unilateral change of a mandatory subject of bargaining would be to foster the very type of labor strife that the Montana collective bargaining statutes are specifically designed to prevent. The hearing officer will not do so. Under all of the attendant circumstances in this case, the CBA language is far short of being a plain and unmistakable waiver on the part of MCCFA.

³The term "gotcha" is a colloquialism that signifies "I got you," signaling the fact of having trapped another.

Finally, the College seems to suggest that the fact that MCCFA members were on the calendar committee strengthens its position that the right to bargain over the floating days was waived. This argument also fails. First, there is no indication that the faculty's acknowledged representative, MCCFA, either explicitly or tacitly condoned such input as a substitute for its power to bargain on behalf of the faculty. Therefore, no waiver can be gleaned from the fact that members of the faculty served on the calendar committee. *See, e.g., Laurel Unified Educ. Ass'n., MEA-MFT v. Yellowstone County Sch. Districts 7 & 70*, ULP 6-2009, 8-2009 (finding that the administration's practice of seeking input from individual members of the teacher's union did not demonstrate that the union waived its right to bargain over increased teacher-student contact time). Also, 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. The work of the calendar committee was not part of ongoing negotiations between MCCFA and the College. To permit the College to prevail on the basis of this argument would result in an "end run" around the Collective Bargaining Act's protections afforded to public employees to organize and choose to be represented in bargaining with an employer.

In sum, the College has failed to meet its burden to show that either the language of the 2012-2013 CBA or the faculty's interactions with the calendar committee demonstrate that MCCFA waived its right to bargain over the mandatory subject of the elimination of the floating days. As the evidence shows that (1) the floating days were a subject of mandatory bargaining (2) MCCFA did not waive its right to bargain over the issue and (3) that the College unilaterally removed the faculty's four floating days, MCCFA has proven the unfair labor practice charges against the College.

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 is to order the College to reinstate the four floating days and thus restore the status quo ante and to engage in good faith bargaining with MCCFA over the floating days until such time as either resolution or impasse is reached.

V. CONCLUSIONS OF LAW

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

2. MCCFA has demonstrated by a preponderance of the evidence that the College's refusal to bargain over the four floating days was an unfair labor practice that violated Mont. Code Ann. § 39-31-401(5) as alleged in the complaint.

3. Imposition of an order requiring the College to restore the status quo ante, and to require the district to bargain in good faith with MCCFA to either resolution or impasse prior to eliminating the four floating days is appropriate pursuant to Mont. Code Ann. § 39-31-406(4).

VI. RECOMMENDED ORDER

Miles Community College should be ordered:

1. To restore the status quo ante by restoring the faculty's four floating days;
2. To bargain in good faith with MCCFA before eliminating the four floating days; and
3. No later than 30 days after the entry of the Board's final order in this matter:
 - a. 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 16th day of April, 2013.

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

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 restore the status quo ante by restoring the faculty's four floating days; and

We will not fail to bargain in good faith with the Miles Community College Faculty Association, MEA-MFT if the school district seeks to increase the assigned teacher-student contact time.

DATED this ____ day of _____, 2013.

Miles Community College

By: _____

Office: _____