

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 23-93:

WOLF POINT EDUCATION)
ASSOCIATION, MEA, NEA,)
Complainant,)
-vs-)
WOLF POINT PUBLIC SCHOOL)
DISTRICTS NO. 45 AND 45A,)
Defendant.)

FINDING OF FACTS, CONCLUSIONS
OF LAW AND RECOMMENDED
ORDER

* * * * *

I. INTRODUCTION

This matter came on for hearing before Gordon D. Bruce, Hearing Examiner, on April 28, 1994 at the hour of 4:00 o'clock p.m. The hearing was held in the Conference room of Sherman Motor Inn. The time and place of the hearing were previously agreed to between the parties. The Wolf Point Education Association, MEA, NEA, (Complainant) was represented by its counsel, John K. Addy, Esq. Wolf Point Public School Districts No. 45 and 45A (Defendant) was represented by Mr. Rick D'Hooge, Labor Relations Director. Parties filed their final post-hearing briefs in July 1994.

II. ISSUE

Did the Wolf Point School District violate Section 39-31-305(1) and (2), MCA, constituting an unfair labor practice as set forth in Section 39-31-401(5), MCA, as contended by the Complainant in this matter.

Essentially, the Complainant believes that if there is a long-standing practice which is clearly understood between the parties, the Defendant cannot impose a unilateral change in working

1 conditions upon the teachers, as it allegedly did here, unless they
2 at least meet and confer about the proposed change.

3 In juxtaposition, the Defendant essentially argues that unless
4 a working condition is expressly set forth in the Collective
5 Bargaining Agreement, they had the right to change work assignments
6 by 10 minutes, to increase class schedules by 10 minutes and/or to
7 increase the hours of instruction by 10 minutes under the
8 "management rights" clause.

9 **III. BACKGROUND FACTS (Pleading & Charges in part)**

10 On December 8, 1993, Defendant filed its "Amended Unfair Labor
11 Practice Charge" as follows in part:

12 1. The Wolf Point Education Association, MEA/NEA is the
13 exclusive representative of teachers employed by the Wolf
14 Point Public Schools.

15 2. Since the Defendant first instituted the unilateral
16 changes subject to this dispute, the parties have bargained a
17 successor agreement to the 1990-92 Contract. This successor
18 agreement does not resolve the dispute between the Complainant
19 and Defendant with regard to the duty-free lunch period as
20 that issue is set forth below in this matter. (Exhibits A and
21 B)

22 3. On September 16, 1992, the Complainant's teachers at
23 Northside Elementary School received a verbal directive from
24 Principal, Gordon Friberg assigning them student supervision
25 duty during duty-free lunch period. The duty was to begin on
26 September 21, 1992.

27 4. The directive assigned Complainant teachers at Northside
28 Elementary to their classrooms during the lunch period for the

1 purpose of student supervision. Prior to defendant's
2 directive, this lunch period had been duty-free.

3 5. On September 18, 1992, Complainant notified Defendant of
4 the unilateral change and demanded to bargain over the change.

5 (Exhibit C)

6 6. On September 21, 1992, Defendant admitted the change was
7 a subject of collective bargaining, but again ordered
8 Complainant to comply with the directive. (Exhibit D)

9 7. . . .

10 8. . . .

11 9. Between the conclusion of the 1992-93 school year and the
12 commencement of the 1993-94 school year, Defendant amended the
13 assignments to Complainant of student supervision during
14 complainant's duty-free lunch period. This assignment of
15 supervision responsibilities during what had theretofore been
16 a duty-free lunch period was the basis of the original
17 complaint filed herein. The new assignment of student
18 supervision responsibilities during the 1993-94 school year
19 was even more onerous than the 1992-93 school roster.

20 (Exhibit E)

21 10. On August 24, 1993, Complainant notified Defendant
22 formally and in writing that this unilateral change in working
23 conditions was not accepted and requested that Defendant
24 submit the issue to collective bargaining. (Exhibit F)

25 11. . . .

26 12. . . .

27 (See Exhibit J-23)

28

1 Additionally, although the Complainant processed the complaint
2 through the grievance procedure, the grievance procedure contains
3 no election of remedies language, consequently a ULP was formally
4 filed .

5 (Exhibit J-8)

6 The record also reflects the Complainant waived any claim to
7 back pay at the outset of the hearing. They simply seek a
8 determination that the administration is required to meet and
9 confer with them prior to instituting a change in working
10 conditions, and that an Order should issue prohibiting any changes
11 in the long-standing practice of a duty-free lunch period until the
12 administration does meet and confer with the teachers.

13 **IV. FINDINGS OF FACT¹**

14 1. The School District consists of three major buildings;
15 the Southside School, consisting of several kindergarten, first,
16 second and third grade classes; the high school; and the Northside
17 School consisting of several classes of fourth, fifth and sixth
18 grades.

19 (Testimony Principal Friberg)

20 2. Prior to September 16, 1992, the Northside School
21 teachers, except for those on lunch duty, were all dismissed from
22 their classrooms for the lunch period. The students were left in
23

24 ¹All 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 their classrooms unsupervised and the Principal would patrol the
2 hallway and dismiss the classes on a rotation basis.

3 (Testimony Principal Friberg)

4 3. Due to concerns for safety of the students, Principal of
5 Northside School, Mr. Friberg, on September 16, 1992, gave verbal
6 directive to the Complainant, assigning teachers at Northside
7 School to their classrooms during the lunch period for the purpose
8 of student supervision, thereby altering the time for their duty-
9 free lunch period. (Testimony of Teachers Sue Patch and Patricia
10 Taovs and Richard Desch-President Wolf Point Education Association
11 and Mr. Friberg)

12 4. Principal Friberg was concerned about maintaining
13 appropriate supervision of some two-hundred forty-eight elementary
14 students during the lunch hour and determined changes in the
15 teachers' duty-free lunch time was necessary to accommodate
16 supervision needs. In denying Complainants' grievance as a result
17 of the changes, teachers were advised in part:

18 "It appears that the union has lost sight of the fact
19 that we are all here for the children. Without the
20 children, we have no job to do. It is for the safety,
21 guidance and instruction of the students that we must
22 maintain supervision of the ... elementary students
23 during the lunch hour."

24 (Exhibit D-4)

25 5. The subject of the change in the teachers' duty free
26 lunch was not discussed in 1992 during any **collective bargaining**
27 **negotiations** between the parties prior to the change made by the
28 Principal. There was some discussion with staff and Principal

1 Friberg concerning the duty free lunch, but the exact extent of
2 those conversations are unclear in the record. It is clear,
3 however, that there were discussions concerning the cost of
4 additional tables for the lunchroom costing \$2,300.00 each.

5 6. In all events, by letter dated September 21, 1992, the
6 Wolf Point Schools District Superintendent informed Richard Desch,
7 President of the Association (Complainant) that Northside teachers
8 would follow Principal Friberg's directive regarding the matter
9 until resolution of the issue at the bargaining table.

10 (Exhibit C-3) (Testimony Friberg)

11 7. Subsequently, a new duty roster was instituted by weekly
12 bulletin on September 28 - October 2, 1992, indicating new duty and
13 in-room supervision would start on Monday, September 28, 1992.
14 The District wrote to the teachers, stating that they would "be
15 looking forward to your proposals regarding teacher responsibility
16 for student supervision" during the lunch hour.

17 (Exhibit C-3)

18 8. The credible testimony of Richard Desch revealed that no
19 such proposals were presented to the school board bargaining team
20 by the Complainant because they believed past practice indicated
21 that teachers had a duty-free lunch. And, the Defendant brought no
22 proposals forward because the collective bargaining agreement did
23 not contain specific language regarding a duty-free lunch period;
24 therefore, they felt administration was free, under the management
25 rights clause of the collective bargaining agreement between the
26 parties, to make whatever changes they wished.

27 9. The record also reflects that Defendant set forth
28 additional changes in working conditions between the 1992-93 school

1 year and the 1993-94 school year which were described as follows by
2 Susan K. Patch, Northside WPEA Building Representative by letter
3 dated August 24, 1993, to Principal Friberg:

4 "Even though you "discussed" the new lunch schedule with
5 us, it was imposed on us by you as administrator. It was
6 not mutually agreed on nor did it involve teacher
7 discussion, suggestions, or input. As was pointed out to
8 you at the staff meeting on August 23, 1993, you **again**
9 have changed our working conditions without discussing it
10 with us and that we do not agree with what has been done.
11 Not only have you changed our working conditions, you
12 have shortened our 45 minute (11:30 a.m. - 12:15 p.m)
13 lunch period to 35 minutes.

14 We all agree that a schedule of some sort must be in
15 place and that agreement does not mean acceptance nor
16 approval of what has been done. The ULP still stands and
17 will now be amended to include this year's changing of
18 our working conditions again without our input or
19 approval."

20 (Exhibit C-5) (Emphasis added)

21 10. The before mentioned duty-free lunch period was set forth
22 in writing in the policy handbook that the District gave to the
23 teachers at the beginning of the 1992-93 school year. It was also
24 contained in the handbook prior to the beginning of the 1992-93
25 school year. When the teachers returned from the summer 1993
26 break, the handbooks had been changed with a red "x" through the
27 paragraph referencing duty-free lunch.

28 (Testimony Ms. Patch)

1 11. Those changes made by Defendant in the 1993-94 school
2 year actually decreased the number of minutes individuals were
3 assigned duties. In 1992-93 the average teacher had 2325 minutes
4 of duties. In 1993-94 the average teacher had 1685 minutes of
5 duties.

6 (Testimony Principal Friberg)

7 12. Prior to September 16, 1992, there were changes in the
8 lunch periods and duty hour day of the teachers. The record does
9 not reflect a substantial list of unilateral changes made by
10 management prior to September 92, but certain incidents of
11 unequivocal changes were made without vote or approval of the
12 teachers. Nevertheless, informal conversations with the teachers
13 were undertaken prior to the final decisions made by management,
14 albeit Defendant did not necessarily follow the teachers'
15 recommendations. Certain changes were made by management as
16 follow:

17 a) At the Northside School in approximately the 1987-88
18 school year, the District made changes to the work
19 schedule to accommodate an early out on Friday's
20 schedule.

21 b) Some years ago, the high school changed from a six
22 period day to a seven period day and from a split lunch
23 period to one lunch period.

24 c) Approximately three years ago the District added a
25 "short teacher" to the noon schedule. Consequently, this
26 decreased the number of duty-free lunch periods the
27 teachers at the Northside School had in a school year.

28 (Testimony Michael Preyer, Principal)

1 d) In approximately 1980, duty free lunch time was
2 reduced by the District from 1 hour to 45 minutes, which
3 it remained until unilaterally reduced to 35 minutes by
4 Defendant. There is nothing in the record indicating the
5 type of informal conversations between parties that may
6 have preceded the change in 1980, but Teacher Susan
7 Patch's credible cross examination testimony revealed
8 that lunch hours had never before been discussed in
9 formal negotiations. (Testimony Susan Patch)

10 e) Patricia Toavs, who had taught at Northside school
11 for 11-12 years was not aware the duty free lunch issue
12 had ever been presented as a "change" for discussion in
13 contract negotiations.

14 13. Clearly, the 1990-92 Collective Bargaining Agreement
15 states that the "Board" (Defendant) shall retain without limitation
16 all powers, rights, authorities, duties and responsibilities
17 represented by law to establish school policy of operation,
18 including the right to determine work assignments under Article
19 5.1, Section B. Section C of the Article sets forth that the
20 School District has the right to establish class schedules and
21 hours of instruction.

22 (Exhibit J-23 "A")

23 14. Article 3 contains the definition of "meet and confer" as
24 pertains to the 1990-92 Negotiated Agreement which reads as
25 follows:

26 Meet and confer means the exchange of views and concerns
27 between the School District and the Exclusive
28

1 Representative. (Meet and confer items will not appear
2 in the text of the Master Agreement.)

3 (See "A" above)

4 **V. CONCLUSIONS OF LAW**

5 1. The Montana Supreme Court has approved the practice of
6 the Board of Personnel Appeals in using federal court and national
7 Labor Relations Board (NLRB) precedence as guidelines interpreting
8 the Montana Collective Bargaining for Public Employees Act as the
9 State Act is so similar to the Federal Labor Management Relations
10 Act, State ex rel Board of Personnel Appeals v. District Court, 183
11 Mont. 223 (1979), 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No.
12 45 v. State ex rel Board of Personnel Appeals, 195 Mont. 272 (1981)
13 635 P.2d 1310, 110 LRRM 2012.

14 2. It is well settled that unilateral changes in mandatory
15 subjects of bargaining by an employer is an unfair labor practice
16 (violation of Section 8(a) (5) of the NLRA which is the Federal
17 counterpart of Section 39-31-401(5), MCA). See NLRB v. Katz, 396
18 U.S. 736, 50 LRRM 2177 (1962).

19 3. In determining which subjects are mandatory subjects of
20 bargaining, this Board has utilized the balancing test adopted by
21 the Kansas Supreme Court in 1973, (N.E.A. v. Shawnee Mission Board
22 of Education, 512 P.2d 426, 84 LRRM 2223) and followed by the
23 Pennsylvania Supreme Court in Pennsylvania Labor Relations Board v.
24 State College Area School district, 337 A.2d 262, 90 LRRM 2081.

25 The Kansas Supreme Court said:

26 It does little good, we think, to speak in terms of "policy"
27 versus something which is not policy. Salaries are a matter
28 of policy, and so are vacation and sick leaves. Yet we cannot

1 doubt the authority of the Board to negotiate and bind itself
2 on these questions. The key, as we see it, is how direct the
3 impact of an issue is on the well-being of the individual
4 teacher, as opposed to its effect on the operation of the
5 school system as a whole. (Emphasis added) The line may be
6 hard to draw, but in the absence of more assistance from the
7 legislature the courts must do the best they can.

8 (N.E.A., supra)

9 De-Minimis Rule

10 4. Defendant argues that changing the duty-free lunch from
11 45 minutes to 35 minutes is a minor amount of change and cites
12 Lower Flathead Education Association v. Charlo School District No.
13 7, ULP 14-76 (12/13/76) in support of such contentions. Here, as
14 contended by Complainant, the above cited case is not dispositive
15 of the instant matter, as cutting ten minutes out of a forty-five
16 minute lunch period is not **de minimis**. Clearly, the reduction
17 leaves the teachers with 22% less lunch time and such facts
18 preclude a conclusion supporting Defendant's contentions.

19 Contract-Past Practice

20 5. Defendant convincingly argues that under the management
21 rights clause of the collective bargaining agreement between the
22 parties, it was able to make unilateral changes in the duty-free
23 lunch period assigned teachers in the School District, including
24 the Northside School. The relevant Sections from the 1990-92
25 Collective Bargaining Agreement reads in part as follows:

26 Article III - Definitions

27 3.1 Terms and Conditions of Employment

1 Terms and conditions of employment shall mean wages,
2 hours, fringe benefits and other conditions of employment
3 **subject to those limitations defined as management rights**
4 **and prerogatives** by the Montana Public Employees
5 Collective bargaining Law, Title 59, Chapter 16, Revised
6 Codes of Montana, as amended. (Emphasis added)

7 * * * * *

8 3.3 Meet and Confer

9 Meet and confer means the exchange of views and concerns
10 between the School District and the **Exclusive**
11 **Representative....** (Emphasis added)

12 * * * * *

13 5.1 Powers of the Board

14 The Board has, and shall retain, without limitation, all
15 powers, rights, authority, duties and responsibilities
16 conferred upon and vested in it by law to establish
17 school policy of operation, including, but not limited
18 to, the right:

19 * * * * *

20 B. to employ and re-employ all personnel, determine
21 their qualifications, conditions of employment and **work**
22 **assignments....**(Emphasis added)

23 C. to select...**class schedules, hours of**
24 **instruction....** (Emphasis added)

25 (Exhibit A)

26 6. Clearly the School District is required to negotiate in
27 good faith with respect to wages, hours, fringe benefits and other
28 conditions of employment and to negotiate an agreement or to

1 negotiate over any questions arriving thereunder. Here, however,
2 the record does not reflect that the Defendant refused to negotiate
3 any item. As pointed out by Defendant, the Union did not present
4 substantial reliable and probative evidence showing where
5 management refused to review any proposal or refused to take under
6 advisement any proposal, or refused to discuss any proposal.

7 7. As to the duty-free lunch at issue herein, the record
8 does not show that the Union set forth any proposals pertaining to
9 the duty-free lunch hour. But the Union had opportunity to do so.
10 By letter from Defendant to Union President Desch on September 21,
11 1992, the Union was informed that the School Board bargaining team
12 was looking forward to their proposals at the next meeting with the
13 Union scheduled for September 24, 1992. Further, as argued by
14 Defendant, if the Union wishes to address those rights as set forth
15 in article 5.1 of the Contract, the Union has an affirmative
16 responsibility to bring forth proposals to the bargaining table..
17 A "union cannot charge an employer with refusal to negotiate when
18 it has made no attempt to bring employer to the table." NLRB v.
19 Alva Allen Industries, 369 F.2d 310, 63 LRRM 2515 (CA 8, 1966).
20 Additionally, in W.W. Grainer indc. v. NLRB, 860 F.2d 244, 129
21 LRRM, 2718 (CA 7, 1988), the court found the Union had waived its
22 right by failure to assert bargaining rights after being given
23 ample opportunity to bargain over the change of contractors.

24 8. The Complainant argues that the School District and its
25 administration unilaterally changed a long-established policy of a
26 duty-free lunch which they allege was clearly understood between
27 the parties, and they did so without notice. Further, Complainant
28 contends the School District made the change without inviting

1 discussion or even suggesting that discussion would be allowed.
2 Here then, the question of the scope of any past practice becomes
3 the key issue as there were no provisions covering the subject of
4 duty-free lunch periods in the collective bargaining agreement.

5 9. The overall record reflects that there was some
6 conversation between the teachers, suggestions from the teachers
7 and finally a directive given by the principal of Northside School
8 as pertains to duty-free lunch schedule changes. The directive may
9 have been a modification and/or a rejection of any and all
10 conversations, however, as contended by Defendant, the width of any
11 past practice in this matter can only go to the concept of exchange
12 of information prior to making a decision when changing work
13 schedules. And, there are sufficient facts in the record
14 indicating that the School District has frequently changed without
15 collective bargaining the time of duty-free lunches and/or the
16 number and length of such lunches, in the District, not just the
17 Northside School; i.e., in 1980 the duty-free lunch was changed
18 from one hour to forty-five (45) minutes.

19 10. Additionally, as convincingly argued by Defendant,
20 binding practice will not be given that effect unless it is well
21 established, and strong proof of its existence will ordinarily be
22 required. Defendant cites Elkouri and Elkouri, How Arbitration
23 Works:

24 In the absence of a written agreement, 'past practice',
25 to be binding on both parties, must be (1) unequivocal;
26 (2) clearly enunciated and acted upon; (3) readily
27 ascertainable over a reasonable period of time as a
28 fixed, and established practice accepted by both parties.

1 (Page 49, supra)

2 Here, however, as before concluded, the record reflects that there
3 is strong proof of the existence of change to the time, number and
4 length of duty-free lunches, and there is nothing in the record
5 showing a past change to have been grieved by Complainant.
6 Moreover, all the changes concerning the lunch duty appear to have
7 been unequivocal, carried out by the School District and acted upon
8 over numerous years, yet the changes were accepted by the
9 Complainant.

10 11. The Hearing Officer also notes that time does have a way
11 of modifying everybody's recollection and judgement concerning the
12 chain of events leading up this ULP as filed by Complainant;
13 however, the facts reveal there were some discussions prior to
14 September 1992 about the problems of supervising students at
15 Northside School, and in September 1992 there was discussion on the
16 price of tables for use by the students. Then there is Sue Patch's
17 letter which speaks to the need to identify problems and for
18 further discussions. In all events, the overall record herein
19 reflects that the width of past practice goes to the concept of
20 "exchange of information" prior to directives being issued by the
21 School District, and the Defendant, by past practice, followed such
22 concept which was acquiesced to by teachers and the Union.

23 12. Complainant argues that Bozeman Education Association v.
24 Gallatin County School district No. 7, ULP No. 43-79 and Polson
25 Education Association v. Lake County Elementary School District,
26 ULP No. 27-88 are controlling in this matter. These cases are
27 dispositive in that they support the contentions of the School
28

1 District that it had the right to make changes in the duty-free
2 lunch periods.

3 In Polson the Union, by negotiating additional minutes, **waived**
4 their right to complain about an increase in the number of periods
5 worked in a school day. In the case at hand there were
6 "discussions" concerning the amount of duty-free lunch time, but
7 the long standing practice was that the School District ultimately
8 made the final directive and the Union waived any rights to
9 complain as it took no action concerning past practice and the
10 issues herein.

11 In Bozeman, comparing it to the case in hand, there is past
12 practice established in both cases. In the instant case, clearly
13 there is a pattern of past practice wherein the School District
14 after some type of "conversation-discussion" and conscious
15 exploration with the Union, made **limited** changes in the number of
16 duty-free lunch periods and the length of the duty-free lunch
17 periods throughout the District. But, at all times the teachers
18 did maintain no less than a 35 minute duty-free lunch period. And
19 the lunch period was **duty-free**.

20 13. The Complainant also cites Katz, 369 US 736 (1962) in
21 support of its position, however, it does not appear that Katz is
22 controlling in this matter. Here, for reason that the Union by
23 past practice waived its bargaining rights, Katz is not
24 dispositive. Nevertheless, as the duty-free lunch issue is a
25 "condition of employment," it appears to be an appropriate subject
26 of collective bargaining.

27 14. In summary, the Complainant has failed to show by a
28 preponderance of the evidence that the Defendant violated Sections

1 39-31-305(1) and (2), MCA, constituting an unfair labor practice as
2 set forth in Section 39-31-401(5), MCA. Section 39-31-406(5), MCA
3 states:

4 If, upon the preponderance of the testimony taken, the
5 Board is not of the opinion that the person named in the
6 complaint has engaged in or is engaging in the unfair
7 labor practice, then the Board shall state its findings
8 of fact. and shall issue an order dismissing the
9 complaint.

10 (39-31-406(5), MCA)

11 **V. RECOMMENDED ORDER**

12 It is hereby ordered that the above captioned unfair labor
13 practice charge of the Wolf Point Education Association against
14 Wolf Point Public School Districts No. 45 and 45A be **Dismissed**.

15 **SPECIAL NOTICE**

16 Exceptions to these Findings of Fact, Conclusions of Law and
17 Recommended Order may be filed within twenty (20) days of service
18 thereof. If no exceptions are filed, this Recommended Order shall
19 become the Final Order of the Board of Personnel Appeals. Address
20 exceptions to the Board of Personnel Appeals, P.O. Box 1728,
21 Helena, MT 596024-1728.

22 DATED this 28th day of November, 1994.

23 * * * * *

24 BOARD OF PERSONNEL APPEALS

25 By: Gordon D. Bruce
26 GORDON D. BRUCE
27 Hearing Examiner
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:

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DATED this 28th day of November, 1994.

Christine A Roland