

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 23-1978:

FRAZER EDUCATION ASSOCIATION)
AFFILIATED WITH THE MONTANA)
EDUCATION ASSOCIATION,)

Complainant,)

FINAL ORDER

- vs -

VALLEY COUNTY SCHOOL DISTRICT)
2 AND 2B,)

Defendant.)

No exceptions having been filed, pursuant to ARM 24.26.107,
to the Findings of Fact, Conclusions of Law and Recommended Order
issued on February 28, 1979:

THEREFORE, this Board adopts that Recommended Order in this
matter as its FINAL ORDER.

BOARD OF PERSONNEL APPEALS

By: Brent Cromley
Chairman

DATED this 10th day of April, 1979.

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that I did
on the 11th day of April, 1979, mail a true and correct copy of
the above FINAL ORDER to the following persons:

Dr. Richard E. Cunningham
Superintendent
Frazer Public Schools
Box 488
Frazer, MT 59225

Emilie Loring
Hilley & Loring
1713 Tenth Avenue South
Great Falls, MT 59405

Peter O. Maltese
Attorney at Law
110 Fifth Avenue South
Glasgow, MT 59230

Tom Gigstad
Box 1382
Glendive, MT 59330

Jennifer Jacobson
Jennifer Jacobson

BEFORE THE BOARD OF PERSONNEL APPEALS

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IN THE MATTER OF UNFAIR LABOR)
PRACTICE NO. 23-78:)
FRAZER EDUCATION ASSOCIATION)
AFFILIATED WITH THE MONTANA)
EDUCATION ASSOCIATION,)
Complainant,)
vs.)
VALLEY COUNTY SCHOOL DISTRICT)
2 AND 2B,)
Defendant.)

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND
RECOMMENDED ORDER

* * * * *

Complainant, in above captioned matter, filed an Unfair Labor charge with the Board on September 7, 1978. The charge alleged that the Defendant violated Sections 39-31-401(1) and (5) MCA, of the Collective Bargaining Act for Public Employees by failing to bargain collectively in good faith with the Complainant in that they demanded teachers to sign individual contracts. The Complainant contended this constitutes individual bargaining, is coercive in nature, and is an attempt to deny teachers their rights under Section 39-31-201 MCA.

On September 13, 1978, Mr. Richard Cunningham, Superintendent, Frazer Public Schools, was served with the Unfair Labor Practice charge.

The Board received reply from the Defendant on September 25, 1978. The Defendant stated that individual contracts were issued, however, Defendant denied all charges as specified.

A formal hearing in this matter was conducted on October 25, 1978, in the Teacher's Lounge, Frazer High School, Frazer, Montana, before Stan Gerke, Hearing Examiner. The hearing was conducted under authority of Section 39-31-406 MCA, and as provided for by the Montana Administrative Procedure Act (Title 2, Chapter 4 MCA).

1 The Frazer Education Association, Affiliated with the Montana
2 Education Association was represented by Ms. Emilie Loring of the
3 law firm of Hilley and Loring, Great Falls, Montana. Valley
4 County School District 2 and 2B was represented by Peter O.
5 Maltese, Attorney at Law, Glasgow, Montana.

6 MOTIONS

7 Complainant made motion to strike certain portions of
8 Defendants Answer to Unfair Labor Practice charge for reason they
9 were completely irrelevant to the matter. The portions are as
10 follows:

- 11 [1] ... and the Association refused to represent its
12 members. The members never vote on any Association
13 propositions and therefore, the president of the
14 Association represents himself, only, most of the
15 time.
- 16 [2] The school board and the association are at impasse
17 on these items of the new proposed contracts.
18 a. Agency shop
19 b. Administrative approval of sick leave (prior
20 notice) and
21 c. Administrative approval of association leave.
22 All other items in the proposed contract have been
23 settled or initialed off.

24 I rule that the first portion be struck from the record. I
25 find the language irrelevant to the matter and highly inflammatory.
26 On the second portion, I rule to include the language in the
27 record. The statements may have been used as a defense by
28 Defendant.

29 After a thorough review of the record, including the testimony
30 of witnesses, the demeanor of witnesses, the exhibits and post-
31 hearing briefs, I make the following:

32 FINDINGS OF FACT

1. The Frazer Education Association (FEA) is the exclusive
bargaining representative for teachers employed by the Valley
County School District No. 2 and 2B (District).
2. The collective bargaining agreement between the FEA and
the District for school year 1977-78 contained language for re-
opening the agreement for negotiating a succeeding agreement

1 for the 1978-79 school year. By letter of January 4, 1978, Tom
2 Gigstad, President and Chief Negotiator for the FEA, notified
3 the District of the FEA's intention of re-opening the 1977-78
4 agreement for that purpose.

5 3. Ten bargaining sessions were held between the parties
6 in February, March, April and May of 1978. No agreement resulted
7 from these sessions.

8 4. The FEA unilaterally requested mediation assistance
9 from the Board of Personnel Appeals and mediation sessions were
10 conducted on June 1 and 2, 1978. The parties agree that mediation
11 helped greatly to reduce the differences at the bargaining table,
12 however, final settlement of all issues was not achieved.

13 5. On June 21 and 22, 1978, Mr. Gigstad and Mr. Peter O.
14 Maltese, negotiations spokesman for the District, met in
15 bargaining sessions and came to a tentative agreement pending
16 clarification of a "couple of items." However, no formal agree-
17 ment was signed at this time.

18 6. Mr. Gigstad received notice on July 26, 1978, from
19 District Superintendent, R.E. Cunningham, that the District was
20 withdrawing its base salary offer of \$10,000 per year that was
21 contained in the tentative agreement and substituting a base of
22 \$9,600. According to Mr. Cunningham and Mr. Don Whitmus, Chairman,
23 District School Board and member of District's Bargaining Team,
24 the reduction was necessary because of school levy failure.

25 7. On August 8, 1978, the parties met again in bargaining
26 session. The FEA proposed to accept the lower \$9,600 base salary
27 figure in return for concessions by the District on representation
28 fee (agency shop) and leave policy. The District conceded on the
29 leave policy but no agreement was reached on the representation
30 fee. Counsel for the District endeavored to gather testimony to
31 the fact that the District had reached its "final position" on
32 the matter. The District's representatives may have discussed

1 and determined that their position was finalized, however, the
2 FEA's representatives were not informed of that fact, according
3 to the testimony of Mr. Gigstad and Mr. Cunningham.

4 8. On October 4, 1978, the parties again met in bargaining
5 session. No agreement was reached and a mutual request for
6 fact-finding was made to the Board. It was pointed out that the
7 parties were in the fact-finding process at the time of this
8 formal hearing.

9 9. Mr. Gigstad testified that all teachers were issued a
10 "letter of intent" (Complainant's Exhibit #10) in the middle of
11 March, 1978, and were given 20 days in which to respond. This
12 testimony was confirmed by Mable Pyle, first-grade teacher. This
13 procedure was in keeping as in years before according to Mr.
14 Gigstad. This testimony was not contradicted during the hearing.

15 10. Mr. Gigstad testified that the "letter of intent" was a
16 subject of discussion during a bargaining session held on April
17 19, 1978. According to Mr. Gigstad, the FEA informed the District
18 that a "letter of intent" was the proper method to handle the
19 hiring of teachers until a new agreement was reached and that the
20 FEA would oppose the issuance of "individual contracts". Mr.
21 Cunningham, while admitting he didn't possess a "super memory",
22 testified he didn't recall the discussion of the "individual
23 contracts", however, he did not deny that the discussion took
24 place. Furthermore, Mr. Gigstad's recollection of the subject
25 was detailed and without hesitance. Therefore, I find the dis-
26 cussion of "individual contracts" was held at the April 19, 1978,
27 bargaining session.

28 11. Mr. Gigstad testified that teachers received "individual
29 contracts" on August 31, 1978, at the end of the school day.
30 (Defendant's Exhibit #1). Mr. Cunningham confirmed the fact that
31 the contracts were issued to all returning teachers. In addition,
32 Mr. Cunningham explained that new teachers received "individual

1 contracts" in May, June or July, 1978.

2 12. Mr. Gigstad and Ms. Pyle both testified they were told
3 verbally that if they would sign the "individual contracts" and
4 return them the following day (September 1, 1978) they would
5 receive their salary. According to Mr. Cunningham, four teachers
6 (including Mr. Gigstad and Ms. Pyle) did not sign their "indi-
7 vidual contracts" and these four did not receive their salary.
8 Mr. Cunningham explained that three of the four signed their
9 contracts by the middle of September, 1978, and were paid. Ms.
10 Pyle testified that she signed her contract on September 14, 1978,
11 and then received her salary on the same day. Mr. Gigstad re-
12 ceived his salary on September 19, 1978, by authorization of Mr.
13 Cunningham. However, Mr. Gigstad did, at the close of school on
14 the same day, sign his contract.

15 13. Mr. Gigstad received a letter from Mr. Cunningham
16 relative to the "individual contract" dated September 14, 1978,
17 which states (Complainant's Exhibit #7):

18 Dear Mr. Gigstad;

19 Teaching contracts were offered you, dated September 1,
20 1978, to teach this year for Frazer Schools.

21 You have had 20 days in which to sign your contract. The 20
22 days extend to September 20, 1978.

23 If you have not signed your contract by that time, the
24 district will assume you are not interested in employment
25 for this year and your job will be terminated.

26 Sincerely,

27 R. E. Cunningham
28 Superintendent

29 Mrs. Tom Gigstad, also a teacher, testified that the letter also
30 pertained to her because of the wording in the first paragraph.
31 Mr. Cunningham explained, "... it's standard that if you issue a
32 contract you have twenty days in which to sign it and if you
don't sign it after twenty days you vacate your position."

DISCUSSION

1
2 Counsel for the Defendant argues, in his post-hearing brief,
3 that the Defendant and the Complainant were at impasse in contract
4 negotiations and, therefore, it was proper for the Defendant
5 (employer) to unilaterally implement his last offer (via individual
6 contracts) to the employees so long as he does not go beyond his
7 last offer (NLRB v. Katz, 369 US 736). A true "impasse" situation
8 may have existed in the minds of the District's bargaining team
9 members, however, as discussed in Finding of Fact #7, no testimony
10 was presented to conclude the parties were in true "impasse". In
11 addition, the "individual contracts" were issued on August 31,
12 1978 (see Findings of Fact #11); the last bargaining session
13 between the parties was held October 4, 1978, (see Findings of
14 Fact #8), more than a month after the issuance of the contracts.
15 Further, the parties had requested Fact Finding on or about
16 October 4, 1978, and were in the process of implementing Fact
17 Finding at time of the formal hearing (see Finding of Fact #8).
18 Defendant's Counsel's argument that the parties were at impasse
19 is not documented by the record. Conversely, the record does
20 indicate the parties were in a continuing state of bargaining up
21 to the time of the formal hearing.

22 Defendant also argues that issuance of the "individual
23 contracts" was merely a bookkeeping device and that the "individual
24 contracts" were contingent upon any collective bargaining agreement
25 between the parties. Mr. Cunningham gave considerable testimony
26 concerning the methods by which the District paid salaries to the
27 teachers. According to Mr. Cunningham, in past years teachers
28 received their salaries one month in advance. This advance
29 payment method was discussed during contract negotiations and Mr.
30 Cunningham explains:

31 The association [FEA] had agreed to switching under the
32 new contract to payment at the end of services, also,
we got into trouble with the Title I office in Helena
because they told us that Federal Law prohibits payment

1 in advance of services and, of course, we had three
2 Title I teachers that are all last year paid a month in
3 advance except for this year, so the association [FEA]
4 had agreed to switch to payment at the end of the
5 month so ...

6 Mr. Cunningham further pointed that it was "bad business
7 practices and everything else" not to have some sort of contract
8 to pay wages.

9 Testimony revealed that the traditional monthly advance wage
10 payment made on the first of each month was changed by the
11 District for school year 1978-79. Mr. Cunningham explained that
12 for September, 1978, only, teachers received a \$300 cash advance
13 on September 1; the balance of wages owed the teachers for the
14 month of September was paid on the last working day in September.
15 Thereafter, teachers would receive their monthly salary for any
16 particular month on the last working day of that month.

17 Counsel for the Defendant argues that section numbers 5 and
18 6 of the "individual contract" (Defendant's Exhibit #1) which
19 states,

20 "(5) Both parties shall comply with the provisions of
21 the applicable State laws, terms and conditions of the
22 collective bargaining agreement and with the adopted
23 policies of the Board of Trustees (a copy of which has
24 been received by the teacher) which are made a part of
25 this contract by reference."

26 "(6) The individual contract is subject to the terms
27 and conditions of the collective bargaining agreement
28 between the Association and the Board of Trustees, and
29 to the extent that the provisions of this contract and
30 said agreement may be inconsistent, the provisions of
31 said agreement shall be controlling.

32 clearly subjugates the terms of the "individual contract" to the
terms agreed to by the FEA and the District in a master contract.

These two arguments appear to be rather insignificant upon
examination of this Board's final order in ULP 17-1975 (Board of
Trustees of Billings School District No. 2 v. State of Montana
ex rel Board of Personnel Appeals and Billings Education
Association, Cause No. 70652, District Court of the Thirteenth
Judicial District of the State of Montana in and for the County

1 of Yellowstone) which states:

2 In fact, it becomes obvious that the function of
3 the individual contract has been relegated to nothing
4 more than a document stating the intention of the
5 teachers to teach in the public school system for the
6 academic year. Any interpretation giving the individual
7 contract any more efficacy would be in conflict with
8 the teachers' right to collectively bargain and would
9 therefore be repugnant to Section 59-1603 [39-31-201
10 MCA], which gives the teachers the right to collectively
11 bargain. It was never intended by the legislature,
12 that the individual contract was to be substituted for
13 the master contract. So they must be kept totally
14 separate. The master contract deals with wages, hours,
15 and other conditions of employment; the individual
16 contract deals only with the individual teacher's
17 intent to return to the district and teach for the
18 upcoming year.

11 In reference to Findings of Fact #9, the teachers were
12 issued "letters of intent" in the Spring of 1978. The content of
13 these letters (Complainant's Exhibit #10) was to confirm the
14 individual teacher's intent to return the following year or not.
15 The "individual contracts" issued by Mr. Cunningham on August 31,
16 1978, (See Findings of Fact #11 and Defendant's Exhibit #1),
17 however, surpassed the limits of a proper "teachers' individual
18 contract" by incorporating wages and hours - two elements
19 strictly reserved for collective bargaining.

20 To bargain individually with members of a bargaining unit is
21 an unfair labor practice as discussed in federal case law,
22 Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944) 14 LRRM
23 581:

24 That it is a violation of the essential principle
25 of collective bargaining and an infringement of the Act
26 for the employer to disregard the bargaining repre-
27 sentative by negotiating with individual employees,
28 whether a majority or a minority, with respect to
29 wages, hours and working conditions was recognized by
30 this Court in J. I. Case Co. v. Labor Board, No. 67
31 1943 Term [14 LRR Man. 501]...

29 The J.I. Case Co. case, supra, discusses individual contracts
30 relative to individual bargaining:

31 Individual contracts, no matter what the circumstances
32 that justify their execution or what their terms may
not be availed of to defeat or delay the procedures
prescribed by the National Labor Relations Act looking
to collective bargaining, nor to exclude the contracting

1 employee from a duly ascertained bargaining unit; nor
2 may they be used to forestall bargaining or to limit or
3 condition the terms of the collective agreement. "The
4 Board asserts a public right vested in it as a public
5 body, charged in the public interest with the duty of
6 preventing unfair labor practices." National Licorice
7 Co. v. National Labor Relations Board, 309 U.S. 350,
8 364 [6 LRR Man. 674]. Wherever private contracts
9 conflict with its functions, they obviously must yield
10 or the Act would be reduced to a futility.

11 In reference to Findings of Fact Nos. 11, 12 and 13, the
12 Defendant amplified the individual bargaining by threatening to
13 withhold wages and, by letter (reference Complainant's Exhibit
14 #7) threatened to terminate employees for failing to sign individual
15 contracts.

16 CONCLUSIONS OF LAW

17 Defendant, Valley County School District 2 and 2B, has
18 engaged in an unfair labor practice within the meanings of Sections
19 39-31-401(1) and (5) MCA by bargaining individually with members
20 of an existing bargaining unit and by that action, failed to
21 bargain collectively, in good faith, with the exclusive bargaining
22 representative, Frazer Education Association affiliated with the
23 Montana Education Association.

24 RECOMMENDED ORDER

25 It is hereby ordered that Valley County School District No.
26 2 and 2B shall:

- 27 1. Cease and desist from failing to bargain in good faith
28 with the Frazer Education Association, affiliated with
29 the Montana Education Association.
- 30 2. Take appropriate action to make null and void all
31 existing individual contracts issued to individual
32 teachers which impair the teachers' right to bargain
collectively.
3. Post these FINDINGS OF FACT, CONCLUSIONS OF LAW AND
RECOMMENDED ORDER in the usual posting area(s) in a
conspicuous manner for a period of not less than thirty
(30) days.

NOTE

Pursuant to Rule ARM 24.26.584, either party in this matter may, within twenty (20) days of issuance of the above Findings of Fact, Conclusions of Law and Recommended Order, file exceptions to the same with the Board of Personnel Appeals.

DATED this 28th day of February, 1979.

BOARD OF PERSONNEL APPEALS

BY Stan Gerke
Stan Gerke
Hearing Examiner

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that on the 28th day of February, 1979, I mailed a true and correct copy of the above FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER to the following:

Dr. Richard E. Cunningham
Superintendent
Frazer Public Schools
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Frazer, MT 59225

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