

1 STATE OF MONTANA  
2 DEPARTMENT OF LABOR AND INDUSTRY  
3 BEFORE THE BOARD OF PERSONNEL APPEALS  
4

5 IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 3-94:  
6

7 MISSOULA ELEMENTARY ASSISTANTS )  
8 AND PARAPROFESSIONALS, MEA/NEA, )  
9 Complainant, ) FINAL ORDER  
10 )  
11 vs. )  
12 )  
13 MISSOULA ELEMENTARY DISTRICT #1, )  
14 Defendant. )  
15

16 \* \* \* \* \*

17  
18 On May 20, 1994, Joseph V. Maronick, Hearing Examiner for the Department of  
19 Labor and Industry, issued his findings of fact, conclusions of law and proposed order.  
20 Defendant filed exceptions to the hearing examiner's findings of fact, conclusions of law and  
21 proposed order on June 3, 1994. The matter was heard before the Board of Personnel Appeals  
22 (Board) on January 25, 1995.

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

25 1. The Board adopts as its own the hearing examiner's findings of fact numbered  
26 1 through 10. The Board finds that those findings are supported by substantial credible  
27 evidence.

28 2. The Board adopts as its own the hearing examiner's conclusions of law  
29 numbered 1 through 4 and 7. The Board determines those conclusions of law to be legally  
30 correct. The hearing examiner's conclusion of law number 7 is renumbered as conclusion of

1 law number 5.

2 3. The Board rejects and vacates the hearing examiner's conclusions of law  
3 numbered 5, 6, and 9. The Board finds those conclusions of law to be legally incorrect. The  
4 Board rejects the hearing examiner's conclusion of law number 8 as being partially incorrect.  
5 The Board acknowledges the hearing examiner's cite to NLRB v. Katz, 369 U.S. 736 (1962) as  
6 being a correct statement of the law but inapplicable to the present case.

7 4. The Board adopts the following additional conclusion of law to be incorporated  
8 into the hearing examiner's decision as modified by the Board:

9 6A. The Defendant did not commit an unfair labor practice by having unit  
10 members report to work one-half day prior to the start of classes.

11  
12 The contract term found in Article 9 Section  
13 9.2 (3) provides the Defendant with authority to determine the normal work year  
14 on a job-by-job basis. Defendant in the present case properly exercised its  
15 discretion pursuant to the contract by determining when unit members were to  
16 report to work according to program needs and availability of funds. The mere  
17 fact that in prior years most of the unit reported to work two days prior to the  
18 start of classes does not defeat the express contract provision which enabled the  
19 defendant to determine the normal work year. Further, given the fact that in  
20 prior years, most, but not all, of the unit reported two days prior to the start of  
21 classes, it cannot be said that the change in the reporting date was done on a  
22 unit basis. Previously, Chapter I aids, who are part of the unit, did not report to  
23 work two days prior to start of classes. The Defendant's actions were proper  
24 and in accordance with a specific provision of the contract and were not an  
25 unfair labor practice.

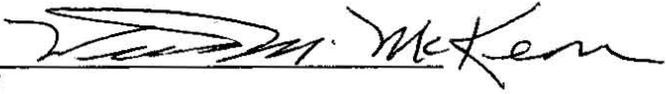
26  
27 5. The Board rejects the hearing examiner's recommended order. The Board  
28 orders as follows:

29 IT IS HEREBY ORDERED that the Defendant did not commit an unfair labor  
30 practice by having unit members report to work one-half day prior to the start of classes.

1 Complainant's unfair labor practice charge is hereby dismissed.

2 DATED this 22<sup>nd</sup> day of February, 1995.

3  
4 BOARD OF PERSONNEL APPEALS

5  
6 By   
7  
8 WILLIS M. MCKEON, CHAIRMAN

9  
10 Board members Talcott, Henry, Schneider, and Hagan concur.

11 \*\*\*\*\*

12 NOTICE: You are entitled to appeal from this order by filing a petition for judicial review  
13 with the District Court no later than thirty (30) days from the service of this order. The  
14 procedure and requirements for filing a petition for judicial are governed by the provisions  
15 of Section 2-4-701, et seq., MCA.  
16  
17

18 \*\*\*\*\*

19  
20  
21 CERTIFICATE OF MAILING

22  
23 I, , do certify that a true and correct  
24 copy of this document was mailed to the following on the 28<sup>th</sup> day of February, 1995:

25 Don K. Klepper  
26 THE KLEPPER COMPANY  
27 PO Box 4152  
28 Missoula MT 59806-4152

29  
30 Karl J. Englund, Attorney  
31 PO Box 8142  
32 Missoula MT 59807-8142  
33  
34  
35

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

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 3-94:

MISSOULA ELEMENTARY ASSISTANTS )  
AND PARAPROFESSIONALS, MEA/NEA, )

Complainant, )

vs. )

MISSOULA ELEMENTARY )  
DISTRICT 1 )

Defendant. )

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
AND PROPOSED ORDER

\* \* \* \* \*

I. INTRODUCTION

On September 3, 1993, the Missoula Elementary Assistants and Paraprofessionals, MEA/NEA (Complainant) filed an unfair labor practice charge with the board alleging the Missoula Elementary District No. 1 (Defendants) violated Section 39-31-401 (1), (5), MCA by reducing the number of days to be worked without bargaining the issue. The Defendant on September 30, 1993 denied the charge. An October 21, 1993, Investigation Report and Determination found sufficient disputed facts and legal issues to refer the matter to hearing.

A telephone hearing was held on January 5, 1994, before Joseph V. Maronick, duly appointed hearing officer of the Labor Commissioner. Parties present duly sworn and offering testimony included Sandy Bushek, Sherry Postma, Lora Mehrer, Lauren Risinger, and Myrna Kitchen. Complainants were represented by Counsel, Karl England, and Defendants represented by Dr. Don K. Klepper.

Exhibits admitted to the record by administrative notice were the Charge, the Collective Bargaining Agreement, the Complaint

1 Response and the Investigation Report and Determination. Also  
2 admitted to the record were Complainant Exhibits 1-7 and Defendant  
3 Exhibits 1-7. Admitted over objection were Defendant Exhibits 8  
4 and 9. Defendant Exhibit 8 and 9 were letters written after the  
5 charge was filed and admitted "for what they're worth"  
6 understanding their having been written after the charge was filed.  
7 Final post-hearing briefs were received February 28, 1994.

## 8 II. FINDINGS OF FACT

9 1. The Complainant association is the exclusive bargaining  
10 representative for certain classified and certified Defendant  
11 employees. The parties association is governed by a collective  
12 bargaining agreement.

13 2. For at least five years (testimony of Sandy Bushek  
14 hearing tape 1) prior to the start of school year 1993-94, all  
15 unit employees except Chapter I aides, which make up about 5  
16 percent of the total unit, (Defendant post-hearing brief page 7)  
17 reported to work two days prior to the start of classes. For the  
18 1993-94 school term unit members were notified not to report until  
19 one half day prior to the start of classes. This action was taken  
20 by the Defendant to redistribute funds.

21 3. The parties agree that Chapter I aides work with a  
22 special class of students who are not "learning disabled like those  
23 students in special education programs. Chapter I students are  
24 normally academically deficient because of other factors. ...they  
25 can exit the program free from the restrictions of the Individual  
26 Education Program (IEP) used by handicapped children and their  
27 advocates." (Defendant Reply Brief pg. 5-6)

1           4.     The IEP must be developed for handicap children and  
2 includes;

- 3           (1)    the child's current level of educational  
            performance;
- 4           (2)    annual goals and short term objectives;
- 5           (3)    special education and related services to  
            be provided;
- 6           (4)    the extent of participation in regular  
            education programs;
- 7           (5)    projected dates for initiation and  
            expected duration of special services;  
            and
- 8           (6)    objective criteria and evaluation  
            procedures to determine whether  
9           instructional objectives are being  
            met.

10           5.     Chapter I assistants do not start two days before the  
11 school year as other unit members because of funding and individual  
12 student needs determinations.

13           6.     The collective bargaining agreement provides in Article  
14 9 Section 9.2 as follows;

15           9.2 WORKDAY

- 16           (1)    The time the workday commences may vary  
17           according to the needs of the district. All  
18           employees shall have at least thirty (30)  
            minute duty free lunch exclusive of work  
            day.
- 19           (2)    Employees shall have a fifteen (15) minute  
            break in the morning and a fifteen (15) minute  
            break in the afternoon.
- 20           (3)    The normal work year shall be determined on  
21           program needs and availability of funds and  
22           will be determined on a job-by-job basis.  
            (emphasis added) The bargaining unit members  
23           will not be required to do work outside the  
            normal work day.

24           7.     Relying on Section 9.2 (3), the Complainant contends the  
25 Defendant violated the act because nearly the entire unit was  
26 subjected to a day and one half reduction in work days on a program  
27 basis rather than on a job-by-job basis. The Complainant has  
28 discussed and proposed changes in Article 9.2 Subsection 3  
language when bargaining but the language has not been changed.

1 8. The Defendant contended student services are regulated by  
2 the IEP and work hours of necessity must be changeable. In their  
3 Reply Brief pg. 4-5 the Defendant indicated, in part;

4 When the **Individual Educational Program** is  
5 developed for a student, one of the components is  
6 to assign on an individual needs basis, the hours  
7 of support services to be rendered by an  
8 instructional assistant/paraprofessional. The  
9 hours of support service contained in an **Individual**  
10 **Educational Program** are dependant upon the specific  
11 needs of the student and can fluctuate greatly.  
12 The hours may increase or decrease. In fact the  
13 hours of support service may not been (sic) needed  
14 during periods of time when the student is  
15 undergoing medical treatment or is absent from  
16 school.

17 When the District bargained this Agreement with the  
18 Association both sides were cognizant of the fact  
19 that the hours worked by the support staff in  
20 delivering the mandated services dictated by the  
21 Individual Education Program could vary from week  
22 to week, month to month, and year to year. An  
23 annual review of each Individual Education Program,  
24 as well as three year evaluation, must occur. This  
25 process constructively guarantees changes in  
26 assignments, work day, work week and work year.

27 9. The Defendant offered the following arguments in Post  
28 Hearing Brief as the basis to deny the charge. (in summary)

19 (1) The Defendant must, because of changes in  
20 laws, administratively be able to adjust  
21 the work hours and days on a job-by-job  
22 basis.

23 (2a) The contract terms which have not changed  
24 in Article 9.2 (3) regarding adjustment  
25 of individual work year based on needs  
26 and funds determined on a job-by-job  
27 basis and Article 13, Management Rights,  
28 allow management to direct, hire,  
relieve, maintain efficiency and take  
other necessary actions.

(2b) The Complainants waived their right to  
bargain the length of the school year  
based upon the fact they have  
unsuccessfully tried to change the  
language in Article 9 to guarantee a work  
year, work day to unit members and now,  
it would appear, have or had given up  
that effort.

- 1 (3) Receipt of federal funds is premised upon  
2 following terms identified in enabling  
3 legislation including IEP's which  
4 determine the use of hourly employees.  
5 (4) Unit members are "at will" employees without a  
6 certain employment term duration.  
7 (5) Employees have no property rights in their job.

8 10. The Defendant indicated they were merely redistributing  
9 the financial resources to better use funds and intended to offer  
10 staff additional training or work time on a volunteer basis to  
11 recoup the one and one half days not worked at the beginning of the  
12 school year.

### 13 III. CONCLUSIONS OF LAW

14 1. The Board of Personnel Appeals has jurisdiction over this  
15 complaint under Sections 39-31-401, et seq. MCA, and under  
16 implementation rules of ARM 24.26.601 and 24.26.680-685.

17 2. The Montana Supreme Court has approved the practice of  
18 the Board of Personnel Appeals using Federal Court and National  
19 Labor Relations Board (NLRB) precedents as guidelines in  
20 interpreting the Montana Collective Bargaining for Public Employees  
21 Act as the state act is so similar to the Federal Labor Management  
22 Relations Act, State ex. rel. Board of Personnel Appeals v. District  
23 Court, 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297 (1979);  
24 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 (Young III), 221 Mont. 13, 683 P.2d 185,  
27 119 LRRM 2682 (1984).

28 3. A unilateral change, that is a change initiated by the  
employer without bargaining with the union, in a 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).

1 4. The Public Employees Collective Bargaining Act, follows  
2 KATZ, supra.

3 The U.S. Supreme Court held in 1962 that an  
4 employer's unilateral change in a working condition  
5 ...may be held to violate Section 8a (5) [similar  
6 to section 39-31-401(5) MCA] even in the absence of  
7 a finding that the employer was guilty of overall  
8 bad faith bargaining because the conduct amounts to  
9 a refusal to negotiate about a matter and must of  
10 necessity obstruct bargaining, AAUP v. Eastern  
11 Montana College ULP 2-82 (1982).

12 The board similarly relied on KATZ in finding that unilateral  
13 imposition of an in-district residency requirement was an unfair  
14 labor practice, MEA v. Musselshell County School District  
15 (Roundup), ULP 6-77 (1977).

16 Once practices are established, an employer is  
17 "required to bargain in good faith; unilateral  
18 changes ... even if (the practices) are not  
19 contained in the contract; cannot be changed  
20 unless... there exists a waiver by the party to  
21 whom the duty to bargain is owed. In the instant  
22 case ...[no waiver] was obtained by the Defendant  
23 prior to making the change in evaluation  
24 procedure." Bozeman Education Association v.  
25 Gallatin County School District No. 7 (Bozeman),  
26 ULP 43-79 (1981).

27 5. The change in work days was made on a unit basis and  
28 involved a mandatory subject of bargaining; wages, hours, and  
working conditions.

29 6. The contract term found in Article 9 Section 9.2 (3)  
30 provides for authority of the Defendant to determine the normal  
31 work year on a job-by-job basis. This did not occur. The language  
32 and bargaining history relating to Article 9 Section 9.2 is  
33 insufficient to find a waiver of the association's right to bargain  
34 over the changes work hour changes which occurred. The argument  
35 offered by the Defendant would be appropriate if:

1 (1) The change were made on a "job-by-job" basis  
2 if the law changed a job requirement.

3 (2a) A change for some legitimate reason had been  
4 made on a "job-by-job" basis.

5 (b) The Complainant had somehow agreed beforehand  
6 and waived the "job-by-job" basis term.

7 7. The parties agree that the "job-by-job" requirement  
8 exists in the contract section relied upon by both parties in their  
9 argument related to this action.

10 8. As pointed out in Complainant brief, the federal funding,  
11 employment at will and property interest arguments are irrelevant.  
12 Unilateral changes in wages, hours, or working conditions during  
13 the course of a collective bargaining relationship are per se  
14 violations of the act. NLRB V. KATZ, 369 U.S. 736 (1962).

15 9. The position offered by the Defendant that they intended  
16 to allow affected staff the opportunity to work the one and one  
17 half days on a volunteer basis in training or some other activity  
18 does not change the conclusion reached here. The offer of  
19 additional training or makeup days may also involve a unilateral  
20 change in working conditions.

#### 21 IV. RECOMMENDED ORDER

22 The Defendant is hereby found to have violated Section 39-31-  
23 401(3) and (5), MCA. The Defendant is hereby ordered to cease and  
24 desist from further reduction in days of work under Article 9  
25 Section 9.2 (3) other than on a job-by-job basis hereafter. They  
26 are also hereby ordered to pay the affected unit members for the  
27 day and one half they would have worked prior to the start of  
28 classes.

1 In accordance with Board Rule ARM 24.26.684 the above recommended  
2 order shall become the final order of this board unless written  
3 exceptions are filed within twenty (20) days after service of these  
4 findings of fact and conclusions of law and recommended order upon  
5 the parties.

6 Entered and date this 20<sup>th</sup> day of May, 1994.

7 Joseph V. Maronick

8 Joseph V. Maronick  
9 Hearing Examiner

10 CERTIFICATE OF MAILING

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

15 Carl J. England  
16 Attorney at Law  
17 P.O. Box 8142  
18 Missoula, MT 59807

19 Dr. Don Klepper  
20 Director of Personnel  
21 Missoula Elementary School District  
22 215 South Sixth West  
23 Missoula, MT 59801

24 DATED this 20<sup>th</sup> day of May, 1994.

25 Christine A. Roland