

1 STATE OF MONTANA  
2 BEFORE THE BOARD OF PERSONNEL APPEALS

3 IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 31-92:

4 SHEILA M. MURPHY AND UNION OF )  
5 MAINTENANCE EMPLOYEES OF VALLEY )  
6 COUNTY SCHOOL DISTRICT #1-1A, )

7 Complainant, )

8 - vs - )

9 BOARD OF TRUSTEES OF VALLEY )  
10 COUNTY SCHOOL DISTRICT #1-1A, )

11 Defendant. )

FINAL ORDER

12 \* \* \* \* \*

13 The Findings of Fact; Conclusions of Law; and Recommended  
14 Order were issued by Joseph V. Maronick, Hearing Examiner, on  
15 April 27, 1993.

16 Complainant's Exceptions to the Hearing Examiner's Findings  
17 of Fact; Conclusions of Law; and Recommended Order were filed by  
18 David L. Irving, Attorney for Complainant, on May 13, 1993.

19 Oral arguments were scheduled before the Board of Personnel  
20 Appeals on Wednesday, September 1, 1993.

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

23 1. IT IS ORDERED that the Exceptions to the Findings of  
24 Fact; Conclusions of Law; and Recommended Order are hereby  
25 denied.

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

5 DATED this 20<sup>th</sup> day of September, 1993.

6 BOARD OF PERSONNEL APPEALS

7  
8 BY Willis M. McKeon  
9 WILLIS M. MCKEON  
CHAIRMAN

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

11 \* \* \* \* \*

12  
13 NOTICE: You are entitled to Judicial Review of this Order.  
14 Judicial Review may be obtained by filing a petition for Judicial  
15 Review with the District Court no later than thirty (30) days  
16 from the service of this Order. Judicial Review is pursuant to  
17 the provisions of Section 2-4-701, et seq., MCA.

18 \* \* \* \* \*

19 CERTIFICATE OF MAILING

20 I, Jennifer Jacobson, do certify that a true  
and correct copy of this document was mailed to the following on  
the 22<sup>nd</sup> day of September, 1993:

21 David L. Irving  
22 Attorney for Complainants  
23 Drawer B  
1110 5th Street South  
Glasgow, MT 59230

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

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

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 31-92:

SHEILA M. MURPHY AND UNION OF )  
MAINTENANCE EMPLOYEES OF VALLEY )  
COUNTY SCHOOL DISTRICT #1-1A, )

Complainant, )

-vs- )

BOARD OF TRUSTEES OF VALLEY )  
COUNTY SCHOOL DISTRICT #1-1A, )

Defendant. )

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
RECOMMENDED ORDER

\* \* \* \* \*

I. INTRODUCTION

Prior to hearing in the above-cited matter, a Motion to Vacate the hearing scheduled to be conducted on January 6, 1993 was submitted by the Complainant. The basis of the Motion was to have this matter determined based upon submission of a November 12 and 13, 1993 hearing transcript conducted pursuant to Section 20-3-210 MCA. The November hearing involved a discharge issue action and authority of the County Superintendent to hear and decide all matters of controversy arising in his county as a result of decisions of the trustees of a district in the county. The Complainant had filed under title 20 and was granted a hearing. The Complainant and Defendant, in the labor law question before this Hearing Officer, indicated that they anticipated calling the same witnesses as had been called in the November 12-13 hearing as well as intended to use the same exhibits as offered in that hearing. The Defendant, School District, opposed the Motion to Vacate on the basis that the School District must be provided an

1 opportunity to be heard by a duly appointed hearing officer of the  
2 Board of Personnel Appeals under application of the Montana Labor  
3 Relations Act. The Motion to vacate was denied on the basis that  
4 this matter involves a legal issue which is different from the  
5 other Administrative appeal and the Defendant must be provided an  
6 opportunity to be heard under application of Section 39-31-105 MCA.

7 A hearing was conducted in this matter in Glasgow, Montana on  
8 January 6, 1993. Parties present, duly sworn and offering  
9 testimony included Complainant, Sheila Murphy, Matthew Murphy,  
10 Willie Zeller, Warren "Nick" Gamas, Adella Mott, Loretta Gore, Lois  
11 Rutherford, Lyndon Erickson, Leonard Boos, James Tribby, Donald  
12 Oss, Donald Turner, Dee Finney, Terry Fuhrmann, Kenneth Scott,  
13 William Riley and Ronald F. Stegmann. The Complainant was assisted  
14 in case presentation by David L. Erving, Attorney at Law and the  
15 Defendant by Rick D'Hooge, Labor Relations Director, Montana School  
16 Board's Association.

17 Documents admitted to the record included Complainant Exhibits  
18 1 through 4. Objection was raised to Complainant Exhibits 1  
19 through 4 on the basis that they had not been submitted by the  
20 December 28, 1992 exchange date established in the Notice of  
21 Hearing. The objection was overruled on the basis that even though  
22 late, exclusion would not be appropriate. Defendant Exhibits  
23 admitted to the record included Exhibits D1 and 2. These were also  
24 objected to on the basis of late submission. The objection was  
25 overruled and the documents admitted on the same basis as were the  
26 Defendant exhibits. Administrative notice was taken of the Unfair  
27 Labor Practice Charge, response and investigation documents.

28

1 Parties submitted post hearing briefs and proposed findings. Final  
2 submission was received March 19, 1993.

3 At the beginning of the hearing, the Complainant filed a  
4 Motion in Limine requesting that any information included in the  
5 November 12-13 hearing relating to Complainant job performance be  
6 precluded from offer by the Defendants, their witnesses or  
7 representative. The Motion in Limine was objected to by the  
8 Defendants. The motion was granted in part and denied in part on  
9 the following basis. Any information obtained or referenced during  
10 the November hearing would be allowed if relevant to the issue  
11 before this Hearing Officer involving the Defendant's refusal to  
12 process the Complainant's grievance but not information relating to  
13 job performance and unjust termination, an issue not raised in the  
14 unfair labor practice charge.

15 II. ISSUE

16 Whether the School District violated Section 39-31-401(1)(5)  
17 MCA when they refused to process a grievance pursuant to the  
18 Complainant's request that such grievance be processed under  
19 application of ARM 2.21.8017 and 2.21.8018 as found in the Montana  
20 Operations Manual.

1 III. FINDINGS OF FACT<sup>1</sup>

2 1. On August 20, 1989, the Complainant was employed as a  
3 Secretary by the Defendant. At all times relevant to the facts in  
4 this case, the Complainant was a member of the Maintenance  
5 Employees of Valley County School District 1-1A.

6 2. The Union contract does not provide for a grievance  
7 procedure nor does it reference any law or regulation which  
8 provides for a grievance procedure. The agreement provides in  
9 part, at Section 7 (Attachment ULP charge):

10 "7.1 During its term, this agreement may  
11 be altered, changed, added to, deleted  
12 from, or modified only through voluntary,  
mutual consent of the parties in writing  
and signed amendment to this agreement."

13 3. On October 31, 1991, the Complainant met with and by  
14 request of the school principal. He informed her of some work  
15 performance problems and advised she would be evaluated in two  
16 weeks and again thereafter on two week intervals if necessary. He  
17 informed her that if her work performance did not improve she might  
18 be terminated. On November 15, 1991 the Claimant was suspended.

19 At a November 20, 1991, School Board meeting, the Principal  
20 recommended that the Complainant be terminated due to poor work  
21 performance. Ms. Murphy was provided an opportunity, though

22 \_\_\_\_\_  
23 <sup>1</sup> All proposed findings, conclusions and supporting  
24 arguments of the parties have been considered. To the extent that  
25 the proposed findings and conclusions submitted by the parties and  
26 the arguments made by them are in accordance with the findings,  
27 conclusions and views stated herein they have been accepted. To  
28 the extent they are inconsistent therewith, they have been  
rejected. Certain proposed findings and conclusions may have been  
omitted as not relevant or as not necessary to a proper  
determination of the material issues presented. To the extent that  
the testimony of the various witnesses is not in accord with the  
findings herein it is not credited.

1 allegedly surprised and unprepared, to discuss the matter or  
2 represent herself at that hearing. Her Union Representative, Mr.  
3 Zeller, did speak on her behalf and offered Board Members a copy of  
4 the Montana Operations Manual, Discipline Handling Policy #3-0130.  
5 Board members were unaware of the policy. Board members testifying  
6 at the present hearing indicated the policy was not agreed upon by  
7 the parties as part of the union contract. Both the Complainant  
8 and her Union Representative felt that the matter was handled in  
9 far to summary a manner to have provided due process for the  
10 Complainant.

11 4. After being discharged, the Complainant filed a grievance  
12 with the District. The Complainant contended her rights were  
13 violated because the School District had not followed established  
14 procedures under the support staff agreement and the Montana  
15 Operations Manual. The Complainant further contended that she was  
16 suspended and later terminated without proper notice and without an  
17 opportunity for hearing in violation of Policies #3-0125 and #3-  
18 0130 of the Montana Operations Manual.

19 In response, the District stated that the Sections of the  
20 Montana Operations Manual (MOM) referenced by the Complainant are  
21 not applicable to local governments or political subdivisions. The  
22 Complainant was a school district employee NOT a state employee  
23 covered by the MOM. The Defendant further indicated that the  
24 Complainant had been provided opportunity to present her case at  
25 the School Board meeting on November 20 and therefore had no legal  
26 basis upon which the Board could reopen the matter.

27 5. The Complainant contends that the failure to process her  
28 grievance constitutes an Unfair Labor Practice in violation of the

1 District's obligation to bargain in good faith, pursuant to Section  
2 39-31-401(1) and (5) MCA as well as a breach of the established  
3 past practices, policies and procedures of the District for  
4 settling disputes between District and its support staff employees.

5 6. The Complainant additionally contended the process used  
6 in her termination was contrary to established past practices,  
7 policies and procedures of the District. She feels the failure to  
8 follow past practice for settling disputes between the District and  
9 support staff violated her right to bargain through her  
10 representatives the conditions of her employment pursuant to  
11 Section 39-31-201, MCA.

12 7. During the Complainant's association with the Defendant,  
13 when problems arose concerning other matters including maternity  
14 leave and sick leave, the Complainant was advised to refer to the  
15 Montana Employee Handbook (Exhibit 3). In a note attached to that  
16 handbook from the School District Clerk/Business Manager's  
17 secretary, Eleanor, she indicated:

18 "Sheila, your principal should have one of these - but you can  
19 keep this one in your office - Mr. Gamas says we only use this  
20 as a guideline, and individual cases may be different - talk  
to him if you want more info. Eleanor"

21 9. Mr. Gamas, the District's business clerk and a person  
22 often consulted stated that when problems arose about which he was  
23 unsure, he would refer to the Handbook of State and Federal  
24 Employee Laws For Montana Public Employees.

25 10. Both parties during the course of their exchange of  
26 information and discussion regarding employment problems as they  
27 arose, would refer to the Montana Operations Manual, the Employee  
28 Handbook, and the Handbook of State and Federal Employees. Neither

1 party particularly raised or asked that their reference book would  
2 be used or included as a contract term.

3 V. CONCLUSION OF LAW

4 1. The contract does not include a discipline or grievance  
5 procedure. While both parties indicated that they followed a book  
6 as a "reference", neither party included these reference books as  
7 a contract term. The clear unmistakable contract language  
8 indicates that the agreement may only be changed through voluntary  
9 mutual consent of the parties in written and signed amendment to  
10 the agreement. While the Complainant's position is supported in  
11 part by the District Clerk\Business Manager's secretary advising  
12 her that she should refer to the Employee Handbook relating to  
13 problems, this does not make the grievance procedure included in  
14 the Montana Operations Manual a contract term. The clear  
15 unmistakable language of the contract specifically points to the  
16 responsibility of the parties to include in their contract that  
17 language which they wish to have a part thereof.

18 2. The duty of this Hearing Examiner is to construe the  
19 contract and applicable law as found. The Hearings Examiner must  
20 examine and declare the substance of the agreement or statute and  
21 may not insert what has been omitted. State ex rel Palmer v. Hart,  
22 201 Mont. at 530 and 533. See also State ex rel. Stewart v. Casne,  
23 172 Mont. 302, 306-307, 564 P.2d 983 (1977), wherein the Court  
24 likewise asserted that "Where the language of a statute is plain,  
25 unambiguous, direct and certain, the statute speaks for itself and  
26 there is nothing left for the Court to construe." (Citations  
27 omitted.) The Court acknowledged its function to be "simply to  
28 declare what in terms or substance is contained in the statute and

1 neither insert what has been omitted nor omit what has been  
2 inserted." Id. at 306. See also Gaub v. Milbank Insurance  
3 Company, 220 Mont. 424, 427, 715 P.2d 443 (1986), where the Court  
4 declared "In search for plain meaning, 'the language used must be  
5 reasonably and logically interpreted, given words their usual and  
6 ordinary meaning'". The same standard applies to the presiding  
7 authority construing the contract in this case. The use of a  
8 reference book or books or manuals relating to other issues does  
9 not give rise the inclusion of a never used or referenced grievance  
10 process in ANY reference document.

11 The contract did not include a grievance procedure and the  
12 parties did not particularly, in conformance with contract terms,  
13 agree to include the State grievance procedure. The Complainant  
14 cannot at this point have this Hearing Officer insert into the  
15 contract something that was not by the parties placed in the  
16 contract. The past practice which the Complainant uses as the  
17 basis of her claim does not support a finding in her favor. The  
18 past practice was that each party used their own reference material  
19 and or at times shared reference to the guideline used. Neither  
20 party agreed to inclusion of a manual as a contract term. This  
21 Hearing Officer will not include a the Montana Operations Manual as  
22 a contract term.

23 Both parties agreed that there had never been an instance  
24 where a grievance was filed or a determination made in which either  
25 the Montana Operations Manual, the Employee Handbook or the  
26 handbook of State and Federal Employee Laws for Montana was used.  
27 While the record shows that the Complainant was provided a hearing  
28 related to the her dismissal which under application of Section 20-

1 3-210 MCA, that is not relevant to this Unfair Labor Practice  
2 Charge.

3 VI. RECOMMENDED ORDER

4 IT IS ORDERED that Unfair Labor Practice Charge No. 16-93 be  
5 dismissed.

6 Dated this 27 day of April, 1993.

7  
8   
9 JOSEPH V. MARONICK  
Hearing Examiner

10 NOTICE:  
11 Under application of Board Rule ARM 24.25.107(2), the above  
12 RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless  
13 written exceptions are filed within twenty (20) days after service  
14 of these FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER  
15 upon the parties.

16 \* \* \* \* \*

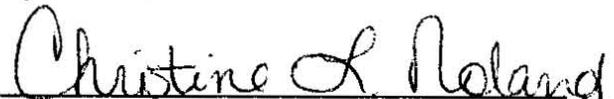
17 CERTIFICATE OF MAILING

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

22 David L. Erving  
23 Attorney at Law  
24 Drawer B  
25 110 5th Street South  
26 Glasgow, MT 59230

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

DATED this 27<sup>th</sup> day of April, 1993.



SP321.10N