

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE 4-89

CUSTER COUNTY CUSTODIANS,)
MEA/NEA,)
Complainant,)
vs.)
CUSTER UNIFIED SCHOOL)
DISTRICT,)
Defendant.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

A hearing on the above matter was held on April 21, 1989 in the Court Room of the Custer County Courthouse. Emilie Loring represented the Complainant, Custer County Custodians, MEA/NEA. The Defendant, Custer Unified School District, was represented by George Huss. Arlyn L. Plowman was the duly appointed Hearing Examiner for the Board of Personnel Appeals. The parties offered evidence and argument, and filed post hearing briefs. Although the Complainant had the opportunity to submit a reply brief, none was received. The matter was deemed submitted June 20, 1989.

II. BACKGROUND

On February 9, 1989 the Complainant, Custer County Custodians, MEA/NEA filed an Unfair Labor Practice Charge with the Board of Personnel Appeals alleging that the Defendant, Custer Unified School District, refused to process a grievance,

1 and by so doing, violated Section 39-31-401 (1) and (5) MCA. In
2 a timely response filed with the Board of Personnel Appeals on
3 February 22, 1989 the Defendant denied any violation of the
4 above referenced sections of the Montana Collective Bargaining
5 for Public Employees Act. Subsequently, the matter was referred
6 to a Board of Personnel Appeals investigator who issued an
7 Investigation Report and Determination on March 21, 1989 wherein
8 there was a finding of probable merit for the Unfair Labor
9 Practice Charge.

10 Consequently a Hearing Examiner was appointed and the matter
11 was noticed for hearing.

12 III. FINDINGS OF FACT

13 1. At all times relevant to the issues in dispute here a
14 Collective Bargaining Agreement existed between the parties,
15 Joint Exhibit No. 1. That Collective Bargaining Agreement was
16 effective as of July 1, 1987 and was to remain in effect until
17 June 30, 1989 (Article XV, A page 20 of Joint Exhibit No. 1).

18 2. The existing Collective Bargaining Agreement contained
19 a grievance/arbitration procedure (Article XI starting on page 14
20 of Joint Exhibit No. 1). Step I of that procedure provides that
21 the grievance be presented to a principal by a steward. Step II
22 provides that the grievance be presented to the superintendent by
23 the grievance committee. In Step III the grievance committee
24 presents the grievance to the Chairman of the Board of Trustees.
25 At Step IV of the procedure the grievance is submitted to final

1 and binding arbitration.

2 3. There are time limits at each stage of the above
3 grievance\arbitration procedure. The union has ten days to refer
4 a grievance from Step II to Step III of the grievance procedure
5 (Article XI, D, Step III, page 16 of Joint Exhibit No. 1).

6 4. The grievance procedure in the parties Collective
7 Bargaining Agreement is most unforgiving. Subparagraphs B and C
8 of Article XI (Joint Exhibit No. 1, page 15) punishes any
9 departure from established procedure by denying further
10 consideration or remedy to the party responsible for such a
11 departure.

12 5. In early November 1988 the Complainant's Head Steward,
13 James Arneson filed a grievance alleging a unilateral change in
14 working conditions (Exhibit C # 1). At Step I a Principal
15 responded denying the grievance (Exhibit C # 3). The Complainant
16 moved the grievance to Step II of the procedure and a meeting was
17 held with the Superintendent. An audio tape recording was made
18 of the Step II meeting. The Superintendent denied the grievance
19 (Exhibit C # 5). On December 7, 1988 the Complainant requested
20 that the grievance be advanced to Step III (Exhibit C # 6). The
21 Defendant refused to advance the grievance stating that the
22 request to do so was untimely (Exhibit C # 7 and Exhibit C # 8).
23 On December 14, 1988 Al Bellister, UniServ Director for the
24 Montana Education Association, the Complainant's parent
25 organization, advised the Defendant of the Complainant's intent

1 to submit the grievance to arbitration, Step IV of the grievance
2 and arbitration procedure (Exhibit C # 9). On December 21, 1988
3 the Defendant replied to Complainant's Notice of Intent to
4 Arbitrate (Exhibit # 10) reiterating its previous position that
5 failure to move the grievance within the Collective Bargaining
6 Agreement established time limits voided the grievance forfeiting
7 the Complainant's right to further consideration of the
8 grievance.

9 6. There is a factual dispute between the parties as to
10 whether the Complainant's request to move the grievance to the
11 third step was timely. At the crux of this dispute is a
12 disagreement as to the date the Complainant received the
13 Defendant's Step II response. To determine the date the response
14 was received it would be necessary to define what constitutes a
15 complete response. The Complainant contends that the Defendant's
16 Step II Response was incomplete until the audio tape recording of
17 the Step II meeting was delivered and the grievance procedure
18 time limits did not begin to run until then. That delivery was
19 not made until several days after the Complainant received
20 written notification of the Step II denial. The Defendant argues
21 that the delivery date of the audio tape is irrelevant and that
22 the grievance procedure time limits began to run upon receipt of
23 the written denial.

24 7. The Defendant would have the Board of Personnel Appeals
25 interpret and apply the Collective Bargaining Agreement,

1 especially Article XI, B (page 15) of Joint Exhibit No. 1 in
2 such a way as to deny the Complainant any further consideration
3 or remedy under the grievance/arbitration procedure.

4 IV. CONCLUSIONS OF LAW

5 1. The Board of Personnel Appeals has jurisdiction in this
6 matter pursuant Section 39-31-405 et seq., MCA.

7 2. The Montana Supreme Court has approved the practice of
8 the Board of Personnel Appeals in using Federal Court and
9 National Labor Relations Board (NLRB) precedents as guidelines in
10 interpreting the Montana Collective Bargaining for Public
11 Employees Act as the state is so similar to the Federal Labor
12 Management Relations Act, State ex. rel. Board of Personnel
13 Appeals v. District Court, 183 Mont. 223, 598 P.2d 1117, 103 LRRM
14 2297; Teamsters Local No. 45 v. State ex. rel. Board of Personnel
15 Appeals, 1985 Mont. 272, 635 P.2d 1310, 110 LRRM 2012; City of
16 Great Falls v. Young (Young III), 683 P.2d 185, 119 LRRM 2682, 21
17 Mont. 13.

18 3. Pursuant to Section 39-31-406, MCA the Complainant's
19 case must be established by a preponderance of the evidence
20 before an unfair labor practice may be found, Board of Trustees
21 v. State of Montana, 103 LRRM 3090, 604 P.2d 770, 185 Mont. 89.
22 See also Indiana Metal Products v. NLRB, 1953 CA 7, 31 LRRM 2490,
23 202 F.2d 613 and NLRB v Kaiser Aluminum and Chemical Corporation,
24 34 LRRM 2412, 217 F.2d 366, 1954 CA 9.

25 4. Pursuant to Section 39-31-401(1) it is an Unfair Labor

1 Practice for a public employer to interfere with, restrain or
2 coerce employees in the exercise of the rights guaranteed in
3 Section 39-31-201, MCA which states that public employees shall
4 have and shall be protected in the exercise of the right of self
5 organization, to form, to join, or assist any labor organization,
6 to bargain collective through representatives of their own
7 choosing on questions of wages, hours, fringe benefits, and other
8 conditions of employment, and to engage in other concerted
9 activities for the purpose of collective bargaining or other
10 mutual aid or protection free from interference, restraint or
11 coercion.

12 5. Pursuant to Section 39-31-401(5) MCA it is an unfair
13 labor practice for a public employer to refuse bargain
14 collectively in good faith with an exclusive representative.

15 6. Good faith bargaining is defined in Section 39-31-305
16 MCA as the performance of the mutual obligation of the public
17 employer or his designated representative and the representatives
18 of the exclusive representative to meet at reasonable times and
19 negotiate in good faith with respect to wages, hours, fringe
20 benefits, and other conditions of employment or the negotiation
21 of an agreement or any question arising thereunder in the
22 execution of a written contract incorporating any agreement
23 reached. Such obligation does not compel either party to agree
24 to a proposal or require the making of a concession. See NLRB v.
25 American National Insurance Company, 30 LRRM 2147, 343 US 395,

1 1952; NLRB v. Bancroft Manufacturing Company, Inc., 106 LRRM
2 2603, 365 F.2d 492, 1981 CA 5; NLRB v. Blevins Popcorn Company,
3 107 LRRM 3108, 659 F.2d 1173, 1981 CA DC; Struthers Wells
4 Corporation v. NLRB, 114 LRRM 3553, 721 F.2d 465, 1980 CA 3.

5 7. Pursuant to the foregoing the Defendant was obligated
6 to bargain collectively in good faith with the Complainant,
7 Custer County Custodians, MEA/NEA. That obligation to bargain in
8 good faith includes the duty to comply with the
9 grievance/arbitration procedure contained within the existing
10 Collective Bargaining Agreement, Chicago Magnesium Casting
11 Company v. NLRB, 103 LRRM 2241, 612 F.2d 108, 1980 CA 7; NLRB v.
12 Southwestern Electric Cooperative, Inc., 122 LRRM 2747, 794 F.2d
13 276, 1986 CA 7.

14 The grievance procedure is part of the continuing
15 collective bargaining process, Steelworkers v. Warrior
16 Navigation, 46 LRRM 2416, 363 U.S. 574, 1960. An employer has
17 the same obligation to bargain collectively over grievances as
18 over the terms of the agreement, City of Livingston v. Montana
19 Council No. 9, 100 LRRM 2528, 571 P.2d 374, 174 Mont. 421.

20 8. In ULP 44-81 James F. Forsman, IAFF Local Number 436 v.
21 Anaconda-Deer Lodge County, and ULP 43-81 William M. Converse,
22 IAFF Local No. 436 v. Anaconda-Deer Lodge County, April 20, 1982
23 the Board of Personnel Appeals deferred Unfair Labor Practice
24 charges to the Collective Bargaining Agreement's grievance/
25 arbitration procedure. In doing so the Board formally adopted

1 the Collyer Doctrine. In Young, et. al v. the City of Great
2 Falls, 112 LRRM 2988, 198 Mont. 346, 646 P.2d 512 the Montana
3 Supreme Court described that doctrine as follows:

4 A "prearbitral deferral policy" was first enunciated
5 by the NLRB v. Collyer Insulated Wire (1971), 192 NLRB
6 837, 77 LRRM 1931. There, quoting from Jos Schlitz
7 Brewing Company (1968), 175 NLRB 23, 70 LRRM 1472,
8 1475, the NLRB found "that the policy of promoting
industrial peace and stability through collective
bargaining obliges us to defer the parties to the
grievance/arbitration procedures that themselves have
established." Collyer at 77 LRRM 1936.

9 9. As a general rule, the parties are encouraged and
10 expected to exhaust their negotiated dispute resolution process
11 prior to seeking relief elsewhere: "The Board is not the proper
12 form for parties seeking to receive a remedy in alleged breach
13 of contract," National Dairy Products Corporation and United
14 Dairy Workers Local 83, 45 LRRM 1332, 126 NLRB 62 February 4,
15 1960. "Where an entire dispute' can adequately be disposed of
16 under the grievance and arbitration machinery, we are favorably
17 toward permitting the parties to do so ..., "Sheet Metal Workers
18 Local 17 and George Koch Sons, 199 NLRB No. 26, 81 LRRM 1195,
19 enforced 85 LRRM 2548, 1978 CA 1. See also Republic Steel
20 Corporation v. Maddox, 58 LRRM 2193, 379 U.S. 650; Brinkman v.
21 Montana, 1 IER 1236, 729 P.2d 301, 43 St.Rep. 2163; United
22 Paperworkers International Union v. Misco, Inc., 126 LRRM 3113,
23 U. S. Supreme Court, December 1, 1987 No. 86-651.

24 10. Likewise, procedural arbitrability questions are best
25 resolved using the negotiated dispute resolution machinery. The

1 Collective Bargaining Agreement's grievance/arbitration procedure
2 is the proper forum for determining the merits of the Complaint's
3 grievance and/or whether the request to move it on to Step III
4 was timely. See Local 4-447 v. Chevron Chemical Company, 125 LRRM
5 2232, 815 F.2d 338, 1987 CA 5.

6 11. Section 39-31-101 MCA states, "In order to promote
7 public business by removing certain recognized sources of strife
8 and unrest, it is the policy of the State of Montana to encourage
9 the practice and procedure of collective bargaining to arrive at
10 friendly adjustment of all disputes between public employers and
11 their employees." A grievance procedure culminating in the final
12 and binding arbitration is one mechanism in the practice and
13 procedure of collective bargaining which allows employer and
14 employees to arrive at friendly adjustment of disputes. This is

15 established by the Montana legislative policy

16 it is essential that the Board of Personnel Appeals encourage the
17 enforcement of those contractual provisions where possible.
18 See ULP 5-80 American Federation of State, County and Municipal
19 Employees, AFL-CIO v. Kalispell School District No. 5, September
20 30, 1980, affirmed by the Eleventh Judicial District Court May
21 15, 1981, Cause No. DV-80-6000. Furthermore, the Board should
22 not interpret or construe a Collective Bargaining Agreement
23 except where necessary to decide an Unfair Labor Practice Charge.
24 See NLRB v. C & C Plywood Corporation, 64 LRRM 2065, 385 U.S.
25 421, January 9, 1967.

1 12. The Board of Personnel Appeals has a long standing
2 tradition of not interpreting or enforcing contract language if
3 resolution is possible through the grievance procedure.

4 It is not within the jurisdiction of the Board, to
5 decide whether grievances are suitable for submission
6 to contractual agreement procedures. Nor is it the
7 right of management or labor to resolve disputes of the
8 contract by ignoring them. The only party which can
9 initiate or withdraw a grievance is the aggrieved
10 party, It is not within the jurisdiction of the
11 Board to rule on the merits of the grievance in
12 question.... what is in question however, is did the
13 employer by refusing to take part in the "contractual
14 mechanism" for the ongoing process of collective
15 bargaining, refuse to bargain in good faith? The
16 answer to this question is in the affirmative. ULP 1-
17 75 International Brotherhood of Painters and Allied
18 Trades, Local No. 1023 v. Montana State University and
19 Barry Hjort, March 12, 1975.

20 13. It has been determined that the Complainant has not
21 been afforded the remedies and procedures available in the
22 Collective Bargaining Agreement's grievance/arbitration
23 provisions. Inasmuch as the Defendant refused to move the
24 grievance on to the next step, the Defendant has refused to
25 process a grievance. In refusing to process a grievance the
Defendant has failed in its obligation to bargain in good faith,
violated Section 39-31-305 and in so doing committed an unfair
labor practice pursuant to Section 39-31-401(5) MCA.

 14. Section 39-31-406(4) MCA requires that, if, upon the
preponderance of the testimony taken, the Board is of the opinion
that the person involved in complaint has engaged in or is
engaging in the Unfair Labor Practice, then the Board shall state

1 its findings of fact and shall issue and cause to be served on
2 the person an order requiring him to cease and desist from the
3 unfair labor practice and to take such affirmative action as
4 would effectuate the policies of the Montana Collective
5 Bargaining for Public Employees Act.

6 V. RECOMMENDED ORDER

7 1. The Defendant, Custer County Unified School District
8 shall cease and desist from any unfair labor practice as defined
9 in Section 39-31-401 (1) and (5) MCA.

10 2. The Defendant, Custer County Unified School District
11 shall cease and desist from refusing to process the Arneson
12 Grievance.

13 3. Within five (5) days of the time that this Recommended
14 Order becomes the Final Order of the Board of Personnel Appeals,
15 the Defendant shall contact the Complainant and establish the
16 earliest possible date to submit the Arneson Grievance to Step
17 III of the grievance procedure and subsequently, if necessary, to
18 arbitration pursuant to the 1987-1989 Collective Bargaining
19 Agreement between the Custer County Unified School District and
20 Custer County Unified School District Custodians (Joint Exhibit #
21 1).

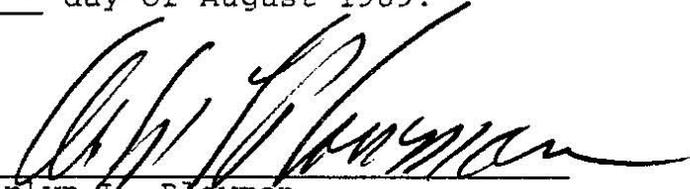
22 4. The Defendant shall post copies of the attached notice
23 entitled "Appendix A" in a conspicuous manner at work locations
24 where notices are usually posted for the benefit of those
25 employees in the bargaining unit represented by the Custer County

1 Custodians, MEA/NEA.

2 VI. SPECIAL NOTICE

3 Exceptions to these Findings of Fact, Conclusions of Law and
4 Recommended Order may filed within twenty (20) days of the
5 service thereof. If no exceptions are filed, the Recommended
6 Order shall become the Final Order of the Board of Personnel
7 Appeals. Address exceptions to the Board of Personnel Appeals,
8 P. O. Box 1728, Helena, Montana 59624-1728.

9 Entered and dated this 11th day of August 1989.

10 
11
12 Arlyn L. Plowman
13 Hearing Examiner

14 * * * * *

15 EXHIBIT LIST

- 16 Joint
- 17 Exhibit No. 1 1987-1989 Collective Bargaining Agreement
- 18 between the Custer County Unified School
- 19 District and Custer County Unified School
- 20 District Custodians
- 21 Complainant's
- 22 Exhibit C # 1 Notice of Grievance dated November 1, 1988
- 23 Complainant's
- 24 Exhibit C # 2 November 8, 1988 Memo to Arneson from
- 25 Mikelson
- Complainant's
- Exhibit C # 3 Notice of Step I Resolution dated November 8,
- 1988.
- Complainant's
- Exhibit C # 4 Notice of Grievance dated November 14, 1988

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Complainant's
Exhibit C # 5

November 17, 1988 memo from Robert Richards
to the Custodial Grievance Committee

Complainant's
Exhibit C # 6

December 7, 1988 letter to Chairman of the
Board of Trustees from J. C. Martin

Complainant's
Exhibit C # 7

Letter from Robert Richards to James Arneson
dated December 7, 1988

Complainant's
Exhibit C # 8

Letter from Robert Richards to James Arneson
dated December 16, 1988

Complainant's
Exhibit C # 9

Letter from Al Bellister to Robert Richards
dated December 14, 1988

Complainant's
Exhibit C # 10

Letter from Robert Richards to James Arneson
and Al Bellister dated December 21, 1988

Defendants
Exhibit D # 1

November 7, 1988 memo to the Custodial
Grievance Committee from Robert Richards
regarding the James Arneson Grievance

Defendants
Exhibit D # 2

Consists of seven (7) pages plus an envelope
which represented several documents dealing
with the Arneson Grievance

* * * * *

CERTIFICATE OF SERVICE

The undersigned does certify that a true and correct copy of this document was served upon the following on the 11th day of August, 1989, postage paid and addressed as follows:

George W. Huss
507 Pleasant Street
Miles City, Montana 59301

Emilie Loring
500 Daly Avenue
Missoula, Montana 59801

A handwritten signature in cursive script, reading "Jennifer Jackson", is written over a horizontal line.

DK417.4

"APPENDIX A"

In accordance with the order of the Board of Personnel Appeals to effectuate the Policies of the Montana Collective Bargaining for Public Employees Act, Section 39-31-101 et seq. MCA, the Custer County Unified School District acting through its officers, agents, and representatives, does hereby notify employees of the Custer County Unified School District that:

The Custer County Unified School District shall cease and desist from any unfair labor practice as defined in Section 39-31-401 (1) and (5) MCA.

The Custer County Unified School District shall cease and desist from refusing to process the Arneson Grievance.

The Custer County Unified School District shall contact the Custer County Unified School District Custodians, MEA/NEA and establish the earliest possible date to submit the Arneson Grievance to Step III of the grievance procedure and subsequently, if necessary, to arbitration pursuant to the 1987-1989 Collective Bargaining Agreement between the Custer County Unified School District and Custer County Unified School District Custodians.

CUSTER COUNTY UNIFIED SCHOOL DISTRICT

By: _____
Robert Richards, Superintendent

Posted and dated this _____ day of _____ 1989

This notice shall remain posted for a period of sixty (60) consecutive days from the date of posting and shall not be altered, defaced or covered.

Questions about this notice or compliance therewith may be directed to the Board of Personnel Appeals, P.O. Box 1728, Helena, Montana 59624-1728, telephone 444-3022