

1 STATE OF MONTANA
2 BEFORE THE BOARD OF PERSONNEL APPEALS

3 IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 12-89

4 LOLO CLASSIFIED ASSOCIATION,)
5 Complainant,)
6 -vs-) FINDINGS OF FACT;
7 LOLO PUBLIC SCHOOL (MISSOULA) CONCLUSIONS OF LAW;
8 COUNTY SCHOOL DISTRICT NO. 7),) AND
9 Defendant.) RECOMMENDED ORDER

10 * * * * *

11 On March 9, 1989, the Complainant, Lolo Classified
12 Association, filed an unfair labor practice charge with this
13 Board alleging the Defendant, Lolo Public School (Missoula County
14 School District No. 7), had violated Sections 39-31-401(1) and
15 (5) MCA. More specifically, the Complainant alleged the
16 Defendant violated the Act by its action of making unilateral
17 changes to working conditions.

18 In Answer filed with this Board on March 23, 1989, the
19 Defendant denied any violations of Sections 39-31-401(1) and (5)
20 MCA. The Defendant also alleged the unfair labor practice had
21 been untimely filed. This Board conducted an investigation in
22 this matter and issued an Investigation Report and Determination
23 on March 30, 1989. The Report found probable merit for the
24 charge and concluded that a formal hearing in the matter was
25 appropriate.

A formal hearing was conducted on May 17, 1989, in Lolo,

1 Montana. The formal hearing was held under authority of Section
2 39-31-406 MCA and in accordance with the Administrative Procedure
3 Act, Title 2, Chapter 4, MCA. Emilie Loring, HILLEY & LORING,
4 Missoula, Montana, represented the Complainant. Michael W.
5 Sehestedt, Deputy County Attorney, Missoula, Montana, represented
6 the Defendant. The Parties submitted post-hearing briefs
7 pursuant to an established briefing schedule. The last document
8 was received August 16, 1989.

9 ISSUES

10 1. Whether the unfair labor practice charge is barred by
11 Section 39-31-404 MCA, as untimely filed.

12 2. Whether the Defendant made unilateral changes to
13 working conditions and by doing so violated Section 39-31-401(1)
14 and (5) MCA.

15 FINDINGS OF FACT

16 1. The Complainant, Lolo Classified Association, is the
17 exclusive collective bargaining representative for classified
18 employees employed by the Defendant, Lolo Public School (Missoula
19 County School District No. 7).

20 2. The Complainant and Defendant have entered into
21 collective bargaining agreements establishing the terms and
22 conditions of employment for bargaining unit members covering
23 from June 30, 1985 to June 30, 1986, and from July 1, 1986 to
24 June 30, 1989.

25 3. Both collective bargaining agreements contained

1 identical language relative to paid holidays:

2 10.2 Paid Holidays

3 A. Legal holidays as provided by law:

- 4 1. New Year's Day (January 1)
5 2. Memorial Day (last Monday in May)
6 3. Independence Day (July 4)
7 4. Labor Day (first Monday in September)
8 5. Thanksgiving Day (fourth Thursday in
9 November)
10 6. Christmas Day (December 25)
11 7. State and national election days when the
12 school building is used as a polling place
13 and the conduct of school would interfere
14 with the election process at the polling
15 place.

16 B. And such other days annually established by
17 the Board.

18 C. Holidays shall be determined by the Board and set
19 out in the school calendar.

20 4. Since at least 1985 the Defendant annually developed
21 the school calendar. The 1988-89 school calendar was determined
22 by the Defendant on June 27, 1988.

23 5. Since at least 1985, the Defendant has designated the
24 two days of the Montana Education Association's IPD Convention
25 (MEA days) as paid holidays. By vote of the Board of Trustees on
June 9, 1988, the Defendant decided not to designate MEA days as
paid holidays for the 1988-89 school year. The Complainant
objected to the Defendant's action at the time.

6. By letter dated October 13, 1988, the Complainant
requested the Defendant to reconsider its action of not
designating MEA days as paid holidays. The Defendant did not
change its position during a Board of Trustees' meeting of
October 13, 1988.

1 Montana's Collective Bargaining Act, Section 39-31-101, et
2 seq., MCA, is very similar to the National Labor Relations Act,
3 29 U.S.C. Section 141, et seq. (NLRA). Where these laws are
4 similar, the Montana Supreme Court has approved and encouraged
5 the Board's use of "federal administrative and judicial
6 construction" in the interpretation of the public employee
7 collective bargaining law. City of Great Falls v. Young, 41 St.
8 Rep. 1174, 686 P.2d 185 (1984).

9 The question here is whether the statutory time began to run
10 when the Complainant first learned of the Defendant's intent of
11 excluding MEA days from the list of paid holidays or when the
12 days were not paid for as evidenced by the payday of November 18,
13 1988. The Ninth Circuit Court of Appeals addressed an identical
14 question and held: "[N]otice of the intention to commit an
15 unfair labor practice does not trigger section 10(b) [of the
16 NLRA]." See National Labor Relations Board v. International
17 Brotherhood of Electrical Workers, Local Union 112, AFL-CIO, 827
18 F.2d 530, 534 (9th Cir. 1987); 126 LRRM 2293. There the court
19 agreed with the board that the limitations period began to run,
20 not when workers received reduction in force cards, but rather,
21 when the layoffs actually began to take effect. Likewise, in the
22 matter at hand, the Complainant did not actually realize the non-
23 payment of the MEA days until the payday of November 18, 1988.
24 Therefore, the limitations period did not begin to run until that
25 payday date. (See also ULP No. 17-87, Montana Public Employees

1 Association, Inc. v. Department of Justice, Highway Patrol
2 Division, [and Board of Personnel Appeals], Cause No. CDV 88-757,
3 Montana First Judicial District, Lewis and Clark County [May,
4 1989]).

5 Whether the Defendant made
6 unilateral changes to working
7 conditions and by doing so,
violated Section 39-31-401(1) and
(5) MCA.

8 The Defendant argues that the action of the Board of
9 Trustees in establishing paid holidays, as provided by the
10 collective bargaining agreement, is not a unilateral change in
11 working conditions. In situations where a contract provision is
12 asserted as a defense to an unfair labor practice charge, the
13 Supreme Court has recognized the National Labor Relations Board
14 has jurisdiction over the dispute to the extent necessary to
15 resolve the unfair labor practice charge. J.I. Case v. NLRB, 321
16 US 332, 340, 14 LRRM 501 (1944). The Defendant asserts that the
17 collective bargaining agreement provides for certain mandatory
18 paid holidays; other paid holidays may be annually designated by
19 the Board of Trustees. The Defendant argues any additional paid
20 holidays are selected solely at the discretion of the Board of
21 Trustees as provided per written agreement. A party may
22 contractually waive its right to bargain about a particular
23 mandatory subject. Ador Corp, 150 NLRB 1658, 58 LRRM 1280
24 (1965); Druwhit Metal Products Co., 153 NLRB 346, 59 LRRM 1359
25 (1965). Where such an assertion of waiver has been made, the

1 test applied has been whether the waiver is in "clear and
2 unmistakable" language. Norris Industries, 231 NLRB 50, 96 LRRM
3 1078 (1977); Memoranda of NLRB General Counsel, Reynolds
4 Electrical and Engineering Company, Case No. 31-CA-16234 (May,
5 1987), 125 LRRM 1368, 1371. In the matter at hand, the language
6 of the collective bargaining agreement is clear. Section 10.2 A
7 of the agreement (See Findings of Fact No. 3) identifies
8 mandatory paid holidays. Section 10.2 B allows the Board of
9 Trustees to annually establish additional paid holidays. Section
10 10.2 C, redundant of Section 10.2 B, gives the Board of Trustees
11 authority to set such holidays in the school calendar. Other
12 than the mandatory holidays, the Defendant has full discretion to
13 set paid holidays.

14 ORDER

15 The unfair labor practice charge was timely filed by the
16 Complainant, Lolo Classified Association. The Defendant, Lolo
17 Public School (Missoula County School District No. 7) has not
18 violated Sections 39-31-401(1) or (5) MCA. The unfair labor
19 practice charge (ULP No. 12-89) is hereby dismissed.

20 DATED this 25th day of September, 1989.

21
22 BOARD OF PERSONNEL APPEALS

23
24 By: Stan Gerke

25 STAN GERKE
Hearing Examiner

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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.

* * * * *

CERTIFICATE OF MAILING

I, Cathleen C. Willag, do hereby certify that a true and correct copy of this document was mailed to the following on the 26th day of September, 1989:

Michael W. Sehestedt
Deputy County Attorney
County Attorney's Office
Missoula County Courthouse
Missoula, MT 59802

Emilie Loring
Attorney at Law
500 Daly Avenue
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SD279.2