

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 7-91:

MONA SISK AND LAUREL CLASSIFIED)
EMPLOYEES ASSOCIATION, MEA/NEA,)

Complainants,)

- vs -)

LAUREL PUBLIC SCHOOL,)
YELLOWSTONE COUNTY SCHOOL)
DISTRICT NO. 7-70,)

Defendant.)

FINAL ORDER

* * * * *

The Findings of Fact; Conclusions of Law; and Recommended Order were issued by Joseph V. Maronick on August 4, 1992.

Exceptions to the Findings of Fact, Conclusions of Law, and Recommended Order were filed by the Defendant Laurel Public School District 7 & 7-70 on August 24, 1992.

Oral argument was scheduled before the Board of Personnel Appeals on October 28, 1992.

Withdrawal of Exceptions were submitted by the Defendant on October 27, 1992.

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

1. IT IS ORDERED that the Board acknowledges receipt of the Withdrawal of Exceptions.

2. IT IS ORDERED that this Board therefore adopts the Findings of Fact; Conclusions of Law; and Order of Hearing Examiner Joseph V. Maronick as the Final Order of this Board.

DATED this 25th day of November, 1992.

BOARD OF PERSONNEL APPEALS

BY *Robert A. Poore*
ROBERT A. POORE
CHAIRMAN

* * * * *

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 2040701 se seq., MCA.

* * * * *

CERTIFICATE OF MAILING

I, *Jennifer Jacobson*, do hereby certify that a true and correct copy of this document was mailed to the following on the 2nd day of December, 1992:

Rick D'Hooge
Montana School Boards Association
One South Montana Avenue
Helena, MT 59601

Emilie Loring
HILLEY & LORING
500 Daly Avenue
Missoula, Montana 59801

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 Denise Yonkin; Norma Cleveland; Chip Lowery; and Superintendent,
2 Wayne Severtson. The Defendant was assisted in case presentation
3 by Rick D'Hooge, Labor Relations Director, Montana School Boards
4 Association.

5 II. FINDINGS OF FACT

6 1. Effective May 16, 1990, the Board of Personnel Appeals
7 certified Montana Education Association, MEA/NEA as the exclusive
8 representative for collective bargaining purposes for certain
9 employees including Complainant, Mona Sisk, employed at Laurel
10 Public School District No. 7-70 and 7.

11 2. In May 1989, the Complainant asked for and was allowed to
12 begin working four ten hour days (four tens) rather than five eight
13 hour days (five eights). Both Parties, initially, understood this
14 change was on a trial basis. The Complainant thought the trial was
15 for several weeks and the Defendant that the change was for an
16 indefinite period of time.

17 3. From time to time during the year and a half while Ms.
18 Sisk worked four tens, when time scheduling was discussed, Ms. Sisk
19 stated she wished to continue her four tens scheduling. The
20 Defendant did not at any time after initially granting Ms. Sisk's
21 four tens advise her regarding the temporary basis of the change or
22 any problems which the scheduling caused.

23 4. When granted the four tens in May 1989, Ms. Sisk was
24 employed as an accounting clerk. In August 1991 Ms. Sisk
25 transferred to work as a payroll clerk. This position had
26 previously held by Wilma Engen from 1983 through August 1991. Ms.
27 Engen normally worked five eights. During the summer of 1990 Ms.
28 Engen, along with other staff, worked staggered shifts. When

1 working staggered shifts, staff worked four nine hour days, four
2 hours on Friday with a full Friday off and worked a full Friday on
3 a rotating basis. (Hearing tape 1, foot 210, testimony of Ms.
4 Engen) Ms. Sisk did not participate in the staggered hours. She
5 continued working four tens as she had since May 1989.

6 5. By letter dated October 4, 1990 the school Superintendent
7 advised Ms. Sisk she must thereafter work five eights rather than
8 four tens. When asked why the hours changed in October 1990, the
9 school Superintendent indicated he changed the hours because he did
10 not feel the "temporary" change was working out as he had
11 anticipated and that scheduling was adversely affecting client
12 service.

13 6. No formal school board action was taken when Ms. Sisk
14 started four tens in May 1989 or was changed back to five eights in
15 October 1990. Board member, Chip Lowery, testified he understood
16 the change was on a trial basis and was aware of scheduling changes
17 as they occurred.

18 7. The hour and day change to four tens and to five eights,
19 did not cause Ms. Sisk any wage or benefit reduction. Ms. Sisk
20 petitioned for added day care and travel expenses caused by the
21 change back to five eight hour shifts. Ms. Sisk claims \$12.00
22 per week, one additional day of day care, and 30 miles travel pay
23 per week, travel to Billings and back for the 5th day of the five
24 days week rather than a four day week, due her as "restoration"
25 for expense suffered because of the schedule change back to the
26 five day, eight hour work week.

27 8. Superintendent Severtson stated he changed back to five
28 eights solely because "I had determined work ... we were having too

1 many people come in, I was hearing Denise telling people 'I am
2 sorry Mona does not work on Friday, I am sorry she has left...'
3 People did not adjust to the change in hours" (Hearing tape 2
4 Severtson foot 20)

5 9. Approximately in July 1989 Ms. Engen asked Superintendent
6 Severtson as he walked by how Ms. Sisk's four ten scheduling was
7 working. Ms. Engen recalled Superintendent Severtson's response as
8 "He did not have any problems with it, nobody said anything, you
9 know had any comments." (Hearing tape one foot 260 testimony Ms.
10 Engen) Superintendent Severtson did not at any time advise Ms.
11 Sisk that he had received any comment, good or bad, regarding her
12 work scheduling.

13 10. A 1989-1990 school term cost out (Exhibit R3) of Ms.
14 Sisk's hours computed by a member of the union negotiation
15 committee, Mona Sisk's 1989-90 individual contract (Exhibit R2) and
16 a March 28, 1992 salary schedule proposal (Exhibit R4) all show Ms.
17 Sisk as working five eight hour days. The school district thus
18 contended the five tens scheduling is shown as temporary because
19 the parties figured Ms. Sisk's on a five day eight hour basis. Ms.
20 Debra Horning testified that Ms. Sisk's hours were shown as five
21 eights on the cost outs and contract so that Ms. Sisk's sick or
22 annual leave would not be figured at ten hour days thus showing
23 receipt of an unwarranted increase in fringe benefits. All parties
24 knew and agreed that Ms. Sisk was working four tens from May 1989
25 through October 1990.

26 III. CONCLUSIONS OF LAW

27 1. The initial and pivotal determination needed in this case
28 is whether Ms. Sisk's four tens scheduling was on an ongoing trial

1 basis or if the change had become permanent. Questions which must
2 be answered include:

- 3 a. was the four ten hour day scheduling
4 temporary on an ongoing basis?,
5 b. if temporary on any basis had the
6 scheduling with time become permanent?,
7 c. if four tens had become a permanent term
8 of employment was the change back to five
9 eights required of Ms Sisk an unfair
10 labor practice?,
11 d. if found to have committed an unfair
12 labor practice, is the school district
13 responsible to make Ms. Sisk whole even
14 to the point of payment for travel and
15 baby sitting expense? and
16 e. was the change in hours for Ms. Sisk
17 taken by the Defendant as the result of
18 Ms. Sisk's union activity?

19 2. The four ten hour day scheduling, initially on a trial
20 basis, had become a permanent term of employment. The fact this
21 scheduling may or may not cause service problems is found
22 irrelevant. Additionally the record presented shows an
23 inconsistency position of the school board. Superintendent
24 Severtson testified he received or overheard several or ongoing
25 complaints or comments regarding Ms. Sisk's scheduling. Over
26 fifteen months, not once, it would appear, did the Superintendent
27 express that concern to Ms. Sisk. On several occasions all parties
28 agree that Ms. Sisk indicated that she wished to continue the four
ten scheduling. If problems had arisen or were ongoing, it does
not appear reasonable that Superintendent Severtson would not have
commented during one of these discussions regarding some of the
problems about which he was apparently aware.

3. The fact that Ms. Sisk's hours were listed on several
documents on a five day eight hour shift basis does not support

1 the conclusion the four tens were temporary. The listing of Ms.
2 Sisk as working five eights, is found to have occurred as a method
3 of fiscally listing her pay but not reflecting either the
4 permanency or temporary nature of the scheduling. The permanency
5 is found based upon the length of time, 15 months, and the lack of
6 any documents or concurrent comments from the Superintendent
7 regarding the temporary nature of the change or complaints which
8 were ultimately the basis for the change back to five eights.

9 4. As pointed out in the Complainant's brief, pages 3,4 and
10 5, the courts and the Montana Board of Personnel Appeals have held:

11 ...A unilateral change, that is a change initiated by the
12 employer without bargaining with the union, in a
13 mandatory subject of bargaining is a refusal to bargain
in good faith and is a per se unfair labor practice, NLRB
v. Katz, 369 U.S. 736 (1962).

14 The Montana Supreme Court has approved the practice of
15 the Board of Personnel Appeals in using federal court and
16 NLRB precedents as guidelines in interpreting the public
employees collective bargaining act and the state act is
17 so similar to LMRA State Department of Highways v. Public
Employees Craft Council, 165 Mont. 349, 529 P2d 785, 87
18 LRRM 2101 (1974); AFSCME Local 2390 v. City of Billings,
171 Mont. 20, 555 P2d 507, 39 LRRM 2753 (1976); State ex
rel. Board of Personnel Appeals v. District Court, 183
19 Mont. 23 598 P2d 1117, 103 LRRM 2297 (1979); Teamsters
Local 45 v. State ex rel. Board of Personnel Appeals, 195
20 Mont. 272, 635 P2d 1310, 110 LRRM 2012 (1981); City of
Great Falls v. Young (Young III), 211 Mont. 13, 686 P2d
21 185, 119 LRRM 2682, (1984).

22 The Public Employees Collective Bargaining Act, follows
23 Katz supra,

24 The U.S. Supreme Court held in 1962 that an
25 employer's unilateral change in a condition of
26 employment...may be held to violate Section
27 8(a)(5) [similar to Section 39-31-401(5) MCA]
even in the absence of a finding that the
28 employer was guilty of over-all bad faith
bargaining because conduct amounts to a
refusal to negotiate about the matter and
must of necessity obstruct bargaining, AAUP v.
Eastern Montana College, ULP 2-82 (1982).

1 The Board similarly relied on Katz in finding that
2 unilateral imposition of an in-district residency
3 requirement was an unfair labor practice, MEA v.
4 Mussellshell County School District (Roundup), ULP No. 6-
5 77 (1977).

6 Once practices are established, and employer
7 is "required to bargain in good faith;
8 unilateral changes cannot... even if (the
9 practices) are not contained in the contract;
10 unless... there exists a waiver by the party
11 to whom the duty to bargain is owed. In the
12 instant case... (no waiver) was obtained by
13 the Defendant prior to making the change in
14 evaluation procedure." Bozeman Education
15 Association v. Gallatin County School District
16 No. 7 (Bozeman), ULP No. 43-79 (1981).

17 The unilateral change in Ms. Sisk's hours without
18 bargaining with the union was a per se refusal to bargain
19 in good faith, an unfair labor practice.

20 The Complainant's position identified above is correct. The
21 Defendant is found to have committed an unfair labor practice in
22 violation of Section 39-31-401(1) and (5). The Defendant
23 interfered with the Claimant's rights guanteed in Section 39-31-201
24 and refused to bargain in good faith.

25 5. The Defendant is not found responsible to reimburse Ms.
26 Sisk for baby sitting and travel expense. No authority is found to
27 support the granting of this part of the charge. If child care and
28 travel expenses are to be included as something new and part of the
contract wage considerations, the matter should be addressed by the
Parties at the bargaining table and not by this court.

6. Information was not offered to support the allegation
that any changes or actions taken by the Defendant were because or
as a result of Ms. Sisk's union activities. A violation of Section
39-31-401(3) MCA is not found.

7. Laurel Public School, Yellowstone County School District
7-70, is found to have violated Section 39-31-401(1) and (5) MCA.

1 IV. RECOMMENDED ORDER

2 The Laurel School District is directed to restore Ms. Sisk's
3 four tens until the matter is bargained in good faith with the
4 Laurel Classified Employees Association.

5 V. SPECIAL NOTE

6 In accordance with Board Rule ARM 24.25.107(2) the above
7 RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless
8 written exceptions are filed within twenty (20) days after service
9 of these FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER
10 upon the Parties.

11 DATED this 4 day of August, 1992.

12 BOARD OF PERSONNEL APPEALS

13
14 Joseph V. Maronick
15 Joseph V. Maronick
16 Hearing Examiner

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 HILLY & LORING
25 500 Daly Avenue
26 Missoula, MT 59801

27 Rick D'Hooge
28 Montana School Boards Association
One South Montana Avenue
Helena, MT 59601

DATED this 4th day of August, 1992.

Michelle Bailly

dk321.10N