

1 STATE OF MONTANA  
2 BEFORE THE BOARD OF PERSONNEL APPEALS

3  
4 IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE 14-93:

5  
6 FLORENCE-CARLTON CLASSIFIED )  
7 EMPLOYEES ASSOCIATION, NEA/NEA, )

8  
9 Complainant, )

10  
11 - vs - )

12 ) FINAL ORDER

13 FLORENCE-CARLTON HIGH SCHOOL )  
14 AND ELEMENTARY DISTRICT NO. 15-6, )  
15 RAVALLI COUNTY, MONTANA, )

16 )  
17 Defendant. )

18  
19 \* \* \* \* \*

20  
21 *The Findings of Fact; Conclusions of Law; and Recommended Order were issued by*  
22 *James L. Keil, Hearing Examiner, on September 15, 1993.*

23 *Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order*  
24 *was filed by Don K. Klepper, Ph.D., on behalf of the Defendant/Complainant on October*  
25 *8, 1993.*

26 *Oral arguments were scheduled before the Board of Personnel Appeals on*  
27 *Wednesday, November 17, 1993.*

28 *After reviewing the record and considering the briefs and oral arguments, the Board*  
29 *concludes as follows:*

30 1. *The Hearings Examiner's findings of fact are supported by substantial*  
31 *evidence and are, therefore, approved and adopted.*

1           2.     *The phrase "changing her hours while in the District's employ" found at line*  
2 *19, on page 9 of conclusion of law #5 is not legally correct and is hereby revoked and*  
3 *vacated. In substitution of the aforementioned phrase, the Board substitutes the following*  
4 *language: "transfer of her bargaining unit work to a non-bargaining unit position" which*  
5 *the Board concludes is both legally correct and supported by substantial evidence.*

6           3.     *Subject to the above amendment, the Hearing Examiner's conclusions of law*  
7 *are legally correct and are, therefore, approved and adopted.*

8           4.     *The phrase "changes in hours of work by paying her a sum of money in the*  
9 *form of wages equal to the difference of hours usually worked prior to the changes in*  
10 *hours and after such changes were enacted" commencing at line 6 of page 11 of the*  
11 *second paragraph of the recommended order is hereby deleted. In its place the Board*  
12 *substitutes the phrase "transfer of bargaining unit work to a non-bargaining unit position,*  
13 *by paying her a sum of money in the form of wages equal to the difference of hours*  
14 *usually worked prior to the aforementioned transfer of duties and after such transfer was*  
15 *enacted."*

16           *Based upon the foregoing conclusions the Board orders as follows:*

17           *IT IS ORDERED that the Defendant's Exceptions to the Findings of Fact; Conclusions*  
18 *of Law; and Recommended Order are hereby denied.*

19           *IT IS FURTHER ORDERED that this Board adopts the Findings of Fact; Conclusions*  
20 *of Law; and Recommended Order as herein amended as the Final Order of this Board.*

1 DATED this 1<sup>st</sup> day of December, 1993.

2 BOARD OF PERSONNEL APPEALS

3  
4 By Willis M. McKeon  
5 WILLIS M. MCKEON  
6 CHAIRMAN  
7

8 Board members Henry and Schneider concur.

9  
10 Board members Talcott dissented.

11 \* \* \* \* \*

12  
13  
14  
15 NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be  
16 obtained by filing a petition for Judicial Review with the District Court no later than thirty  
17 (30) days from the service of this Order. Judicial Review is pursuant to the provisions of  
18 Section 2-4-701, et seq., MCA.  
19

20 \* \* \* \* \*

21  
22 CERTIFICATE OF MAILING

23  
24 I, Jennifer Jacobson, do certify that a true and correct copy of  
25 this document was mailed to the following on the 1<sup>st</sup> day of December, 1993:

26  
27 DR. ERNEST JEAN, SUPERINTENDENT  
28 Florence-Carlton High School and  
29 Elementary School Districts No. 15-6  
30 5602 Old Hiway 93  
31 Florence, MT 59833

32  
33 KARL J. ENGLUND  
34 Attorney for Complainant  
35 401 North Washington Street  
36 P.O. Box 8142  
37 Missoula, MT 59807  
38

39 \* \* \* \* \*

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

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 14-93:

FLORENCE-CARLTON CLASSIFIED )  
EMPLOYEES ASSOCIATION, NEA/MEA, )  
Complainant, )  
v. )  
FLORENCE-CARLTON HIGH SCHOOL )  
AND ELEMENTARY DISTRICT NO. 15-6, )  
RAVALLI COUNTY, MONTANA, )  
Defendant. )

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND  
RECOMMENDED ORDER

**I. INTRODUCTION**

The formal hearing in the above-referenced matter was conducted on March 10, 1993, in Helena, Montana. Following submission of initial and reply post-hearing briefs, the matter was considered submitted for decision effective April 20, 1993. The hearing was conducted under authority of § 39-71-406, MCA, and in accordance with the Montana Administrative Procedures Act, Title 2, Chapter 4, MCA.

Complainant, Florence-Carlton Classified Employees Association, NEA/MEA (hereinafter referred to as "Association"), was represented by counsel Karl Englund. Defendant, Florence-Carlton High School and Elementary School District No. 15-6 (hereinafter referred to as "Defendant"), was represented by Don Klepper, Ph.D. Sworn testimony was provided by Sarah Perry, Food Service Worker; Sandy Bushek, Uniserve Director, MEA, Missoula Office; and Dr. Earnest Jean, Superintendent, Florence-Carlton School District.

1 Association's exhibits (Exh.) 2 through 8 and Defendant's  
2 Exhs. A through D were admitted into the record by stipulation.  
3 Association's Exh. 1 was withdrawn.

#### 4 **II. ISSUE**

5 The issue to be decided in this matter is whether Defendant  
6 violated § 39-31-401(1) and (5), Montana Code Annotated (MCA), of  
7 the Collective Bargaining for Public Employees Act, in transferring  
8 certain work previously performed by bargaining unit member Sarah  
9 Perry to a non-union supervisor, thus reducing the number of hours  
10 worked.

#### 11 **III. FINDINGS OF FACT<sup>1</sup>**

12 1. The defendant and the association have been parties to a  
13 series of collective bargaining agreements covering all classified  
14 employees of the district, excluding supervisors, Secretary to the  
15 superintendent, and temporary, casual and substitute employees.  
16 Included in the unit are lunchroom helpers and food service  
17 employees. (Testimony of Ms. Bushek; Exh. 2--p. 2)

18 2. The most recent collective bargaining agreement covering  
19 classified employees of Defendant's district covers the term July  
20 1, 1992, to June 30, 1994. The agreement was concluded on July 23,  
21 1992, but the contract was not signed until December of 1992.  
22 (Testimony of Ms. Bushek; Exh. 2)

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23  
24 <sup>1</sup>All proposed findings, conclusions and supporting arguments  
25 of the parties have been considered. To the extent that the  
26 proposed findings and conclusions submitted by the parties, and the  
27 arguments made by them, are in accordance with the findings,  
28 conclusions and views stated herein, they have been accepted, and  
to 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 determina-  
tion of the material issues presented. To the extent that the  
testimony of various witnesses is not in accord with the findings  
herein, it is not credited.

1           3. Defendant provides a hot lunch program for which it  
2 contracts with Missoula School District No. 1. The lunches are  
3 prepared at the University of Montana (U of M) and must daily be  
4 transported from the U of M campus to Defendant schools. (Testimony  
5 of Dr. Jean)

6           4. It is the responsibility of the defendant to administer  
7 and supervise the hot lunch program to ensure compliance with  
8 Federal and state guidelines. (Testimony of Dr. Jean)

9           5. Prior to the 1992-1993 school year, the hot lunch program  
10 was under the general supervision of the District Clerk. (Testimony  
11 of Dr. Jean)

12           6. Sarah Perry (hereinafter referred to as "Perry") was  
13 hired by Defendant in December 1985 as a Food Service Worker/Driver  
14 (FSW/D), a position included in the classified employee bargaining  
15 unit. She was one of two FSW/Ds working for Defendant. Her duties  
16 at that time included driving Defendant's van to the U of M campus  
17 to pick up the food, monitoring the food quantity and quality (with  
18 the duty and right of refusal if the food was not the proper  
19 temperature and/or portions), set-up, serving and clean-up. She  
20 initially worked 5½ hours per day, 5 days per week (27½ hours per  
21 week). (Testimony of Perry and Ms. Bushek)

22           7. Prior to working for Defendant, Perry was employed as a  
23 food service worker for a state hospital in California where she  
24 was a lead worker and substituted in her supervisor's absence.  
25 (Testimony of Perry)

26           8. In 1987, Perry's hours were increased to 6 hours per day  
27 (30 hours per week) when she began doing more clean-up work.  
28 (Testimony of Perry)

1 9. In 1989, Perry's hours were increased to 6½ hours per day  
2 (32½ hours per week) when the other FSW/D was laid off. She also  
3 was assigned the addition duties of ordering and picking up à la  
4 carte supplies, running errands for the school office, and  
5 orienting new food service workers. (Testimony of Perry)

6 10. In July of 1992, Defendant reorganized the hot lunch  
7 program in order to gain more control and accountability, the need  
8 for which was also voiced by some food service employees who felt  
9 the need for an on-site supervisor. (Testimony of Dr. Jean) To  
10 this end, the position of Hot Lunch Supervisor/Driver was created.  
11 The position vacancy was posted July 29, 1992, and read, as  
12 follows:

13 The Board of Trustees has opened a position for hot lunch  
14 supervisor/driver. This may mean, depending upon who is  
15 hired for this position, a shift in your duties and  
responsibilities. Enclosed is the advertisement for that  
position.

16 The advertisement read, in pertinent part, as follows:

17 HOT LUNCH SUPERVISOR-SATELLITE KITCHEN PROGRAM

18 Duties include: Driving lunch van, managing hot lunch  
19 program, supervising five employees. Applicant must have  
20 ability to lift 50 lbs and move heavy carts regularly.  
\$6.00 hr/minimum, 7 hours, 182-day year, August-June.  
Deadline for application is August 17, 1992.

21 (Exhs. 3--p. 2 and 4--pp. 1-2) In addition to the posted  
22 qualifications and duties, the incumbent is required to manage the  
23 financial matters of the hot lunch program, including preparation  
24 of the overall program budget, to evaluate employees and to make  
25 recommendations with regard to hiring and termination. (Testimony  
26 of Dr. Jean)

27 11. Perry's driving, quality control, supply ordering and  
28 lead worker/supervision duties were removed from her and

1 transferred to the new Hot Lunch Supervisor/Driver position.  
2 (Testimony of Dr. Jean and Perry) As a result, as of September 8,  
3 1992, Perry's work schedule was reduced to 4 hours per day (20  
4 hours per week). (Testimony of Perry)

5 12. The position of Supervisor/Driver is not included in the  
6 bargaining unit. (Testimony of Dr. Jean and Ms. Bushek)

7 13. The association was not consulted or advised in any way  
8 concerning the creation of the position of Hot Lunch Supervisor/  
9 Driver, nor was it advised of the transfer of bargaining unit work  
10 to the non-bargaining unit position. (Testimony of Ms. Bushek and  
11 Dr. Jean)

12 14. Perry applied for the position of Hot Lunch Supervisor/  
13 Driver but was not selected for an interview. (Testimony of Perry)  
14 It was the determination of Defendant that Perry was not qualified  
15 for the Hot Lunch Supervisor/Driver position. (Testimony of Dr.  
16 Jean)

17 15. As of March 10, 1993, the Hot Lunch Supervisor/Driver  
18 position was held by Mr. Tom Dreyer, who possesses a Bachelor of  
19 Science degree in Hotel/Restaurant Management and had 2 years  
20 practical experience. (Testimony of Dr. Jean; Exh. 5--p. 2)

21 16. Around the end of September or the first part of October  
22 1992, Perry's hours were further reduced to 3½ hours per day (17½  
23 hours per week). (Testimony of Perry)

24 17. Defendant offered and Perry accepted a temporary part-  
25 time assignment as a Janitor, beginning in October of 1992, in  
26 addition to her FSW/D position. As a janitor, she worked one 8-  
27 hour Monday afternoon-evening shift each week. Her combined hours  
28 then totalled 25½ per week. (Testimony of Perry) The temporary

1 part-time janitor assignment was offered in part to assuage Perry  
2 for the loss of hours. (Testimony of Dr. Jean) Perry was not  
3 interested in a full-time position due to family considerations.  
4 (Testimony of Perry)

5 18. Effective February 1, 1993, Perry's FSW/D hours were  
6 reduced again to 2½ hours per week and she was relieved of her  
7 janitorial duties, the effect of which was to reduce her work hours  
8 to 12½ per week. The Defendant's fiscal situation was cited as the  
9 reason for this change. (Testimony of Perry; Exh. 7--pp. 1-2)

10 19. Defendant never notified the association its decisions to  
11 increase or reduce Perry's work hours. (Testimony of Ms. Bushek and  
12 Dr. Jean)

13 20. There is no provision in the bargaining agreement  
14 contract which prohibits the Defendant from reducing the number of  
15 hours worked by a classified employee. (Exh. 2) Perry was never  
16 led to believe she was guaranteed a minimum number of hours of  
17 work. (Testimony of Perry) The number of work hours of food  
18 service employees is contingent on the student enrollment, the  
19 actual number of which cannot be accurately determined until the  
20 first day of each school year. (Testimony of Dr. Jean)

21 21. As a result of Perry's loss of hours, Defendant reduced  
22 its share of contribution to Perry's employment health policy from  
23 \$145.00 per month to \$0 per month in September of 1992 and--  
24 following the filing by Perry of a grievance--in October of 1992  
25 insurance contributions were reinstated at the prorated amount of  
26 \$92.80 per month. (Testimony of Perry; Exh. 8) Defendant continued  
27 premium contributions despite the fact Perry did not work enough  
28 hours to qualify. (Testimony of Perry)

1 22. Perry served as a recruiter for the association, served  
2 as Membership Chair and was a negotiating team member for the 1992-  
3 1994 contract. (Testimony of Perry)

4 23. Since 1988, Perry has "almost yearly" filed grievances  
5 against Defendant through the association or the association had to  
6 intervene in other ways on behalf of Perry. (Testimony of Ms.  
7 Bushek)

8 24. The Classified Personnel Salary Schedule has not been  
9 modified to reflect the change in Perry's job duties. It still  
10 reads "Food Service/Drivers." (Exh. 2--p. 18)

11 **IV. CONCLUSIONS OF LAW**

12 1. The Department of Labor and Industry has jurisdiction  
13 over this matter pursuant to § 39-31-405, Montana Code Annotated  
14 (MCA).

15 2. The association charges that Defendant violated § 39-31-  
16 401(1) and (5), MCA. That statute, in pertinent part, reads as  
17 follows:

18 It is an unfair labor practice for a public employer to:

19 (1) interfere with, restrain, or coerce employees in the  
20 exercise of the rights guaranteed in 39-31-201;

21 . . . ; or

22 (5) refuse to bargain collectively in good faith with an  
23 exclusive representative.

24 Section 39-31-201, MCA, as referred to in Subparagraph (1) above,  
25 reads as follows:

26 Public employees shall have and shall be protected in the  
27 exercise of the right of self-organization, to form,  
28 join, or assist any labor organization, to bargain  
collectively through representatives of their own  
choosing on questions of wages, hours, fringe benefits,  
and other conditions of employment, and to engage in

1 other concerted activities for the purpose of collective  
2 bargaining or other mutual aid or protection free from  
interference, restraint, or coercion.

3 3. The association argues that the defendant's decision to  
4 transfer work from Perry to the new supervisory position affected  
5 her hours of employment and other terms and conditions of her  
6 employment, specifically gross wages and employer insurance  
7 contributions, and, further, interfered with her free exercise of  
8 employee rights in retaliation for her union membership and  
9 activities. Defendant responds that the absorption of many of  
10 Perry's duties into the new supervisory position was required by  
11 federal codes to provide for fiscal and organizational management  
12 and accountability in the inspection of food being distributed to  
13 students; and further, that Perry has no property interest in her  
14 FSW/D position, and therefore could be terminated at will since  
15 there was no contractually specified term of employment.

16 4. The Montana Supreme Court has approved the practice of  
17 the Board of Personnel Appeals in using federal court and National  
18 Labor Relations Board (NLRB) precedence as guidelines interpreting  
19 the Montana Collective Bargaining for Public Employees Act as the  
20 State Act is so similar to the Federal Labor Management Relations  
21 Act. State ex rel Board of Personnel Appeals v. District Court and  
22 Teamsters Local No. 445 v. State ex rel Board of Personnel Appeals  
23 v. District Court, 183 Mont 223, 598 P.2d 1117, 103 LRRM 2297  
24 (1979); Teamsters Local No. 45 v. State ex rel Board of Personnel  
25 Appeals, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981); City  
26 of Great Falls v. Young (III), 686 P.2d 185, 199 LRRM 2682 (1984).  
27 It is among such precedents that is found that the basic,  
28 fundamental purpose of labor relations is the good faith

1 negotiation of the mandatory subjects of bargaining--wages, hours,  
2 and other terms and conditions of employment. Unilateral changes  
3 by an employer during the course of a collective bargaining  
4 relationship concerning mandatory subject matter of bargaining is  
5 considered a violation of law. NLRB v. Katz, 369 U.S. 736, 50 LRRM  
6 2177 (1962). The U.S. Supreme Court has further held that,

7       The particular hours of the day and the particular days  
8       of the week during which employees may be required to  
9       work are subjects well within the realm of wages, **hours**,  
and other terms and conditions of employment about which  
employers and unions **must** bargain.

10 (Emphasis added.) Meat Cutters v. Jewel Tea Co., 381 US 676, 691,  
11 59 LRRM 2376 (1965). Even unilaterally changing hours for a one-  
12 week period is considered a denial of a union's opportunity to  
13 bargain. Florida Steel Corp., 601 F2d 125, 101 LRRM 2671 (CA 4,  
14 1979). This is also true where an employer unilaterally changes  
15 the hours of work to the advantage of the employee(s). American Oil  
16 Co., 602 F2d 184, 101 LRRM 2981 (CA 8, 1979).

17       5. Defendant's argument with regard to Perry's status as an  
18 "at will" employee is persuasive although misplaced. While Perry  
19 may very well be subject to termination, changing her hours while  
20 in the district's employ remains the domain of collective  
21 bargaining. In consideration of cited precedents, it can only be  
22 concluded that the historical changes in Perry's hours denied the  
23 association's opportunity and right to bargain--when hours were  
24 being added, and, especially, when they were being taken away.

25       The association does not argue against Defendant's right to  
26 create a supervisory position to oversee and manage the hot lunch  
27 program, but it does take exception to the transfer of Perry's  
28 duties to that position, which is excluded from the unit pursuant

1 to the bargaining agreement. When the impact of a change in  
2 bargaining unit work is significant, it constitutes a change in the  
3 terms of employment and, thus, is subject to collective bargaining.  
4 It is concluded the change in Perry's duties was significant as  
5 evidenced by the major reduction in her work schedule--4 hours per  
6 day. Based on the above discussion, the conclusion is that  
7 Defendant violated the provisions of § 39-31-401(5), MCA.

8 6. The association also charges that Defendant attempted to  
9 interfere, restrain and/or coerce Perry in the exercise of her  
10 rights. Section 39-31-401(1), MCA. In that charge it is alleged  
11 the defendant's reduction of Perry's hours and benefits was a  
12 calculated move to send a message to other union members that any  
13 attempt to enforce their rights under the bargaining agreement  
14 would result in similar punishment. It cites Perry's active  
15 involvement in the union as a member, officer and negotiator, and  
16 her frequent utilization of the grievance procedure and other union  
17 interventions on her behalf. The facts in the record, however, do  
18 not support this argument.

19 Perry first sought union intervention in 1988, yet in 1989 her  
20 hours were increased from 6 to 6½ per day. She was allowed to  
21 continue this hour work schedule until the beginning of the 1992-  
22 1993 school year when the position of Hot Lunch Supervisor/Driver  
23 was created and filled. The impact this had on Perry's wages and  
24 benefits was recognized by Defendant which prompted the offer to  
25 her of the temporary janitorial position. It is concluded from  
26 this that there was no violation of § 39-31-401(1), MCA.

1 **V. RECOMMENDED ORDER**

2 1. IT IS ORDERED that the defendant cease and desist from  
3 refusing or failing to bargain collectively in good faith with the  
4 association as to hours of work.

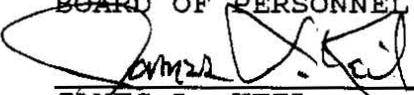
5 2. IT IS FURTHER ORDERED that the defendant make whole Sarah  
6 Perry who was affected by the unilateral changes in hours of work  
7 by paying her a sum of money in the form of wages equal to the  
8 difference of hours usually worked prior to the changes in hours  
9 and after such changes were enacted. The calculation of such back-  
10 pay will be performed in cooperation with and in agreement with the  
11 association. If no agreement on the amount of back-pay award can  
12 be reached between the parties within thirty (30) days of this  
13 Order, a hearing will be conducted by the Board of Personnel  
14 Appeals to determine such amount.

15 **VI. NOTICE**

16 In accordance with Board's Rule ARM 24.25.107(2), the above  
17 RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless  
18 written exceptions are filed within twenty (20) days after service  
19 of this Order. The notice of appeal shall consist of a written  
20 appeal of the decision of the hearing officer, must set forth the  
21 specific errors of the hearing officer and the issues to be raised  
22 on appeal. Notice of appeal is to be mailed to: Administrator,  
23 Employment Relations Division, Department of Labor and Industry,  
24 P.O. Box 1728, Helena, MT 59624-1728.

25 Dated this 15<sup>th</sup> day of September, 1993.

26  
27 BOARD OF PERSONNEL APPEALS

28   
JAMES L. KEIL  
Hearing Examiner

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the attached document(s) were, this day, served upon the following individual(s) by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Karl J. Englund  
Attorney at Law  
401 N. Washington  
Missoula, MT 59802

Don Klepper  
THE KLEPPER COMPANY  
P.O. Box 4152  
Missoula, MT 59807

DATED this 15<sup>th</sup> day of September, 1993.

Christine O. Toland