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UUL - 6 1995

STANDARD

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

1 IN THE MATTER OF THE AMENDED UNFAIR LABOR PRACTICE CHARGE #1-91:

2 FRAZER EDUCATION ASSOCIATION, MEA/NEA, )  
3 COMPLAINANT, )

4 vs. )

FINAL ORDER

5 TRUSTEES OF FRAZER ELEMENTARY SCHOOL )  
6 DISTRICT NO. 2 & HIGH SCHOOL DISTRICT NO. 2B;) )  
7 SUPERINTENDENT JOHN MARLETTE, )  
8 DEFENDANTS. )

9 \* \* \* \* \*

10 The above-captioned matter came before the Board on June 28, 1995. Mr. Arlyn Plowman appeared and presented oral argument on behalf of the Defendant. Mr. John K. Addy appeared and argued on behalf of the Complainant. Both parties filed briefs in support of their positions.

11 The crux of the matter entails resolution of an unfair labor practice (ULP) charge brought by the Complainant. The matter was originally heard by a department hearing examiner on August 11, 1992. The hearing examiner issued his findings of fact, conclusions of law, and proposed order (decision) on December 1, 1992. That decision found no unfair labor practice and recommended dismissal of the matter.

12 The Complainant filed exceptions to the hearing examiner's decision which were heard by the Board on July 7, 1993. On July 22, 1993, the Board issued an order which reversed the hearing examiner's decision and remanded the matter for modification of the hearing examiner's decision to be consistent with the Board's order. The Board's order remanding the matter was appealed to district court on August 26, 1993 where it was dismissed pending exhaustion of administrative remedies.

13 After the hearing examiner revised his decision, exceptions were filed by the Defendant. The Board at its meeting of December 14, 1994, considered those exceptions. The Board adopted the hearing examiner's findings of fact and remanded the matter for further modification of the hearing examiner's decision. Defendant filed exceptions to the hearing examiner's second modified decision and the matter was set for consideration by the Board at its June 28, 1995 meeting.

14 Prior to consideration of the merits of the matter at the June 28, 1995 meeting, the parties were informed of the recusal of Board member Steve Henry. Mr. Henry participated at the previous proceedings before the Board, however, Mr. Henry's new position presented a potential conflict of interest resulting in his recusal. Alternate Board member Tom Foley sat in Mr. Henry's place

and the parties indicated that they did not object to Mr. Foley's participation.

After consideration of the record and the arguments made by the parties it is the unanimous decision of the Board to set aside its prior order reversing the hearing examiner's December 1, 1992 decision. The Board may reconsider or modify its prior orders at any time prior to the record being filed at district court. **Section 39-31-408, MCA.**

Further, the Board believes that the hearing examiner's December 1, 1992, decision was correct and that the ULP should be dismissed. The Board is unable to conclude from the record that the parties ever intended to alter the terms of the collective bargaining agreement (CBA). The Board will not modify the terms of the CBA without some evidence that the parties had mutually agreed to do so. In the present case, the evidence indicates that upon learning of the overpayment, the Defendant notified the Complainant of its error and intent to discontinue paying more than the amount specified in the CBA. Accordingly, the Board believes that the hearing examiner's December 1, 1992, decision dismissing the unfair labor practice charge was correct and should be adopted by the Board.

IT IS HEREBY ORDERED that the prior orders of the Board rejecting and modifying the hearing examiner's December 1, 1992, decision in this matter be set aside.

IF IS FURTHER ORDERED that the Board adopts as its own the hearing examiner's December 1, 1993, findings of fact, conclusions of law, and proposed order. The unfair labor practice charge of the complainant is hereby dismissed.

DATED this 5<sup>th</sup> day of July, 1995.

BOARD OF PERSONNEL APPEALS

By Willis M. McKeon  
WILLIS M. MCKEON  
PRESIDING OFFICER

Board members Hagan, Talcott, Foley and Schneider concur.

\* \* \* \* \*

RECEIVED  
JUL - 6 1995  
STANDARD

\*\*\*\*\*

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

\*\*\*\*\*

CERTIFICATE OF MAILING

I, Janifer Jacobson, do hereby certify that a true and correct copy of this document was mailed to the following on the 6th day of July, 1995:

JOHN K. ADDY, ATTORNEY  
MATOVICH, ADDY & KELLER, P.C.  
225 PETROLEUM BUILDING  
2812 FIRST AVENUE NORTH  
BILLINGS MT 59101

ARLYN L. PLOWMAN  
MONTANA SCHOOL BOARDS ASSOCIATION  
ONE SOUTH MONTANA AVENUE  
HELENA MT 59601

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3/3/95

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 1-91:

4	FRAZER EDUCATION ASSOCIATION,	)	
	MEA/NEA,	)	
5		)	AMENDED TO CORRECT
	Complainant,	)	CASE CAPTION
6		)	
	vs.	)	FINDINGS OF FACT;
7		)	CONCLUSIONS OF LAW;
	TRUSTEES OF FRAZER ELEMENTARY	)	AND PROPOSED ORDER
8	SCHOOL DISTRICT NO. 2 AND HIGH	)	AMENDED TO STRIKE
	SCHOOL DISTRICT NO. 2B;	)	LANGUAGE WHICH ALTERS
9	SUPERINTENDENT JOHN MARLETTE,	)	CONTRACT TERMS
		)	
10	Defendant.	)	

\* \* \* \* \*

I. INTRODUCTION

In January, 1991, Frazer Education Association, MEA/NEA (Complainant) filed this charge against the Trustees of the Frazer Elementary School District No. 2 and High School District 2B, Superintendent John Marlette (Defendant). An evidentiary hearing was conducted in August, 1992 and Findings of Fact, Conclusions of Law and Recommended Order dismissing the charge issued December 1, 1993. The Recommended Order was appealed to the Board of Personnel Appeals. The Board in a Final Order of July 22, 1993 affirmed and adopted the Hearing Officer's findings and then reversed the decision. The Board substituted the following rationale and reasoning:

The Board believes that while the expired collective bargaining agreement provided for a \$208.00 cap in the District health insurance contributions, the Respondent's almost three year practice of paying the entire insurance contribution effectively created a different status quo with respect to such contribution. Consequently, the Respondent's unilateral reduction of the health insurance cap set forth in the expired collective bargaining agreement constituted

1 the modification of the status quo as to a  
2 mandatory subject of bargaining prior to impasse.  
3 Such status quo, however, did not reflect the  
4 Respondent's payment of 100% of the medical  
5 contributions. Rather, the action amounted to  
6 placement of a different cap of higher value.

7 The Hearing Officer's conclusion of law that no  
8 unfair labor practice occurred is hereby reversed.

9 This case is remanded to the Hearing Officer for  
10 additional findings and a determination as to the  
11 Respondent's appropriate health insurance  
12 contribution at this time.

13 Following remand, an appeal was filed in district court. The  
14 court on January 19, 1994 dismissed the appeal because lower level  
15 administrative remedies were not completed or exhausted. In an  
16 additional pre-hearing conducted before the below signed Hearing  
17 Officer on January 19, 1994, the parties agreed to submit the Board  
18 remand order for determination based upon Complainant's  
19 argument/memorandum and proposed order, followed by Defendant's  
20 response. Defendant's response was received March 21, 1994.

21 On May 26, 1994 the Hearing Officer issued his amended  
22 Findings of Fact; Conclusions of Law; and Proposed Order. On June  
23 14, 1994, Complainant filed exceptions to the amended Findings of  
24 Fact; Conclusions of Law; and Proposed Order. The Board heard oral  
25 argument regarding Complainant's exceptions on December 14, 1994.  
26 The Board adopted the Findings of Fact and ordered that the  
27 Conclusions of Law and Proposed Order be remanded to the Hearing  
28 Examiner to strike the language which purports to alter the terms  
of the contract.

Pursuant to such Board direction this Amended Findings of  
Fact; Conclusions of Law; and Proposed Order are now issued.

1 II. FINDINGS OF FACT

2 1. The Complainant represents the professional non-  
3 supervisory employees of the Defendant School District. The  
4 parties' expired collective bargaining agreement provides the  
5 District will pay \$208.47 per teacher toward medical insurance.  
6 The Board of Personnel Appeals determined that Defendant's "almost  
7 three year practice of paying the entire insurance contribution  
8 effectively created a different status quo with respect to such  
9 contribution. ... Such status quo, however, did not reflect the  
10 Respondent's (sic) [Defendant's] payment of 100% of the medical  
11 contributions." The Defendant allegedly first became aware of  
12 their payments in excess of the \$208.47 contract amount during a  
13 May 1991 mediation session.

14 2. Sections 20.1, 23.2, and 24.2 of the collective  
15 bargaining agreement provided a calculation method for determining  
16 the monthly insurance contribution per teacher. The insurance  
17 premium being paid in May, 1991, using the contract term  
18 calculation method, was \$293.76 per teacher per month (Complainant  
19 Exhibit C-10). The Complainant argued that a new cap of 100% of  
20 the insurance premium was established and requested that amount be  
21 paid. In the alternative, the Complainant requested that the  
22 amounts of insurance contribution paid be on an individual basis as  
23 found on Exhibit C-3. The amounts identified on that exhibit did  
24 not reflect monthly contribution per teacher using the contract  
25 calculation method. The amounts on Exhibit C-3 listed individual  
26 coverage amounts as follows:

<u>Single</u>	<u>Two-Party</u>	<u>Family</u>	<u>Employee + Dependents</u>
\$158.16	\$336.76	\$473.44	\$294.82

1 3. Based upon these coverage figures, the Complainant  
2 requested as follows:

3 If any employee had to drop, or not secure,  
4 dependent coverage because of Frazer School  
5 District refusal to pay more than \$208.47 for  
6 insurance coverage and such dependents incurred  
7 medical expenses which would have been covered by  
8 Blue Cross/Blue Shield, such costs are to be  
9 reimbursed by the District upon submission by the  
employee of medical bills and substantiation by  
Blue Cross/Blue Shield that it would have paid all,  
or a specific portion, of such bills, had the  
dependent been covered by the policy between Frazer  
School District and Blue Cross/Blue Shield.

10 IV. CONCLUSIONS OF LAW

11 1. The Board specifically held the new cap was not 100% of  
12 unit members' insurance premium.

13 2. The collective bargaining agreement must be followed.  
14 The contract may not be added to or deleted from (Section 1-4-101,  
15 MCA, Herrin vs. Herrin, 182 Mont. 142, 146-147, 595 P.2d 1152  
16 (1979), Williams vs. Insurance Company of North America, 150 Mont.  
17 292, 295, 494 P.2d 395, (1967), School District No. 1 Silver Bow  
18 vs. Driscoll, 176 Mont. 555, 559, 568 P.2d 149 (1977), Rumph vs.  
19 Dale Edwards, Inc., 183 Mont. 359, 367-368, 600 P.2d 979 (1982),  
20 Martin vs. Community Gas and Oil Co. Inc., 205 Mont. 394, 398-400,  
21 668 P.2d 243 (1983), Danielson vs. Danielson, 172 Mont. 55, 58,  
22 59, 560 P.2d 893 (1977), Nordlund vs. School District No. 14 et  
23 al., 277 Mont. 402, 404-405, 738 P.2d 1299 (1987). The Board of  
24 Personnel Appeals reached a similar conclusion in ULP 37-81,  
25 Forsyth Education Association vs. Rosebud County School District  
26 No.14, (1984).

27 3. The contribution being provided at the time the Defendant  
28 became aware it was paying an amount higher than \$208.47 was

1 | \$293.79. The maximum payment of \$293.79 was the "status quo" when  
2 | this charge was filed and must be used for calculation of insurance  
3 | premiums.

4 | 4. The Complainant wishes to increase the amount(s) to be  
5 | assessed or granted on an individual or tiered basis as shown on  
6 | Exhibit 3, ie. individual coverage for year 1990-91 (see above).  
7 | The collective bargaining agreement and Exhibit 10 show that the  
8 | Defendant consistently made contributions on a per-teacher basis.  
9 | The suggested individual or tiered contribution structure suggested  
10 | by the complainant with different contributions for two party,  
11 | family and singles is not provided for in the collective bargaining  
12 | agreement.

13 | 5. The Defendant, while not agreeing with the Board's  
14 | reversal of the initial Findings of Fact, Conclusions of Law and  
15 | Recommended Order dismissing the charge, does accept that if there  
16 | is a new cap, it is no higher than \$293.79. The Complainant's  
17 | individual benefit cap process would establish a benefit cap  
18 | process not found in the collective bargaining agreement and  
19 | disregard the calculation methodology established in the collective  
20 | bargaining agreement. In order to maintain the status quo, the  
21 | Defendant must pay insurance contribution of \$293.79. The  
22 | Defendant did not contemplate or agree to increase the cap or  
23 | change other contract terms regarding insurance contribution  
24 | calculation once the Complainant was notified the \$209.54 contract  
25 | insurance cap was not being followed.

26 | 6. This case involves a situation where the unit members  
27 | received the benefit of an insurance contribution cap in excess of  
28 | the explicit terms of the contract. They did not notify the

1 employer of this excess. The Complainants do not wish to share any  
2 of the responsibility for the failure to follow the contract  
3 benefit cap. The Complainants are, at least in part, responsible  
4 for the failure to follow contract terms.

5 7. The complainants request benefits on an individualized  
6 basis which they would have received, or may have considered using,  
7 had the defendant not returned to paying only the amount listed in  
8 the contract. To grant this part of the remedy requested is found  
9 inappropriate. The basis for this conclusion is that the unit  
10 members for one or more years received more than the explicit  
11 contract term of \$208.47 in medical benefits. When the defendant  
12 discovered the overpayment, they returned to paying only \$208.47.  
13 This amount is less than the amount now determined to be the status  
14 quo, \$293.79, but a complete make whole remedy is not found to be  
15 appropriate.

16 7. Both parties in this case share some liability, as  
17 discussed above, for the fact situation from which this conflict  
18 developed. The National Labor Relations Board has addressed  
19 situations wherein an apportionment of liability is appropriate.  
20 In Vol. II, Charles J Morris, Developing Labor Law, pg. 1354,  
21 (1989); the following discussion regarding apportionment of  
22 liability is found.

23 **Apportionment of Liability.** Following the award of  
24 non-monetary relief, such as back pay, in a fair  
25 representation case, the issue of apportionment of  
26 liability for damages between the union and the  
27 employer must be resolved. As previously noted,  
28 the court in Vaca, stressed that "[T]he governing  
principle...is to apportion liability between the  
employer and the union according to the damage  
caused by the fault of each." The damages must be  
apportioned to the extent that the union shares  
responsibility with the employer for the damages.  
The Eighth Circuit Court has suggested that the

1 union is not liable for damages arising from the  
2 employer's breach of contract unless the plaintiff  
3 demonstrates that the damage would not have  
4 occurred "but for" the union's breach of the duty  
5 of fair representation. One court suggested that  
6 if judgment is entered for the union because of the  
7 employee's failure to exhaust internal union  
8 remedies, and the judgment is also entered against  
9 the employer, liability can be apportioned between  
10 the employer and the union and thereby limit the  
11 employer's liability.

12 7. In the case of Winn-Dixie Stores, Inc. v. NLRB, 567 F.2d  
13 1343, pg. 1346 the court stated in part:

14 ... (1) With respect to the company's profit  
15 sharing/retirement plan, the company must reinstate  
16 the funds in the accounts forfeited by employees as  
17 a result of the 1970 collective bargaining  
18 agreement, open accounts for those employees who  
19 would have become eligible for the company plan  
20 since 1970, and contribute the funds that should  
21 have gone into those accounts including annual  
22 payments of up to \$300.00 for those employees  
23 eligible for benefits; and (2) the company must  
24 make unit employees whole for any losses they have  
25 suffered as a result of the company's unfair labor  
26 practices by compensating employees for any  
27 differences in benefits which exist between the  
28 Jacksonville warehouse and another comparable  
warehouse in the Winn-Dixie system (page 1346).

... The court also stated "Although we share the  
board's concern that the employees cannot be made  
whole for any harm they may have suffered as a  
result of the company's refusal to bargain over  
"double coverage," we think that the board's remedy  
here is too speculative and that it is unduly  
burdensome on the employer. Even though the  
company violated the act, there is no way to  
evaluate, or even to identify, the harm flowing to  
employees as a result of that violation. We  
therefore refuse to enforce all parts of the  
board's order requiring the company to provide  
monetary relief for violations relating to its  
profit sharing/retirement plan."

8. In the case of H. K. Potter Company, Inc. v. NLRB, 397  
U.S. 99, 90 S.Ct. 821, 73 LRRM 2561 (1970), the court indicated  
that the intent of Congress in changing the National Labor

1 Relations Act was to preclude extension of contract terms by the  
2 board. The court stated, in part, as follows:

3 The amendment offered in Congress provided as  
4 follows:

5 ... Accordingly, Congress amended the provisions  
6 defining unfair labor practices and said in Section  
7 8(d) that "For the purposes of this section, to  
8 bargain collectively is the performance of the  
9 mutual obligation of the employer and the  
10 representative of the employees to meet at  
11 reasonable times and confer in good faith with  
12 respect to wages, hours and other terms and  
13 conditions of employment, or to negotiation of an  
14 agreement, or any question arising thereunder, and  
15 the execution of a written contract incorporating  
16 any agreement reached if requested by either party,  
17 but such obligation does not compel either party to  
18 agree to a proposal or require the making of a  
19 concession."

20 In discussing the effect of that amendment, this  
21 court said it is "clear that the board may not,  
22 either directly or indirectly, compel concessions  
23 or otherwise sit in judgment upon the substantive  
24 terms of collective bargaining agreements." NLRB  
25 v. American Insurance Company, 343 U.S. 395, 404  
26 (1952). Later this court affirmed that view  
27 stating that "Here remains clear that Section 8(d)  
28 was an attempt by Congress to prevent the board  
from controlling and settling the terms of  
collective bargaining agreements. NLRB v.  
Insurance Agents, 361 U.S. 477, 487 (1960). The  
parties to the instant case are agreed that this is  
the first time in the 35 year history of the act  
that the board has ordered either an employer or a  
union to agree to substantive term of a collective  
bargaining agreement.

22 9. The record in this case shows that the Board found the  
23 employer had committed an unfair labor practice in failing to  
24 maintain the status quo. The status quo in this case based on the  
25 information offered by the parties is found to require that \$293.79  
26 be the insurance contribution paid by the Defendant/Plaintiffs.  
27 That amount is to be hereafter apportioned to the unit members in  
28 conformance with other contract terms. The request of the

1 Complainant that individual insurance coverage be granted as shown  
2 in Complainant brief requiring single, two-party, family, and  
3 employee and dependent coverage would require the Board to rewrite  
4 contract terms. This would be prohibited by the act. The Board  
5 does not have the authority to compel either party to agree to a  
6 proposal or require the making of a concession. This is especially  
7 so given the collective bargaining agreement terms which require or  
8 identify the calculation methodology as shown in Exhibit 10 for  
9 determining employee per month contribution.

10 10. The request of the Complainant that the unit members be  
11 provided coverage on an individual or tiered basis for any and all  
12 covered expenses which would have or may have been claimed would  
13 unnecessarily burden the employer. This would require a concession  
14 which might not be accepted if and when collective bargaining over  
15 the insurance cap is negotiated.

16 11. The health insurance contract was a yearly contract  
17 between the Defendant and Blue Cross and Blue Shield. The  
18 Defendant was the only party able to pay any bill for that  
19 insurance agreement. The coverage the Blue Cross/Blue Shield would  
20 have continued under the then current collective bargaining  
21 agreement and/or the coverage as would have to be negotiated  
22 between Blue Cross and Blue Shield prior to application of such  
23 claims if and when they would or might have come forward would be  
24 based in large part on speculation.

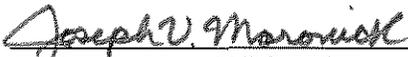
25 11. The cases cited; Vaca, Winn-Dixie, Potter and the  
26 discussion from Developing Labor Law involved different fact  
27 situations than found here. The Board has used apportionment of  
28 liability and/or, limited relief when the relief effort would be

1 too burdensome or when speculation is likely to be needed to  
2 fashion a remedy. Use of these concepts in this fact situation is  
3 found appropriate.

4 RECOMMENDED ORDER

5 The insurance premium cap to be paid by the  
6 Defendant/Plaintiff for insurance contribution, "at this time"  
7 (July 22, 1993), is found to be \$293.79 per teacher per month.  
8 Other remedies requested are denied as beyond Board authority, too  
9 burdensome for the Respondent and too speculative to be  
10 appropriate.

11 Entered and Dated this 3<sup>rd</sup> day of March, 1995.

12   
13 \_\_\_\_\_  
14 JOSEPH V. MARONICK  
Hearing Examiner

15 NOTICE: You are entitled to review of this Order pursuant to  
16 Section 39-31-406 MCA. Review may be obtained by filing a notice  
17 of appeal to the Board of Personnel Appeals postmarked within 20  
18 days after the day the decision of the hearing officer is mailed.  
The notice of appeal shall consist of a written appeal of the  
decision of the hearing officer, must set forth the specific errors  
of the hearing officer and the issues to be raised on appeal.  
Notice of Appeal shall be mailed to:

19 Administrator, Employment Relations Division  
20 Department of Labor and Industry  
21 P.O. Box 1728  
22 Helena, MT 59624  
23  
24  
25  
26  
27  
28

\* \* \* \* \*

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Emilie Loring  
Attorney at Law  
500 Daly Avenue  
Missoula, MT 59801

Peter O. Maltese  
Attorney at Law  
P.O. Box 969  
Sidney, MT 59270

Arlyn "Butch" Plowman  
Montana School Boards Association  
1 South Montana Avenue  
Helena, MT 59601

DATED this 3rd day of March, 1995.

Christine L. Ireland

SD321.7

1/25/95

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE AMENDED UNFAIR LABOR PRACTICE CHARGE #1-91:

FRAZER EDUCATION ASSOCIATION, MEA/NEA, )  
COMPLAINANT, )  
vs. )  
TRUSTEES OF FRAZER ELEMENTARY SCHOOL )  
DISTRICT NO. 2 & HIGH SCHOOL DISTRICT NO. 2B;) )  
SUPERINTENDENT JOHN MARLETTE, )  
DEFENDANTS. )

INTERLOCUTORY  
ORDER

\* \* \* \* \*

On December 1, 1992, Joseph V. Maronick, Hearing Examiner for the Department of Labor and Industry, issued his Findings of Fact; Conclusions of Law; and Recommended Order for the above captioned matter. On December 16, 1992, Emilie Loring, attorney for the Complainant/Appellant, filed exceptions to Mr. Maronick's Findings of Fact; Conclusions of Law; and Recommended Order. On July 7, 1993, the Board of Personnel Appeals heard oral argument regarding Ms. Loring's exceptions. The Board then remanded the matter back to the Hearing Examiner for additional findings and a determination of the appropriate health insurance contribution rate as of July 22, 1993, the date of that order.

On May 26, 1994, the Hearing Examiner issued his amended Findings of Fact; Conclusions of Law; and Proposed Order. On June 14, 1994, Complainant filed exceptions to the amended Findings of Fact; Conclusions of Law; and Proposed Order. The Board heard oral argument regarding Complainant's exceptions on December 14, 1994.

After review of the record, consideration of the parties' oral arguments and briefs, the Board enters the following order:

1. IT IS HEREBY ORDERED that the Board adopts as its own the amended Findings of Fact by Hearing Examiner Joseph V. Maronick dated May 26, 1994.
2. IT IS FURTHER ORDERED that the amended Conclusions of Law and Proposed Order are remanded to the Hearing Examiner to strike the language which purports to alter the terms of the contract.
3. The Proposed Order shall cap the insurance contribution at \$293.79.

1 DATED this 25<sup>th</sup> day of January, 1995.

2  
3 BOARD OF PERSONNEL APPEALS

4  
5 BY *Willis M. McKeon*  
6 WILLIS M. MCKEON  
7 CHAIRMAN  
8

9 \* \* \* \* \*

10  
11 CERTIFICATE OF MAILING

12  
13 I, *Jennifer Jacobson*, do hereby certify a  
14 true and correct copy of this document to the following on the  
15 26<sup>th</sup> day of January, 1995:

16 EMILIE LORING, ATTORNEY AT LAW  
17 500 DALY AVENUE  
18 MISSOULA MT 59801

19  
20  
21 PETER O. MALTESE, ATTORNEY AT LAW  
22 PO BOX 969  
23 SIDNEY MT 59270

24  
25 ARLYN L. PLOWMAN  
26 MONTANA SCHOOL BOARDS ASSOCIATION  
27 ONE SOUTH MONTANA AVENUE  
28 HELENA MT 59601  
29

5/26/94

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
BEFORE THE BOARD OF PERSONNEL APPEALS

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MEA/NEA, )

Complainant/Defendant, )

vs. )

TRUSTEES OF FRAZER ELEMENTARY )  
SCHOOL DISTRICT NO. 2 AND HIGH )  
SCHOOL DISTRICT NO. 2B; )  
SUPERINTENDENT JOHN MARLETTE, )

Defendant/Plaintiffs. )

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
AND PROPOSED ORDER  
AMENDED TO CORRECT  
APPEAL STATUTE AND TIME

\* \* \* \* \*

I. INTRODUCTION

In January, 1991, Frazer Education Association, MEA/NEA (Complainant) filed this charge against the Trustees of the Frazer Elementary School District No. 2 and High School District 2B, Superintendent John Marlette (Defendant). An evidentiary hearing was conducted in August, 1992 and Findings of Fact, Conclusions of Law and Recommended Order dismissing the charge issued December 1, 1993. The Recommended Order was appealed to the Board of Personnel Appeals. The Board affirmed and adopted the Hearing Officer's findings and then reversed the decision. The Board substituted the following rationale and reasoning:

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1 Such status quo, however, did not reflect the  
2 Respondent's payment of 100% of the medical  
3 contributions. Rather, the action amounted to  
4 placement of a different cap of higher value.

5 The Hearing Officer's conclusion of law that no  
6 unfair labor practice occurred is hereby reversed.

7 This case is remanded to the Hearing Officer for  
8 additional findings and a determination as to the  
9 Respondent's appropriate health insurance  
10 contribution at this time.

11 Following remand, an appeal was filed in district court. The  
12 court on January 19, 1994 dismissed the appeal because lower level  
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15 Officer on January 19, 1994, the parties agreed to submit the Board  
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17 argument/memorandum and proposed order, followed by Defendant's  
18 response. Defendant's response was received March 21, 1994.

## 19 II. FINDINGS OF FACT

20 1. The Complainant represents the professional non-  
21 supervisory employees of the Defendant School District. The  
22 parties' expired collective bargaining agreement provides the  
23 District will pay \$208.47 per teacher toward medical insurance.  
24 The Board of Personnel Appeals determined that Defendant's "almost  
25 three year practice of paying the entire insurance contribution  
26 effectively created a different status quo with respect to such  
27 contribution. ... Such status quo, however, did not reflect the  
28 Respondent's (sic) [Defendant's] payment of 100% of the medical  
contributions." The Defendant allegedly first became aware of  
their payments in excess of the \$208.47 contract amount during a  
May 1991 mediation session.

1           2.    Sections 20.1, 23.2, and 24.2 of the collective  
 2 bargaining agreement provided a calculation method for determining  
 3 the monthly insurance contribution per teacher. The insurance  
 4 premium being paid in May, 1991, using the contract term  
 5 calculation method, was \$293.76 per teacher per month (Complainant  
 6 Exhibit C-10). The Complainant argued that a new cap of 100% of  
 7 the insurance premium was established and requested that amount be  
 8 paid. In the alternative, the Complainant requested that the  
 9 amounts of insurance contribution paid be on an individual basis as  
 10 found on Exhibit C-3. The amounts identified on that exhibit did  
 11 not reflect monthly contribution per teacher using the contract  
 12 calculation method. The amounts on Exhibit C-3 listed individual  
 13 coverage amounts as follows:

	<u>Single</u>	<u>Two-Party</u>	<u>Family</u>	<u>Employee + Dependents</u>
	\$158.16	\$336.76	\$473.44	\$294.82

14  
 15  
 16  
 17           3.    Based upon these coverage figures, the Complainant  
 18 requested as follows:

19           If any employee had to drop, or not secure,  
 20 dependent coverage because of Frazer School  
 21 District refusal to pay more than \$208.47 for  
 22 insurance coverage and such dependents incurred  
 23 medical expenses which would have been covered by  
 24 Blue Cross/Blue Shield, such costs are to be  
 reimbursed by the District upon submission by the  
 employee of medical bills and substantiation by  
 Blue Cross/Blue Shield that it would have paid all,  
 or a specific portion, of such bills, had the  
 dependent been covered by the policy between Frazer  
 School District and Blue Cross/Blue Shield.

25 IV.   CONCLUSIONS OF LAW

26           1.    The Board specifically held the new cap was not 100% of  
 27 unit members' insurance premium.

28

1           2.    The collective bargaining agreement must be followed.  
2 The contract may not be added to or deleted from (Section 1-4-101,  
3 MCA, Herrin vs. Herrin, 182 Mont. 142, 146-147, 595 P.2d 1152  
4 (1979), Williams vs. Insurance Company of North America, 150 Mont.  
5 292, 295, 494 P.2d 395, (1967), School District No. 1 Silver Bow  
6 vs. Driscoll, 176 Mont. 555, 559, 568 P.2d 149 (1977), Rumph vs.  
7 Dale Edwards, Inc., 183 Mont. 359, 367-368, 600 P.2d 979 (1982),  
8 Martin vs. Community Gas and Oil Co. Inc., 205 Mont. 394, 398-400,  
9 668 P.2d 243 (1983), Danielson vs. Danielson, 172 Mont. 55, 58,  
10 59, 560 P.2d 893 (1977), Nordlund vs. School District No. 14 et  
11 al., 277 Mont. 402, 404-405, 738 P.2d 1299 (1987). The Board of  
12 Personnel Appeals reached a similar conclusion in ULP 37-81,  
13 Forsyth Education Association vs. Rosebud County School District  
14 No.14, (1984).

15           3.    The contribution being provided at the time the Defendant  
16 became aware it was paying an amount higher than \$208.47 was  
17 \$293.79. The maximum payment of \$293.79 was the "status quo" when  
18 this charge was filed and must be placed in the contract in place  
19 of \$208.47.

20           4.    The Complainant wishes to increase the amount(s) to be  
21 assessed or granted on an individual or tiered basis as shown on  
22 Exhibit 3, ie. individual coverage for year 1990-91 (see above).  
23 The collective bargaining agreement and Exhibit 10 show that the  
24 Defendant consistently made contributions on a per-teacher basis.  
25 The suggested individual or tiered contribution structure suggested  
26 by the complainant with different contributions for two party,  
27 family and singles is not provided for in the collective bargaining  
28 agreement.

1           5.       The Defendant, while not agreeing with the Board's  
2 reversal of the initial Findings of Fact, Conclusions of Law and  
3 Recommended Order dismissing the charge, does accept that if there  
4 is a new cap, it is no higher than \$293.79. The Complainant's  
5 individual benefit cap process would establish a benefit cap  
6 process not found in the collective bargaining agreement and  
7 disregard the calculation methodology established in the collective  
8 bargaining agreement. In order to maintain the status quo, the  
9 Defendant must pay \$293.79 in conformance with contract terms. The  
10 Defendant did not contemplate or agree to increase the cap or  
11 change other contract terms regarding insurance contribution  
12 calculation once the Complainant was notified the \$209.54 contract  
13 insurance cap was not being followed.

14           6.       This case involves a situation where the unit members  
15 received the benefit of an insurance contribution cap in excess of  
16 the explicit terms of the contract. They did not notify the  
17 employer of this excess. The Complainants do not wish to share any  
18 of the responsibility for the failure to follow the contract  
19 benefit cap. The Complainants are, at least in part, responsible  
20 for the failure to follow contract terms.

21           7.       The complainants request benefits on an individualized  
22 basis which they would have received, or may have considered using,  
23 had the defendant not returned to paying only the amount listed in  
24 the contract. To grant this part of the remedy requested is found  
25 inappropriate. The basis for this conclusion is that the unit  
26 members for one or more years received more than the explicit  
27 contract term of \$208.47 in medical benefits. When the defendant  
28 discovered the overpayment, they returned to paying only \$208.47.

1 This amount is less than the amount now determined to be the status  
2 quo, \$293.79, but a complete make whole remedy is not found to be  
3 appropriate.

4 7. Both parties in this case share some liability, as  
5 discussed above, for the fact situation from which this conflict  
6 developed. The National Labor Relations Board has addressed  
7 situations wherein an apportionment of liability is appropriate.  
8 In Vol. II, Charles J Morris, Developing Labor Law, pg. 1354,  
9 (1989); the following discussion regarding apportionment of  
10 liability is found.

11 **Apportionment of Liability.** Following the award of  
12 non-monetary relief, such as back pay, in a fair  
13 representation case, the issue of apportionment of  
14 liability for damages between the union and the  
15 employer must be resolved. As previously noted,  
16 the court in Vaca, stressed that "[T]he governing  
17 principle...is to apportion liability between the  
18 employer and the union according to the damage  
19 caused by the fault of each." The damages must be  
20 apportioned to the extent that the union shares  
21 responsibility with the employer for the damages.  
22 The Eighth Circuit Court has suggested that the  
23 union is not liable for damages arising from the  
24 employer's breach of contract unless the plaintiff  
25 demonstrates that the damage would not have  
26 occurred "but for" the union's breach of the duty  
27 of fair representation. One court suggested that  
28 if judgment is entered for the union because of the  
employee's failure to exhaust internal union  
remedies, and the judgment is also entered against  
the employer, liability can be apportioned between  
the employer and the union and thereby limit the  
employer's liability.

23 7. In the case of Winn-Dixie Stores, Inc. v. NLRB, 567 F.2d  
24 1343, pg. 1346 the court stated in part:

25 ... (1) With respect to the company's profit  
26 sharing/retirement plan, the company must reinstate  
27 the funds in the accounts forfeited by employees as  
28 a result of the 1970 collective bargaining  
agreement, open accounts for those employees who  
would have become eligible for the company plan  
since 1970, and contribute the funds that should  
have gone into those accounts including annual

1 payments of up to \$300.00 for those employees  
2 eligible for benefits; and (2) the company must  
3 make unit employees whole for any losses they have  
4 suffered as a result of the company's unfair labor  
5 practices by compensating employees for any  
6 differences in benefits which exist between the  
7 Jacksonville warehouse and another comparable  
8 warehouse in the Winn-Dixie system (page 1346).

9 ... The court also stated "Although we share the  
10 board's concern that the employees cannot be made  
11 whole for any harm they may have suffered as a  
12 result of the company's refusal to bargain over  
13 "double coverage," we think that the board's remedy  
14 here is too speculative and that it is unduly  
15 burdensome on the employer. Even though the  
16 company violated the act, there is no way to  
17 evaluate, or even to identify, the harm flowing to  
18 employees as a result of that violation. We  
19 therefore refuse to enforce all parts of the  
20 board's order requiring the company to provide  
21 monetary relief for violations relating to its  
22 profit sharing/retirement plan."

23 8. In the case of H. K. Potter Company, Inc. v. NLRB, 397  
24 U.S. 99, 90 S.Ct. 821, 73 LRRM 2561 (1970), the court indicated  
25 that the intent of Congress in changing the National Labor  
26 Relations Act was to preclude extension of contract terms by the  
27 board. The court stated, in part, as follows:

28 The amendment offered in Congress provided as  
follows:

... Accordingly, Congress amended the provisions  
defining unfair labor practices and said in Section  
8(d) that "For the purposes of this section, to  
bargain collectively is the performance of the  
mutual obligation of the employer and the  
representative of the employees to meet at  
reasonable times and confer in good faith with  
respect to wages, hours and other terms and  
conditions of employment, or to negotiation of an  
agreement, or any question arising thereunder, and  
the execution of a written contract incorporating  
any agreement reached if requested by either party,  
but such obligation does not compel either party to  
agree to a proposal or require the making of a  
concession."

In discussing the effect of that amendment, this  
court said it is "clear that the board may not,  
either directly or indirectly, compel concessions

1 or otherwise sit in judgment upon the substantive  
2 terms of collective bargaining agreements." NLRB  
3 v. American Insurance Company, 343 U.S. 395, 404  
4 (1952). Later this court affirmed that view  
5 stating that "Here remains clear that Section 8(d)  
6 was an attempt by Congress to prevent the board  
7 from controlling and settling the terms of  
8 collective bargaining agreements. NLRB v.  
9 Insurance Agents, 361 U.S. 477, 487 (1960). The  
10 parties to the instant case are agreed that this is  
11 the first time in the 35 year history of the act  
12 that the board has ordered either an employer or a  
13 union to agree to substantive term of a collective  
14 bargaining agreement.

15 9. The record in this case shows that the Board found the  
16 employer had committed an unfair labor practice in failing to  
17 maintain the status quo. The status quo in this case based on the  
18 information offered by the parties is found to require that \$293.79  
19 be placed in the contract in place of the \$208.47 now found in the  
20 contract. That amount is to be hereafter apportioned to the unit  
21 members in conformance with other contract terms. The request of  
22 the Complainant that individual insurance coverage be granted as  
23 shown in Complainant brief requiring single, two-party, family, and  
24 employee and dependent coverage would require the Board to rewrite  
25 contract terms. This would be prohibited by the act. The Board  
26 does not have the authority to compel either party to agree to a  
27 proposal or require the making of a concession. This is especially  
28 so given the collective bargaining agreement terms which require or  
identify the calculation methodology as shown in Exhibit 10 for  
determining employee per month contribution.

10. The request of the Complainant that the unit members be  
provided coverage on an individual or tiered basis for any and all  
covered expenses which would have or may have been claimed would  
unnecessarily burden the employer. This would require a concession

1 | which might not be accepted if and when collective bargaining over  
2 | the insurance cap is negotiated.

3 |       11. The health insurance contract was a yearly contract  
4 | between the Defendant and Blue Cross and Blue Shield. The  
5 | Defendant was the only party able to pay any bill for that  
6 | insurance agreement. The coverage the Blue Cross/Blue Shield would  
7 | have continued under the then current collective bargaining  
8 | agreement and/or the coverage as would have to be negotiated  
9 | between Blue Cross and Blue Shield prior to application of such  
10 | claims if and when they would or might have come forward would be  
11 | based in large part on speculation.

12 |       11. The cases cited; Vaca, Winn-Dixie, Potter and the  
13 | discussion from Developing Labor Law involved different fact  
14 | situations than found here. The Board has used apportionment of  
15 | liability and/or, limited relief when the relief effort would be  
16 | too burdensome or when speculation is likely to be needed to  
17 | fashion a remedy. Use of these concepts in this fact situation is  
18 | found appropriate.

19 |           RECOMMENDED ORDER

20 |       The insurance premium cap to be placed in the collective  
21 | bargaining agreement is found to be \$293.79 per teacher per month.  
22 | Other remedies requested are denied as beyond Board authority, too  
23 | burdensome for the Respondent and too speculative to be  
24 | appropriate.

1  
2 Entered and Dated this 26<sup>th</sup> day of May, 1994.

3 Joseph V. Maronick  
4 JOSEPH V. MARONICK  
Hearing Examiner

5 NOTICE: You are entitled to review of this Order pursuant to  
6 Section 39-31-406 MCA. Review may be obtained by filing a notice  
7 of appeal to the Board of Personnel Appeals postmarked within 20  
8 days after the day the decision of the hearing officer is mailed.  
9 The notice of appeal shall consist of a written appeal of the  
10 decision of the hearing officer, must set forth the specific errors  
11 of the hearing officer and the issues to be raised on appeal.  
12 Notice of Appeal shall be mailed to:

13 Administrator, Employment Relations Division  
14 Department of Labor and Industry  
15 P.O. Box 1728  
16 Helena, MT 59624

17 \* \* \* \* \*

18 CERTIFICATE OF MAILING

19 The undersigned hereby certifies that true and correct copies  
20 of the foregoing documents were, this day served upon the following  
21 parties or such parties' attorneys of record by depositing the same  
22 in the U.S. Mail, postage prepaid, and addressed as follows:

23 Emilie Loring  
24 Attorney at Law  
25 500 Daly Avenue  
26 Missoula, MT 59801

27 Peter O. Maltese  
28 Attorney at Law  
P.O. Box 969  
Sidney, MT 59270

Arlyn "Butch" Plowman  
Montana School Boards Association  
1 South Montana Avenue  
Helena, MT 59601

DATED this 26<sup>th</sup> day of May, 1994.

Joseph V. Maronick

423

CLARA GILREATH  
CLERK

Oct 28 4 11 PM '93

FILED BY NANCY SWEENEY  
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MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY

\*\*\*\*\* )  
IN THE MATTER OF UNFAIR LABOR )  
PRACTICE CHARGE NO. 1-91 )  
FRAZER EDUCATION ASSOCIATION, )  
MEA/NEA, )  
Complainant/Defendant, )  
vs. )  
TRUSTEES OF FRAZER ELEMENTARY )  
SCHOOL DISTRICT NO. 2 and HIGH )  
SCHOOL DISTRICT NO. 2B; )  
SUPERINTENDENT JOHN MARLETTE, )  
Defendants/Plaintiffs. )  
\*\*\*\*\* )

Cause No. ADV-93-1219

DECISION AND ORDER

The present matters before the Court are Frazer Education Association's motion to dismiss and the Montana Board of Personnel Appeals' motion to intervene. The motion to dismiss has been fully briefed, and the motion to intervene has not been resisted.

The Montana Board of Personnel Appeals' motion to

1 intervene is hereby GRANTED.

2 In its motion to dismiss, Frazer Education Association  
3 (Association) asserts that Defendants (Trustees) have failed to  
4 exhaust their administrative remedies.

5 The Association filed an unfair labor practice charge  
6 against the Trustees for terminating their practice of paying  
7 100% of the health insurance premiums for the Association  
8 members. The union contract provided that the Trustees were  
9 only required to contribute \$208 per teacher per month; however,  
10 through inadvertence that was later discovered, the members'  
11 full premiums were being paid by the Trustees. When the members  
12 were notified that their insurance premiums would no longer be  
13 fully paid by the Trustees, they filed this unfair labor  
14 practice charge. After an evidentiary hearing, the Board of  
15 Personnel Appeals' hearing examiner recommended that the unfair  
16 labor practice charge be dismissed because of the clear language  
17 of the union contract. On July 22, 1993, the Board of Personnel  
18 Appeals reversed the hearing examiner and ruled that an unfair  
19 labor practice occurred. The Board remanded the case to the  
20 hearing examiner for additional findings and a determination of  
21 the Trustees' appropriate health insurance contributions. The  
22 Board's order also contained a statement that the parties were  
23 entitled to judicial review of its order. Since the Board  
24 remanded the matter back to the hearing examiner, its order is

1 not final.

2 The Montana Administrative Procedure Act provides for  
3 judicial review of an agency's final decision when the aggrieved  
4 person has exhausted all administrative remedies. Section 2-4-  
5 702, MCA. However, Section 2-4-701, MCA, provides:

6 Immediate review of agency action. A  
7 preliminary, procedural, or intermediate  
8 agency action or ruling is immediately  
9 reviewable if review of the final agency  
10 decision would not provide an adequate  
11 remedy.

12 The Trustees contend that this section is applicable  
13 here because any action taken by the hearing examiner upon  
14 remand, and subsequently by the Board, cannot resolve the injury  
15 suffered by the Trustees as a result of the July 22 order. The  
16 Court agrees. The Trustees assert that they are required to  
17 contribute no more than \$208 per teacher for the health  
18 insurance premiums. However, the Board ruled:

19 Consequently, the Respondent's unilateral  
20 reduction of the health insurance cap set  
21 forth in the expired Collective Bargaining  
22 Agreement constituted the modification of  
23 the status quo [the contractual amount] as  
24 to a mandatory subject of bargaining prior  
25 to impasse. Such status quo, however, did  
not reflect the Respondent's payment of  
100% of the medical contributions. Rather  
the action amounted to the placement of a  
different cap *of higher value.* (Emphasis  
added.)

26 The matter was remanded to the hearing examiner to determine  
27 that higher value. Thus, whatever the hearing examiner decides,

1 the figure will be higher than that stated in the union  
2 contract.

3           Notwithstanding the fact the order in question falls  
4 under the purview of Section 2-4-701, MCA, judicial economy  
5 compels this Court to grant the motion to dismiss. If, in later  
6 deciding the merits of this case, the Court were to affirm the  
7 Board of Personnel Appeals, the matter would have to be remanded  
8 to the hearing examiner to determine the appropriate remedy.  
9 That decision would again be subject to judicial review, thus  
10 requiring the Court to entertain this action again. On the  
11 other hand, if the matter is remanded now, the issues of the  
12 alleged unfair labor practice and the appropriate remedy could  
13 be decided together.

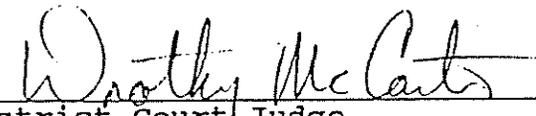
14           If the matter is not remanded at this time and the  
15 Court later determines that no unfair labor practice was  
16 committed, no remand would be necessary. The extra time and  
17 expense involved in a remand at this time under this latter  
18 scenario is outweighed by the interest of judicial economy under  
19 the former.

20           IT IS HEREBY ORDERED that the Association's motion to

21 /////  
22 /////  
23 /////  
24 /////  
25

1 dismiss is GRANTED for failure to exhaust administrative  
2 remedies.

3 DATED this 28 day of October, 1993.

4  
5   
6 District Court Judge

7 pc: Emilie Loring  
8 Melanie A. Symons  
9 Peter O. Maltese

10 Frazer.d&o

11 k

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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 1-91:

FRAZER EDUCATION ASSOCIATION, )  
MEA/NEA, )

Complainant, )

- vs - )

TRUSTEES OF FRAZER ELEMENTARY )  
SCHOOL DISTRICT NO. 2 AND HIGH )  
SCHOOL DISTRICT NO. 2B; )  
SUPERINTENDENT JOHN MARLETTE, )

Defendant. )

FINAL ORDER

\* \* \* \* \*

The Findings of Fact; Conclusions of Law; and Recommended Order were issued by Joseph V. Maronick, Hearing Examiner, on December 1, 1992.

Exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order were filed by Emilie Loring, Attorney for Complainant, on December 16, 1992.

Oral arguments was scheduled before the Board of Personnel Appeals on Wednesday, July 7, 1993 at 1:00 p.m. MDT.

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

1. The Hearing Officer's Findings of Fact are affirmed and hereby adopted.

2. The Hearing Officer's Discussion is reversed and the following rationale substituted:

1  
2 The Board believes that while the expired Collective  
3 Bargaining Agreement provided for a \$208 cap in the District  
4 health insurance contributions, the Respondent's almost three-  
5 year practice of paying the entire insurance contribution  
6 effectively created a different status quo with respect to such  
7 contribution. Consequently, the Respondent's unilateral  
8 reduction of the health insurance cap set forth in the expired  
9 Collective Bargaining Agreement constituted the modification of  
10 the status quo as to a mandatory subject of bargaining prior to  
11 impasse. Such status quo, however, did not reflect the  
12 Respondent's payment of 100% of the medical contributions.  
13 Rather, the action amounted to the placement of a different cap  
14 of higher value.

15 3. The Hearing Officer's Conclusion of Law that no Unfair  
16 Labor Practice occurred is hereby reversed.

17 4. This case is remanded to the Hearing Officer for  
18 additional findings and a determination as the Respondent's  
19 appropriate health insurance contribution at this time.

20 DATED this 22<sup>nd</sup> day of July, 1993.

21 BOARD OF PERSONNEL APPEALS

22  
23 BY Willis M. McKeon  
24 WILLIS M. MCKEON  
25 CHAIRMAN

\* \* \* \* \*

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CERTIFICATE OF MAILING

I, Jennifer Jacobson, do certify that a true and correct copy of this document was mailed to the following on the 28<sup>th</sup> day of July, 1993:

Emilie Loring  
Attorney at Law  
500 Daly Avenue  
Missoula, MT 59801

Arlyn Plowman  
Montana School Board Association  
One South Montana Avenue  
Helena, MT 59620

\* \* \* \* \*

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

\* \* \* \* \*

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 1-91:

FRAZER EDUCATION ASSOCIATION, )  
MEA/NEA, )

Complainant, )

-vs-

) FINDINGS OF FACT;  
) CONCLUSIONS OF LAW;  
) RECOMMENDED ORDER

TRUSTEES OF FRAZER ELEMENTARY )  
SCHOOL DISTRICT NO. 2 AND )  
HIGH SCHOOL DISTRICT NO. 2B; )  
SUPERINTENDENT JOHN MARLETTE, )

Defendants. )

\* \* \* \* \*

I. INTRODUCTION

A hearing was conducted in this matter in Frazer, Montana High School on August 11, 1992 before Joseph V. Maronick, duly appointed Hearing Officer of the Labor Commissioner. Representatives present were Counsel Emilie Loring representing the Complainant and Arlyn L. Plowman representing the Defendants. Parties present sworn and testifying included Maggie Copeland, Mark Murray, Kevin Kriskovich, Dennis Maasjo, Elliot Todd, Beth Flynn, Edward Bauer, Joseph Beston, Sr., and Mason Runs Through.

Documents admitted to the record included Joint Exhibits 1 and 2, Complainant Exhibits 1 through 10. Complainant Exhibits 1 through 6 were admitted over objection by the Defendants. Exhibits 1 through 4 were application signature pages for insurance with Blue Cross Blue Shield for the years 1988 through 1991), Complainant Exhibit 5 was a benefit page for a previous contract,

1 Complainant Exhibit 6 was negotiation minute notes for meetings  
2 held between the parties.

3 Post-hearing briefs were submitted September 21, 1992 and  
4 response briefs received November 14, 1992.

5 II. ISSUE

6 Did the Defendants violate Section 39-31-401(1)(5) MCA when  
7 the Defendants stopped payment of 100% of insurance premium without  
8 bargaining to impasses and thereby committing an Unfair Labor  
9 Practice by refusing to bargain in good faith.

10 III. FINDINGS OF FACT

11 1. From July 1, 1989 through May, 1991, the Defendants paid  
12 100% of health insurance premiums for members of the Complainant  
13 association. In May, 1991, (Joint Exhibit 1), the Defendants  
14 notified the Complainant association the School District Defendant  
15 would thereafter contribute only the \$208.47 per teacher as  
16 prescribed in the Collective Bargaining Agreement.

17 2. The parties Collective Bargaining Agreement which had  
18 expired, (Joint Exhibit 2), provided the Defendants were obliged to  
19 contribute \$208.47 per teacher per month for medical insurance and  
20 that only through agreed written contract term change could the  
21 contract be modified. (Joint Exhibit 2 - page 28) The teachers  
22 were, according to the agreement, to pay the difference between the  
23 contractually agreed \$208.47 per month and the amount charged by  
24 the insurance provider, Blue Cross Blue Shield.

25 3. The School Board clerk every month or regularly  
26 presented warrants approved by the Board which paid insurance  
27 premium due. The parties are negotiating a successor contract and  
28 the Defendants' trustees allegedly first found out they had been

1 paying full insurance premium during a mediation session. The  
2 Complainants were advised thereafter that only the contractually  
3 required \$208.47 would be paid toward medical insurance.

4 4. During contract negotiations, the parties have discussed  
5 several proposals which included, among other things, insurance  
6 premium payments. Settlement or final agreement regarding contract  
7 terms including insurance premium has not occurred.

8 5. The Complainants contend the Defendants' insurance  
9 contribution payment change to only the required contract amount,  
10 is an unilateral change without bargaining to impasse and  
11 therefore, an unfair labor practice. Such change, they allege  
12 constitutes a violation of Section 39-31-401(1)(5) MCA.

13 6. The Defendants contend the insurance premium reduction  
14 was merely compliance with the clear and unmistakable contract  
15 terms and no violation of Section 39-31-401(1)(5) MCA. The  
16 Defendants also, in post-hearing brief, contend the Board of  
17 Personnel Appeals should not enter into this case as an arbitrator  
18 because the parties have a Collective Bargaining Agreement and the  
19 dispute should be determined under contract grievance and  
20 arbitration process.

#### 21 IV. DISCUSSION

22 The Complainants do not contend the Defendant violated the  
23 contract but have refused to bargain in good faith which is a  
24 statutory violation. As pointed out in Complainant Reply brief,  
25 the Board does have jurisdiction to hear and determine if Defendant  
26 violated the Collective Bargaining Act Title 39 Chapter 31, MCA.  
27 Additionally, where the contract language is unambiguous the  
28 National Labor Relations Board has held the special competence of

1 an arbitrator is not needed to interpret the contract, Oak Cliff-  
2 Golman Baking Co., 202 NLRB 614, 82 LRRM 1688 (1973)

3 The contract terms regarding insurance premiums are clear and  
4 unmistakable. The parties agreed to the contract term listing  
5 Defendants insurance payment responsibility of \$208.47 per unit  
6 member. If the contract insurance contribution term is or could be  
7 changed by independent failure of the Board clerk or the Board  
8 members to follow that term without negotiation and/or a signed  
9 agreement, also required by contract terms, then logically, the  
10 contract can or would have no meaning at all as written.

11 Where the contract terms are clear and unambiguous, the  
12 contract terms control. In 79 LA 658, 661 Louisiana Pacific  
13 Corporation, W. Eaton, 8-16-82 is found the following:

14 It is axiomatic that where language is clear and  
15 unambiguous, an arbitrator must give that language  
16 effect. The late Justice Douglas, in one of the  
17 "Steelworker Trilogy" cases, outlined the limits of the  
18 arbitrator's authority: "... nevertheless, an arbitrator  
19 is confined to interpretation and application of the  
20 Collective Bargaining Agreement; he does not sit to  
21 dispense his own brand of industrial justice. He may, of  
22 course, look for guidance from any sources, yet his award  
23 is legitimate only so long as it draws its essence from  
24 the Collective Bargaining Agreement. When an  
25 arbitrator's words manifest an infidelity to this  
26 obligation, courts have no choice but to refuse to  
27 enforce the award. (Steel workers v. Enterprise Wheel  
28 and Car Corporation, 363 U. S. 593, 80 Sup. Ct. 1358, 34  
LA 569, [1960])"... 'An arbitrator cannot resort to  
interpretation or construction if there is no ambiguity  
in fact' 'in the language being construed. 'To do  
otherwise' Arbitrator Shipman stated, 'would, in effect,  
be to change or alter the Agreement through in  
direction', which the arbitrator was not empowered to do.  
Lionel Corp., 9 LA 716, 717-718 (1948). '...Other  
arbitrators have agreed that past practices are of no  
probative value when the language is unambiguous and  
definite. See Union Carbide Corp., 70-1 ARB #8098  
(1969), Weather Seal Division of Georgia Pacific Corp.,  
70-1 ARB #8247 (1969), Exxon Chemical Company, 68 LA 362  
(1977), Kennecott Copper Corp., 70-2 ARB #8849 (1970),  
Duriron Company, Inc., 51 LA 185 (1968).



CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

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DATED this 1<sup>st</sup> day of December, 1992.

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SP321.3