

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 28-84:

BOARD OF TRUSTEES, )  
MISSOULA ELEMENTARY DISTRICT #1, )  
Complainant, )  
- vs - )  
MISSOULA ELEMENTARY EDUCATION )  
ASSOCIATION, MEA, )  
Defendant. )

FINAL ORDER

\*\*\*\*\*

On December 13, 1984, Investigator Joseph V. Maronick issued an Investigation Report and Determination dismissing these charges for the reason that they lack probable merit.

Exceptions to the Investigation Report and Determination were filed by Michael W. Sehestedt, attorney for complainant, on December 18, 1984.

Oral argument was scheduled before the Board of Personnel Appeals on January 25, 1985.

After reviewing the record and considering the briefs and oral arguments, the Board Finds and Orders as follows:

1. IT IS ORDERED that the Exceptions to the Investigation Report and Determination are hereby denied.

2. IT IS ORDERED that this Board therefore adopts the Investigation Report and Determination issued by Investigator Joe Maronick dismissing the charge as the Final Order of this Board.

The upholding of the dismissal of this unfair labor practice is in no way an acceptance by this Board of the Union's attempt to escape its obligations under the election of remedies clause of the collective bargaining agreement.

DATED this 1<sup>st</sup> day of April, 1985.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn  
Alan L. Joscelyn  
Chairman

CERTIFICATE OF MAILING

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I, Jennifer Jacobson, do certify that a true and correct copy of this document was mailed to the following on the 2nd day of April, 1985:

Michael W. Sehestedt  
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Don K. Klepper  
Director of Personnel  
Missoula Elementary School District #1  
c/o Missoula County Attorney's Office  
Missoula County Courthouse  
Missoula, MT 59802

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 28-84:

BOARD OF TRUSTEES,	)	
MISSOULA ELEMENTARY	)	
DISTRICT #1	)	INVESTIGATION
	)	REPORT AND
Complainant,	)	DETERMINATION
	)	
vs.	)	
	)	
MISSOULA ELEMENTARY EDUCATION	)	
ASSOCIATION, MEA,	)	
	)	
Respondent.	)	

\* \* \* \* \*

Background

On October 12, 1984 the Board of Trustees Missoula Elementary District #1 (the employer) filed an unfair labor practice charge with this Board alleging that the Missoula Elementary Education Association (the union) was committing violations of Section 39-31-402 (2) MCA. The complaint alleged that the union had agreed under contract that a grievance may be processed only until another form of appeal outside the contract is elected. Notwithstanding this election of remedies provision, the union first filed an appeal with the County Superintendent of Schools and then filed a grievance, both seeking reinstatement of the same teacher. Carol Anderson, a tenured teacher on leave for 1983-84 was dismissed while under contract for 1984-85. In that dismissal the union grieves violation of "Involuntary Transfer, Reduction in Staff and Leaves Without Pay" articles of the contract.

In answer the union denied any violation of the pertinent sections of Title 39, Chapter 31 MCA relied on by the employer to bring its charge. Further, the union asserted that violation of contract terms is a matter for an arbitrator, not the Board of Personnel Appeals.

Jurisdiction Question

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2 The Employer cites in part ULP 1-75, International  
3 Brotherhood of Painters and Allied Trades, Local 1023 v. MSU  
4 et al; ULP 3-76, Firefighters v. City of Billings, ULP 5-80  
5 AFSCME School District #5; and Eleventh Judicial District  
6 Court Flathead County Cause No. DV80-600, as holding that  
7 violation of a contract was an Unfair Labor Practice.

8 The refusal to process a dispute concerning a labor  
9 contract, as found in the cases cited where a contract  
10 violation occurred, was an unfair labor practice recognized  
11 by the Board.

12 The issue in this case is whether the violation of the  
13 terms of the contract was an unfair labor practice. The  
14 matter of the employees dismissal is now before the Missoula  
15 County Superintendent of Schools. The merits of that pro-  
16 ceeding are not in question in this Unfair Labor Practice  
17 Charge.

18 As was stated in the Investigation Report and Determin-  
19 ation in ULP 18-83 American Federation of State, County and  
20 Municipal Employees, AFL-CIO, vs City and/or County of  
21 Butte-Silver Bow et al. dated May 4, 1984:

22 The refusal to process a dispute concerning a  
23 labor contract, if it is in violation of the  
24 contract, is an unfair labor practice recognized  
25 by the Montana Board of Personnel Appeals, the  
26 State District Court and the Montana Supreme  
27 Court. Board decisions: ULP #1-75, International  
28 Brotherhood of Painters and Allied Trades, Local  
29 #1023 vs. Montana State University and Barry Hjort;  
30 and ULP #3-76, Local #521 of the International  
31 Association of Fire Fighters v. City of Billings.  
32 District court decisions: Board of Trustees of  
Flathead County School District No. 5 v. Board of  
Personnel Appeals and AFSCME, Cause No. DV-80-600,  
Flathead County; and City of Livingston v. Board  
of Personnel Appeals and AFSCME, Cause No. 81-159,  
Park County, (1983). Montana Supreme Court deci-  
sion: City of Livingston v. AFSCME, et al. 174 MT  
421, 571 P.2d 374 (1977).

1 As was stated by the Montana Supreme Court in  
2 the City of Livingston, supra, case:

3 Thus, by statute, the duty to bargain  
4 "in good faith" continues during the  
5 entire course of the contract.

6 (3) The Supreme Court has held that  
7 "Collective bargaining is a continuing  
8 process. Among other things it involves  
9 \*\* protection of employees rights al-  
10 ready secured by contract." Conley v.  
11 Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.  
12 Ed. 2d 949 (6th Cir. 1947). In Ostro-  
13 fosky v. United Steelworkers of America,  
14 171 F. Supp. 782, 790 (D. Md. 1959),  
15 aff'd, 273 F2d 614 (4th Cir. 1960),  
16 cert. den., 363 U.S. 849, 80 s.Ct. 1628,  
17 4 L.Ed. 1d 1732 (1950), the court stat-  
18 ed: "\*\*\* the employer had the same duty  
19 to bargain collectively over grievances  
20 as over the terms of the agreement."

21 (4) Under Montana's Collective Bargain-  
22 ing Act for Public Employees a failure  
23 to hold a grievance hearing as provided  
24 in the contract is an unfair labor  
25 practice for failure to bargain in good  
26 faith.

27 174 Mt at 424, 571 P.2d at 377.

28 When a party to a collective bargaining agreement  
29 refuses to abide by the mutually agreed-upon  
30 grievance procedure, then that party is repudiat-  
31 ing its statutory duty to bargain in good faith,  
32 and is interfering with the rights of employees  
guaranteed to them in Section 39-31-201 MCA.

The Board of Personnel Appeals recognizes the  
refusal to abide by a contractual grievance pro-  
cedure as an unfair labor practice because such a  
refusal strikes at the very heart of the purpose  
of the Act - to promote labor peace via collective  
bargaining. Section 39-31-101 MCA.

In this case, however, the employer asserts just the  
opposite of the above cited cases. The allegation is not  
that the union refuses to use the grievance procedure but  
that the union is using the grievance procedure. If the use  
of the grievance procedure under these facts constitutes a  
violation the collective bargaining agreement, then the  
employer's remedy is to assert such a defense in the griev-  
ance procedure and to the arbitrator if necessary. This  
Board has never held that the use of a contractual grievance

1 procedure is an unfair labor practice. It is the opposite  
2 act which is an unfair labor practice.

3 Use of the contractual grievance procedure is always  
4 favored. Defenses to the grievance procedure based on  
5 allegations of contract violations must be submitted to an  
6 arbitrator.

7 Determination

8 The relevant alleged facts, insofar as they are neces-  
9 sary to determine here if the charge filed is with or without  
10 probable merit, are the following: (1) The merits of the  
11 dismissal are proceeding toward resolution through appeal to  
12 the Missoula County Superintendent of schools, and (2) the  
13 employer filed a ULP alleging a violation of contract terms  
14 requiring election of remedies.

15 Although use of the grievance procedure under the facts  
16 in this case may constitute a breach of the collective  
17 bargaining agreement, the remedy for that alleged breach is  
18 a suit for enforcement of the contract or is a defense to be  
19 asserted in the grievance process. The alleged breach is  
20 not an unfair labor practice. This is a matter more appro-  
21 priately brought before an arbitrator not the Board of  
22 Personnel Appeals.

23 Accordingly, pursuant to Section 39-31-405 MCA we find  
24 that there is not probable merit for the charge and dismiss  
25 the same.

26 Dated this 13 day of December, 1984.

27 BOARD OF PERSONNEL APPEALS

28  
29 By: Joseph V. Maronick  
30 Joseph V. Maronick  
31 Investigator  
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NOTICE

Pursuant to 39-31-405(2) MCA, this decision becomes the final order of the Board unless a written request for review is filed within ten (10) days of receipt of this notice.

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 14<sup>th</sup> day of December, 1984.

Emilie Loring  
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Don K. Klepper  
Director of Personnel  
c/o Missoula County Attorney's Office  
Missoula County Courthouse  
Missoula, MT 59802



BPAB:Jmd