

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE 30-92:

GREAT FALLS EDUCATION SUPPORT)
PERSONNEL ASSOCIATION, MEA/NEA.)

Complainant,)

- vs -)

FINAL ORDER

GREAT FALLS PUBLIC SCHOOL)
DISTRICTS NO. 1 AND 1,)

Defendant.)

* * * * *

The Findings of Fact; Conclusions of Law; and Recommended Order were issued by Joseph V. Maronick, Hearing Examiner, on May 26, 1993.

Complainant's Exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order were filed by J. Dennis Moreen, Attorney for Complainant, on June 18, 1993.

Oral arguments was scheduled before the Board of Personnel Appeals on Wednesday, September 29, 1993 at 10:00 A.M. MDT.

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

1. The Hearing Examiner's Finding of Fact are supported by substantial evidence and are hereby adopted.

2. The Hearing Examiner's Conclusions of Law numbers 1 through 6 are legally correct and are hereby affirmed and adopted. Conclusions of Law number 7 is not legally correct and is hereby rejected and vacated.

1 3. The Board substitutes the following Conclusion of Law
2 in place of that rejected in the preceding paragraph:

3 7A. "The record presented is sufficient to show that
4 good faith negotiations did not occur. As concluded above,
5 the tobacco free policy and its effects are a mandatory
6 subject of bargaining. By requiring the Complainant to enter
7 into a separate bargaining process over this single issue
8 (outside of the existing negotiations) the Defendant
9 improperly established a bifurcated negotiation system. The
10 imposition of this unilateral requirement by the Defendant
11 constitutes a refusal to bargain in good faith."

12 4. The Board also rejects the Order of the Hearing
13 Examiner. In place of the Hearing Examiner's Order and in
14 accordance with the preceding findings and conclusions, the Board
15 order as follows:

16 IT IS ORDERED that the Defendant is guilty of an unfair
17 labor practice for requiring two-tiered bargaining over a
18 mandatory subject of bargaining.

19 DATED this 21st day of October, 1993.

20 BOARD OF PERSONNEL APPEALS

21 By Willis M. McKeon
22 WILLIS M. MCKEON
23 CHAIRMAN

24 Board members Klepper, Henry, Talcott and Schneider concur.

25 * * * * *

1 * * * * *

2 CERTIFICATE OF MAILING

3 I, Jennifer Jacobson, do certify that a true
4 and correct copy of this document was mailed to the following on
the 25th day of October, 1993:

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

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE 30-92

GREAT FALLS EDUCATIONAL SUPPORT)
PERSONNEL ASSOCIATION, MEA/NEA,)

Complainant,)

vs.)

GREAT FALLS PUBLIC SCHOOL)
DISTRICTS NO. 1 AND A,)

Defendant.)

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
ORDER**

* * * * *

I. INTRODUCTION

On May 15, 1992, Great Falls Educational Support Personnel Association, MEA/NEA, herein after the Complainant, filed an Unfair Labor Practice Charge alleging the Great Falls Public School Districts 1 and A, hereinafter the Defendant, was violating Section 39-31-401(5), refusing to bargain in good faith, by unilaterally implementing a no smoking policy. The Defendant denied any law of violation. An Investigation Report and Determination issued by the Board on November 10, 1992, found probable merit in the charge sufficient to warrant a referral to an evidentiary hearing.

Prior to the hearing, Complainant moved to consolidate this charge with another filed November 23, 1992, involving the same Parties. The Defendant objected December 23, 1992, to charge consolidation. The November 23, 1993, charge was in board process and yet undetermined as sufficient to support referral to an evidentiary hearing. Due to status of the matter being only

1 in process, the Motion for Consolidation Request was denied by
2 Order issued December 29, 1992.

3 A formal hearing on the above matter was conducted Janu-
4 ary 13, 1993, in Great Falls, Montana. Parties present, duly
5 sworn, and offering testimony included: UniServ Director, Jane
6 Fields; Benefit Coordinator, Gwen Williams; Christie Deck, and
7 Rick D'Hooge, Representatives of Montana School Boards Associa-
8 tion. The Complainants were assisted in case presentation by
9 Attorney, J. Dennis Moreen, and the Defendants by Arlyn "Butch"
10 Plowman, Representative, Montana School Boards Association.
11 Documents admitted to the record included Complainant's Exhibits
12 1-28, Respondent Exhibits A-I and, through administrative notice,
13 the charge, response, investigation report, motion and ruling.

14 II. ISSUE

15 Did the Defendant refuse to bargain in good faith.

16 III. FINDINGS OF FACT

17 1. The parties' Collective Bargaining Agreement (Exhibit
18 1) was to expire December 31, 1991. On October 2, 1991, (Exhibit
19 2) the Complainant requested negotiations. The Defendant was
20 considering a no smoking policy and this matter identified as a
21 bargaining subject. The Complainant intended to bargain the
22 policy and not the effects of the policy. (Complainant's Post-
23 Hearing Brief Page 2, Line 14-18)

24 2. The Defendant under Section 50-40-201 MCA is required
25 to regulate smoke in work areas as follows:

26 Reservation of smoking and non-smoking areas 27 in work areas in local government buildings

28 In offices and work areas in buildings main-
tained as a political subdivision, except a
school or community college facility desig-

1 nated as tobacco free by the Board of Trust-
2 ees of the school district or community col-
3 lege district, in which seven or more employ-
4 ees of the political subdivision are em-
5 ployed, the manager or person in charge of
6 work area shall arrange smoking and non-
7 smoking areas in a convenient area.

8 **Section 50-40-2-2 Public Policy**

9 In recognition of the increased health haz-
10 ards of passive smoke on the nonsmoker, it is
11 the declared policy of the State of Montana
12 that all buildings maintained by the State
13 are to be smoke free.

14 3. A proposed smoke free policy (Exhibit B, page 1) was
15 developed and published. On October 3, 1991, (Exhibit B, page 5)
16 the Complainant requested bargaining the effects of the smoke
17 free policy. On October 11, 1991, (Exhibit B, page 6 and 7) the
18 Defendant sent letters to its nine bargaining units including the
19 Complainant indicating a wish for comment on the proposed smoke
20 free policy. Thereafter the Defendant met with the Complainant
21 on December 10, 1991, December 16, 1991, and January 15, 1992. A
22 January 16, 1992, scheduled meeting was canceled by the Com-
23 plainant. On February 5, 1993, the Complainant was advised by
24 letter (Exhibit 24) that the last Defendant proposal of Janu-
25 ary 15, 1992, was their final position.

26 4. On February 13, 1993, another tobacco free bargaining
27 session was held which did not resolve the issue. By letter of
28 February 27, 1992, the Defendant advised the Complainant of the
need for mediation which thereafter occurred on March 16, 1992,
without dispute resolution. On March 23, 1992, the tobacco free
school policy as presented initially to the Complainant on
January 15, 1992, was adopted effective June 6, 1992. All eight
of the other bargaining units who have contracts with the Defen-

1 | dant had reached agreement with the Defendant regarding the
2 | tobacco free policy.

3 | 5. The Defendant had established a separate bargaining
4 | team which only bargained the tobacco free school policy not
5 | other contract subject matters so that a uniform tobacco free
6 | school policy would hopefully exist with all nine of the bargain-
7 | ing units. With this intent, the defendant refused to bargain
8 | the tobacco free policy as part of other contract terms indepen-
9 | dent or without their tobacco free policy negotiating members.
10 | Some of the Defendant's tobacco free policy negotiating team
11 | members were also members of the other contract issues bargaining
12 | team. On March 23, 1992, impasse with the Complainant regarding
13 | the effects of the tobacco free school policy was declared.
14 | (Exhibit D-7) On May 7, 1992, and June 19, 1992, mediation
15 | sessions between the Complainant and the Defendant were concluded
16 | without conflict resolution. On May 19, 1992, this Unfair Labor
17 | Practice Charge was filed.

18 | 6. The Defendant's policy proposal changed during the
19 | process of the discussions from forbidding smoking during school
20 | hours on buildings and grounds with some employee cessation
21 | assistance to a ban at all times in school buildings and grounds
22 | still including cessation assistance but adding discipline for
23 | policy violation. (Complainant brief page 7, line 2-6)

24 | 7. The Complainant contended the smoking policy implemen-
25 | tation is a substantial material change in working conditions and
26 | a mandatory subject of bargaining citing W-I Forest Products, 304
27 | NLRB 83 138 LRRM 1091 (1991). In W-I Forest, supra, a determina-
28 | tion was issued indicating that unilateral smoking bans were or

1 are a violation of the collective bargaining agreement. Based on
2 this rationale the Complainant contends that the smoking policy
3 was a mandatory subject of bargaining and that the school dis-
4 trict refused to bargain this mandatory subject in good faith as
5 required. (Page 4, brief line 10) The Defendant, according to
6 the Claimant's argument, engaged in surface bargaining decided
7 impasse prematurely and implemented the policy in violation of
8 39-31-401(5). The Complainant's argument as provided in Post-
9 hearing Brief page 4 indicates:

10 Restrictions on employees smoking in the work
11 place are changes effecting working condi-
12 tions. A total ban is a substantial and a
13 material change in those working conditions.
14 A smoking ban is a mandatory subject of bar-
15 gaining. W-I Forest Products, 304 NLRB 83,
16 138 1 LRRM 109 (1991). See also Faywette
17 County Area Vo-Tech School, 94 LA 894 (1990),
18 and Basler Electric Company, 94 LA 889
19 (1990), where arbitrators found unilateral
20 impositions of a smoking ban to be a viola-
21 tion of the collective bargaining agreement
22 in that it was a change of past practice.
23 The District obviously was aware that the ban
24 was a mandatory subject of bargaining, it
25 went through the formality of surface bar-
26 gaining in a pale attempt to meet the re-
27 quirement.

28 The District's actions were not good faith
bargaining but contrived to create an impasse
so it could unilaterally implement its tobac-
co ban. The District actions are an unfair
labor practice in violation of Section
39-31-401, MCA. If a party's bad faith bar-
gaining or unfair labor practice precludes
reaching an agreement, the resulting impasse
is not a valid one, and any changes the party
unilaterally makes one illegal. . . .

7. The Complainant, in part, contended the use of a sepa-
rate bargaining team for only negotiations relating to the
tobacco free policy which were not an integral part of other
individual unit contract bargaining demonstrates a refusal to

1 bargain in good faith. Both parties claimed the other party
2 either refused to make any proposals or counter proposals or
3 bargain in good faith without unnecessary constraints or unalter-
4 able positions. Both parties also found the opposing party's
5 position or actions frustrating.

6 IV. CONCLUSIONS OF LAW

7 1. The Board of Personnel Appeals has jurisdiction over
8 this complaint under applicable Montana and Federal Labor Rela-
9 tions Law.

10 2. The Montana Board of Personnel Appeals has held:

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

17 The Montana Supreme Court has approved the
18 practice of the Board of Personnel Appeals in
19 using federal court and NLRB precedents as a
20 guidelines in interpreting the public employ-
21 ees collective bargaining act and the state
22 act is so similar to LMRA State Department of
23 Highways v. Public Employees Craft Council,
24 165 Mont. 349, 529 P2d 785, 87 LRRM 2101
25 (1974); AFSCME Local 2390 v. City of Bill-
26 ings, 171 Mont. 20, 555 P2d 507, 39 LRRM 2753
27 (1976); State ex rel. Board of Personnel
28 Appeals v. District Court, 183 Mont. 23 598
P2d 1117, 103 LRRM 2297 (1979); Teamsters
Local 45 v. State ex rel. Board of Personnel
Appeals, 195 Mont. 272, 635 P2d 1310, 110
LRRM 2012 (1981); City of Great Falls v.
Young (Young III), 211 Mont. 13, 686 P2d 185,
119 LRRM 2682, (1984).

24 The Public Employees Collective Bargaining Act, follows Katz
25 supra,

26 The U.S. Supreme Court held in 1962 that an
27 employer's unilateral change in a condition
28 of employment. . . may be held to violate Sec-
tion 8(a)(5) [similar to Section 39-31-401(5)
MCA] even in the absence of a finding that
the employer was guilty of over-all bad faith
bargaining because conduct amounts to a re-

1 fusual to negotiate about the matter and must
2 of necessity obstruct bargaining, AAUP v.
Eastern Montana College, ULP 2-82 (1982).

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

6 Once practices are established, an employer
7 is "required to bargain in good faith; uni-
8 lateral changes cannot. . .even if (the prac-
9 tices) 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
Association v. Gallatin County School Dis-
trict No. 7 (Bozeman), ULP No. 43-79 (1981).

15 3. As pointed out in Defendant's Brief:

16 In Taff Broadcasting Company, 64 LRRM 1689,
17 163 NLRB 55, the National Labor Relations
18 Board said:

19 An employer violates his duty to
20 bargain if when negotiations are
21 sought or are in progress he uni-
22 laterally institutes changes in
23 existing terms and conditions of
24 employment. On the other hand,
25 after bargaining to an impasse,
26 that is, after good faith negotia-
27 tions have exhausted the process of
28 concluding an agreement, the em-
ployer does not violate the act by
making unilateral changes that are
reasonably comprehended within his
pre-impasse proposals.

The Board of Personnel Appeals has adopted
the theory of and the test for impasse estab-
lished in Taff Broadcasting, supra: See ULP
7-89 and 9-89, IUOE, Local 400 and Teamsters
Local 2 v. Flathead County,

That test is as follows:

- a. the bargain history
- b. the good faith of the parties
in negotiations,
- c. the length of negotiations
(frequent, numerous, ex-

- 1 haust -- exploring all ground
2 for settlement),
3 d. importance of the issue or
4 impasse as to which there is a
5 disagreement (mandatory sub-
6 ject of bargaining), and
7 e. the contemporaneous under-
8 standing of the parties as to
9 the negotiations (positions
10 solidified).

11 5. The tobacco free policy and its effects are found to be
12 a mandatory subject of bargaining in this case. The positions
13 offered by the parties relating to whether or not the subject of
14 the smoking policy and/or its effects is a mandatory subject of
15 bargaining show that the smoking policy does involve a material
16 change in working conditions and as such a mandatory subject of
17 bargaining.

18 6. The primary issue for determination in this matter is
19 whether or not the Defendant refused to bargain in good faith.

20 7. The record presented is inefficient to show that good
21 faith negotiations did not occur. While the positions of the
22 parties, as is normally the case in negotiations, involves some
23 positioning - emphasis, statement, evaluation relating to effects
24 or gravity; the record presented is insufficient to support a
25 finding that the Defendant engaged in surface bargaining or did
26 not bargain in good faith.

27 **V. RECOMMENDED ORDER**

28 The Unfair Labor Practice Charge in this matter is hereby
 dismissed. The Defendant is found to have engaged in good faith
 bargaining regarding the smoking policy and implemented that
 policy after impasse had occurred.

1 VI. SPECIAL NOTE

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

7 Entered and dated this 26 day of May, 1993.

8 BOARD OF PERSONNEL APPEALS

9
10 Joseph V. Maronick
11 Joseph V. Maronick
Hearing Examiner

12 * * * * *

13 CERTIFICATE OF MAILING

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

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25 DATED this 26th day of May, 1992.

26
27 Christine P. Roland

28 DA321.5