

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 3-2014:

LITTLE ROCKY MOUNTAIN CLASSIFIED )	Case No. 204-2014
EMPLOYEES ASSOCIATION, MEA-MFT, )	
)	
Complainant, )	
)	
vs. )	<b>FINDINGS OF FACT;</b>
)	<b>CONCLUSIONS OF LAW;</b>
)	<b>AND RECOMMENDED ORDER</b>
BOARD OF TRUSTEES OF HAYS- )	
LODGE POLE SCHOOL DISTRICT, )	
)	
Defendant. )	

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**I. INTRODUCTION**

On July 31, 2014, the Hearing Officer issued a “prospective” proposed order deciding that the Board of Trustees of Hays-Lodge Pole School District (the District) committed an Unfair Labor Practice when it laid off virtually the entire membership of the Little Rocky Mountain Classified Employees Association, MEA-MFT (the Unit), without the requisite notice or an opportunity to bargain. The decision was prospective because there remained the issue of remedies to address the ULP.

On November 6, 2014, the Hearing Officer convened a telephone status conference with counsel regarding progress toward resolving this matter or, in the alternative, scheduling a remedies hearing. Counsel indicated that progress has been made toward a resolution, but that the time had come to schedule the remedies hearing, in case the resolution proves impossible without further adjudication. The Hearing Officer then set the remedies hearing.

The remedies hearing convened on January 13, 2015, and concluded on January 14, 2015, at the Hays-Lodge Pole School, grades 8 through 12, Hays, Montana. Exhibits 1, 2a through 2u, 3, 10-15, 100, 100-R, 101, 101-R, 102 through 104, and 108 through 115 were admitted into evidence. Josh Werk, Don Racine, Jr., Darla Snell, Carol Haverlandt, Sheldon Doney, Joyce Blackwolf, Pam Geboe, Stan Zander, Sr., Dale Fortin, Bruce Denny, Sr., Catherine Weigand, Amol Belgard, Ken Morin, Daralyn Shambo, Margaret Campbell, and Gloria Blackcrow testified under oath. Gloria Blackcrow testified by telephone – all other witnesses testified in person.

Thereafter, the parties filed and served proposed decisions and briefs, with the final post-hearing brief filed and served on March 2, 2015.

## **II. ISSUE**

The issue for the remedies hearing was what the Board of Personnel Appeals (“BOPA”) should order to remedy the harm caused by the unfair labor practice committed by the District, in violation of Mont. Code Ann. § 39-31-401, by laying off virtually the entire membership of the Unit, in a fashion that effectively precluded any bargaining.

## **III. FINDINGS OF FACT**

1. The Findings of Fact in the July 31, 2014 Hearing Officer’s “prospective” proposed order are hereby adopted and incorporated by reference herein as if set forth at length.

2. A public employer must take into account its available resources. A school district in Montana is a political subdivision of the State, governed by an elected board of trustees. The District was and is responsible to educate the students attending the schools in a manner consistent with the community’s expectations, the legislature’s statutory requirements, the Board of Public Education’s accreditation standards, and the constitutional obligation to “develop the full educational potential of each person.” The District was and is obligated to provide to its employees fair compensation and a safe and healthy working environment in accordance with state and federal law. The District must meet those fundamental responsibilities and obligations with public funds generated from local, state, and federal sources. These public funds must be managed by the District in a manner that respects parents’ wishes, meets local auditor’s requirements, and is consistent with Office of Public Instruction and federal government practices.

3. The District and the Unit were parties to a Collective Bargaining Agreement. Exhibit 1. Article IX of that CBA permitted the District to lay off employees.

4. The District faced an uncertain financial future during the spring of 2013 due to declining enrollment and sequestration of impact aid. The possible reduction in the District’s overall budget appeared significant enough to imperil its ability to deliver the educational services necessary in the 2013-14 school year. Superintendent Campbell headed a review of the district budget and identified cost saving measures, measures she reasonably believed were necessary to keep the District functioning. Among the cost saving measures recommended to the Board of Trustees was “reduction” of the classified employee workforce by laying off all of its members.

Campbell believed rehire of some but not all of the classified employees, as the needs of the District required during the next school years, could result in significant savings. As found previously, there is no evidence that the District considered whether it had any obligation to do more than give the 14-calendar day notice or the 10 days' pay required under the CBA. No thought was given to the possibility of bargaining regarding the layoffs, nor to the impact upon the members of the Unit if they were all laid off. The Board approved the layoffs, which were implemented on May 16, 2013, without sufficient notice to allow the members to meet and consider requesting bargaining before they were laid off.

5. There were 24 Unit member classified staff employees.<sup>1</sup> Exhibit 101-R. The total salaries paid to those 24 classified staff employees in 2012-13 was \$548,088.24. The District rehired 14 of those classified staff employees<sup>2</sup> during the 2013-14 school year, after the District had laid off virtually the entire Unit. The total salaries paid to those 14 classified staff employees during the 2013-14 school year was \$248,094.47. In the 2013-14 school year, the Board approved laying off all the classified staff on May 16, 2013, and then notified the members of the Unit of their layoffs on May 21 or 22, 2013.<sup>3</sup> By rehiring 14 of the former classified staff Unit members during that school year, the District saved \$299,993.77 in salary expenses from the previous school year.

6. The 14 classified staff employees rehired in 2013-14 had total salaries in 2012-13 of \$315,903.76. Although four of them actually made more money in 2013-14 than in 2012-13, the average change in salary for the 14 classified employees hired back by the District in 2013-14 was 21.47% lower than their earnings in 2012-13.

7. By January 2015, the time of the remedies hearing in this matter, the District had rehired and currently employed 18 of the 24 Unit members laid off on May 16, 2013, hiring four more of the members in the first half or so of the 2014-15

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<sup>1</sup> Amol Belgard, Gloria Blackcrow, Joyce Blackwolf, Staci Bradley, Val Chopwood, Wanda Cliff, Sheryl Crasco, Bruce Denny, Cynthia Doney, Sheldon Doney, Dale Fortin, Pam Geboe, Julia Lamebull, Laurie Main, Angie McConnell, Ken Morin, Denise Perez, Donald Racine Jr., Irma Skunkcap, Darla Snell, Cathy Weigand, Josh Werk, Kenneth Wing Jr. and Stan Zander. There were also two non-union employees on that list – Paul Webb and Sandra Zander – who apparently are not involved in this case. Their salaries have not been included in the calculations herein, although they also lost their jobs, thereby saving the District \$71,565.58.

<sup>2</sup> Amol Belgard, Val Chopwood, Wanda Cliff, Sheryl Crasco, Bruce Denny, Cynthia Doney, Dale Fortin, Laurie Main, Ken Morin, Denise Perez, Donald Racine Jr., Cathy Weigand, Josh Werk, and Stan Zander.

<sup>3</sup> The May 21, 2013 letters were the “I see no reasonable expectations of employment” letters. The May 22, 2013 letters said, “your employment may or may not be available at the school.”

school year. Of the 24 Unit employees laid off on May 16, 2013, the District had rehired 10 of them in the same positions they held before the layoffs and eight of them in different positions from those they held before the layoff.

8. The remaining six former classified staff employees, who to date have not been rehired, have been known to the District, from their former employment. The District chose which of its former classified staff members would be offered positions that became available during subsequent years. From the evidence adduced in this entire case, the only identifiable bases bearing upon the choices of which staff members to rehire were the skills and experience of the staff members and the salaries each staff member would be paid upon rehire into either the old or a new position.<sup>4</sup>

9. Had the District and the Unit bargained about the layoffs and the subsequent call backs, which they did not, there still would not have been any obligation for the District to bring the entirety of the Unit employees back to work until bargaining ended. Bargaining is resolved and ended either by agreement between the parties or by reaching impasse. Bargaining itself would not have changed the contractual right of the District to lay off the classified staff employees. There was no guarantee that bargaining would have resulted in better or worse outcomes vis-a-vis rehire for any of the Unit members.

10. Based upon the credible and substantial evidence of record, the District was not required to give the 14-day written notice of the layoffs. Bargaining with the Unit about any rehiring could not have forced the District to make any different hiring decisions and could not have forced the District to keep the Unit members employed until the conclusion of bargaining. The District needed to make the most economical decisions possible in its rehire choices. The specter of serious cuts in funding was real. The CBA gave the District a right to lay off unit members. The layoffs could and would have gone forward in May 2013, with or without a 14-day notice and with or without bargaining. In bargaining, the Unit could not have forced the District to make different hiring decisions that would have cost more money or favored less qualified staff members.

11. As a result, there were no meaningful lost opportunities for former Unit employees who were not rehired, that would have been ameliorated by bargaining. The bases for the rehires – good qualifications for the positions and/or lower salary entitlements – would have remained the same regardless of any longer notice and/or negotiation. The same hiring decisions would have ensued.

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<sup>4</sup> The Unit argued that the District did not rehire active union members. There was insufficient evidence to support that argument.

12. At first glance, it seems grossly inequitable that the staff members who were laid off have no remedy or right to recovery from the District. But the facts are clear. The CBA allowed the layoffs. Virtually the entire staff was laid off in the identical fashion (except that some Unit members were told there were no reasonable expectations of employment while others were told that future employment may or may not be available at the school). Every staff member suffered as a result of the layoffs, although some lost more than others. The losses did not result from the unfair labor practice. Even if the District had given the 14-day notice, even if they had gone beyond following the letter of the CBA, and had openly invited and encouraged bargaining on the manner of rehiring, it is more likely than not that the same Unit members would have suffered the same consequences over the next two school years.

13. The gravamen of the unfair labor practice comes in the failure of the District to give any notice of the coming mass layoff, stifling any Unit effort to negotiate about the mass layoff before it was implemented. But neither the lack of a notice nor the stifling effect of the mass layoff caused the lost wages of the Unit members. The way the mass layoff was handled manifested a disregard for the Unit's bargaining rights, an Unfair Labor Practice. But the mass layoff decision itself was consistent with the CBA. It was that mass layoff decision, not how it was handled, that caused the lost wages. The manner in which the layoffs were administered, with lack of any prior notice followed by the demoralizing impact of the extent of the layoffs, constituted the ULP, not the layoff decision itself. Therefore, the impact of the layoff decision itself, which caused the lost wages, did not result from the ULP, and is not subject to remedies herein.

#### **IV. DISCUSSION<sup>5</sup>**

Montana law gives public employees the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. Mont. Code Ann. § 39-31-201. The purpose of the Montana statutory provisions regarding collective bargaining for public employees is to address 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 Ed. Assoc.*, 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

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<sup>5</sup> 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.

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. 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.

In this case, the most recent CBA, extended pending agreement upon a new CBA, recognized the right of the District to lay off Unit employees, with either a 14-day notice or with payment of 10 days’ wages coming with the layoff itself. The District exercised that right, consistent with the CBA, by effectuating a mass layoff of virtually the entire unit, with payment of 10 days’ wages rather than any prior notice. Such a mass layoff is not just any layoff. While the decision to effectuate a mass layoff adhered to the letter of the CBA, the manner in which the District presented this mass layoff stifled any Unit effort to bargain about the layoffs, which was an unfair labor practice.

The Unit did not waive the right to seek bargaining about the layoffs. A waiver can arise out of express provisions in the CBA, by the parties’ bargaining history, or by a combination of both. *Local Joint Exec. Board of Las Vegas v. NLRB*, 540 F.3d 1072, 1079, note 10, (9<sup>th</sup> Cir. 2008), citing *Am. Distributing Co. v. NLRB*, 715 F.2d 446 (9<sup>th</sup> Cir. 1983). The District had to prove the waiver. An express contractual waiver must be “explicitly stated, clear and unmistakable.” *Local Joint Executive Board*, supra, 540 F.2d at 1079. No such waiver appeared in the CBA, nor did the failure of the Unit to request bargaining after its entire membership was laid off. 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). None of those requirements have been proved in this case. But, again, what is subject to challenge is the mass layoff, resulting in denial to the Unit of its right to bargain. The layoffs were within those permitted by the CBA, so what was lost was only the opportunity to bargain about the mass layoff, and not the wages lost by reason of layoffs accomplished consistent with 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. The Association has demonstrated by a preponderance of the evidence that the school district's mass layoff of virtually the entire bargaining unit resulted in an unfair denial of the right to bargain about the layoffs, which constituted an unfair labor practice in violation of Mont. Code Ann. § 39-31-401(1) and (5).

3. Imposition of an order requiring the school district to refrain from implementing a layoff of so much of the membership of a collective bargaining unit that it will stifle any effective response seeking bargaining, without affording an opportunity to bargain regarding the layoff and any subsequent call backs, is appropriate. However, the layoffs of the individual Unit members themselves were within the express terms of the extended CBA, and therefore restoration of the status quo ante and recovery of individual wages lost by Unit members because of the layoffs are not within the scope of Mont. Code Ann. § 39-31-406(4).

4. Since no award of back pay resulting from the layoffs is supported by the facts of this case, the only appropriate recovery of lost wages is an order to make the members of the Unit whole for any losses resulting from the unfair labor practice by reinstating any leave used to participate in the hearings of this matter, together with a cease and desist order and an order requiring the posting of an appropriate notice.

## **VI. RECOMMENDED ORDER**

1. That BOPA adopt the Hearing Officer's "prospective" proposed order deciding that the Board of Trustees of Hays-Lodge Pole School District committed an Unfair Labor Practice in violation of Mont. Code Ann. § 39-31-401, et seq., when it laid off virtually the entire membership of the Little Rocky Mountain Classified Employees Association, without such notice as would have allowed an opportunity to bargain.

2. To cure the effects of the unfair labor practice committed by the District, the Unit is entitled to a cease and desist order, an order to make the members of the Unit whole for their losses resulting from the unfair labor practice by reinstating any leave used to participate in the hearings of this matter, and an order to post and publish the notice set forth in Appendix A.

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 Unit in order to participate in the proceedings held on November 6, 2013, and on January 13 and 14, 2015.

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 13th day of July, 2015.

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR  
TERRY SPEAR  
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 201503  
Helena MT 59620-1503



APPENDIX

NOTICE TO ALL CLASSIFIED EMPLOYEES

Pursuant to the Order of the Board of Personnel Appeals and in order to effectuate the policies of the Montana Public Employees Collective Bargaining Act, we hereby notify our classified employees that:

We will cease and desist hereafter from giving such a short notice of a layoff of virtually the entire Unit so as to stifle bargaining, whether said short notice is to the Little Rocky Mountain Classified Employees Association, MEA-MFT, or any other exclusive representative.

We will not in any way interfere with your right to:

- ✓ Organize yourselves, or form, join or help unions
- ✓ Bargain for working conditions through a representative freely chosen by a majority of the classified employees in this District
- ✓ Act together for mutual aid or protection of your working conditions
- ✓ Refuse to do any or all of these things

Board of Trustees of Hays-Lodge Pole School District  
Hays and Lodge Pole, Montana

By \_\_\_\_\_  
(Representative) (Title)

Dated: \_\_\_\_\_

This notice must remain posted for 60 consecutive days from the posting date and must not be altered, defaced, or covered by any other material. If classified employees have questions about this notice or compliance with its provisions, they may communicate directly with the Board of Personnel Appeals, 1417 Helena Ave., Helena, Montana 59601, telephone 449-2890.