

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 29-86:

LOLO EDUCATION ASSOCIATION,)
MONTANA EDUCATION)
ASSOCIATION,)
Complainant,)
- vs -)
MISSOULA COUNTY SCHOOL)
DISTRICT NO. 7,)
Defendant.)

FINAL ORDER

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner John Andrew on July 9, 1987.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Larry W. Jones, attorney for Defendant, on July 23, 1987.

Oral arguments were scheduled before the Board of Personnel Appeals on November 30, 1987.

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

1. IT IS ORDERED that the Defendant's Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED that this Board therefore adopt the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner John Andrew as the Final Order of this Board.

DATED this 24th day of February, 1988.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn
Alan L. Joscelyn
Chairman

CERTIFICATE OF MAILING

1
2 I, Janita Jacobson, do certify that on
3 the 24th day of February, 1988, a true and correct copy of
4 this document was mailed to the following:

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Charge No. 29-86)
LOLO EDUCATION ASSOCIATION,)
MONTANA EDUCATION ASSOCIATION)
Complainant,)
vs.)
MISSOULA COUNTY SCHOOL)
DISTRICT NO. 7)
Defendant.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

The Complainant, Lolo Classified Association, Montana Education Association filed an Unfair Labor Practice charge with the Board of Personnel Appeals on December 11, 1986. The complaint alleged that the Defendant violated 39-31-401(1) and (5), MCA, by refusing to bargain in good faith with Complainant, the certified exclusive representative of its classified employees.

On May 4, 1987 the Complainant and the Defendant filed stipulated facts and a briefing schedule. The Complainant waived the filing of a response brief to the the Defendant's brief. Neither side requested oral argument. The matter was thus submitted on July 7, 1987.

II. LEGAL ISSUE

Whether the failure to pay step increases based on years of experience provided in the expired contract, in light of provision 13.1, is a unilateral change in a mandatory subject of bargaining constituting a refusal to bargain in good faith and a violation of Section 39-31-401(1) and (5), MCA.

III. STIPULATED FACTS

1. Complainant Association is the duly certified

1 exclusive representative of Defendant's classified employees
2 at the Lolo School.

3 2. The last collective bargaining contract between
4 the parties expired on July 1, 1986. The parties have been
5 in bargaining attempting to reach an agreement on a succes-
6 sor contract and have requested and utilized mediation;
7 impasse has not been reached.

8 3. The expired contract had a wage schedule providing
9 for step increases based on years of experience.

10 4. The Defendant has refused to advance the employees
11 for an additional year of experience on the salary schedule
12 after the contract expired.

13 5. The expired collect bargaining agreement contained
14 the following provision:

15 13.1 Effective Period

16 This agreement shall be effective as of
17 June 30, 1985 and shall continue in full force and
18 effect until June 30, 1986. It is expressly
understood that all provisions of the agreement
terminate after this date.

19 IV. CONCLUSIONS OF LAW

20 A matter similar to this has been previously
21 addressed by the Board of Personnel Appeals in Forsyth
22 Education Association v. Rosebud County School District No.
23 4, ULP. 37-81; Forsyth School District No. 4 v. Board of
24 Personnel Appeals and Forsyth Education Association, 42 St.
25 Rptr. 21, 692 P.2d 1261 (1985). The Supreme Court in
26 Forsyth v. Board, supra, did not address the heart of the
27 Forsyth case which was whether failure to implement negoti-
28 ated steps constituted an unfair labor practice. The
29 Supreme Court ruled that because retroactive benefits were
30 paid Forsyth was moot. The Court further held that this was
31 not an occasion to apply the "capable of repetition, yet
32 evading review" doctrine. The hearing examiner must make

1 specific note that this question is a recurring one and that
2 some clear guidance by the Board and the courts is neces-
3 sary.

4 In the Forsyth Order issued by the Board on December
5 16, 1983, the Board made several conclusions very relevant
6 to the Lolo case at hand. The Board stated in Forsyth, "We
7 specifically reject, however, the use of public sector cases
8 as precedent in this case for the reason stated below." The
9 Board then went on to point out that public sector cases
10 often come to opposite conclusions over the same issues.
11 For that reason the Board elected to give credence to
12 decisions of the National Labor Relations Board under the
13 Labor Management Relations Act and to negate the usefulness
14 of decisions rendered by state courts and boards. This was
15 consistent with long held Board practice. Counsel have not
16 cited nor has the hearing examiner found any federal case
17 directly on line with the issue in Lolo. Forsyth, thus
18 appears controlling to the extent it addresses the issue.

19 It is well settled that a unilateral change in a
20 mandatory subject of bargaining, even after the expiration
21 of a collective bargaining agreement, is a violation of
22 39-31-401 (5) MCA. Wages, however stated or paid are a
23 mandatory subject of bargaining. A unilateral change in
24 wages, even following the expiration of a collective bar-
25 gaining agreement, is a violation of 39-31-401 (5) MCA,
26 Forsyth, ULP #37-81, supra.

27 In Forsyth, the Board in lengthy discussion addressed
28 whether implementation of steps or failure to implement
29 steps was a disruption of status quo. The Board in citing a
30 Ninth Circuit case, American Distributing Co. V NLRB, 715,
31 F.2d 446, 114 LRRM 2402 (CA 9, 1983) likened the collective
32 bargaining agreement to a living document whose obligations

1 carry on beyond expiration. Citing other cases the Board
2 concluded that to not implement steps constituted a change
3 from the status quo and thus an unfair labor practice. Of
4 primary importance the Board stated:

5 Placement on a salary schedule such as the
6 matrix in question is an automatic wage increase
7 determined only by the length of years of exper-
8 ience and current number of credits.

9 If as the Board has found, that a pay matrix constitutes
10 a living part of every agreement subject only to meeting the
11 contractual term of the matrix (a year of service), it makes
12 no difference that the contract has language such as in
13 13.1. Failure to pay an employee according to the con-
14 tract's stated method of placement on the pay matrix and in
15 accord with the truth as to how many years experience that
16 employee has, is a unilateral change in a mandatory subject
17 of bargaining.

18 Had Missoula County School District #7 implemented the
19 step changes contained in the agreement the District would
20 not have been guilty of an unfair labor practice charge
21 under the Board's holding in Forsyth. As it were, the
22 District committed an unfair labor practice under 39-31-401
23 (1) and (5) MCA by failing to implement the negotiated
24 steps.

25 V. RECOMMENDED ORDER

26 IT IS ORDERED that the Defendant, Missoula County
27 School District No. 7, cease not paying the increments
28 provided for in a collective bargaining agreement upon
29 expiration of that agreement.

30 IT IS FURTHER ORDERED that Missoula County School
31 District No. 7 recognize the step increments where applica-
32 ble subsequent to the expiration of the collective bargain-
ing agreement and compensate employees in accordance with

1 this decision.

2 NOTICE

3 Pursuant to ARM 24.25.107(2), this RECOMMENDED ORDER
4 shall become the FINAL ORDER of this Board unless written
5 exceptions are filed within 20 days after service of these
6 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER
7 upon the parties.

8
9
10 Dated this 9th day of July, 1987.

11 BOARD OF PERSONNEL APPEALS

12
13 By John Andrew
14 John Andrew
Hearing Examiner

15
16 CERTIFICATE OF MAILING

17 The undersigned does certify that a true and correct
18 copy of this document was mailed to the following on the
9th day of July, 1987.

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