

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE AMENDED UNFAIR LABOR PRACTICE CHARGE #5-94:

FLORENCE-CARLTON CLASSIFIED EMPLOYEES)
ASSOCIATION, MEA/NEA,)
COMPLAINANT)

vs.) **FINAL ORDER**

FLORENCE-CARLTON HIGH SCHOOL & ELEMENTARY)
DISTRICT NO. 15-6,)
DEFENDANT)

TO: MAUREEN LENNON
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On July 14, 1994, Joseph V. Maronick, Hearing Examiner for the Department of Labor and Industry, issued his **FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER** for the above captioned matter. On August 1, 1994, Don K. Klepper, filed **RESPONDENT'S EXCEPTIONS TO FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER. COMPLAINANT'S APPEAL BRIEF** was filed by Karl J. Englund, Attorney for Complainant on October 17, 1994. Order.

Oral argument was scheduled before the Board of Personnel Appeals on January 25, 1995. Maureen Lennon, Attorney, presented oral argument on behalf of the Defendant/Appellant. Karl J. Englund, Attorney, presented oral argument on behalf of the Complainant/Respondent/Appellant.

After review of the record, consideration of the parties' oral arguments and briefs, the Board enters the following order:

1. IT IS HEREBY ORDERED that the Appeal filed by DEFENDANT/APPELLANT is hereby denied.

2. IT IS HEREBY ORDERED that the Board adopts as its own the **FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER** of Hearing Examiner Joseph V. Maronick dated July 14, 1994.

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

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

FLORENCE-CARLTON CLASSIFIED)	
EMPLOYEES ASSOCIATION, MEA/NEA,)	
)	
Complainant,)	
)	
-vs-)	FINDING OF FACT;
)	CONCLUSIONS OF LAW;
)	RECOMMENDED ORDER
FLORENCE-CARLTON ELEMENTARY)	
AND HIGH SCHOOL DISTRICT 15-6,)	
)	
Defendant.)	

* * * * *

I. INTRODUCTION

Florence-Carlton Classified Employees Association (Complainant) filed an unfair labor charge against the Florence-Carlton Elementary and High School District 15-6 (Defendant) on September 1, 1993 alleging the Defendant violated Section 39-31-401(1), and (5), MCA, by subcontracting out Complainant association work without proper bargaining. On November 15, 1993, the Defendant denied any violation as alleged.

A hearing was held in this matter in Florence, Montana on April 14, 1994. Parties present, duly sworn and offering testimony included Eleanor McCullough, Sara Perry, Dr. Ernst Jean, and Laura Risinger. Complainants were represented by Counsel Karl Englund and Respondents were represented by Dr. Don Klepper. Also present were observers Kay Winter and Nancy Newall. Documents submitted into the record by joint stipulation were Joint Exhibits A, B and C. Administrative notice was taken without objection of the September 3, 1993 complaint, the November 15, 1993 response and the

1 November 23, 1993 investigation report. Complainant/Defendant
2 Post-Hearing Briefs were received May 16, 1994 and Complainant
3 reply brief received May 26, 1994.

4 **II. FINDINGS OF FACT**

5 1. The Defendant's food service program had been, prior to
6 the start of the 1993-'94 school term, operated by five Complainant
7 unit members. Based upon economic considerations the Defendant
8 without specific or formal notification to the Complainant,
9 subcontracted out the food service program thereby eliminating five
10 unit member positions.

11 2. In the summer of 1993, the Defendant's District
12 Superintendent informed the Complainant unit association president
13 the hot lunch program was being considered and discussed. Another
14 meeting of the superintendent and the association president
15 occurred in August, 1993. At that meeting the superintendent
16 advised the association president the lunch program would be
17 subcontracted out pursuant to School Board action taken the day
18 before. The five unit members positions were thereafter
19 eliminated.

20 3. The school district practice had not been to contract out
21 work. The Complainant contended they did not waive their
22 opportunity or responsibility to bargain the subcontracting
23 decision because they were only advised the subcontracting had been
24 done and the unit members work thereafter would be completed by
25 subcontract employees.

26 4. The Association did not at anytime request bargaining
27 over the contracting of the lunch program. The Defendant, based
28 upon the "management rights" contract section, considered the

1 subcontracting action was allowed under the collective bargaining
2 agreement. The management rights contract language reads as
3 follows:

4 The Association recognizes the prerogatives of the
5 employer to operate and manage its affairs in such areas
as, but not limited to:

- 6 1) Direct employees;
- 7 2) Hire, promote, transfer, assign, and retain
employees;
- 8 3) Relieve employees from duties because of lack or
9 work, or funds or under conditions where
continuation of such work would be inefficient and
non-productive;
- 10 4) Maintain the efficiency of government operations;
- 11 5) Determine the methods, means, job classifications
and personnel by which government operations are to
be conducted;
- 12 6) Take whatever actions may be necessary to carry out
the missions of the agency in situations of
emergency;
- 13 7) Establish the methods and processes by which work
is performed.

14
15 5. The Defendant contended the subcontracting action did not
16 demonstrate "good/bad faith" standards as established in Allis
17 Chalmers Manufacturing Company 39 LA 1213, 1219 (Smith, 1992) which
18 involved development of guides used by arbitrators in good/bad
19 faith determinations made. The standard established four indices
20 to established bad faith actions as follows:

- 21 1) Negotiate classified work while withholding
22 contemplated change which will eliminate such work.
- 23 2) Use of subcontracting agents as a subterfuge
24 so that subcontract employees become the
25 employer's employees.
- 26 3) Commingling of differently paid subcontractor
27 employees with other employer employees performing
the same kinds of work.
- 28 4) Subcontracting out the work was intended to
weaken the union or eliminate employment.

1 6. All contractual rights including bumping of terminated
2 food service employees were preserved under the contract terms.
3 The Defendant, therefore, pointed out, in post-hearing brief, that
4 the bumping ability or term had been "bargained to deal with that
5 kind (the situation in this case) of management decision".

6 7. The Parties agreed that the standards set by the National
7 Labor Relations Board applied to this case. In the case of Town
8 and Country Manufacturing, 13 NLRB 1022 (1972), enforced, 316 F.2d
9 846 (5th Cir. 1963), Fiberboard Paper Products Corporation 130 NLRB
10 1558 (1961), supplemented, 138 NLRB 550 (1962), enforced, 322 F.2d
11 411 (D.C. Cir. 1963), AFF'D, 379 U.S. 203 (1964) Westinghouse
12 Electric Corp., 150 NLRB 1574 (1965), and adopted by the Board of
13 Personnel Appeals in Teamsters Local 190 v. Yellowstone County
14 School District No. 26, ULP No. 9-83, a standard was adopted which
15 established factors necessary for the finding of bad faith in
16 bargaining related to subcontracting out unit work.

17 8. In the above cases cited the Boards and courts have
18 concluded that subcontracting of collective unit work is a
19 mandatory subject of bargaining and bargaining over a decision to
20 subcontract out unit work is not necessary only if the following
21 factors are present:

- 22 1) The subcontracting is motivated solely by economic
23 reasons;
- 24 2) It is the employer's custom to subcontract various kinds
of work;
- 25 3) No substantial variance is shown in kind or degree from
26 the established past practice of the employer;
- 27 4) No significant deterrent results to employees in the
unit; and

28

1 5) The union has had the opportunity to bargain about
2 changes in existing subcontracting practices at a general
negotiation meetings.

3 9. Due to political pressures the food service program work
4 was returned to unit members January 3, 1994 thus ending the
5 subcontract program which is the subject of this charge. The unit
6 employees were recalled to their former positions in food service
7 work.

8 III. CONCLUSIONS OF LAW

9 1. The Board of Personnel Appeals has jurisdiction over this
10 complaint under Sections 39-31-401 and 103(7), MCA and under
11 implementation rules of ARM 24.26.601 and 24.26.680-685.

12 2. The Montana Supreme Court has approved the practice of
13 the Board of Personnel Appeals using Federal Court and National
14 Labor Relations Board (NLRB) precedents as guidelines in
15 interpreting the Montana Collective Bargaining for Public Employees
16 Act as the state act is so similar to the Federal Labor Management
17 Relations Act, State ex. rel. Board of Personnel Appeals v. District
18 Court, 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297 (1979);
19 Teamsters Local No. 45 v. State ex. rel. Board of Personnel
20 Appeals, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981); City
21 of Great Falls v. Young (Young III), 221 Mont. 13, 683 P.2d 185,
22 119 LRRM 2682 (1984).

23 3. The record shows that the subject matter involved in this
24 case is subcontracting of unit work. This is a mandatory subject
25 of bargaining.

26 4. The factors identified in Westinghouse Electric
27 Corporation must all be identified and satisfied in order to avoid
28 the necessity of negotiation prior to subcontracting out the work.

1 While the decision to subcontract out the lunch program may have
2 been based on economic reasons, the other four required factors
3 were not present. The Defendant did not have the practice of
4 subcontracting out various kinds of work, there was a substantial
5 variance in the past practice of the Defendant, there was
6 significant detriment - loss of four unit jobs - and the union did
7 not have an opportunity to bargain the changes prior to their
8 taking effect. Based on these conclusions it is found that the
9 Defendant did fail to bargain in good faith and violated Section
10 39-31-401(1) and (5), MCA.

11 5. The Allis Chalmers, supra, arbitration "good/bad faith"
12 standard identified by the Defendant as applicable is considered
13 but not controlling. This conclusion is reached because the Town
14 & Country, supra, line of cases especially Westinghouse, supra, as
15 adopted by the Board of Personnel Appeals in Yellowstone, supra, is
16 on point in this case.

17 6. The agreement of the Complainant union to the "Management
18 Rights" contract section is insufficient to constitute a waiver of
19 the Complainant union's right to bargain the subcontracting of unit
20 food service work. Additionally, no waiver is found because the
21 Complainant union did not ask to bargain after being advised of the
22 subcontracting change which had already taken place.

23 **IV. RECOMMENDED ORDER**

24 The Defendant must reinstate with full back pay and benefits
25 all unit members adversely affected by the subcontracting.

26 **V. SPECIAL NOTE**

27 In accordance with Board Rule ARM 24.26.684 the above
28 **RECOMMENDED ORDER** shall become the **FINAL ORDER** of this Board unless

1 written exceptions are filed within twenty (20) days after service
2 of these FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER
3 upon the Parties.

4 Entered and Date this 14th day of July, 1994.

5 BOARD OF PERSONNEL APPEALS

6
7 By: Joseph V. Maronick
8 Joseph V. Maronick
9 Hearing Officer

10 * * * * *

11 CERTIFICATE OF MAILING

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

15 Karl J. England
16 401 N. Washington St.
17 PO Box 8142
Missoula, MT 59807

18 Dr. Don K. Klepper
19 The Klepper Company
PO Box 4152
Missoula, MT 59806

20 DATED this 14th day of July, 1994.

21 Christine R. Roland
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