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84-343,84

No. 84-343

IN THE SUPREME COURT OF THE STATE OF MONTANA

1984

SCHOOL DISTRICT NO. 4, FORSYTH,  
MONTANA,

Petitioner and Appellant,

-vs-

BOARD OF PERSONNEL APPEALS, and  
FORSYTH EDUCATION ASSOCIATION, MEA,  
NEA,

Respondents and Respondents.

RECEIVED  
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BOARD OF PERSONNEL APPEALS

APPEAL FROM: District Court of the Sixteenth Judicial District,  
In and for the County of Rosebud,  
The Honorable Alfred B. Coate, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Charles E. Erdmann, Helena, Montana

For Respondent:

Hilley & Loring, Great Falls, Montana  
James E. Gardner, Bd. of Personnel Appeals, Helena,  
Montana

Submitted on Briefs: Nov. 20, 1984

Decided: January 2, 1985

Filed: JAN 2 - 1985

*Ethel M. Harrison*

Clerk

Mr. Justice John Conway Harrison delivered the Opinion of the Court.

This is an appeal from the order of the District Court of the Sixteenth Judicial District, Rosebud County, granting the respondent's, Forsyth Education Association, motion to dismiss on the basis the petition filed was moot.

Appellant School District No. 4, Forsyth, Montana, (School District) challenges the District Court's dismissal and its appeal from part of an order of the Board of Personnel Appeals.

One issue is raised for consideration: Did the District Court err in dismissing count I of the School District's complaint for a declaratory judgment.

Respondent, Forsyth Education Association, affiliated with the Montana Education Association and National Education Association, (Association) is the exclusive bargaining agent for the professional employees of the appellant, School District. The collective bargaining agreement between the parties expired July 1, 1981. While negotiating a new contract for the 1981-82 academic year, the School District paid its teachers at the same rate it had paid them in 1980-81, and did not advance to them the amounts provided in the expired collective bargaining agreement.

The Association believed the failure to advance teachers on the salary schedule contained in the expired collective bargaining agreement constituted a unilateral change in wages and a refusal to bargain in good faith. The School District argued it was maintaining status quo during negotiations.

The Association filed an unfair labor practice charge with the Board of Personnel Appeals (BPA) on October 13,

1981. On May 17, 1982, the BPA examiner found there had been no violation of the Public Employees Bargaining Act. In the meantime, a new contract was negotiated for the 1982-83 academic year. The teachers were paid at a new salary level and received retroactive pay, at that new level, to the beginning of the 1981-82 school year.

The Association filed exceptions to the BPA hearing examiner's proposed order. The BPA adopted its examiner's findings of fact, but concluded there had been a violation. The BPA ordered an amendment to the examiner's proposed order.

The School District filed exceptions and the matter was again argued before the BPA. In September of 1983, the BPA voted unanimously to affirm the amended order, finding an unfair labor practice based on the unilateral change in salaries. The appellant, School District petitioned the District Court for judicial review of the order and for declaratory judgment alleging:

1. In count I the BPA erred in finding an unfair labor practice; and

2. In count II the BPA, at the time it issued its administrative decision, was unlawfully constituted and its decision was therefore void.

The Association filed a motion to dismiss count I of the petition for declaratory judgment on the grounds the School District had failed to state a claim upon which relief could be granted and on the ground of mootness. The Association argued that since the teachers had received retroactive pay at the new salary levels, neither the teachers nor the Association received any financial benefit and the School District experienced no financial detriment

when the examiner issued the amended order in May 1983. Nothing would be gained or lost from the judicial review of the order. Therefore, the issue was moot.

The District Court granted the Association's motion to dismiss the appeal as being moot. From that order, the School District appeals.

The appellant School District argues the action was not moot and the District Court had jurisdiction to review the final order of the BPA. The appellant notes that underlying the motion to dismiss, the general rule is courts view such motions with disfavor and will grant them only when the complaint and the accompanying allegations show upon their face some insuperable barrier to relief, citing Buttrell v. McBride Land and Livestock (1976), 170 Mont. 296, 553 P.2d 407; Wheeler v. Moe (1973), 163 Mont. 154, 515 P.2d 679. In reading the above cases, we find neither applicable in that Wheeler, supra, was decided on a disqualification of a judge in the time for filing the disqualification therein, and Buttrell, supra, was decided on the failure of the plaintiff to state a claim in its complaint.

Appellant argues the question of whether a civil case has become moot is not, as argued by respondent, a simple issue. Appellant contends in this particular case an appeal from an administrative agency's final decision is involved, a decision which was settled prior to the administrative decision by the adoption by the parties of a collective bargaining agreement for 1981-82 contract.

Appellant argues one important factor to be taken into consideration in determining the mootness of a case is what the United States Supreme Court has called on a number of occasions the "capable of repetition, yet evading review"

doctrine. This doctrine is limited to a situation where two elements are combined: (1) the challenged action was in its duration too short to be fully litigated prior to the cessation or expiration; and (2) there was a reasonable expectation the same complaining party would be subjected to the same action again. *Sosna v. Iowa* (1975), 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532.

Considering the cases cited by both parties, we do not find a sufficient substantial interest to invoke the above doctrine. The BPA's finding that, in the absence of an "impasse," the School District must continue to pay the salaries of expired collective bargaining contracts pending agreement on a successful contract, does not warrant further action by this Court. Here the School District had already budgeted at least the amount in the expired contract for salaries and it suffers no loss.

While the appellant School District argued the BPA had ordered it to automatically grant teachers' wage increases under the terms of the expired contract, we find no such ruling by the BPA in its order. It simply ordered that, in absence of an "impasse," the provisions of the expired contract may not be unilaterally changed by the employer.

The decision of the District Court is affirmed.

  
Justice

We concur:

Chief Justice

*Daniel J. Shea*

*John L. Sheehy*

*Paul B. Murphy*

Justices

Mr. Chief Justice Frank I. Haswell, dissenting:

I respectfully dissent.

Here the orders of the Board of Personnel Appeals provided in substance (1) that the Forsyth School District committed an unfair labor practice when it declined to pay an increased wage scale under an expired collective bargaining agreement and (2) to "cease and desist" from denying automatic step wage increments under an expired collective bargaining agreement. The majority have denied judicial review of the order on the basis of mootness because a new collective bargaining agreement has been negotiated.

Mootness is a matter of judicial policy, not constitutional law. See *RLR v. State (Alaska 1971)*, 487 P.2d 27, 45. This case falls squarely within those cases in which the United States Supreme Court has granted review under the principle that they tend to be "capable of repetition, yet evading review." *Roe v. Wade (1973)*, 410 U.S. 113, 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147, 161, and its progeny. The question of whether a Montana school district must pay increased wage increments under an expired wage contract pending negotiation and settlement of a new contract will recur time and again in school districts throughout Montana until it is authoritatively and finally answered by this Court. The majority have denied this Court review of this question on the merits.

Two cases have particular application to the case at bar. In *City of Albuquerque v. Campos (N.M. 1974)*, 525 P.2d 848, 851, the New Mexico Supreme Court held that settlement of a city labor dispute did not render questions moot that were of great public importance and likely to recur. Another analogous case is *Bd. of Ed. of Danville Etc. v. Danville Ed.*

Ass'n (Ill.App. 1978), 376 N.E.2d 430. There the Illinois appellate court found a education association's appeal from a judgment granting a school board's request to enjoin association members from striking and picketing would not be dismissed as moot on the ground that parties had executed a new contract and settled their differences, since the question involved overriding public importance.

I would review this question on the merits and provide a final and authoritative answer.



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Chief Justice

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 37-81:

FORSYTH EDUCATION ASSOCIATION,  
MEA, NEA,

Complainant,

- vs -

ROSEBUD COUNTY SCHOOL DISTRICT  
NO. 14, FORSYTH, MONTANA,

Defendant,

- and -

MONTANA UNIVERSITY SYSTEM, and the  
LABOR RELATIONS BUREAU, DEPARTMENT  
OF ADMINISTRATION,

Amici Curiae.

FINAL ORDER

\* \* \* \* \*

PROCEDURAL BACKGROUND

On May 17, 1982, hearing examiner Stan Gerke issued Findings of Fact, Conclusions of Law and Recommended Order in this case. Exceptions to the hearing examiner's decision were filed by the Complainants. After reviewing the record and considering the briefs and oral argument of the parties, the Board of Personnel Appeals issued an Order dated September 2, 1982. That Order adopted the Findings of Fact of the hearing examiner but concluded that the employer's conduct did violate 39-31-401(5), MCA. The Board then remanded the case to the hearing examiner to fashion an appropriate remedy for such a violation. On January 18, 1983, the hearing examiner issued an Amended Recommended Order which stated an administratively noticed fact and stated a recommended remedial order. The administratively noticed fact was that the parties involved in this ULP proceeding had reached agreement on a subsequent collective bargaining agreement and agreed that retroactive pay had been paid. Monetary relief therefore was not considered as a possible remedy. The recommended

1 remedial order ordered the defendant school district to,  
2 "cease not paying the increments provided for in a collective  
3 bargaining agreement upon the expiration of that agreement."  
4 The hearing examiner stated that, "Such action, short of  
5 impasse, constitutes unilateral changes in working conditions  
6 and a violation of Section 39-31-401(5) MCA."

7 The defendant school district filed timely exceptions  
8 to the Amended Recommended Order and later filed a motion  
9 requesting the Board to reconsider its earlier decision that  
10 defendant's conduct constituted a violation of the Act.

11 The complainant education association filed a Motion to  
12 Dismiss [Defendant's] Motion for Reconsideration on procedural  
13 grounds. The Board denied the Motion to Dismiss.

14 Thereafter, the Montana University System and the Labor  
15 Relations Bureau, Personnel Division of the Department of  
16 Administration both petitioned the Board to be named amicus  
17 curiae. Through an Order issued April 1, 1983, the Board  
18 granted the petitions to be named amicus curiae.

19 Subsequently, the education association, the school  
20 district, and the University System-Department of Admin-  
21 istration filed briefs in support of their respective  
22 positions.

23 At its June 3, 1983 meeting, the Board granted the  
24 school district's motion for reconsideration and then heard  
25 oral argument from the school district, the Montana University  
26 System and the education association. The Board voted to  
27 postpone a decision on the matter. At its September 23,  
28 1983 meeting, all Board members were present and engaged in  
29 a lengthy discussion of the issue involved. The Board voted  
30 5-0 to affirm the hearing examiner's order dated January 18,  
31 1983.

32 THE ISSUE

1 The issue before us of course is:

2 WHETHER FAILURE OF A SCHOOL DISTRICT TO PAY EXPERIENCE  
3 AND ADDITIONAL EDUCATIONAL AND CREDIT INCREMENTS PROVIDED  
4 IN AN EXPIRED COLLECTIVE BARGAINING AGREEMENT, WHILE  
5 THE PARTIES ARE NEGOTIATING FOR A SUCCESSOR AGREEMENT,  
6 IS A UNILATERAL CHANGE IN WAGES CONSTITUTING A REFUSAL  
7 TO BARGAIN IN GOOD FAITH IN VIOLATION OF SECTION 39-31-  
8 401(5), MCA.

9 USE OF NLRB PRECEDENT OR PUBLIC SECTOR PRECEDENT FROM  
10 OTHER STATES.

11 The school district cites us cases from the public  
12 sector (primarily New York) in support of its position. The  
13 amici curiae cite private sector federal precedent which  
14 they assert supports their position.

15 We discuss the federal private sector law we believe  
16 applicable, in the next section of this Final Order.

17 We specifically reject, however, the use of public  
18 sector cases as precedent in this case for the reasons  
19 stated below.

20 Of foremost importance to us is the fact that Montana's  
21 Public Employee Collective Bargaining Act, 39-31-101, et.  
22 seq., which is the statutory basis for this proceeding is  
23 modeled almost identically after the federal Act, the Labor-  
24 Management Relations Act, 29 USC 150, et. seq. For this  
25 reason and other cogent reasons, the Montana Supreme Court,  
26 when called upon to interpret the Collective Bargaining for  
27 Public Employees Act, 39-31-101 through 39-31-409, MCA, has  
28 consistently turned to National Labor Relations Board (NLRB)  
29 precedent for guidance. State Department of Highways v. Public  
30 Employees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974);  
31 AFSCME Local 2390 v. City of Billings, \_\_\_\_\_ Mont. \_\_\_\_\_, 555  
32 P.2d 507, 93 LRRM 2753 (1976); The State of Montana, ex rel.,

1 The Board of Personnel Appeals v. The District Court of  
2 the Eleventh Judicial District, \_\_\_\_\_ Mont. \_\_\_\_\_, 598 P.2d  
3 1117, 36 St. Rpt. 1631 (1979). Teamsters Local #45 v.  
4 Board of Personnel Appeals and Stuart Thomas McCarvel,  
5 \_\_\_\_\_ Mont. \_\_\_\_\_, 635 P 2d 1310, 38 St. Rep. 1841 (1981).

6 On the other hand, the public sector collective bargaining  
7 acts of other states are not always similar to Montana's  
8 Act. One very significant difference is that Montana law  
9 permits strikes by public employees (which is analogous to  
10 the LMRA for private sector employees) and almost all other  
11 states have restrictions on public sector strikes.

12 The need to take that factor alone into consideration  
13 in interpreting Montana's Act, renders resort to the federal  
14 NLRB precedent ineluctable.

15 Second, the LMRA represents broad national trends in  
16 labor relations law, not the result of political decision  
17 making in one state which might have no bearing on Montana's  
18 Act. As recognized by the Montana Supreme Court, the extensive  
19 use by the Montana legislature of wording from the LMRA  
20 necessarily reflects legislative intent. That intent is  
21 judicially acknowledged by the judicial doctrine that similar  
22 wording in similar Acts are to be construed similarly. This  
23 Board believes that the wording of Montana's Act, reflects a  
24 legislative intent to follow those broad national trends.

25 Third, the members of the Board of Personnel Appeals  
26 believe that the NLRB and the federal courts reviewing the  
27 NLRB constitute a better area of law to draw precedent from  
28 because of the federal sector's (a) greater experience  
29 (since 1936); (b) greater number of cases (the LMRA is  
30 national of course); and (c) greater consistency, to the  
31 extent possible with the continuing development of labor  
32 law, as in all areas of law.

1 And fourth, the two-fold problem of the use of another  
2 state's precedent. There first is the problem that the use  
3 of another state's precedent in one case becomes precedent  
4 in itself to continue using that other state's precedent for  
5 other labor matters. For example, to adopt New Jersey law  
6 on this case we would thereby set a precedent to adopt other  
7 New Jersey case law on other issues. That would impose a  
8 substantial limitation on the amount of experience we could  
9 otherwise draw from the federal sector.

10 There secondly is the problem of which state do we  
11 follow. Consider the following: The following states have  
12 thus far adopted the position of the school board in this  
13 case:

14 MAINE: - M.S.A.D. No. 43 Teachers' Assoc. v. M.S.A.D.  
15 No. 43 Board of Directors, \_\_\_\_\_ Me. \_\_\_\_\_, 432 A.2d 395  
16 (1981).

17 NEW YORK: - Board of Cooperative Educational Services  
18 of Rockland County v. New York State Public Employment  
19 Relations Board, et. al., 41 N.Y. 2d 753, 395 N.Y.S. 2d 439,  
20 363 NY. 2d 1174, 95 LRRM 3046; Corbin v. County of Suffolk,  
21 54 A.2d 698, 387 NYS 2d 295, 95 LRRM 2030 (NY App Div.  
22 1976); Wyandanch Union Free School District, Board of Educa-  
23 tion v. Wyandanch Teachers Association, 58 A.2d 415, 396  
24 N.Y.S. 2d 702, 96 LRRM 2652 (NY App. Div. 1977).

25 WISCONSIN: - Menasha Teachers Union, Local 1166, WFT-AFT,  
26 AFL-CIO vs. Menasha Joint School District, National Public  
27 Employment Reporter (NPER) Volume 4, page V-676, an admini-  
28 strative decision by the Wisconsin Employment Relations  
29 Commission.

30 An Indiana case cited by the school district (at page  
31 12 of its May 27, 1983 brief) which was an administrative  
32 decision by the Indiana Education Employment Relations

1 Board, was overruled by the Superior Court of Indiana in  
2 December 13, 1980. See infra.

3 The following states have thus far adopted a position  
4 which supports the education association in this case:

5 CALIFORNIA: - Davis Unified School District, 2 NPER,  
6 page V-480 (1980), decision of the California Public Employ-  
7 ment Relations Board.

8 FLORIDA: - Duval County School Board, 2 NPER page V-480  
9 (1980) a decision of the Florida PERC. Review of this  
10 decision was dismissed for lack of jurisdiction.

11 INDIANA: - Mill Creek Community School Corporation, 3  
12 NPER p. 336-337 (1980), a decision by the Superior Court of  
13 Indiana.

14 PENNSYLVANIA: - Chester Upland School District, 2 NPER  
15 p. V 481 (1980), a decision by the Court of Common Pleas;  
16 and Lehigh County, 2 NPER p. V-480 (1980), an administrative  
17 decision by the Pennsylvania PLRB.

18 It is thus seen that the states themselves are at odds  
19 over the issue before us in this case.

20 NLRB PRECEDENT ON THE ISSUE BEFORE US.

21 We begin our analysis of the private sector precedent  
22 with the statements that are settled law. A unilateral  
23 change in a mandatory subject of bargaining, even after the  
24 expiration of a collective bargaining agreement, is a violation  
25 of Section 8 (a)(5), of the Labor Management Relations Act  
26 [LMRA], 29 U.S.C. 158 (a)(5), the equivalent of section  
27 39-31-401 (5), MCA. Wages, however stated or paid are a  
28 mandatory subject of bargaining. Therefore, a unilateral  
29 change in wages, even following expiration of a collective  
30 bargaining agreement, is a violation of 39-31-401 (5), MCA.

31 Clear examples of these established rules are found in  
32 the facts and holdings of the following cases.

1           Although we have earlier rejected the use of precedent  
2 from other states involving other public sector statutes, in  
3 order to understand the legal context this issue involves,  
4 we find it helpful to refer to the case of Galloway Board  
5 of Education vs. Galloway Education Association, (N.J. Sup.  
6 Ct.), 395 A. 2d 218, 100 LRRM 2250 (1978). We refer to the  
7 Galloway case not for its holding but for its discussion of  
8 the federal sector precedent interpreting the LMRA, 29 USC  
9 150, et. seq.

10           In Galloway, the New Jersey Supreme Court stated that,

11           A settled principle of private sector labor law under  
12 the LMRA is that an employer's unilateral alteration of  
13 the prevailing terms and conditions of employment  
14 during the course of collective bargaining concerning  
15 the affected conditions constitutes an unlawful refusal  
16 to bargain, since such unilateral action is a circum-  
17 vention of the statutory duty to bargain. NLRB v. Katz,  
18 369 U.S. 736. 743-47, 82 S.Ct. 1107, 8 L.Ed. 2d 230. 50  
19 LRRM 2177 (1962); NLRB v. J.P. Stevens & Co., Inc.,  
20 Gulistan Div., 538 F.2d 1152, 1162, 93 LRRM 2265 (5  
21 Cir. 1976). "Unilateral" in this regard refers to a  
22 change in the employment conditions implemented without  
23 prior negotiation to impasse with the employee rep-  
24 resentative concerning the issue. The basis of the  
25 rule prohibiting unilateral changes by an employer  
26 during negotiations is the recognition of the importance  
27 of maintaining the then-prevailing terms and conditions  
28 of employment during this delicate period until new  
29 terms and conditions are arrived at by agreement.  
30 Unilateral changes disruptive of this status quo are  
31 unlawful because they frustrate the "statutory objective  
32 of establishing working conditions through bargaining."  
NLRB v. Katz, supra, 369 U.S. at 744, 82 S.Ct. at 1112.

Galloway, supra, 100 LRRM  
at 2258

We must accordingly determine whether payment of the salary increment withheld by the Board constituted an element of the status quo whose continuance could not be disrupted by unilateral action. The answer to this question turns, to some extent, on whether the annual step increments in the teachers' salaries were "automatic," in which case their expected receipt would be considered as part of the status quo, or "discretionary," in which case the grant or denial of the salary increases would be a matter to be resolved in negotiations. Analytically helpful in this inquiry is stating the issue in an alternative manner - could the Board have been found to have violated the Act if it had granted, rather than withheld, the salary increments. Under the rationale of Katz, supra, the answer to the question is in the affirmative if the increments were discretionary and in the negative if they were automatic. See 369

1 U.S. at 746-7, 82 S.Ct. 1107. In Katz, the Supreme  
Court,

2 ...distinguished between automatic and discretionary  
3 wage increases and held that discretionary increases  
4 during contract negotiations violated the employer's  
5 duty to bargain in good faith. Automatic increases  
6 are sanctioned because they do not represent actual  
7 changes in conditions of employment but continue the  
8 status quo in the sense that they perpetuate existing  
9 terms and conditions of employment. Because the em-  
10 ployees expect these benefits and readily recognize  
11 them as established practice. The increases do not  
12 tend to subvert employee's support for their bargain-  
13 ing agent or disrupt the bargaining relationship.  
14 (NLRB v. John Zink Co., 551 F.2d 799. 801. 94 LRRM  
15 3067 (10 Cir. 1977).

16 Galloway, supra,  
17 100 LRRM at 2259

18 In a Fifth Circuit case involving an employer's refusal  
19 to continue contributions to a health, welfare and pension  
20 fund for carpenters pursuant to an expired collective bar-  
21 gaining agreement (also cba), the Court of Appeals stated  
22 that,

23 At contract expiration, an employer may not unilaterally  
24 alter, without bargaining to impasse, a contractual  
25 term that is a mandatory subject of bargaining. This  
26 result obtains because such a term by operation of  
27 statute continues even after the contract embodying it  
28 has terminated. See *Nolde Brothers, Inc. v. Local 358,*  
29 *Bakers & Confectionery Workers Union*, 430 U.S. 243,  
30 257, 97 S.Ct. 1067, 1075, 51 L.Ed.2d 300 (1977) (dis-  
31 senting opinion); *SAC Construction Co., supra*, 603 F.2d  
32 at 1156-57; *Cartwright Hardware Co. vs. NLRB*, 600 F.2d  
268, 269-70 (10th Cir. 1979); *NLRB v. Cone Mills Corp.*,  
373 F.2d 595, 598-99 (4th Cir. 1967); *Industrial Union*  
of Marine and Shipbuilding Workers v. NLRB, 320 F.2d  
615, 619-20 (3d Cir. 1963), cert. denied, 375 U.S. 984,  
84 S.Ct. 516, 11 L. Ed.2d 472 (1964). Examples of  
contractual terms which survive contract expiration  
include a schedule of wages and fringe benefits, see  
*Cartwright Hardware Co., supra*, 600, F.2d at 269-70,  
superseniority rights of a shop steward, see *Cone Mills*  
*Corp., supra*, 373 F.2d 598-99, employee seniority  
rights, See *Industrial Union of Marine & Shipbuilding*  
*Workers Union, supra*, 320 F.2d 619-20, and grievance  
procedures. See *id.* Since the carpenters' benefits are  
contractual terms that continue by operation of the  
Act, respondent would not have been free to cancel  
those benefits, even though the contract expired,  
without first bargaining to an impasse. Thus, the  
Board's remedy was a precise method of restoring the  
status quo ante.

31 NLRB v. Haberman Construction  
32 Company,  
618 F.2d 288 at 302-303 (CA 5, 198

In the case of American Distributing Co. v. NLRB, 715 F.2d

1 446, 114 LRRM 2402 (CA 9, 1983), the Ninth Circuit addressed  
2 the issue of an employer's obligation to continue making con-  
3 tributions to a pension trust fund after the expiration of a  
4 cba. The Ninth Circuit began its discussion by stating the  
5 applicable law.

6 An employer may not unilaterally institute changes  
7 in established terms and conditions of employment that  
8 constitute mandatory subjects of bargaining, 29 U.S.C.  
9 Section 158(a)(5), (d); see Fibreboard Paper Products  
10 Corp. v. NLRB. 379 ILS 203, 209-10, 57 LRRM 2609 (1964).  
11 The prohibition against unilateral changes extends past  
12 the expiration of a collective bargaining agreement  
13 until the parties negotiate a new agreement or bargaining  
14 in good faith to impasse, NLRB v. Carilli, 648 F2d  
15 1206, 1214, 107 LRRM 2961 (9th Cir. 1981). Because  
16 contributions to an employee pension trust fund constitute  
17 a mandatory bargaining subject, an employer may not  
18 make unilateral changes in pension fund contributions.  
19 Id. at 1213-14. An employer who does make such unilateral  
20 changes has committed an unfair labor practice in  
21 violation of sections 8(a)(1) and (5) of the Act.

22 American Distributing Co.,  
23 supra, 114 LRRM at 2404

24 The Court went on to state that, "The Company does not  
25 dispute that it discontinued the pension trust fund contribu-  
26 tions upon the expiration of the 1977-80 contract. Instead,  
27 the company claims..." three defenses. One of the asserted  
28 defenses was that under Section 302 of the Labor Management  
29 Relations Act (LMRA), the pension trust fund could not  
30 legally accept and the company could not legally make further  
31 contributions. Under section 302 of the LMRA an employer  
32 may make payments to a pension fund and the trust may accept  
them only if "the detailed basis on which such payments are  
to be made is specified in a written agreement with the  
employer." 29 U.S.C, Section 186(c)(5)(B).

The company's argument was that since statute mandates  
the existance of a written agreement conforming to certain  
requirements before an employer can make contributions,  
and since the cba expired, it was therefore illegal to make  
contributions.

1 Affirming the concept that an expired cba is still a  
2 living document which retains binding obligations, the Ninth  
3 Circuit stated and held as follows:

4 The Board properly found that the Company had an  
5 obligation to continue the pension contributions absent  
6 a bargaining impasse or a waiver from the Union.  
7 Because a written agreement -the expired contract -  
8 specified the basis on which the Company was legally  
9 obligated to make contributions, the literal language  
10 and underlying purpose of section 302 has been satisfied.  
11 See Producers Dairy Delivery Co. v. Western Conference  
12 of Teamsters Pension Trust Fund, 654 F.2d 625, 627, 108  
13 LRRM 2510 (9th Cir. 1981); Peerless Roofing Co. v.  
14 NLRB, 641 F2d 734, 736, 107 LRRM 2330 (9th Cir. 1981).

15 The Company asserts that this case is disting-  
16 uishable from Producers and Peerless because here both  
17 the collective bargaining agreement and the pension  
18 trust certification have expired. In Peerless, the  
19 trust fund agreement was still valid. 641 F2d. at 736.  
20 Nonetheless, the unequivocal language of Producers  
21 states that an employer is required to maintain the  
22 status quo and make payments in conformity with the  
23 terms of an expired written agreement. 654 F.2d at  
24 627. Accordingly, we held that the Company's section  
25 302 defense fails.

26 American Distributing Co., supra,  
27 114 LRRM at 2406.

28 In full accord with the American Distributing Co.  
29 holding, supra, is another decision issued by the 9th Circuit  
30 on the same day. See Stone Boat Yard v. NLRB, 715 F2d, 441,  
31 114 LRRM 2407 (CA 9, 1983).

32 We therefore see that an expired cba is recognized by  
the 9th Circuit Court of Appeals as a fully binding document  
which can lawfully serve as the statutorily mandated, legally  
binding written agreement controlling the receipt of funds  
into a pension fund.

In the case of Clear Pine Mouldings, Inc. v. NLRB 632  
F.2d 721 at 729-730 (CA 9, 1980), the Ninth Circuit held  
that health care plans are mandatory subjects of bargaining  
and that an employer's unilateral change in health care  
plans after the expiration of the cba was a violation of 8  
(a)(5) of the LMRA.

Additionally, another type of case involving a unilateral

1 change by an employer in the organizational phase of collective  
2 bargaining, when of course there is no cba, nor even an  
3 expired cba, is instructional on the issue before us.

4 In the case of NLRB v. Southern Coach and Body Company,  
5 Inc. 336 F2d 214 (CA 5, 1964), the Court of Appeals was  
6 confronted with the legality of an employer granting unilateral  
7 wage increases to some of its employees while the union was  
8 attempting to persuade a majority of employees to join the  
9 union. The employer contended that it had a long standing  
10 practice of granting automatic wage increases three and six  
11 months after initial hiring and that this automatic increase  
12 based on experience thus did not violate 8(a)(5) of the  
13 LMRA. The Fifth Circuit agreed with the employer and held  
14 as follows:

15 The rule is clearly established that the granting of a  
16 unilateral wage increase, in the absence of some extenu-  
17 ating circumstance such as the existence of a bona fide  
18 bargaining impasse or the implementation of a new wage  
19 program identical to one previously offered to and  
20 rejected by the bargaining agent, constitutes a refusal  
21 to bargain in good faith because it serves to disparage  
22 the union and frustrate its bargaining objectives. See  
23 N.L.R.B. v. Katz, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.  
24 2d 230 (1962); N.L.R.B. v. Crompton-Highland Mills,  
25 Inc., 337 U.S. 217, 69 S.Ct. 960, 93 L.Ed. 1320 (1948).  
26 However, the Supreme Court clearly indicated in both  
27 the Crompton-Highland and Katz cases that a mere contin-  
28 uation of the status quo during the bargaining period  
29 cannot constitute a disparagement of the bargaining  
30 process; there must be an actual change in working  
31 conditions. Therefore, as to the three-month and six-  
32 month automatic increases, there is no evidence on  
which to base a conclusion that section 8 (a) (5) was  
violated.

NLRB v. Southern Coach and Body,  
336 F.2d at 217.

Southern Coach and Body is helpful in analyzing the  
case sub judice from another point of view.

As the Supreme Court of the state of New Jersey (in  
Galloway, supra) found helpful, analyzing the case sub  
judice from the standpoint of whether the school board would  
have been guilty of an unfair labor practice if it had given

1 the step increments, we find that Southern Coach and Body,  
2 supra, holds that granting automatic wage increases is not a  
3 ULP. See also NLRB v. Katz, 369 US 736 at 746-47, 82 S.Ct.  
4 1107 (1962).

5 Thus the Forsyth School District would not have been  
6 guilty of an unfair labor practice if it had paid automatic  
7 step increments, even pursuant to an expired collective  
8 bargaining agreement (cba).

9 The case of Nolde Bros, Inc. v. Local No. 358 Bakery  
10 and Confectionary Workers Union, 430 U.S. 243, 97 S.Ct. 1067  
11 (1977), rehearing denied, 430 U.S. 988, 97 S.Ct. 1689, holds  
12 that a grievance which arises after the expiration of a cba  
13 must be arbitrated pursuant to the grievance mechanism  
14 established in the expired cba. In Nolde Bros., during  
15 negotiations after the contract's expiration date, the union  
16 gave notice of cancellation and the contract terminated a  
17 week later. After further negotiations produced no results,  
18 the employer announced that it was closing its plant immediately.  
19 The employer paid accrued wages, but rejected the union's  
20 demand for severance pay under the cba and declined to  
21 arbitrate the claim therefor on the ground that its obligation  
22 to do so terminated with the cba.

23 The union brought suit before a federal district court  
24 to compel the employer, inter alia, to arbitrate the severance-  
25 pay issue. On appeal the U.S. Supreme Court held that,

26 In short, where the dispute is over a provision of  
27 the expired agreement, the presumptions favoring arbitra-  
28 bility must be negated expressly or by clear implication.

29 We therefore agree with the conclusion of the  
30 Court of Appeals that, on this record, the Union's  
31 claim for severance pay under the expired collective  
32 bargaining agreement is subject to resolution under the  
arbitration provisions of that contract.

Nolde Bros., supra,  
97 S.Ct. at 1074

The Board believes that the proper implementation of

1 the status quo ante in a situation involving an expired cba  
2 which contains a pay matrix is to pay according to the  
3 schedule set forth for determining wages. If a teacher who  
4 last year had 8 years of experience but now has 9 full years  
5 of experience, then that teacher's proper placement on the  
6 wage scale - pay matrix is to place him/her at 9 years  
7 experience and whatever educational credits he now has.

8 By way of example, craft contracts that provide wages  
9 for apprentices often state that an apprentice shall be  
10 paid, say \$3.00 per hr. for the first six months or 1040  
11 hrs., then \$3.50 per hr. for the next 1040 hrs., then \$4.00  
12 per hr. etc. This goes on until the apprentice satisfies  
13 his 3-4 year apprenticeship and thereafter is paid equal to  
14 the journeyman hourly wage rate for that craft. Such clauses  
15 reflect the fact that additional experience (time at the  
16 job) and additional learning (an apprentice often is required  
17 to fulfill approximately 150 hours of classroom work per  
18 year during his apprentice), is valuable to the employer and  
19 the employer contracts to pay the step increments.

20 In that example, if the following facts occurred: (1)  
21 the contract expired, (2) the employees continued to work,  
22 and (3) an apprentice became eligible for a step increase  
23 because he had satisfied the requisite number of hours under  
24 the expired cba, then it is clear that the employer would be  
25 obligated to pay the additional step increment even after  
26 the cba expired.

27 This Board believes the apprenticeship analogy is  
28 instructive for the case sub judice.

29 Two cases from the NLRB which are closely analagous to  
30 the fact situation of the case before us are: Struthers  
31 Wells Corp. 262 NLRB No. 136, 111 LRRM 1018 (1982); and  
32 Meilman Food Industries, Inc., 234 NLRB 698, 97 LRRM 1372

1 (1978). In Struthers Wells, supra, a collective bargaining  
2 agreement, hereinafter cba, expired November 1, 1980. The  
3 union engaged in a two day strike in early November but  
4 thereafter continued to work. The expired cba had a cost-of-  
5 living adjustment provision (COLA) in it relating to wages  
6 which stated that on January 1 of each year, wages would be  
7 adjusted pursuant to the Consumer Price Index as of the  
8 preceding November 15.

9 In Struthers Wells, the NLRB held that,

10 Indeed, to so find would go against Board precedent  
11 concerning employer obligations after expiration of a  
collective bargaining agreement.

12 Here the cost-of-living adjustment was an existing  
13 term and condition of employment as established by the  
recently expired collective-bargaining agreement. It  
14 is axiomatic that such a condition of employment survives  
the expiration of a collective-bargaining agreement and  
15 cannot be altered without bargaining. An employer is  
permitted to institute a unilateral change either where  
16 the union has waived bargaining on the issue or where  
the unilateral change is a result of a rejected company  
offer after impasse has been reached. Otherwise, the  
17 employer has a duty to continue the terms of the expired  
collective-bargaining agreement.

18 5. See, e.g., Bethlehem Steel Company (Shipbuilding Division),  
136 NLRB 1500, 50 LRRM 1013 (1962)

19 6. Cf. Harold W. Hinson, d/b/a a Hen House Market No. 3, 175 NLRB  
20 596, 71 LRRM 1072 (1969), enf. 428 F.2d 133, 73 LRRM 2667 (8th  
Cir. 1970).

21 7. Peerless Roofing Co. Ltd., 247 NLRB 500, 103 LRRM 1173 (1980):  
22 Allen W. Bird II. Receiver for Caravelle Boat Company, a Corporation,  
and Caravelle Boat Company, 227 NLRB 1355, 95 LRRM 1003 (1977): and  
23 Roayl Himmel Distilling Company, 203 NLRB 370, 83 LRRM 1219 (1973).

24 Struther Wells, supra, 111  
LRRM at 1019-1020.

25 The NLRB found that neither exception (bargaining  
26 waiver or impasse) was extant in that case and held that,

27 From these facts alone it is evident that Respondent  
28 was obligated to continue to implement the COLA as required  
by the expired agreement. Thus, we find that its failure to  
29 do so violated Section 8(a)(5) and (1) of the Act.

30 Struther Wells, supra  
111 LRRM at 1020

31 The school board and the amici curiae contend that  
32 Struther Wells is inapposite for the reason that "a tentative

1 agreement had been reached " in that case. While the facts  
2 of that case state that that was the position of the union,<sup>1</sup>  
3 a complete reading of the Board's analysis shows that the  
4 possible existance of a tentative agreement was only secondarily  
5 mentioned in the NLRB's analysis.

6 The board found Struther Wells guilty of two separate  
7 violations of 8 (a)(5). The first violation was for the  
8 unilateral change in wages by refusing to pay the COLA  
9 increment pursuant to the expired cba. The second violation  
10 was premised on the employer's stated reason for not paying  
11 the increment --in order to gain leverage at the bargaining  
12 table. The NLRB found this to be a separate violation.

13 In its analysis of the first violation, the NLRB examined  
14 the facts to determine the applicability of the two exceptions  
15 to the general rule against unilateral changes. See 111  
16 LRRM 1019-1020, quoted supra. As stated earlier, the NLRB  
17 found neither exception factually supported and on those  
18 facts alone found a ULP.

19 The case of Meilman Food Industries, Inc., supra,  
20 involved facts essentially similar to the facts in Struther Wells  
21 supra, except that the cba expired on December 6, after the  
22 CPI determination date of November 15. In Meilman, the NLRB  
23 found that the employer's refusal to effectuate the increase  
24 on January 1 was a unilateral change in the existing wage  
25 structure in violation of 8 (a)(5) of the Act.

#### 26 CONCLUSION

27 Maintenance of the status quo means adherence to the  
28 expired collective bargaining agreement (cba). If the expired  
29 cba contains a wage scale (pay matrix) based on (a) the  
30

31  
32 1. When the employer announced in December its intention not to implement the COLA on the following January 1, the union responded that it was the union's position that a tentative agreement had been reached on that issue.

1 number of years of teaching experience and (b) the degrees  
2 (B.A., M.A.) and the number of 15-credit increments that a  
3 given teacher has, then adherence to the expired cba means  
4 that a teacher must be given the salary reflected by his  
5 years of experience and number of post- B.A. college credits  
6 at the start of each year. That means that a teacher who  
7 has gained an additional year of experience (and any additional,  
8 approved credit increments) must be given credit on the wage  
9 scale for that additional year's experience (and 15 credit  
10 increments). That is simply adhering to the expired cba as  
11 required by the Act and federal precedent interpreting the  
12 federal Act, (the LMRA).

13 The school board argues that to pay the increment  
14 changes the status quo (page 14 of its May 27, 1983 brief).  
15 We disagree.

16 The expired cba contains a pay matrix specifying annual  
17 increments for each additional year of service. That pay  
18 matrix constitutes wages and is therefore a mandatory subject  
19 of bargaining. Teachers who begin a new school year and who  
20 have met the contractual requirements (of an additional  
21 year's teaching experience and/or additional 15-credit  
22 increments) are entitled to be paid the salary according to  
23 their experience and/or education. To not pay a teacher  
24 according to the contract's stated method of placement on  
25 the pay matrix and in accord with the truth as to how many  
26 years experience and college credits that a given teacher  
27 actually has, is a unilateral change in a mandatory subject  
28 of bargaining.

29 Placement on a salary schedule such as the pay matrix  
30 in question is an automatic wage increase determined only by  
31 length of years of experience and current number of credits.  
32 To pay an automatic wage increment is not an unfair labor

1           practice (ULP). Southern Coach and Body, supra. To not pay  
2           an automatic wage increase, such as a COLA, is a ULP.  
3           Struther Wells, supra.

4           By paying the teachers during the beginning of the  
5           1981-1982 school year, the same salaries they received  
6           during the previous year (the 1980-1981 school year), the  
7           Forsyth School District was not compensating the teachers  
8           according to the salary schedule then in effect, i.e., under  
9           the terms of the still binding, expired, 1980-1981 cba.

10          Since the payment of the salary increments herein  
11          should have been automatic upon the start of the 1981-1982  
12          school year, the school district's unilateral withholding of  
13          the increments violated 39-31-401 (1) and (5), MCA.

14          We therefore hold that the Forsyth school district's  
15          failure to pay returning teachers in the fall of 1981 the  
16          automatic step increase to which they were entitled was a  
17          violation of 39-31-401 (1) and (5), MCA.

18  
19  
20          This decision by the BPA is not as onerous as suggested  
21          by the school district and amici curiae. That is so for the  
22          reason that if during negotiations impasse occurs, then the  
23          employer is free to unilaterally implement its last, best,  
24          final offer.

25  
26  
27          We note that the 1983 legislature of Montana saw the  
28          introduction of two bills which would have directly affected  
29          the issues before us in this case. S.B. 198, introduced by  
30          Senator Tveit at the request of the Montana School Board  
31          Association (MSBA) would have mandated that a school district  
32          not pay additional automatic step increments upon the expiration

1 of a cba. S.B. 199, also introduced by Senator Tveit at the  
2 request of the MSBA would have ordered the Board of Personnel  
3 Appeals to follow only public sector precedent in interpreting  
4 Montana's Public Employees Collective Bargaining Act, 39-  
5 31-101 et. seq.

6 Both bills died in the Senate Labor Committee.

7  
8  
9 For the reasons stated above, it is ordered that:

10 (1) The exceptions of the Forsyth School District are  
11 hereby denied;

12 (2) The hearing examiner's Amended Recommended Order  
13 is affirmed; and

14 (3) The Forsyth School District violated 39-31-401 (1)  
15 and (5), MCA when it unilaterally changed the implementation  
16 of the wage scale contained in an expired collective bargaining  
17 agreement.

18 (4) The Forsyth School District shall cease and desist  
19 not paying automatic step increments upon the expiration of  
20 a collective bargaining agreement.

21 Dated this 16<sup>th</sup> day of December, 1983.

22  
23 Board of Personnel Appeals

24  
25 By: Allan L. Joscelyn

26 Allan L. Joscelyn  
27 Chairman

28 CERTIFICATE OF SERVICE

29 The undersigned does certify that a true and correct  
30 copy of this document was mailed to the following on the  
20<sup>th</sup> day of December, 1983, postage paid and  
addressed as follows:

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BPA6 : Amd

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 37-81:

FORSYTH EDUCATION ASSOCIATION, )  
MEA, NEA, )  
Complainant, )  
- vs - )  
ROSEBUD COUNTY SCHOOL DISTRICT )  
NO. 14, FORSYTH, MONTANA, )  
Defendant. )

AMENDED  
RECOMMENDED ORDER

\* \* \* \* \*

By ORDER dated September 27, 1982, the Board of Personnel Appeals adopted the hearing examiner's Findings of Fact in this matter. The Board did not adopt the hearing examiner's Conclusion of Law or Recommended Order. The Board concluded that the Rosebud County School District No. 14, Forsyth, Montana, did violate Section 39-31-401 (5) MCA, by not paying the increments provided for in the expired collective bargaining agreement. The Board remanded the matter to the hearing examiner to establish a remedy consistent with the above Conclusion of Law.

During the oral argument before the Board it developed that the parties in this matter had reached agreement on a collective bargaining agreement and the retroactive pay pursuant to that agreement. Because the retroactive pay, at issue in this matter, had been paid, no monetary relief is possible for a remedy. Therefore;

IT IS ORDERED that the Defendant, Rosebud County School District No. 14, Forsyth, Montana, cease not paying the increments provided for in a collective bargaining agreement upon the expiration of that agreement. Such action, short of impasse, constitutes unilateral changes in working conditions

1 and a violation of Section 39-31-401(5) MCA.

2 DATED this 18 day of January, 1983.

3 BOARD OF PERSONNEL APPEALS

4  
5 By   
6 Stan Gerke  
7 Hearing Examiner

8 \* \* \* \* \*

9 CERTIFICATE OF MAILING

10 The undersigned does certify that a true and correct copy  
11 of this document was mailed to the following on the 18<sup>th</sup> day  
12 of January, 1983:

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ISSUE

Whether failure of a school district to pay experience and additional education credit increments provided in an expired collective bargaining contract, while the parties are negotiating for a successor agreement, is a unilateral change in wages constituting a refusal to bargain in good faith, in violation of Section 39-31-401(5) MCA.

STIPULATED FACTS

1. The Forsyth Education Association, affiliated with the Montana Education Association, is the duly recognized exclusive representative for collective bargaining of the faculty employed by Defendant.

2. Defendant, Rosebud County School District No. 14, is a body corporate, political subdivision, of the State of Montana, operating the elementary and high schools in Forsyth, Montana.

3. The parties had a Professional Negotiations Agreement, Master Contract which expired on June 30, 1981.

4. There was no provision in the expired contract to extend its provisions beyond its expiration date.

5. The parties are in negotiations for a successor collective bargaining contract; agreement has not been reached.

6. The expired agreement contained a teachers' salary schedule which provided for increments based on experience and increments contingent on additional educational credits.

7. Defendant has issued individual contracts to the teachers and is making 1981-82 salary payments based on teachers' salaries for 1980-81, without any additional experience and education increments provided in the old contract.

DISCUSSION

1  
2 The issue in this matter has been narrowed because of  
3 the factual situation. The Master Contract between the  
4 parties, which contained a teachers' salary schedule providing  
5 for automatic increments based upon experience (years of  
6 service) and education (additional credits), expired June 30,  
7 1981. No provision existed to extend the contract beyond  
8 the expiration date. The parties were in negotiations for a  
9 successor contract and, although agreement had not been  
10 reached, they were not at impasse. The Defendant, Rosebud  
11 County School District No. 14, issued individual contracts  
12 in the Fall of 1981 to the teachers for the 1981-82 school  
13 year containing salaries based upon the expired Master  
14 Contract without additional automatic increments: The  
15 Complainant, Forsyth Education Association, MEA, NEA, alleged  
16 that this action of not implementing the increased salary  
17 increments constituted a unilateral change in wages in  
18 violation of Sections 39-31-401(1) and (5) MCA.

19 There is no dispute that, as a general rule, an employer  
20 may not unilaterally alter wages or other employment condi-  
21 tions that are mandatory subjects of bargaining. Such an  
22 action may constitute a refusal to bargain in good faith in  
23 violation of the Act. (See NLRB v. Katz, 369 U.S. 736, 50  
24 LRRM 2177 (1962). The parties do not disagree that the  
25 experience and education increments are mandatory subjects  
26 of bargaining. The question in this matter simply becomes  
27 whether or not the "status quo" of the increments was unila-  
28 terally changed by the Defendant.

29 The Complainant cites Galloway Board of Education v.  
30 Galloway Education Association, 395 A. 2d 218 (N.J. Sup. Ct.  
31 1978) 100 LRRM 2250 as being a case almost in point. In  
32 this New Jersey case a one-year contract containing a salary  
schedule for the 1974-75 school year plus annual salary

1 increments expired June 30, 1975. At the start of the  
2 1975-76 school year the parties, the Galloway Township  
3 Education Association (the Association) and the Galloway  
4 Township Board of Education (the Board) were in negotiations  
5 for a successor agreement. The Association filed an unfair  
6 labor practice charge alleging the Board refused to negotiate  
7 in good faith by its action of unilaterally withholding the  
8 annual salary increment due at the beginning of 1975-76  
9 school year. The facts of this case are nearly identical to  
10 the matter at hand. However, in New Jersey a specific state  
11 statute (N.J.S.A. 18A:29-4.1) dictates that school boards  
12 shall adopt salary schedules for two-year durations. Thus,  
13 in the Galloway case, the Board by its agreement with the  
14 1974-75 collective bargaining contract, adopted a salary  
15 schedule that would, by state statute, extend into the  
16 1975-76 school year. The New Jersey Supreme Court did  
17 affirm that the Board unilaterally withheld the annual  
18 salary increments which constituted a refusal to bargain in  
19 good faith. However the Court stated, "We need not consider  
20 the general issue of whether the terms and conditions of  
21 employment which prevailed under a previous collective  
22 agreement constitute the "status quo" after its expiration  
23 because in this case a specific statute applies to command  
24 that conclusion with respect to the payment of increments  
25 according to the salary schedule."

26 The issue and facts in Board of Coop. Educational  
27 Servs. of Rockland County v. New York State Public Employment  
28 Relations Bd., 41 N.Y. 2d 753, 395 N.Y.S. 2d 439, 363 N.E.  
29 2d 1174, 95 LRRM 3046 (hereafter referred to as BOCES) are  
30 similar, if not identical, to the case at hand. In BOCES,  
31 the collective bargaining agreement between the parties had  
32 expired prior to a successor agreement being adopted. The  
expired agreement had contained a salary schedule and provi-

1 sions for automatic step increments. In previous years upon  
2 expiration of the collective bargaining agreement, the  
3 public employer had paid returning unit employees the automa-  
4 tic step increments before a successor agreement was reached.  
5 However, on June 19, 1974, after being advised that the unit  
6 employees wished to negotiate a successor agreement to the  
7 1972-74 contract, the public employer adopted a resolution  
8 affecting the status of salaries during the course of negoti-  
9 ations. The resolution provided that pending the execution  
10 of a new agreement or September 1, 1974, whichever came  
11 earlier, the provisions of the agreement expiring June 30,  
12 1974, would be recognized, including salary and salary rates  
13 in effect on June 30, 1974. Pursuant to the resolution,  
14 which had the same effect of the individual teaching contracts  
15 in the present matter, the public employer maintained the  
16 salaries at the rate in effect on June 30, 1974, during  
17 negotiations for the successor agreement, but refused to pay  
18 the automatic step increments to returning unit members.  
19 Because of the refusal, the labor organization filed an  
20 unfair labor practice charge alleging that the public employer  
21 had unilaterally withdrawn a previously enjoyed benefit -  
22 automatic step increments.

23 In its reasoning of the BOCES case, the Court reviewed  
24 the principles of labor law relating to maintaining the  
25 "status quo" during negotiations. Unilateral changes to  
26 wages and conditions of employment by the employer during  
27 the course of negotiations indicates lack of good faith  
28 bargaining. The Court stated, "While such a principal may  
29 apply where an employer alters unilaterally during negotia-  
30 tions other terms and conditions of employment, it should  
31 not apply where the employer maintains the salaries in  
32 effect at the expiration of the contract but does not pay  
increments." The Court also reasoned, "To say that the

1 'status quo' must be maintained during negotiations is one  
2 thing; to say that the 'status quo' includes a change and  
3 means automatic increases in salary is another." The Court  
4 concluded, "We hold that, after the expiration of an employ-  
5 ment agreement, it is not a violation of a public employer's  
6 duty to negotiate in good faith to discontinue during the  
7 negotiations for a new agreement the payment of automatic  
8 annual salary increments, however long standing the practice  
9 of paying such increments may have been."

10 The question addressed in Wyandanch Union Free School  
11 District, Board of Education v. Wyandanch Teachers Association,  
12 58 AD 2d 475, 396 NYS 2d 702, 96 LRRM 2652 [NY App.Div.  
13 (1977)] is identical to the matter at hand and the BOCES,  
14 supra, case. However, the Court in WYANDANCH dealt with a  
15 factual matter that presents a curious difference to the  
16 case at hand. Unlike the fact in BOCES, supra, and the  
17 present matter that the employment agreement had expired and  
18 no provisions were made to extend the agreement through the  
19 period of negotiations, in WYANDANCH, supra, a survivorship  
20 clause was contained in the employment agreement. The  
21 clause stated:

22 "ARTICLE XXII SUCCESSOR AGREEMENTS

23 "A. On or after February 1, 1976, either  
24 party may notify the other, in writing,  
25 that negotiations are required on neg-  
26 tiable items for the collective bargain-  
27 ing agreement for the succeeding school  
28 year. The notice shall set forth the  
times which that party desires to negotiate.  
Negotiating sessions shall commence within  
ten days of the notice initiating negotia-  
tions.

29 "B. In the event a successor contract or  
30 provisions are not agreed upon on or before  
31 the termination date of the present contract  
32 or provisions, all terms of the present con-  
tract and all working conditions will remain  
in effect until the successor contract or  
provisions have entered into. Upon agreement  
all salaries, benefits and working conditions

1 will be retroactive to the termination date  
2 of the present contract or provisions."

3 In WYANDANCH, supra, the Court addressed this factual  
4 difference:

5 While, as we have noted, the [unit members] in  
6 the [BOCES] case sought to collect salary in-  
7 crements after the expiration of a survivor-  
8 ship clause, and here the contract does have  
9 such a clause, we interpret the broad language  
10 of the Court of Appeals to void any attempt to  
11 compel the payment of increments under an  
12 expired contract even though that contract is  
13 deemed, for other purposes, to continue in effect.

14 The facts in CORBIN v. COUNTY OF SUFFOLK, 54 AD2d 698,  
15 387 NYS2d 295, 95 LRRM 2030 [NY App.Div. (1976)] are on all  
16 forms with the matter at hand. The contract had expired and  
17 the parties were in negotiations for a successor collective  
18 bargaining agreement. The public employer maintained the  
19 "status quo" by honoring the terms of the expired contract  
20 except with respect to the salary increment provisions. The  
21 bargaining unit employees charged that the employer unilateral-  
22 ly altered salaries which constituted a refusal to bargain  
23 in good faith. The Court succinctly stated, "We disagree  
24 with [the bargaining unit employees'] contentions. The  
25 contracts having expired, the provisions for salary increments  
26 and longevity payments are no longer in effect."

27 It is clear that the courts have continued to maintain  
28 the findings in KATZ, supra. An employer's unilateral  
29 change in conditions of employment during negotiations,  
30 short of true impasse, is generally held to be a refusal to  
31 bargain in good faith. Maintaining the "status quo" upon  
32 the expiration of a collective bargaining agreement has been  
deemed proper during the period of negotiations for a succes-  
sor agreement. Maintaining the "status quo", however, does  
not include "change". Increasing salaries by the use of  
increments based upon educational or experience credits  
surely constitutes change. The Courts have determined that

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an employer's refusal to pay increments based upon an expired contract during the period of negotiations is not a refusal to bargain in good faith.

I agree with the reasoning in BOCES, supra, "The matter of increments can be negotiated and, if it is agreed that such increments can and should be paid, provision can be made for payment retroactively."

CONCLUSIONS OF LAW

The Rosebud County School District No. 14, Forsyth, Montana, did not violate Sections 39-31-401(1) or (5) MCA.

RECOMMENDED ORDER

It is hereby ordered that Unfair Labor Practice No. 37-81 be dismissed.

SPECIAL NOTE

In accordance with Board's Rule ARM 24.25.107(2), the above RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless written exceptions are filed within 20 days after service of these FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER upon the parties.

DATED this 17 day of May, 1982.

BOARD OF PERSONNEL APPEALS

By Stan Gerke  
STAN GERKE  
Hearing Examiner

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 17 day of May, 1982:



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