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BOARD OF PERSONNEL APPEALS

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF MONTANA IN AND FOR THE COUNTY OF
LEWIS AND CLARK

INDEXED

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4	POWELL COUNTY SCHOOL DISTRICT #1)	
5)	
6	Plaintiff)	Cause No. 44573
7)	
8	vs.)	OPINION AND ORDER
9)	
10	STATE OF MONTANA, ex. rel. BOARD)	
11	OF PERSONNEL APPEALS, et. al.,)	
12)	
13	Defendants.)	

10 This action originally arises from two unfair labor practice
 11 charges filed by Plaintiff Powell County School District #1 (School
 12 District) and Defendant Deer Lodge Education Association (DLEA)
 13 with the Defendant Board of Personnel Appeals (BPA). The Charges
 14 were filed in March and April during the heat of collective bar-
 15 gaining between the parties. Each party charged the other with
 16 refusal to bargain in good faith in violation of sections 39-31-
 17 401(5) and 39-31-402(2), MCA.

18 During the pre-hearing conference conducted by the BPA the
 19 parties stipulated that they had reached agreement on a collective
 20 bargaining contract which had been ratified by both parties,
 21 although a signed copy was not then available. The Counsel for
 22 the DLEA moved that all charges involving failure to bargain in
 23 good faith be dismissed as moot.

24 Subsequently the hearing examiner for the BPA issued an order
 25 dismissing counts II and IV of the DLEA's charge as moot. The
 26 DLEA filed timely exceptions to the Order. By a BPA order of
 27 December 20, 1978, the DLEA's Exceptions were denied and a hearing
 28 was ordered on the charges which had not been dismissed.

29 The DLEA filed a Petition for Judicial Review, Cause No.
 30 43348 in the First Judicial District, naming the School District
 31 and the Board of Personnel Appeals as Defendants. The appeal was
 32 based on the DLEA's theory that all charges should have been

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DEC 11 AM 8 45

Alan Schmitt

1 dismissed as moot or, in the alternative, a hearing should have
2 been scheduled on all charges. Following briefing and oral argu-
3 ment, the Court issued its Opinion and Order on October 4, 1979,
4 remanding the matter to the Board of Personnel Appeals with in-
5 structions to treat the two cases consistently. That is, to
6 either reinstate the dismissed Counts of the DLEA's charges or, in
7 the alternative, dismiss all charges as moot.

8 Upon remand the BPA exercised its discretion and, in compli-
9 ance with the Court's directive, dismissed all charges. The order
10 dismissing all charges as moot is the subject of this Petition for
11 Judicial Review.

12 The Defendants have made a motion to dismiss on the grounds
13 that this court lacks jurisdiction over the subject matter because
14 Plaintiff is barred from bringing this action by virtue of its
15 participation in cause #43348 in this same court, involving the
16 same parties and issues, by either the doctrine of res judicata or
17 of collateral estoppel. This matter was briefed by the parties
18 and oral argument was had by this Court.

19 Having considered the matter this Court finds merit in the
20 motion to dismiss. The same issue that was before Judge Bennett
21 in cause number 43348 is now before this Court. The same parties
22 are involved in the matter along with the fact situation being the
23 same. Any order or decision rendered in cause no. 43348 is there-
24 fore binding on all parties in this matter. SEE: 46 Am. Jur. 2d,
25 Judgments, section 621, and Smith v. Mussellshell County, 472 P.2d
26 878 (Mt. 1970).

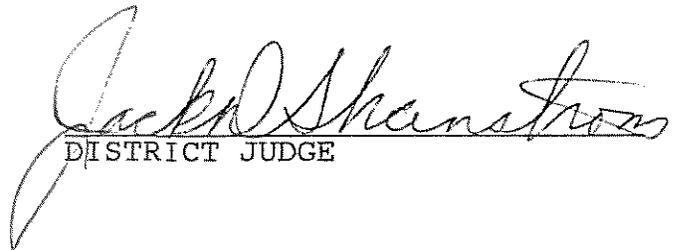
27 Petitioner argues that such decision deprives it of its right
28 of review of the Final Order issued by Defendant Board dated
29 October 29, 1979. With that argument this court cannot agree.
30 Section 2-4-711 MCA provides that an appeal from a final judgment
31 of a district court may be taken within 60 days "after entry of
32 judgment." On review of the record in this matter, this Court can

1 find no indication that an entry of judgment has been made, or
2 that a notice of entry of judgment has been issued. It appears,
3 therefore, that the order issued by the Court dated October 4,
4 1979 in cause no. 43348 was an interlocutory order merely remand-
5 ing the matter back to the Board and not a relinquishment of final
6 jurisdiction in the form of a judgment and notice of entry of
7 judgment. Any objection Petitioner has over the compliance by the
8 Board with the Court's Opinion and Order dated October 4, 1979,
9 should be directed to the Court in a Motion in cause #43348 and
10 not in a new action.

11 ORDER

12 This matter is dismissed on the grounds of collateral estoppel.

13 DATED this 27th day of November, 1980.

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16 DISTRICT JUDGE
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FEB 26 1980

BOARD OF PERSONNEL APPEALS

1 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
2 STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK

3 Cause No. 44573

4 POWELL COUNTY SCHOOL DISTRICT #1,)

5 Petitioner)

6 -vs-)

7 STATE OF MONTANA ex rel, et al,)

8 Respondents.)

O R D E R

9 * * * *

10 Upon stipulation of the parties and good cause appearing
11 therefrom,

12 NOW IT IS ORDERED AND THIS DOES ORDER that the Order
13 Dismissing the above action is hereby vacated and set aside and
14 to be held for naught.

15 IT IS FURTHER ORDERED AND THIS DOES ORDER that the
16 Petitioner shall have until February 29, 1980 to submit their
17 Reply Brief to respond to this Motion to Dismiss and brief in
18 support thereof and that Respondents shall have ten (10) days
19 after service of Petitioner's Reply Brief to file any rebuttal
20 brief they may wish to file in response.

21 IT IS SO ORDERED.

22 DATED This 25 day of February, 1980.

23
24 PETER G. MELOY

25 DISTRICT JUDGE PRESIDING
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1 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
2 STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK
3 Cause No. 44573

4 POWELL COUNTY SCHOOL DISTRICT #1)
5 Petitioner)
6 -vs-)
7 STATE OF MONTANA, ex rel, et al.,)
8 Respondent.)

STIPULATION

9 * * * * *

10 COMES NOW the Parties above-named and through their
11 attorneys stipulate and agree as follows:

12 1. That the Order Dismissing the above matter may be
13 vacated and set aside for the reasons stated in Petitioner's
14 Motion to Vacate the Order Dismissing and Affidavit in support
15 thereof.

16 2. That the District Judge set a time for submission of
17 Petitioner's Reply Brief and any Rebuttal Brief Respondents
18 would desire to file concerning Respondents Motion to Dismiss.

19 DATED This 7th day of February, 1980.

20 MORALES, VOLINKATY & HARR

21 Richard Volinkaty
22 Richard Volinkaty
23 P.O. Box 8272
24 Missoula, MT 59807
25 ATTORNEY FOR PETITIONER

26 DATED This 11th day of February, 1980.

27 HILLEY & LORING

28 Emilie Loring
29 Emilie Loring
30 1713 Tenth Ave. South
31 Great Falls, MT 59405
32 ATTORNEY FOR DEER LODGE EDUCATION
ASSOCIATION

DATED This 13th day of February, 1980.

BOARD OF PERSONNEL APPEALS

Jerry L. Painter
Jerry L. Painter
ATTORNEY FOR BOARD OF PERSONNEL
APPEALS

JAN 30 1980

BOARD OF PERSONNEL APPEALS

1 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
2 OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

3 * * *

4 POWELL COUNTY SCHOOL DISTRICT #1,

5 Plaintiff,

6 VS

Cause No. 44573

7 STATE OF MONTANA ex rel BOARD OF
8 PERSONNEL APPEALS AND DEER LODGE
9 EDUCATION ASSOCIATION affiliated
with MONTANA EDUCATION ASSOCIATION,

Defendant.

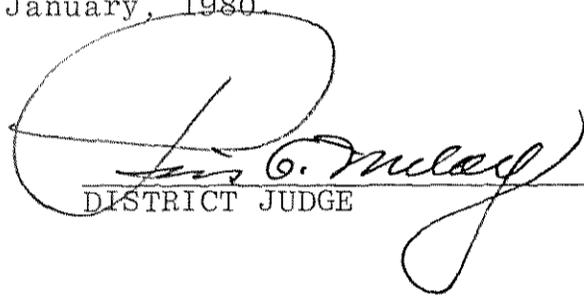
10 * * *

11 ORDER

12 * * *

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14 Pursuant to Uniform District Court Rule No. II, the motion
15 to dismiss is hereby GRANTED.

16 Dated this 29 of January, 1980.

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19 DISTRICT JUDGE

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28 cc: Richard Volinkaty, Esq.
29 MORALES, VOLINKATY & HARR
30 601 Western Bank Bldg.
Missoula, MT 59801

31 Emilie Loring, Esq.
1713 Tenth Avenue South
Great Falls, MT 59405

32 ✓ Jerry L. Painter, Esq.
Board of Personnel Appeals
Helena, MT 59601



STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE #8-78 & #9-78:

BOARD OF TRUSTEES, SCHOOL)
DISTRICT NO. 1, POWELL COUNTY,)
MONTANA,)

Complainant-)
Defendant,)

- vs -)

FINAL ORDER

DEER LODGE EDUCATION ASSOCIATION,)
Affiliated with MONTANA EDUCATION)
ASSOCIATION,)

Defendant-)
Complainant.)

* * * * *

On October 4, 1979, the District Court of the First Judicial District of the State of Montana (Cause No. 43348) issued an order, signed by Judge Gordon R. Bennett, vacating and setting aside an Order dated December 20, 1978, issued by this Board in this matter. The Court further ordered as follows:

". . .This matter is remanded back to Respondent Board of Personnel Appeals with instructions to either reinstate counts II and IV of Petitioner's Complaint (Deer Lodge Education Association's Complaint) or in the alternative dismiss all charges in this matter as being moot."

On October 9, 1979, the Deer Lodge Education Association filed a Motion to Dismiss all charges with this Board. On October 16, 1979, the Board of Trustees filed a Response to Motion to Dismiss opposing the Motion to Dismiss and requesting this Board to hear all of the charges.

After reviewing the briefs involved, we believe that since all charges allege failure to bargain in good faith, and the parties have reached an agreement in this matter, that all of the charges in question should be dismissed as being moot.

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IT IS THEREFORE ORDERED, that ULP #8-78 and ULP #9-78 are hereby dismissed as being moot.

DATED this 29 day of October, 1979.

BOARD OF PERSONNEL APPEALS

By *Brent Cromley*
Brent Cromley
Chairman

* * * * *

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that I mailed a true and correct copy of the above FINAL ORDER to the following persons on the 29 day of October, 1979:

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

Richard Volinkaty, Attorney
MORALES, VOLINKATY & HARR
601 Western Bank Building
Missoula, MT 59801

Jennifer Jacobson

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BOARD OF PERSONNEL APPEALS

1 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
2 OF MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK

3 Cause No. 43348

4 DEER LODGE EDUCATION ASSOCIATION)
5 affiliated with MONTANA EDUCATION)
6 ASSOCIATION,)

7 Petitioner)

8 vs.)

OPINION AND ORDER

9 STATE OF MONTANA ex rel BOARD OF)
10 PERSONNEL APPEALS and BOARD OF)
11 TRUSTEES, POWELL COUNTY SCHOOL)
12 DISTRICT NO. 1,)

13 Respondents.)

14 This matter came for hearing before this Court on a Petition
15 for Judicial Review filed by Petitioner seeking review of an
16 Order issued by Respondent Board of Personnel Appeals on December
17 20, 1978.

18 The facts leading up to the filing of the Petition for
19 Judicial Review show that a labor dispute arose between the
20 Petitioner and Respondent Board of Trustees, Powell County School
21 District No. 1 (School District). Both the Petitioner and the
22 School District filed unfair labor practices with Respondent
23 Board of Personnel Appeals (Board). After the filing of the
24 charges, the Petitioner and the School District reached an agree-
25 ment which culminated into a contract. The Board dismissed two
26 of the four counts of Petitioner's charge as being moot.
27 Petitioner alleges that it is aggrieved by the order because
28 "both charges should have been dismissed in their entirety on the
29 ground of mootness" or in the alternative "none of the charges
30 should have been dismissed, and regardless of mootness, the
31 Respondent Board should proceed to hold a hearing and reach a
32 decision on both of them." The Petition for Judicial Review
raises two main issues: (1) Does the Board of Personnel Appeals
have discretion to hear an unfair labor practice charge alleging

failure to bargain in good faith after the parties involved have

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CLERK OF DISTRICT COURT
MARY G. HARRIS

1 reached agreement and entered into a contract; (2) if so, has the
2 Board exercised that discretion properly in this matter.

3 As to the first issue, the statute conferring jurisdiction
4 on the Board to hear, decide and remedy unfair labor practice
5 charges is section 39-31-406, MCA. Subsection (4) of that statute
6 provides:

7 "(4) If, upon the preponderance of the testimony taken, the
8 board is of the opinion that any person named in the com-
9 plaint has engaged in or is engaging in an unfair labor
10 practice, it shall state its findings of fact and shall
11 issue and cause to be served on the person an order requiring
12 him to cease and desist from the unfair and to take such
13 affirmative action, . . . as will effectuate the policies
14 of this chapter." (emphasis added)

15 The above-quoted statute clearly provides that the Board has
16 the authority to consider not only charges alleging that a party
17 is engaging in an unfair labor practice, but also that a party
18 has engaged in an unfair labor practice. The Board is also given
19 considerable remedial powers after finding that a party has
20 engaged or is engaging in an unfair labor practice. It appears,
21 therefore, that the Board has the discretion to hear unfair labor
22 practice charges even if the alleged wrongful act has ceased if
23 the Board decides that an underlying conflict still remains and
24 deciding the unfair labor practice would best effectuate the
25 policy of the act it administers. As to the first issue, I
26 determine that the Board of Personnel Appeals has the discretion
27 to hear an unfair labor practice charge alleging failure to
28 bargain in good faith after the parties involved have reached an
29 agreement and entered into a contract.

30 Having found that the Board has the discretion to hear the
31 matters involved, we come to the second issue of whether or not
32 the Board properly exercised that discretion. Having reviewed

1 the charges alleged in Petitioner's unfair labor practice com-
2 plaint, I cannot see how the Board can distingush between the
3 four charges, such that two can be dismissed and two are not
4 dismissed. This is not to say that there cannot be a situation
5 that arises in which the Board may dismiss a portion of the
6 complaint as moot and hear the remainder of the complaint. But
7 in the fact situation before this Court, this Court cannot find
8 any basis for the dismissal of two of Petitioner's charges and
9 the retention of the other two charges.

10 ORDER

11 The Order issued by Respondent Board of Personnel Appeals,
12 dated December 20, 1978, is hereby vacated and set aside. This
13 matter is remanded back to Respondent Board of Personnel Appeals
14 with instructions to either reinstate counts II and IV of
15 Petitioner's Complaint or in the alternative dismiss all charges
16 in this matter as being moot.

17 Dated this 4 day of October, 1979.

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19 **GORDON R. BENNETT**

20 _____
DISTRICT COURT JUDGE

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGES #8 and #9-1978:

BOARD OF TRUSTEES, SCHOOL DISTRICT)
NO. 1, POWELL COUNTY, MONTANA,)
Complainant/)
Defendant,)

- vs -

ORDER

DEER LODGE EDUCATION ASSOCIATION,)
AFFILIATED WITH MONTANA EDUCATION)
ASSOCIATION,)
Defendant/)
Complainant/.)

* * * * *

A Pre-Hearing Conference Statement was issued on the above captioned matter on July 6, 1978, by the Hearing Examiner, Janice S. VanRiper.

Exceptions to the Order and Request for Oral Argument were filed by Emilie Loring, Attorney for the Association, on July 14, 1978.

Oral arguments were heard by the Board on December 14, 1978. After reviewing the briefs and considering the oral arguments, the Board orders that the exceptions to the Hearing Examiner's Pre-Hearing Conference Statement be denied and that a hearing be scheduled on the charges that have not been dismissed.

DATED this 20th day of December, 1978.

BOARD OF PERSONNEL APPEALS

By: Brent Cromley
Brent Cromley
Chairman

* * * * *

CERTIFICATE OF MAILING

I, Jennifer Jacobson, hereby certify and state that I did on the 20th day of December, 1978, mail a true and correct copy

1 of the above ORDER to the following:

2 Emilie Loring
3 Hilley & Loring, P.C.
4 1713 Tenth Avenue South
5 Great Falls, MT 59405

6 Duane Johnson
7 Box 4282
8 Missoula, MT 59801


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BEFORE THE BOARD OF PERSONNEL APPEALS

In the Matter of ULP #8-1978)
and #9-1978: Board of Trustees,)
School District No. 1, Powell)
County, Montana,)
Complainant and Defendant)
vs.)
Deer Lodge Education Association,)
Affiliated with Montana Education)
Association,)
Complainant and Defendant.)

ORDER

The hearing examiner has considered the possibility that, due to the stipulated occurrences subsequent to the filing of charges, some of the matters involved in the charges may have become moot. This Board does not yet have a well-established policy regarding mootness, and will consequently avail itself of considerations used by the National Labor Relations Board. (See State Department of Highways v. Public Employees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974); AFSCME Local 2390 v. City of Billings, ___ Mont. ___, 255 P.2d 507, 93 LRRM 2753 (1976)).

Contractual agreement between parties with respect to issues already before the Board does not automatically render those issues moot. NLRB v. American National Insurance Co., 343 U.S. 395 (1952); Sheet Metal Workers Union, 153 NLRB 50, 59 LRRM 1512, 1515 (1965). Similarly, cessation of boycotting does not necessarily render an unlawful boycott issue moot. Carpenters Union Local 74 v. NLRB, 341 U.S. 707 (1951); Linoleum & Carpet Layers, Local 1236, 73 LRRM, 1150, 180 NLRB 241 (1969). The Board does, however, have discretion to refuse to hear a complaint when in its judgment the policy behind the law would be served thereby. Sheet Metal Workers Union, Id at 1515.

1 The primary consideration in such a decision is what
2 will best serve the public interest:

3 Once a charge is filed the General Counsel
4 proceeds, not in the vindication of private
5 rights, but as the representative of an
6 agency entrusted with the enforcement of
7 public law and the assertion of the public
8 interest thereof. [Citations omitted]
9 When a matter has ripened to the point of
10 being before the National Labor Relations
11 Board of decision, we must of course give
12 paramount weight to the public interest
13 affected by withdrawal of the underlying
14 charge.

15 Schuylkill Metals Corp., 218 NLRB 49, 89 LRRM 1792 (1975).

16 The public has an interest in peaceful labor relations.
17 59-1601 R.C.M. (1947) Therefore, if an underlying conflict
18 remains, the public interest is not served by dismissal of
19 charges as moot. Carpenters Union Local 74 v. NLRB, 341
20 U.S. 707 (1951); Linoleum & Carpet Layers Local 1236, 180
21 NLRB 241, 73 LRRM 1150 (1969).

22 It is apparent that a general underlying conflict still
23 exists between the parties here, reflected by the fact that
24 neither party is willing to drop their complaint against the
25 other. Therefore, in the public interest of resolving
26 conflict between the Deer Lodge Education Association and
27 the Board of Trustees, the complaints will not be dismissed
28 in their entirety.

29 A contract having been reached, however, some particular
30 issues have become moot. First, although both parties may
31 still disagree with respect to what demands are subjects of
32 mandatory bargaining, an agreement has in fact been reached
without such a determination. No public interest would be
served by deciding on these issues, since the demands are
undoubtedly particularized to this negotiation. Secondly,
any decision at this point as to whether the School Board
bargained unfairly by allegedly unilaterally declaring an

1 impasse would serve no useful purpose at this point in time.
2 Consequently, charges II and IV of Cause ULP #9-78 will be
3 deemed moot and not be considered by the Board of Personnel
4 Appeals at this time.

5 It is hereby ordered that paragraphs II and IV from
6 Cause ULP #9-78 be dismissed for mootness.

7 Dated this 6th day of July, 1978.

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Board of Personnel Appeals

By Janice S. VanRiper
Janice S. VanRiper
Hearing Examiner

CERTIFICATE OF MAILING

I, Janice S. VanRiper, hereby certify and
state that I did on the 6th day of July, 1978, mail a true
and correct copy of the above Pre-Hearing Conference State-
ment to the following persons:

Emilie Loring, Attorney at Law 1713 Tenth Avenue South Great Falls, Montana 59403	Duane Johnson Box 4282 Missoula, Montana 59806
James L. Lee Chairman of the Board of Trustees Powell County School District Number 1 Deer Lodge, Montana 59722	David Pugsley 109 Larabie Deer Lodge, Montana 59722
Gene Comes, Superintendent Box 630 Trask Hall Deer Lodge, Montana 59722	Leo Perkins, President Deer Lodge Education Association 200 Dixon Deer Lodge, Montana 59722

Janice S. VanRiper