

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

7/1/95  
10/1/95

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 61-94:

SMITH VALLEY TEACHERS )  
ASSOCIATION, MEA/NEA, )  
Complainant/Appellant )  
vs. )  
SMITH VALLEY ELEMENTARY SCHOOL )  
DISTRICT NO. 89, FLATHEAD COUNTY, )  
Defendant/Respondent. )

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
AND ORDER

\* \* \* \* \*

**I. INTRODUCTION**

Unfair Labor Practice charges were filed by the Smith Valley Teachers Association, affiliated with the Montana Education Association, NEA of Missoula, Montana, against the Smith Valley Elementary School District No. 89, Flathead County, Montana on September 7, 1994.

An in-person hearing on the above matter was held on April 12, 1995, in Kalispell, Montana before Gordon D. Bruce, duly appointed Hearing Officer of the Department of Labor and Industry. The Complainant was represented by its counsel, Karl J. Englund. Defendant was represented by its counsel, Michael Dahlem. Witnesses Renee Boisseau, Stephen Foster and Tammy Stremel gave sworn testimony at the hearing. Subsequent to the close of hearing, parties filed their post-hearing briefs with the Hearing Officer and final briefs were filed on May 25, 1995. On August 28, 1995, Findings of Fact; Conclusions of Law; and Recommended Order was issued by Gordon D. Bruce.

1 Notice of Appeal/Exceptions to the Hearing Officer's Findings  
 2 of Fact; Conclusions of Law; and Recommended Order were filed by  
 3 the Complainant on September 18, 1995. On October 25, 1995, oral  
 4 arguments were held before the Board of Personnel Appeals. Karl J.  
 5 Englund, Esquire, and Michael Dahlem, Esquire, each presented oral  
 6 argument on behalf of their respective clients. Upon considering  
 7 the record, written briefs and oral arguments of the parties, the  
 8 Board finds, concludes and orders as follows:

9 **II. ISSUE**

10 Whether the Smith Valley Elementary School District No. 89,  
 11 Flathead County, Montana violated Section 39-31-402 (1) and (5),  
 12 MCA.

13 **III. FINDINGS OF FACT**

14 1. As a result of a reduction of 4.5% in State funding for  
 15 Smith Valley Elementary School District No. 89 for the 1994-95  
 16 school year the school board (the "school board") was prompted to  
 17 propose a wage and benefit freeze in negotiations with the Smith  
 18 Valley Teachers Association (SVTA) as a means to control its costs.  
 19 (Testimony of Stephen Foster, tape 3).

20 2. Ultimately the school board first contacted the SVTA on  
 21 January 18, 1994 to request the commencement of 1994-95  
 22 negotiations on January 27, 1994. The SVTA proposed March 7, 1994,  
 23 as the date for the opening session and rejected the board's  
 24 proposal for an earlier session, noting that negotiations  
 25 traditionally began around the first of April. When this request  
 26 was rejected, the board again requested a negotiation date on  
 27 January 27, 1994. (Exhibit J-4)

3. Subsequently, on February 17, 1994, the school board communicated its first offer to the Association through the mail. The proposal called for a two year freeze in teacher salaries, steps (experience), lanes (education) and the district's health insurance contribution. (Exhibits J-4 and 14; Testimony of Stephen Foster, tape 3).

4. By agreement of SVTA and the school board, the first negotiation session took place on March 7, 1994. Ground rules were adopted on March 21, 1994. Nothing in the ground rules limited the parties' right to introduce new proposals during the course of negotiations. (Exhibit 17, Testimony of Renee Boisseau, tape 2).

5. The SVTA's first wage proposal was made approximately March 21, 1994. At this third session, SVTA called for an increase of approximately 4% in the base salary, step and lane increases for the 1994-95 and the 1995-96 school years and an increase in the district's contribution for health insurance for the 1995-96 school year. The district estimated the cost of the proposal at about \$60,000. (Exhibit 16; Testimony of Renee B, tape 2; Stephen Foster, tape 3).

6. Agreement was reached early in negotiations on Article 6.3--Teachers Evaluations and Article 7.2.--Working Conditions. (Testimony of Renee Boisseau, tape 1.)

7. On April 5, 1994 the school board first considered language which provided that wage and benefit increases would not be granted after the expiration of the collective bargaining agreement without the written consent of the parties. Association officers Renee Boisseau and Mickey Hammond were in attendance at the meeting. (Exhibit J-4, Testimony of Stephen Foster, tape 3).

8. The May 2, 1994, school board proposal included the following under Section 10.2:

"This agreement shall be in effect upon ratification of the Board of Trustees, once it has been ratified by the SVTA, and shall remain in effect until June 30, 1995. **No increases in benefits or salary shall be provided without proper written approval of the parties.**" (emphasis added)

The proposal was made in response to the SVTA's contentions that teachers are entitled to automatic step and lane increases pursuant to Forsyth Education Association v. Rosebud County School District No. 4, ULP # 37-81 and the decision in Forsyth School District No. 4 v. Board of Personnel Appeals, 214 Mont. 361, 692 P.2d 1261 (1984). (Exhibits 6 & 7; Testimony Stephen Foster)

9. The purpose of the above language, which was subsequently incorporated into Article 10.1, was explained to the SVTA at the bargaining table, as the school board did not concur with the holding in the Forsyth case. (Exhibits 6 and 7; Testimony of Stephen Foster, tape 3; Testimony of Renee Boisseau, tape 2.)

10. On the May 2, 1994, negotiation meeting, the school board made a conditional offer that would be withdrawn if not accepted within one week. Subsequently, the May 9, 1994 meeting was held, and the Minutes of Negotiation Committee read in part:

...Sherry Svennungsen asked where the board is moving toward negotiations, and if the community doesn't want to jeopardize losing teachers can they address the issue. Stephen Foster stated that he couldn't address those issues as him (sic) and Mr. LaVanway were only a negotiation committee and not a Board.

Mark Gronley asked what happens if negotiations are not done by June 30. Mr. Foster stated that contracts would be issued at 1993-94 salary and negotiations would continue. Renee Boisseau stated the (sic) Board is legally bound to working conditions and salary until new contract is negotiated, the teachers could not be denied steps and lanes.

1 Sherry Svennungsen stated that asking the teachers to give up  
2 steps and lanes, we are asking them to for our childrens'  
education....

3 ...

4 Renee Boisseau stated that the SVTA rejected last weeks  
5 proposal from the Board concerning salary, benefits and  
6 section 10.1. Ms. Boisseau asked if the Board is reoffering  
a two year freeze. Steve Foster said he was assuming that was  
correct....

7 (Exhibits 6 and 7; Testimony of Stephen Foster, tape 3).

8 11. During the May 19, 1994 Special Meeting of the school  
9 board, it reported in the minutes on "Negotiation Discussion and  
10 Preparation" as follows:

11 Stephen Foster reported on the last negotiations meeting. The  
12 SVTA did not accept sections 10.1 or 8.5 or the salary/benefit  
13 proposal. Mr. Foster recommended to the board to consider  
14 going back to the original offer of a two year freeze as the  
last, best and final offer, with the exception of honoring all  
lane movement for the 1994-95 school year, but not for 1995-  
96.

15 **Motion:** Tammy Stremel moved to offer the SVTA the May 2,  
16 proposal with the following exceptions: 1) a two year freeze  
17 in step and lane movements, honoring all lane movements for  
18 people who notify the board by June 1. 2) additional change  
to section 10.1 date should be June 30, 1996. This offer  
would be the Board's last, best and final offer...

19 (Exhibit J-4)

20 12. During a "Special Meeting" on June 6, 1994, the parties  
21 continued contract negotiations. At the meeting, the school board  
22 stated that it appeared appropriate to call in a mediator, and that  
23 the SVTA could notify them at any time the teachers determined they  
24 could bring a proposal closer to that presented by the school  
25 board. SVTA commented that the petition to overrule the Forsyth  
26 rights has not been heard, therefore, the Forsyth rights are in  
27 place and the District must proceed with the contract that is in  
28 place. SVTA asserted that "the District is still bound to honor

1 working conditions including steps and lanes." The Smith Valley  
2 School Board then prepared its "last, best and final" proposal  
3 dated June 6, 1994, which reads in part:

4 ARTICLE XI SALARY

5 11.5 - Salary Schedule Placement-

6 Placement on the salary schedule will be done on the basis of  
7 educational and teaching experience. All teachers shall be  
8 granted credit for up to five years of prior teaching  
9 experience. All credits accepted for Montana teacher  
10 certification or renewal thereof, and which have been approved  
11 by the district administrator shall be used for salary  
12 schedule placement and movement purposes. These credits shall  
13 not be limited to graduate level. Teachers will notify the  
14 Board in writing by June 1st if they intend to acquire enough  
15 credits for movement on the salary schedule for the ensuing  
16 school year.

12 Salary and Insurance Proposal-

13 The Board is proposing a two year freeze in salary, steps,  
14 lanes, and benefits. The Board will honor all lane movement  
15 for 1994-95, for parties that have notified the Board by June  
16 1, 1994. (10.4)

16 11.4 Insurance

17 The Board agrees to pay \$3,000.00 per teacher during the 1994-  
18 95 and 1995-96 school years.

18 Section 10.1 Effective Period -

19 This agreement shall be in effect upon ratification of the  
20 Board of Trustees, once it has been ratified by the SVTA, and  
21 shall remain in effect until June 30, 1996. **No increases in  
benefits or salary shall be provided without proper written  
approval of the parties.**

22 (Emphasis added) (Exhibit No. 8)

23 13. On June 9, 1994, SVTA notified the school board that it  
24 was rejecting the June 6, 1994 offer. That letter reads in part:

25 The Smith Valley Teachers Association has viewed and discussed  
26 the June 6, 1994 last, best and final proposal submitted by  
27 the Board. At this time the Smith Valley Teachers Association  
28 cannot accept this proposal as it currently reads concerning  
sections 8.5 - Professional Leave and article XI salary.

The Smith Valley Teachers Association also notes that the Board of Trustees is considering mediation concerning negotiations as stated at the June 6, 1994 meeting....

(Exhibit No. 18)

14. On June 20, 1994, the school board requested mediation services from the Board of Personnel Appeals, as the trustees believed they were at bargaining **impasse**. In the request, the school board indicated that parties were **deadlocked** over salary and other terms and conditions of employment for the **1994-95** school year. (Exhibit J-4; Testimony of Tammy Stremel, tape 4)

15. The record does not reflect that substantial negotiations took place between the parties during the summer of 1994. When school resumed in the fall, the teachers were paid the same salary as they received the previous year with no increases in steps or lanes. And the Smith Valley School District (District) has not paid teachers step increases for the 1994-95 school year. (Testimony of Renee Boisseau, tape 1; Testimony of Stephen Foster, tape 3)

16. On September 7, 1994, the District was served a **Summons** by the Department informing them that the SVTA had filed an Unfair Labor Practice action with the Board of Personnel Appeals in regard to the dispute. (Exhibit J-3)

17. Ultimately, a mediation session was held in September or October 1994, but without success. Subsequently, the school board requested a resumption of bargaining on December 5, 1994, and the SVTA agreed to the meeting. (Exhibits 20 & 21; Testimony Renee Boisseau, tape 2)

1 18. On December 5, 1994, a "Special Meeting" was held between  
2 the parties for bargaining purposes which was recorded in part as  
3 follows:

4 ...

5 5. TEACHERS CONTRACT NEGOTIATIONS

6 After a lengthy discussion the board proposed to offer the  
7 SVTA an amended proposal dated 12-5-94, stating a one year  
8 freeze on salary and benefits (instead of two), provided that  
9 the SVTA would drop the current Unfair Labor Practice suit,  
10 and with the stipulation that the SVTA must respond within one  
11 week...

12 **MOTION: Move to offer SVTA a one year freeze on salary and**  
13 **benefits, providing the SVTA would drop the Unfair Labor**  
14 **Practice suit and with the stipulation that the SVTA has 10**  
15 **days to reply. If there is no response, a meeting would be**  
16 **scheduled to discuss any future proposal...**

17 ...

18 It was the consensus of the SVTA that there was no difference  
19 in the proposal except for the language in Section 10.1  
20 regarding dropping the lawsuit. The SVTA rejected a similar  
21 offer on May 2, 1994, and rejected the above offer. Steps and  
22 lanes were negotiated in 91-92 contract, and awarded in 92-93.  
23 Teachers worked 93-94 in good faith, performing duties set  
24 forth in the 91-92 contract. SVTA feels that the Board is  
25 picking and choosing certain points of the contract to honor,  
26 and that the board continues to spend money on other things  
27 instead of their teachers. It was discussed that the general  
28 fund is up \$25,000.00 from the previous year and that the  
Board underexpended the 93-94 budget by \$11,000.00. Total  
cost of steps and lanes for 93-94 is \$8,500.00. The SVTA  
feels that they haven't seen any movement from the board to  
honor teacher's commitment, dedication and years of service.

29 **MOTION: Move to settle a two year contract with a flat**  
30 **increase of \$2600 to be divided among the certificated staff**  
31 **to satisfy alleged contractual obligations for steps and lanes**  
32 **from 93-94. In addition the board proposes a specified**  
33 **increase in salary the second year if a proposed operating**  
34 **levy is approved by the voters and with Section 10.1 as**  
35 **amended....Motion carried.**

36 SVTA feels that levy should be kept separate from  
37 negotiations. The SVTA asked the Board to go through the  
38 budget and confirm that all of the money is budgeted properly.  
The current proposal would break the salary schedule now in  
place. **The SVTA thanked the board for the forward movement.**  
(Emphasis added)

39 ...

40 The SVTA would like to take the current proposal back to the  
41 teachers. They would like to meet again on January 9, 1995...

1 (Exhibit 22; Testimony of Renee Boisseau, tape 2.)

2 19. Following the December 5th negotiations, the school board  
3 presented the SVTA with another proposal which appeared to be  
4 identical to the "last, best and final" proposal from June, 1994.  
5 Subsequently, the school board presented a third proposal which  
6 offered a one-year contract, a waiver of Forsyth ruling, a freeze  
7 in salary, steps, lanes and benefits, and a requirement that the  
8 SVTA dismiss the unfair labor practice charge. The SVTA rejected  
9 the proposal. (Exhibits 9 & 10)

10 20. Additionally, on December 7, 1994, the school board  
11 memorialized certain changes discussed in its December 5, 1994,  
12 meeting in a "Last, Best And Final Proposal" with all changes from  
13 previous proposals noted in italics. Pertinent parts read as  
14 follow:

15 Section 10.1 - Effective Period

16 *This agreement shall be in effect upon ratification of the*  
17 *Board of Trustees, once it has been ratified by the SVTA, and*  
18 *shall remain in effect until June 30, 1995. No increases in*  
19 *benefits or salary shall be provided without proper written*  
20 *approval of the parties. If a settlement is reached, the SVTA*  
*must be willing to withdraw its Unfair Labor Practice charge.*  
*If a settlement is not reached, the Board will proceed with a*  
*pre-hearing conference on the charge scheduled for January 25,*  
*1995.*

21 Section 11.4 - Salary and Insurance Proposal

22 *The Board agrees to pay \$3,000.00 per teacher during the 1994-*  
23 *95 school year. The Board is proposing to settle (sic) a two*  
24 *year contract with a flat increase of \$2,600 to be divided*  
25 *among certificated staff to satisfy alleged contractual*  
26 *obligations for steps and lanes from 1993-94. In addition,*  
*the Board proposes a specified increase in salary the second*  
*year if a proposed operating levy is approved by the voters.*  
*This proposal also includes Section 10.1 as amended.*

27 (Exhibit 23)

28

21. As noted above, beginning on December 5, 1994 the board made a series of economic offers that were progressively more costly to the district. The first offer to the 12 members of the bargaining unit amounted to \$2600 for the 1994-95 school year. (Exhibits 22 and 23; Testimony of Tammy Stremel, tape 3).

22. In January, 1995, the board offered a conditional contract proposal for the 1994-95 contract year which would provide payments to tax sheltered savings accounts for teachers in the amount of \$5,075. This offer was made after a review of district finances revealed additional unencumbered funds. (Exhibit 11: Testimony of Tammy Stremel, tape 3).

23. On January 9, 1995, the SVTA made the following proposal to the school board which reads in part:

The SVTA proposes a two year contract with steps and lanes with a 1.4% increase on the base the 1st year and a 1.4% increase on the base the 2nd year. This would be a \$4000.00 increase over steps and lanes already owed from the 1992-1994 contract.

1994-95 school year insurance freeze with a \$50.00 per teacher increase in insurance for the 1995-96 school year.

Article X

Section 10.1

This agreement shall be in effect upon ratification of the Board of Trustees, once it has been ratified by the SVTA, and shall remain in effect until June 30, 1996...

The SVTA also looked at possible areas in the budget that could be reduced.

(Exhibit 24)

24. On February 7, 1995, the District held a "Special Meeting" and the Minutes read in pertinent part:

. . . .

5. **TEACHER CONTRACT NEGOTIATIONS**

Negotiations were opened at 7:00 p.m.. At the last negotiation meeting the Board proposed to offer the SVTA an amount of \$5,075 to be placed in a TSA account as follows: Eleven tenured teachers to receive \$425.00, two non-tenured teachers to receive \$200.00 each. Negotiations resumed with the response from the SVTA to not accept the offer.

The SVTA said that although they rejected this offer, they intend to continue to engage in meaningful negotiations, and wish to work with the Board. The SVTA presented the board with several areas in question in the budget and asked the board to examine the budget carefully. The SVTA provided several line items as examples as to where money could possible (sic) be taken from to provide settlement.

The SVTA again asked the board if its intent was to settle. Mr. Dunk stated that the board would like to settle. He feels that this matter is having a detrimental effect on the staff, students, and community.

After a short caucus, the Board stated that at this time they feel they have explored the possible avenues presented by the SVTA, however, the negotiation committee would like to meet with the full board to see if more money can be stripped from the budget...

(Exhibit 25)

25. On February 13, 1995, the school board voted to request fact finding in an attempt to obtain the opinion of a neutral third party. This motion was subsequently rescinded because of cost concerns. (Exhibits 26; Testimony of Tammy Stremel, tape 4).

26. On February 23, 1995, a "Special Board Meeting" was held wherein Chairperson Tammy Stremel recommended that in the best interest of the district, they should settle the current year (1995) contract. As a result of the meeting, the school board made motion: **"In favor of offering a one year contract for 1994-95 with steps and lanes, no language changes...."**

(Exhibit 27).

27. Subsequently, the board offered the Association a one year contract in which each eligible teacher would receive step and lane increases for the 1994-95 school year. This offer would cost

1 the district between \$9,000 and \$10,000. (Exhibit 12; Testimony of  
2 Renee Boisseau, tape 2; Testimony of Tammy Stremel, tape 4).

3 28. The Association rejected this offer and made a counter-  
4 offer on April 1, 1995 that was **identical** to the board's offer with  
5 the exception of three sentences in Article 10.1. The first  
6 sentence addressed the waiver of any entitlement to automatic wage  
7 increases after the expiration of the agreement. The latter two  
8 sentences concerned the unfair labor practice charge pending before  
9 the Board of Personnel Appeals. The SVTA inferred during  
10 discussions that the ULP charge would be moot once agreement was  
11 reached by the parties. (Exhibit 28; Testimony of Renee Boisseau,  
12 tape 2.)

13 29. On April 7, 1995, the school board met to consider the  
14 Association's counter-offer. The board rejected the offer and  
15 reaffirmed its prior offer of February 23, 1995. (Testimony of  
16 Stephen Foster, tape 3; Testimony of Tammy Stremel, tape 4).

17 30. During negotiations in this dispute, the board and the  
18 Association met a total of 16 times (certain substantive and  
19 pertinent meetings and proposals mentioned above) in an attempt to  
20 settle the contract in question. At no time did either party  
21 unreasonably refuse to meet for collective bargaining in this  
22 matter, and both parties remain willing to meet to reach a  
23 settlement of the matter. The school board never implemented any  
24 of the provisions of its rejected offers and never refused to  
25 bargain with the Association unless the unfair labor practice  
26 charge was withdrawn. Furthermore, the Association's chief  
27 negotiator acknowledged that it was her intent to withdraw the  
28 charge if a settlement was reached. (Testimony of Renee Boisseau,

VED  
17 33  
17 33

1 tape 2; Testimony of Stephen Foster, tape 3; Testimony of Tammy  
2 Stremel, tape 4).

3 31. As pointed out by the school board, the SVTA never  
4 requested mediation, fact finding or binding arbitration of the  
5 dispute. Nor did the SVTA ever ask the school board to implement  
6 those provisions on which tentative agreement was reached.  
7 (Testimony of Renee Boisseau, tape 2).

8 **IV. CONCLUSIONS OF LAW**

9 1. The Montana Supreme Court has approved the use of federal  
10 court and National Labor Relations Board decisions as precedent  
11 when interpreting the Montana Public Employees Collective  
12 Bargaining Act. City of Great Falls v. Young, 211 Mont. 13, 686  
13 P.2d 185, 119 LRRM 2682 (1984). Pursuant to Section 39-31-406,  
14 MCA, the Court has also held that a Complainant's case must be  
15 established by a preponderance of the evidence. Board of Trustees  
16 v. State of Montana, 185 Mont. 89, 604 P.2d 770, 103 LRRM 3090  
17 (1979).

18 2. In addition, the Montana Board of Personnel Appeals has  
19 adopted the totality of conduct standard when deciding whether or  
20 not a Defendant has failed to bargain in good faith. MPEA v. City  
21 of Great Falls, ULP 19-85 (July 28, 1986); Montana Education  
22 Association v. Laurel School District Nos. 17 and 7-70, ULP 40-93  
23 (February, 1995).

24 3. The duty to bargain in good faith is outlined in Volume  
25 1, Patrick Hardin, Charles J. Morris, Developing Labor Law, pages  
26 608-610 (1992) as follows:

27 [The duty to bargain in good faith is an obligation ... to  
28 participate actively in the deliberations so as to indicate a  
present intention to find a basis for agreement...." This implies  
both "an open mind and a sincere desire to reach an agreement" as

1 well as "a sincere effort ... to reach a common ground." The  
2 presence or absence of intent "must be discerned from the record."  
3 Except in cases where the conduct fails to meet the minimum  
4 obligation imposed by law or constitutes an outright refusal to  
5 bargain, relevant facts of a case must be studied to determine  
6 whether the employer or the union is bargaining in good or bad  
7 faith. The "totality of conduct" is the standard by which the  
8 "quality" of negotiations is tested. Thus, even though some  
9 specific actions, viewed alone, might not support a charge of bad-  
10 faith bargaining, a party's overall course of conduct in  
11 negotiations may reveal a violation of the Act].

7 4. It is clear that the Board considers the entire course of  
8 conduct in bargaining, and will not necessarily view isolated  
9 misconduct as a failure to bargain in good faith. Thus, an  
10 employer's withdrawal of tentative agreements, standing alone, does  
11 not constitute bad faith in contravention of the bargaining  
12 obligation. Respondent points out that in Roman Iron Works, as  
13 cited and outlined in Volume 1, Patrick Hardin, Charles J. Morris,  
14 Developing Labor Law, pages 608-610 (1992), "the employer violated  
15 section 8(a)(5) by its unilateral wage increase during  
16 negotiations. The employer also engaged in hard bargaining  
17 including a reduction of the wage offer during bargaining, denial  
18 of a union request for employee addresses, insistence on a right to  
19 subcontract, and a demand for significant cost reductions.  
20 However, the Board found that the employer met frequently with the  
21 union, made complete contract proposals, and made several  
22 significant concessions. Under all of these circumstances, the  
23 Board found that the employer did not engage in bad-faith  
24 bargaining." [citations omitted].

#### 25 **SURFACE OR REGRESSIVE BARGAINING**

26 5. SVTA contends that the Smith Valley School Board has  
27 committed an unfair labor practice through surface bargaining. As  
28 contended by Respondent, however, it was the school board which

1 initiated the request to begin negotiations. And, when the school  
2 board thought the parties had reached apparent impasse, it was the  
3 school board that made a unilateral request for mediation and  
4 requested fact finding in order to resolve this dispute.

5 Moreover, the record reflects that neither of the parties were  
6 uncooperative in their attempts to set and hold settlement  
7 conferences. Neither party refused to meet, and that the school  
8 board met approximately 16 times with the Association in an attempt  
9 to settle the contract. The record further shows that the school  
10 board made a sincere effort to find money within its budget to fund  
11 step and lane increases for the 1994-95 school year, and on  
12 February 23, 1995, it made an offer to do so.

13 6. More importantly, instead of immediately implementing its  
14 rejected offers, the school board continued to meet and to make  
15 offers to the Association. The Association, however, never  
16 requested the school board to implement any of its proposals.  
17 SVTA's allegations that the school board was engaged in **surface**  
18 **bargaining** is clearly not supported by the record in this matter.

19 7. With regard to SVTA's claim that the withdrawal of the  
20 May 2, 1994 offer constitutes **regressive bargaining**, as argued by  
21 the school board, the Board of Personnel Appeals has held that:  
22 "[E]ither party may retract an offer not accepted and revert to a  
23 lower offer without being guilty of bad faith bargaining. . . ."  
24 AFSCME v. State of Montana, ULP 11-79 (April 3, 1982). When the  
25 one year wage freeze offer of May 2 was communicated to the SVTA,  
26 it was clearly stated that the offer would be withdrawn if not  
27 accepted. That the school board subsequently reinstated its  
28 previous offer appears to be that of "hard bargaining," as

1 demonstrated by the parties throughout the collective bargaining  
2 process. Contrary to SVTA's contentions, such lower offer did not  
3 reach the level of an unfair labor practice act when it actually  
4 reinstated its previous offer on May 9, 1994.

5 Under the totality of conduct standard, the record reflects  
6 that the school board has not engaged in surface or regressive  
7 bargaining tactics. MPEA v. City of Great Falls, ULP 19-85 (July,  
8 1986 and Montana Education Association v. Laurel School District  
9 Nos. 17 and 7-70, ULP 40-93 (February, 1995).

10 **CONDITION PRECEDENT - THE WITHDRAWAL OF AN UNFAIR LABOR**  
11 **PRACTICE CHARGE**

12 8. It is well established that a party may not bargain to  
13 impasse over an illegal or permissive subject of bargaining. In  
14 affirming the NLRB, however, the Supreme Court also clarified its  
15 ruling to reflect that bargaining need not be confined to the  
16 statutory subjects. NLRB v. Borg Warner, 356 U.S. 342 (1958), 42  
17 LRRM 2034. Thus, the NLRB has held that a party violates the NLRA  
18 when it demands that an unfair labor practice charge against it be  
19 withdrawn as a condition to agreement. Stackpole Components Co.,  
20 232 NLRB 723. 96 LRRM 1324 (1977).

21 9. As contended by the school board, however, it is also  
22 well established that the mere request by one party that the other  
23 party withdraw an unfair labor practice charge does not violate the  
24 law. In Inner City Broadcasting Corp., 270 NLRB 1230 (1984), the  
25 NLRB held: "[E]ven assuming that Respondent's comments could be  
26 considered that, as a condition precedent to the reaching of an  
27 agreement, the Union withdrew its charge and arbitration demands,  
28 such a proposal is not per se illegal. However, Respondent could

1 not legally insist to impasse on its acceptance in the face of a  
2 clear and expressed refusal by the Union to bargain about the [non-  
3 mandatory subjects]" Id. at 1223. A similar result was reached in  
4 Carlsen Porsche Audi, Inc., 266 NLRB 141 (1983).

5 10. The above mentioned cases establish the proposition that  
6 one party may request the other to withdraw an unfair labor  
7 practice charge as a condition for settlement, but may not bargain  
8 to impasse on the request. Here, however, the school board did  
9 not bargain to impasse on this issue because SVTA admitted at the  
10 hearing that they intended to withdraw the charges in the event of  
11 a settlement. Moreover, the record in this matter indicates that  
12 the school board's request to withdraw the unfair labor practice  
13 charge did not unreasonably restrain or inhibit the bargaining  
14 process between parties. As contended by the board, the record  
15 does not reflect the board has conditioned its willingness to meet  
16 on the withdrawal of the charge, and the SVTA never objected to  
17 such request as a permissive subject over which it would not  
18 bargain.

19 11. As pointed out by SVTA in its argument, the overall  
20 record indicates that the main sticking point in these negotiations  
21 has never been the board's request to drop the unfair labor  
22 practice charge. It has been the school board's insistence and the  
23 Association's rejection of language which would waive a teacher's  
24 step and lane increases after a collective bargaining agreement  
25 expires pursuant to the Forsyth case (discussion follows) that  
26 deadlocked the parties.

27 12. Clearly, steps and lanes are mandatory subjects for  
28 bargaining, therefore, it appears that the board has the right to

1 insist on this language. And, the SVTA has the right to reject it.  
2 In so doing, neither party is guilty of a refusal to bargain in  
3 good faith.

4 13. In Forsyth Education Association v. Rosebud County School  
5 District No. 14, ULP 37-81 (1983) and Lolo Education Association v.  
6 Missoula County School District No. 7, ULP 29-86 (1987), the  
7 Montana Board of Personnel Appeals held that a school district  
8 commits an unfair labor practice when it withholds an experience  
9 step under the terms of an expired collective bargaining agreement  
10 **in the absence of a bargaining impasse.**

11 14. The rule announced in Forsyth was derived from the  
12 unilateral change doctrine first announced by the United States  
13 Supreme Court in NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962).  
14 In that case, the Court affirmed the rule that it is an unfair  
15 labor practice for an employer to make a unilateral change in any  
16 term or condition of employment following the expiration of a  
17 collective bargaining agreement without first bargaining to  
18 impasse. The Court reasoned that unilateral changes are unlawful  
19 because they frustrate the "statutory objective of establishing  
20 working conditions through bargaining." Id. at 744. In that case,  
21 the employer imposed a wage increase during the course of  
22 negotiations.

23 **IMPASSE INTERPRETED**

24 15. The Board of Personnel Appeals (BPA) adopted a definition  
25 of impasse in Bigfork Area Education Association v. Board of  
26 Flathead and Lake County School District No. 38, ULP #20-78 (1979).  
27 In that case, the BPA cited an NLRB holding in Taft Broadcasting  
28 Company, 163 NLRB 475, 478, 64 LRRM 1386 (1967) to define a

1 bargaining impasse as a "deadlock reached by bargaining parties  
2 'after good faith negotiations have exhausted the prospects of  
3 concluding an agreement.'"

4 In applying this definition, BPA held that it must consider  
5 the "bargaining history, the good faith of the parties in  
6 negotiations, the length of the negotiations, the importance of the  
7 issue or issues as to which there is disagreement, [and] the  
8 contemporaneous understanding of the parties as to the state of  
9 negotiations. . . ." before determining if a bona fide impasse  
10 permits an employer to implement a unilateral change in a mandatory  
11 subject of bargaining.

12 16. As the U.S. Supreme Court found in NLRB v. Borg-Warner  
13 Corp., Wooster Div., 356 US 342, 352, 42 LRRM 2034 (1958), some  
14 difficulty exists in establishing the "inherently vague and fluid  
15 ... standard" applicable to an impasse reached by hard and  
16 steadfast bargaining, as distinguished from one resulting from an  
17 unlawful refusal to bargain. And, the NLRB found that in  
18 collective bargaining "part of the difficulty arises from the fact  
19 that the law recognizes the possibility of the parties reaching an  
20 impasse." (40 LRRM 98, 105-6 (1957))

21 17. The difficulty of applying this definition has caused  
22 some of our federal courts to reject the impasse standard. In NLRB  
23 v. Citizens Hotel, 326 F.2d 501, 55 LRRM 2135 (5th Cir. 1964), for  
24 example, the Fifth Circuit Court of Appeals held: "[A]n employer  
25 may make changes without the approval of the union as the  
26 bargaining agent. The union has no absolute veto power under the  
27 Act. Nor do negotiations necessarily have to exhaust themselves to  
28 the point of the so-called impasse." Id. at 2137.

1 18. Here too, as contended by Respondent, on the surface it  
2 is difficult to know whether parties were deadlocked and in true  
3 impasse. The overall record clearly indicates, however, that Smith  
4 Valley trustees honestly believed that they were at impasse by the  
5 end of May, 1994, even to the extent they requested mediation on  
6 June 20, 1994. However, subsequent bargaining developments show  
7 further progress in negotiations (Finding of Fact No. 29).

8 19. As the Board of Personnel Appeals stated in Forsyth,  
9 "This decision by the BPA is not as onerous as suggested by the  
10 school district and amici curiae. That is so for the reason that  
11 **if during negotiations impasse occurs**, then the employer is free to  
12 unilaterally implement its last, best, final offer." (Emphasis  
13 added) Forsyth Education Association v. Rosebud County School  
14 District #14, 2 Ed Law 230, 242 (1983). As the facts of this case  
15 make clear, however, impasse did not occur prior to the expiration  
16 of the current contract and the district was obligated to pay steps  
17 and lanes as provided in the agreement.

18 20. Furthermore, as contended by the school board, given the  
19 reduction in the district's budget, it is understandable why the  
20 school board would ask for such a provision as a condition for  
21 settlement. And, making this request less than two months after  
22 the beginning of negotiations does not constitute a failure to  
23 bargain in good faith. Moreover, consistent with the Court's  
24 pronouncement in Katz, the Montana Public Employees Collective  
25 Bargaining Act was adopted to encourage public employers and  
26 employee unions to determine the terms and conditions of employment  
27 at the **bargaining table**. Clearly, the bargaining history herein  
28 reflects both SVTA and the board made good faith efforts to resolve

1 the dispute over this very important language issue. NLRB v. Katz,  
2 369 U.S. 736 (1962).

3 21. Here, the school board essentially argues that Forsyth  
4 should be overturned, and SVTA argues it is controlling and must  
5 stand. The parties have provided citation to and discussion of a  
6 number of cases supporting their contentions on that matter. In  
7 this case, however, as before concluded from the facts, all of the  
8 factors (Length of Negotiations; Good Faith of Parties; Importance  
9 of the Issue; Contemporary Understanding) indicate that impasse had  
10 not been reached. The parties were not at impasse as of the date  
11 of the filing of Unfair Labor Practice No. 61-94.

12 22. In the absence of impasse in this matter, as contended by  
13 the SVTA, the Hearing Officer is bound by precedent established by  
14 the Board of Personnel Appeals for whom he is conducting the  
15 hearing. Clearly, Forsyth sets forth precedent that must be  
16 followed by the Department of Labor and Industry. Certainly, the  
17 Hearing Officer in this matter has no authority to reverse  
18 established principles of law or to reverse a decision of the  
19 Montana Supreme Court.

20 23. Furthermore, as pointed out by the SVTA, the school board  
21 provided no citations to any authority holding that the Hearing  
22 Officer has such power to overturn the Board. Moreover, in Chester  
23 School District No. 33. et. al v. Montana Education Association  
24 et. al, Declaratory Ruling No. 1-94, the School District asked the  
25 Board to revisit the Forsyth holding and the Board declined to do  
26 so. SVTA also points out that House Bill 264 was introduced in the  
27 recently completed legislature to overturn Forsyth and ultimately  
28 failed.

1 24. Here, having concluded the parties are not at impasse,  
2 Forsyth is controlling. In Forsyth the Montana Supreme Court held  
3 in part:

4 While the appellant School district argued the BPA had ordered  
5 it to **automatically grant** teachers' wage increases under the  
6 terms of the expired contract, **we find no such ruling** by the  
7 BPA in its order. It simply ordered that, **in the absence of**  
8 **an "impasse," the provisions of the expired contract may not**  
9 **be unilaterally changed by the employer.**

10 *Id.* at 365 (Emphasis added)

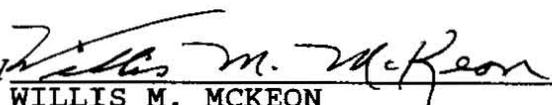
11 25. Based on the overall record, Smith Valley School District  
12 violated MCA 39-31-401(1) and (5), MCA.

13 **ORDER**

14 Smith Valley School District has violated MCA 39-31-401(1) and  
15 (5) and is hereby ordered to negotiate with the Association as  
16 required by the Act. It is further ordered that the District pay  
17 backpay based on the terms of the expired agreement to each teacher  
18 of the District.

19 DATED this 15th day of December, 1995.

20 BOARD OF PERSONNEL APPEALS

21 By   
22 WILLIS M. MCKEON  
23 PRESIDING OFFICER

24 Board members Foley and Schneider concur.

25 Board members Talcott and Hagan dissent.

26 \* \* \* \* \*

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

\*\*\*\*\*

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify that a true and correct copy of this document was mailed to the following on the 20<sup>th</sup> day of December, 1995:

KARL J. ENGLUND  
ATTORNEY FOR COMPLAINANT  
PO BOX 8358  
MISSOULA MT 59807-8358

MICHAEL DAHLEM, STAFF ATTORNEY  
MONTANA SCHOOL BOARDS ASSOCIATION  
ONE SOUTH MONTANA AVENUE  
HELENA MT 59601

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

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 61-94:

SMITH VALLEY TEACHERS )  
ASSOCIATION, MEA/NEA, )  
Complainant, )  
vs. )  
SMITH VALLEY ELEMENTARY SCHOOL )  
DISTRICT NO. 89, FLATHEAD COUNTY, )  
Defendant. )

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
ORDER

\* \* \* \* \*

**I. INTRODUCTION**

An in-person hearing on the above matter was held on April 12, 1995, in Kalispell, Montana before Gordon D. Bruce, duly appointed Hearing Officer of the Department of Labor and Industry. The Complainant was represented by its counsel, Karl J. Englund. Defendant was represented by its counsel, Michael Dahlem. Witnesses Renee Boisseau, Stephen Foster and Tammy Stremel gave sworn testimony at the hearing. Subsequent to the close of hearing, parties filed their post-hearing briefs with the Hearing Officer and final briefs were filed on May 25, 1995.

**II. ISSUE**

Whether the Smith Valley Elementary School District No. 89, Flathead County, Montana violated Section 39-31-402 (1) and (5), MCA.

**III. FINDINGS OF FACT**

1. As a result of a reduction of 4.5% in State funding for Smith Valley Elementary School District No. 89 for the 1994-95 school year the school board (the "school board") was prompted to

1 propose a wage and benefit freeze in negotiations with the Smith  
2 Valley Teachers Association (SVTA) as a means to control its costs.  
3 (Testimony of Stephen Foster, tape 3).

4 2. Ultimately the school board first contacted the SVTA on  
5 January 18, 1994 to request the commencement of 1994-95  
6 negotiations on January 27, 1994. The SVTA proposed March 7, 1994,  
7 as the date for the opening session and rejected the board's  
8 proposal for an earlier session, noting that negotiations  
9 traditionally began around the first of April. When this request  
10 was rejected, the board again requested a negotiation date on  
11 January 27, 1994. (Exhibit J-4)

12 3. Subsequently, on February 17, 1994, the school board  
13 communicated its first offer to the Association through the mail.  
14 The proposal called for a two year freeze in teacher salaries,  
15 steps (experience), lanes (education) and the district's health  
16 insurance contribution. (Exhibits J-4 and 14; Testimony of Stephen  
17 Foster, tape 3).

18 4. By agreement of SVTA and the school board, the first  
19 negotiation session took place on March 7, 1994. Ground rules were  
20 adopted on March 21, 1994. Nothing in the ground rules limited the  
21 parties' right to introduce new proposals during the course of  
22 negotiations. (Exhibit 17, Testimony of Renee Boisseau, tape 2).

23 5. The SVTA's first wage proposal was made approximately  
24 March 21, 1994. At this third session, SVTA called for an increase  
25 of approximately 4% in the base salary, step and lane increases for  
26 the 1994-95 and the 1995-96 school years and an increase in the  
27 district's contribution for health insurance for the 1995-96 school  
28 year. The district estimated the cost of the proposal at about

1 \$60,000. (Exhibit 16; Testimony of Renee B, tape 2; Stephen  
2 Foster, tape 3).

3 6. Agreement was reached early in negotiations on Article  
4 6.3--Teachers Evaluations and Article 7.2.--Working Conditions.  
5 (Testimony of Renee Boisseau, tape 1.)

6 7. On April 5, 1994 the school board first considered  
7 language which provided that wage and benefit increases would not  
8 be granted after the expiration of the collective bargaining  
9 agreement without the written consent of the parties. Association  
10 officers Renee Boisseau and Mickey Hammond were in attendance at  
11 the meeting. (Exhibit J-4, Testimony of Stephen Foster, tape 3).

12 8. The May 2, 1994, school board proposal included the  
13 following under Section 10.2:

14 "This agreement shall be in effect upon ratification of the  
15 Board of Trustees, once it has been ratified by the SVTA, and  
16 shall remain in effect until June 30, 1995. **No increases in  
benefits or salary shall be provided without proper written  
approval of the parties.**" (emphasis added)

17 The proposal was made in response to the SVTA's contentions that  
18 teachers are entitled to automatic step and lane increases pursuant  
19 to Forsyth Education Association v. Rosebud County School District  
20 No. 4, ULP # 37-81 and the decision in Forsyth School District No.  
21 4 v. Board of Personnel Appeals, 214 Mont. 361, 692 P.2d 1261  
22 (1984). (Exhibits 6 & 7; Testimony Stephen Foster)

23 9. The purpose of the above language, which was subsequently  
24 incorporated into Article 10.1, was explained to the SVTA at the  
25 bargaining table, as the school board did not concur with the  
26 holding in the Forsyth case. (Exhibits 6 and 7; Testimony of  
27 Stephen Foster, tape 3; Testimony of Renee Boisseau, tape 2.)  
28

1 10. On the May 2, 1994, negotiation meeting, the school board  
2 made a conditional offer that would be withdrawn if not accepted  
3 within one week. Subsequently, the May 9, 1994 meeting was held,  
4 and the Minutes of Negotiation Committee read in part:

5 ...Sherry Svennungsen asked where the board is moving toward  
6 negotiations, and if the community doesn't want to jeopardize  
7 losing teachers can they address the issue. Stephen Foster  
8 stated that he couldn't address those issues as him (sic) and  
9 Mr. LaVanway were only a negotiation committee and not a  
10 Board.

11 Mark Gronley asked what happens if negotiations are not done  
12 by June 30. Mr. Foster stated that contracts would be issued  
13 at 1993-94 salary and negotiations would continue. Renee  
14 Boisseau stated the (sic) Board is legally bound to working  
15 conditions and salary until new contract is negotiated, the  
16 teachers could not be denied steps and lanes.

17 Sherry Svennungsen stated that asking the teachers to give up  
18 steps and lanes, we are asking them to for our childrens  
19 education....

20 ...

21 Renee Boisseau stated that the SVTA rejected last weeks  
22 proposal from the Board concerning salary, benefits and  
23 section 10.1. Ms. Boisseau asked if the Board is reoffering  
24 a two year freeze. Steve Foster said he was assuming that was  
25 correct....

26 (Exhibits 6 and 7; Testimony of Stephen Foster, tape 3).

27 11. During the May 19, 1994 Special Meeting of the school  
28 board, it reported in the minutes on "Negotiation Discussion and  
Preparation" as follows:

Stephen Foster reported on the last negotiations meeting. The  
SVTA did not accept sections 10.1 or 8.5 or the salary/benefit  
proposal. Mr. Foster recommended to the board to consider  
going back to the original offer of a two year freeze as the  
last, best and final offer, with the exception of honoring all  
lane movement for the 1994-95 school year, but not for 1995-  
96.

**Motion:** Tammy Stremel moved to offer the SVTA the May 2,  
proposal with the following exceptions: 1) a two year freeze  
in step and lane movements, honoring all lane movements for  
people who notify the board by June 1. 2) additional change  
to section 10.1 date should be June 30, 1996. This offer  
would be the Board's last, best and final offer...

1 (Exhibit J-4)

2 12. During a "Special Meeting" on June 6, 1994, the parties  
3 continued contract negotiations. At the meeting, the school board  
4 stated that it appeared appropriate to call in a mediator, and that  
5 the SVTA could notify them at any time the teachers determined they  
6 could bring a proposal closer to that presented by the school  
7 board. SVTA commented that the petition to overrule the Forsyth  
8 rights has not been heard, therefore, the Forsyth rights are in  
9 place and the District **must** proceed with the contract that is in  
10 place. SVTA asserted that "the District is still bound to honor  
11 working conditions including steps and lanes." The Smith Valley  
12 School Board then prepared its "last, best and final" proposal  
13 dated June 6, 1994, which reads in part:

14 ARTICLE XI SALARY

15 11.5 - Salary Schedule Placement-

16 Placement on the salary schedule will be done on the basis of  
17 educational and teaching experience. All teachers shall be  
18 granted credit for up to five years of prior teaching  
19 experience. All credits accepted for Montana teacher  
20 certification or renewal thereof, and which have been approved  
21 by the district administrator shall be used for salary  
22 schedule placement and movement purposes. These credits shall  
23 not be limited to graduate level. Teachers will notify the  
24 Board in writing by June 1st if they intend to acquire enough  
25 credits for movement on the salary schedule for the ensuing  
26 school year.

27 Salary and Insurance Proposal-

28 The Board is proposing a two year freeze in salary, steps,  
lanes, and benefits. The Board will honor all **lane** movement  
for 1994-95, for parties that have notified the Board by June  
1, 1994. (10.4)

11.4 Insurance

The Board agrees to pay \$3,000.00 per teacher during the 1994-  
95 and 1995-96 school years.

Section 10.1 Effective Period -

1 This agreement shall be in effect upon ratification of the  
2 Board of Trustees, once it has been ratified by the SVTA, and  
3 shall remain in effect until June 30, 1996. **No increases in  
benefits or salary shall be provided without proper written  
approval of the parties.**

4 (Emphasis added) (Exhibit No. 8)

5 13. On June 9, 1994, SVTA notified the school board that it  
6 was rejecting the June 6, 1994 offer. That letter reads in part:

7 The Smith Valley Teachers Association has viewed and discussed  
8 the June 6, 1994 last, best and final proposal submitted by  
9 the Board. At this time the Smith Valley Teachers Association  
cannot accept this proposal as it currently reads concerning  
sections 8.5 - Professional Leave and article XI salary.

10 The Smith Valley Teachers Association also notes that the  
11 Board of Trustees is considering mediation concerning  
negotiations as stated at the June 6, 1994 meeting....

12 (Exhibit No. 18)

13 14. On June 20, 1994, the school board requested mediation  
14 services from the Board of Personnel Appeals, as the trustees  
15 believed they were at bargaining **impasse**. In the request, the  
16 school board indicated that parties were **deadlocked** over salary and  
17 other terms and conditions of employment for the **1994-95** school  
18 year. (Exhibit J-4; Testimony of Tammy Stremel, tape 4)

19 15. The record does not reflect that substantial negotiations  
20 took place between the parties during the summer of 1994. When  
21 school resumed in the fall, the teachers were paid the same salary  
22 as they received the previous year with no increases in steps or  
23 lanes. And the Smith Valley School District (District) has not  
24 paid teachers step increases for the 1994-95 school year.  
25 (Testimony of Renee Boisseau, tape 1; Testimony of Stephen Foster,  
26 tape 3)

27 16. On September 7, 1994, the District was served a **Summons**  
28 by the Department informing them that the SVTA had filed an Unfair

1 Labor Practice action with the Board of Personnel Appeals in regard  
2 to the dispute. (Exhibit J-3)

3 17. Ultimately, a mediation session was held in September or  
4 October 1994, but without success. Subsequently, the school board  
5 requested a resumption of bargaining on December 5, 1994, and the  
6 SVTA agreed to the meeting. (Exhibits 20 & 21; Testimony Renee  
7 Boisseau, tape 2)

8 18. On December 5, 1994, a "Special Meeting" was held between  
9 the parties for bargaining purposes which was recorded in part as  
10 follows:

11 ...

12 5. TEACHERS CONTRACT NEGOTIATIONS

13 After a lengthy discussion the board proposed to offer the  
14 SVTA an amended proposal dated 12-5-94, stating a one year  
15 freeze on salary and benefits (instead of two), provided that  
the SVTA would drop the current Unfair Labor Practice suit,  
and with the stipulation that the SVTA must respond within one  
week...

16 **MOTION: Move to offer SVTA a one year freeze on salary and**  
17 **benefits, providing the SVTA would drop the Unfair Labor**  
18 **Practice suit and with the stipulation that the SVTA has 10**  
19 **days to reply. If there is no response, a meeting would be**  
20 **scheduled to discuss any future proposal...**

21 ...

22 It was the consensus of the SVTA that there was no difference  
23 in the proposal except for the language in Section 10.1  
24 regarding dropping the lawsuit. The SVTA rejected a similar  
25 offer on May 2, 1994, and rejected the above offer. Steps and  
26 lanes were negotiated in 91-92 contract, and awarded in 92-93.  
27 Teachers worked 93-94 in good faith, performing duties set  
28 forth in the 91-92 contract. SVTA feels that the Board is  
picking and choosing certain points of the contract to honor,  
and that the board continues to spend money on other things  
instead of their teachers. It was discussed that the general  
fund is up \$25,000.00 from the previous year and that the  
Board underexpended the 93-94 budget by \$11,000.00. Total  
cost of steps and lanes for 93-94 is \$8,500.00. The SVTA  
feels that they haven't seen any movement from the board to  
honor teacher's commitment, dedication and years of service.

29 **MOTION: Move to settle a two year contract with a flat**  
30 **increase of \$2600 to be divided among the certificated staff**  
31 **to satisfy alleged contractual obligations for steps and lanes**  
32 **from 93-94. In addition the board proposes a specified**

1 increase in salary the second year if a proposed operating  
2 levy is approved by the voters and with Section 10.1 as  
amended....Motion carried.

3 SVTA feels that levy should be kept separate from  
4 negotiations. The SVTA asked the Board to go through the  
5 budget and confirm that all of the money is budgeted properly.  
6 The current proposal would break the salary schedule now in  
place. **The SVTA thanked the board for the forward movement.**  
(Emphasis added)

7 ...  
8 The SVTA would like to take the current proposal back to the  
9 teachers. They would like to meet again on January 9, 1995...

10 (Exhibit 22; Testimony of Renee Boisseau, tape 2.)

11 19. Following the December 5th negotiations, the school board  
12 presented the SVTA with another proposal which appeared to be  
13 identical to the "last, best and final" proposal from June, 1994.  
14 Subsequently, the school board presented a third proposal which  
15 offered a one-year contract, a waiver of Forsyth ruling, a freeze  
16 in salary, steps, lanes and benefits, and a requirement that the  
17 SVTA dismiss the unfair labor practice charge. The SVTA rejected  
18 the proposal. (Exhibits 9 & 10)

19 20. Additionally, on December 7, 1994, the school board  
20 memorialized certain changes discussed in its December 5, 1994,  
21 meeting in a "Last, Best And Final Proposal" with all changes from  
22 previous proposals noted in italics. Pertinent parts read as  
23 follow:

24 Section 10.1 - Effective Period

25 *This agreement shall be in effect upon ratification of the*  
26 *Board of Trustees, once it has been ratified by the SVTA, and*  
27 *shall remain in effect until June 30, 1995. No increases in*  
28 *benefits or salary shall be provided without proper written*  
*approval of the parties. If a settlement is reached, the SVTA*  
*must be willing to withdraw its Unfair Labor Practice charge.*  
*If a settlement is not reached, the Board will proceed with a*  
*pre-hearing conference on the charge scheduled for January 25,*  
*1995.*

Section 11.4 - Salary and Insurance Proposal

1 The Board agrees to pay \$3,000.00 per teacher during the 1994-  
2 95 school year. The Board is proposing to settle (sic) a two  
3 year contract with a flat increase of \$2,600 to be divided  
4 among certificated staff to satisfy alleged contractual  
5 obligations for steps and lanes from 1993-94. In addition,  
6 the Board proposes a specified increase in salary the second  
7 year if a proposed operating levy is approved by the voters.  
8 This proposal also includes Section 10.1 as amended.

6 (Exhibit 23)

7 21. As noted above, beginning on December 5, 1994 the board  
8 made a series of economic offers that were progressively more  
9 costly to the district. The first offer to the 12 members of the  
10 bargaining unit amounted to \$2600 for the 1994-95 school year.  
11 (Exhibits 22 and 23; Testimony of Tammev Stremel, tape 3).

12 22. In January, 1995, the board offered a conditional  
13 contract proposal for the 1994-95 contract year which would provide  
14 payments to tax sheltered savings accounts for teachers in the  
15 amount of \$5,075. This offer was made after a review of district  
16 finances revealed additional unencumbered funds. (Exhibit 11:  
17 Testimony of Tammev Stremel, tape 3).

18 23. On January 9, 1995, the SVTA made the following proposal  
19 to the school board which reads in part:

20 The SVTA proposes a two year contract with steps and lanes  
21 with a 1.4% increase on the base the 1st year and a 1.4%  
22 increase on the base the 2nd year. This would be a \$4000.00  
23 increase over steps and lanes already owed from the 1992-1994  
24 contract.

25 1994-95 school year insurance freeze with a \$50.00 per teacher  
26 increase in insurance for the 1995-96 school year.

27 Article X

28 Section 10.1

This agreement shall be in effect upon ratification of the  
Board of Trustees, once it has been ratified by the SVTA, and  
shall remain in effect until June 30, 1996...

1 The SVTA also looked at possible areas in the budget that could be  
2 reduced.

3 (Exhibit 24)

4 24. On February 7, 1995, the District held a "Special  
5 Meeting" and the Minutes read in pertinent part:

6 . . . .

7 **5. TEACHER CONTRACT NEGOTIATIONS**

8 Negotiations were opened at 7:00 p.m.. At the last  
9 negotiation meeting the Board proposed to offer the SVTA an  
10 amount of \$5,075 to be placed in a TSA account as follows:  
11 Eleven tenured teachers to receive \$425.00, two non-tenured  
12 teachers to receive \$200.00 each. Negotiations resumed with  
13 the response from the SVTA to not accept the offer.

14 The SVTA said that although they rejected this offer, they  
15 intend to continue to engage in meaningful negotiations, and  
16 wish to work with the Board. The SVTA presented the board  
17 with several areas in question in the budget and asked the  
18 board to examine the budget carefully. The SVTA provided  
19 several line items as examples as to where money could  
20 possible (sic) be taken from to provide settlement.

21 The SVTA again asked the board if its intent was to settle.  
22 Mr. Dunk stated that the board would like to settle. He feels  
23 that this matter is having a detrimental effect on the staff,  
24 students, and community.

25 After a short caucus, the Board stated that at this time they  
26 feel they have explored the possible avenues presented by the  
27 SVTA, however, the negotiation committee would like to meet  
28 with the full board to see if more money can be stripped from  
the budget...

21 (Exhibit 25)

22 25. On February 13, 1995, the school board voted to request  
23 fact finding in an attempt to obtain the opinion of a neutral third  
24 party. This motion was subsequently rescinded because of cost  
25 concerns. (Exhibits 26; Testimony of Tammey Stremel, tape 4).

26 26. On February 23, 1995, a "Special Board Meeting" was held  
27 wherein Chairperson Tammey Stremel recommended that in the best  
28 interest of the district, they should settle the current year

1 (1995) contract. As a result of the meeting, the school board made  
2 motion: "In favor of offering a one year contract for 1994-95 with  
3 steps and lanes, no language changes...."

4 (Exhibit 27).

5 27. Subsequently, the board offered the Association a one  
6 year contract in which each eligible teacher would receive step and  
7 lane increases for the 1994-95 school year. This offer would cost  
8 the district between \$9,000 and \$10,000. (Exhibit 12; Testimony of  
9 Renee Boisseau, tape 2; Testimony of Tammey Stremel, tape 4).

10 28. The Association rejected this offer and made a counter-  
11 offer on April 1, 1995 that was **identical** to the board's offer with  
12 the exception of three sentences in Article 10.1. The first  
13 sentence addressed the waiver of any entitlement to automatic wage  
14 increases after the expiration of the agreement. The latter two  
15 sentences concerned the unfair labor practice charge pending before  
16 the Board of Personnel Appeals. Essentially, parties remained  
17 **deadlocked** as a result of the Forsyth language, and had been  
18 deadlocked on that issue beginning at least in February and March  
19 of 1994 as reflected in the school board's minutes, proposals and  
20 counter proposals set out in the above facts. And, the SVTA  
21 inferred during discussions that the ULP charge would be moot once  
22 agreement was reached by the parties. (Exhibit 28; Testimony of  
23 Renee Boisseau, tape 2.)

24 29. On April 7, 1995, the school board met to consider the  
25 Association's counter-offer. The board rejected the offer and  
26 reaffirmed its prior offer of February 23, 1995. (Testimony of  
27 Stephen Foster, tape 3; Testimony of Tammey Stremel, tape 4).  
28

1           30. During negotiations in this dispute, the board and the  
2 Association met a total of 16 times (certain substantive and  
3 pertinent meetings and proposals mentioned above) in an attempt to  
4 settle the contract in question. At no time did either party  
5 unreasonably refuse to meet for collective bargaining in this  
6 matter, and both parties remain willing to meet to reach a  
7 settlement of the matter. The school board never implemented any  
8 of the provisions of its rejected offers and never refused to  
9 bargain with the Association unless the unfair labor practice  
10 charge was withdrawn. Furthermore, the Association's chief  
11 negotiator acknowledged that it was her intent to withdraw the  
12 charge if a settlement was reached. (Testimony of Renee Boisseau,  
13 tape 2; Testimony of Stephen Foster, tape 3; Testimony of Tammy  
14 Stremel, tape 4).

15           31. As pointed out by the school board, the SVTA never  
16 requested mediation, fact finding or binding arbitration of the  
17 dispute. Nor did the SVTA ever ask the school board to implement  
18 those provisions on which tentative agreement was reached.  
19 (Testimony of Renee Boisseau, tape 2).

#### 20 **IV. CONCLUSIONS OF LAW**

21           1. The Montana Supreme Court has approved the use of federal  
22 court and National Labor Relations Board decisions as precedent  
23 when interpreting the Montana Public Employees Collective  
24 Bargaining Act. City of Great Falls v. Young, 211 Mont. 13, 686  
25 P.2d 185, 119 LRRM 2682 (1984). Pursuant to Section 39-31-406,  
26 MCA, the Court has also held that a Complainant's case must be  
27 established by a preponderance of the evidence. Board of Trustees  
28

1 v. State of Montana, 185 Mont. 89, 604 P.2d 770, 103 LRRM 3090  
2 (1979).

3 2. In addition, the Montana Board of Personnel Appeals has  
4 adopted the totality of conduct standard when deciding whether or  
5 not a Defendant has failed to bargain in good faith. MPEA v. City  
6 of Great Falls, ULP 19-85 (July 28, 1986); Montana Education  
7 Association v. Laurel School District Nos. 17 and 7-70, ULP 40-93  
8 (February, 1995).

9 3. The duty to bargain in good faith is outlined in Volume  
10 1, Patrick Hardin, Charles J. Morris, Developing Labor Law, pages  
11 608-610 (1992) as follows:

12 [The duty to bargain in good faith is an obligation ... to  
13 participate actively in the deliberations so as to indicate a  
14 present intention to find a basis for agreement...." This implies  
15 both "an open mind and a sincere desire to reach an agreement" as  
16 well as "a sincere effort ... to reach a common ground." The  
17 presence or absence of intent "must be discerned from the record."  
18 Except in cases where the conduct fails to meet the minimum  
19 obligation imposed by law or constitutes an outright refusal to  
bargain, relevant facts of a case must be studied to determine  
whether the employer or the union is bargaining in good or bad  
faith. The "totality of conduct" is the standard by which the  
"quality" of negotiations is tested. Thus, even though some  
specific actions, viewed alone, might not support a charge of bad-  
faith bargaining, a party's overall course of conduct in  
negotiations may reveal a violation of the Act].

20 4. It is clear that the Board considers the entire course of  
21 conduct in bargaining, and will not necessarily view isolated  
22 misconduct as a failure to bargain in good faith. Thus, an  
23 employer's withdrawal of tentative agreements, standing alone, does  
24 not constitute bad faith in contravention of the bargaining  
25 obligation. Respondent points out that in Roman Iron Works, as  
26 cited and outlined in Volume 1, Patrick Hardin, Charles J. Morris,  
27 Developing Labor Law, pages 608-610 (1992), "the employer violated  
28 section 8(a)(5) by its unilateral wage increase during

1 negotiations. The employer also engaged in hard bargaining  
2 including a reduction of the wage offer during bargaining, denial  
3 of a union request for employee addresses, insistence on a right to  
4 subcontract, and a demand for significant cost reductions.  
5 However, the Board found that the employer met frequently with the  
6 union, made complete contract proposals, and made several  
7 significant concessions. Under all of these circumstances, the  
8 Board found that the employer did not engage in bad-faith  
9 bargaining." [citations omitted].

#### 10 **SURFACE OR REGRESSIVE BARGAINING**

11 5. SVTA contends that the Smith Valley School Board has  
12 committed an unfair labor practice through surface bargaining. As  
13 contended by Respondent, however, it was the school board which  
14 initiated the request to begin negotiations. And, when the school  
15 board thought the parties had reached apparent impasse, it was the  
16 school board that made a unilateral request for mediation and  
17 requested fact finding in order to resolve this dispute.

18 Moreover, the record reflects that neither of the parties were  
19 uncooperative in their attempts to set and hold settlement  
20 conferences. Neither party refused to meet, and that the school  
21 board met approximately 16 times with the Association in an attempt  
22 to settle the contract. The record further shows that the school  
23 board made a sincere effort to find money within its budget to fund  
24 step and lane increases for the 1994-95 school year, and on  
25 February 23, 1995, it made an offer to do so.

26 6. More importantly, instead of unilaterally implementing  
27 any of its rejected offers, the school board continued to meet and  
28 to make offers to the Association. The Association, however, never

1 requested the school board to implement any of its proposals.  
2 SVTA's allegations that the school board was engaged in **surface**  
3 **bargaining** is clearly not supported by the record in this matter.

4 7. With regard to SVTA's claim that the withdrawal of the  
5 May 2, 1994 offer constitutes **regressive bargaining**, as argued by  
6 the school board, the Board of Personnel Appeals has held that:  
7 "[E]ither party may retract an offer not accepted and revert to a  
8 lower offer without being guilty of bad faith bargaining. . . ."  
9 AFSCME v. State of Montana, ULP 11-79 (April 3, 1982). When the  
10 one year wage freeze offer of May 2 was communicated to the SVTA,  
11 it was clearly stated that the offer would be withdrawn if not  
12 accepted. That the school board subsequently reinstated its  
13 previous offer appears to be that of "hard bargaining," as  
14 demonstrated by the parties throughout the collective bargaining  
15 process. Contrary to SVTA's contentions, such lower offer did not  
16 reach the level of an unfair labor practice act when it actually  
17 reinstated its previous offer on May 9, 1994.

18 Under the totality of conduct standard, the record reflects  
19 that the school board has not engaged in surface or regressive  
20 bargaining tactics. MPEA v. City of Great Falls, ULP 19-85 (July,  
21 1986 and Montana Education Association v. Laurel School District  
22 Nos. 17 and 7-70, ULP 40-93 (February, 1995).

23 **CONDITION PRECEDENT - THE WITHDRAWAL OF AN UNFAIR LABOR**  
24 **PRACTICE CHARGE**

25 8. It is well established that a party may not bargain to  
26 impasse over an illegal or permissive subject of bargaining. In  
27 affirming the NLRB, however, the Supreme Court also clarified its  
28 ruling to reflect that bargaining need not be confined to the

1 statutory subjects. NLRB v. Borg Warner, 356 U.S. 342 (1958), 42  
2 LRRM 2034. Thus, the NLRB has held that a party violates the NLRA  
3 when it demands that an unfair labor practice charge against it be  
4 withdrawn as a condition to agreement. Stackpole Components Co.,  
5 232 NLRB 723. 96 LRRM 1324 (1977).

6 9. As contended by the school board, however, it is also  
7 well established that the mere request by one party that the other  
8 party withdraw an unfair labor practice charge does not violate the  
9 law. In Inner City Broadcasting Corp., 270 NLRB 1230 (1984), the  
10 NLRB held: "[E]ven assuming that Respondent's comments could be  
11 considered that, as a condition precedent to the reaching of an  
12 agreement, the Union withdrew its charge and arbitration demands,  
13 such a proposal is not per se illegal. However, Respondent could  
14 not legally insist to impasse on its acceptance in the face of a  
15 clear and expressed refusal by the Union to bargain about the [non-  
16 mandatory subjects]" Id. at 1223. A similar result was reached in  
17 Carlsen Porsche Audi, Inc., 266 NLRB 141 (1983).

18 10. The above mentioned cases establish the proposition that  
19 one party may request the other to withdraw an unfair labor  
20 practice charge as a condition for settlement, but may not bargain  
21 to impasse on the request. Here, however, the school board did  
22 not bargain to impasse on this issue because SVTA admitted at the  
23 hearing that they intended to withdraw the charges in the event of  
24 a settlement. Moreover, the record in this matter indicates that  
25 the school board's request to withdraw the unfair labor practice  
26 charge did not unreasonably restrain or inhibit the bargaining  
27 process between parties. As contended by the board, the record  
28 does not reflect the board has conditioned its willingness to meet

1 on the withdrawal of the charge, and the SVTA never objected to  
2 such request as a permissive subject over which it would not  
3 bargain.

4 11. As pointed out by SVTA in its argument, the overall  
5 record indicates that the main sticking point in these negotiations  
6 has never been the board's request to drop the unfair labor  
7 practice charge. It has been the school board's insistence and the  
8 Association's rejection of language which would waive a teacher's  
9 step and lane increases after a collective bargaining agreement  
10 expires pursuant to the Forsyth case (discussion follows) that  
11 deadlocked the parties.

12 12. Clearly, steps and lanes are mandatory subjects for  
13 bargaining, therefore, it appears that the board has the right to  
14 insist on this language. And, the SVTA has the right to reject it.  
15 In so doing, neither party is guilty of a refusal to bargain in  
16 good faith.

17 13. In Forsyth Education Association v. Rosebud County School  
18 District No. 14, ULP 37-81 (1983) and Lolo Education Association v.  
19 Missoula County School District No. 7, ULP 29-86 (1987), the  
20 Montana Board of Personnel Appeals held that a school district  
21 commits an unfair labor practice when it withholds an experience  
22 step under the terms of an expired collective bargaining agreement  
23 **in the absence of a bargaining impasse.**

24 14. The rule announced in Forsyth was derived from the  
25 unilateral change doctrine first announced by the United States  
26 Supreme Court in NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962).  
27 In that case, the Court affirmed the rule that it is an unfair  
28 labor practice for an employer to make a unilateral change in any

1 term or condition of employment following the expiration of a  
2 collective bargaining agreement without first bargaining to  
3 impasse. The Court reasoned that unilateral changes are unlawful  
4 because they frustrate the "statutory objective of establishing  
5 working conditions through bargaining." Id. at 744. In that case,  
6 the employer imposed a wage increase during the course of  
7 negotiations.

#### 8 IMPASSE INTERPRETED

9 15. The Board of Personnel Appeals (BPA) adopted a definition  
10 of impasse in Bigfork Area Education Association v. Board of  
11 Flathead and Lake County School District No. 38, ULP #20-78 (1979).  
12 In that case, the BPA cited an NLRB holding in Taft Broadcasting  
13 Company, 163 NLRB 475, 478, 64 LRRM 1386 (1967) to define a  
14 bargaining impasse as a "deadlock reached by bargaining parties  
15 'after good faith negotiations have exhausted the prospects of  
16 concluding an agreement.'"

17 In applying this definition, BPA held that it must consider  
18 the "bargaining history, the good faith of the parties in  
19 negotiations, the length of the negotiations, the importance of the  
20 issue or issues as to which there is disagreement, [and] the  
21 contemporaneous understanding of the parties as to the state of  
22 negotiations. . . ." before determining if a bona fide impasse  
23 permits an employer to implement a unilateral change in a mandatory  
24 subject of bargaining.

25 16. As the U.S. Supreme Court found in NLRB v. Borg-Warner  
26 Corp., Wooster Div., 356 US 342, 352, 42 LRRM 2034 (1958), some  
27 difficulty exists in establishing the "inherently vague and fluid  
28 ... standard" applicable to an impasse reached by hard and

1 steadfast bargaining, as distinguished from one resulting from an  
2 unlawful refusal to bargain. And, the NLRB found that in  
3 collective bargaining "part of the difficulty arises from the fact  
4 that the law recognizes the possibility of the parties reaching an  
5 impasse." (40 LRRM 98, 105-6 (1957))

6 17. The difficulty of applying this definition has caused  
7 some of our federal courts to reject the impasse standard. In NLRB  
8 v. Citizens Hotel, 326 F.2d 501, 55 LRRM 2135 (5th Cir. 1964), for  
9 example, the Fifth Circuit Court of Appeals held: "[A]n employer  
10 may make changes without the approval of the union as the  
11 bargaining agent. The union has no absolute veto power under the  
12 Act. Nor do negotiations necessarily have to exhaust themselves to  
13 the point of the so-called impasse." Id. at 2137.

14 18. Here too, as contended by Respondent, on the surface it  
15 is difficult to know whether parties were deadlocked and in true  
16 impasse. The overall record clearly indicates, however, that Smith  
17 Valley trustees honestly believed that they were at impasse by the  
18 end of May, 1994, even to the extent they requested mediation on  
19 June 20, 1994. Notwithstanding the fact subsequent bargaining  
20 developments show further progress in negotiations, leading up to  
21 a tentative agreement pursuant to the contract proposal in April,  
22 1995 (Finding of Fact No. 29), parties still remained deadlocked  
23 over the language in 10.1.-- **"No increases in benefits or salary**  
24 **shall be provided without proper written approval of the parties."**

25 19. As the Board of Personnel Appeals stated in Forsyth,  
26 "This decision by the BPA is not as onerous as suggested by the  
27 school district and amici curiae. That is so for the reason that  
28 **if during negotiations impasse occurs, then the employer is free to**

1 unilaterally implement its last, best, final offer." (Emphasis  
2 added) Forsyth Education Association v. Rosebud County School  
3 District #14, 2 Ed Law 230, 242 (1983). As the facts of this case  
4 make clear, however, impasse occurred on the above mentioned  
5 "language" issue even prior to the expiration of the current  
6 contract, and parties remain in deadlock.

7 20. A number of holdings indicate that a deadlock on all  
8 issues is not necessary to a finding of impasse. Jordan Bus Co.,  
9 107 N.L.R.B. 717 (1954) and Essex Wire Co., 19 N.L.R.B. 51 (1940).  
10 In Sharon Hats, Inc., 127 N.L.R.B. 947 (1960), enforced, 289 F.2d  
11 628 (5th Cir. 1961), the parties bargained about wages and other  
12 matters, but after two months without reaching agreement, parties  
13 were deadlocked only on the issue of wages. The Board found that  
14 impasse in bargaining had been reached. Here, as in Sharon Hats,  
15 Inc., the parties remained deadlocked on only one issue--the 10.1  
16 "language" above mentioned.

17 21. Furthermore, as contended by the school board, given the  
18 reduction in the district's budget, it is understandable why the  
19 school board would ask for such a provision as a condition for  
20 settlement. And, making this request less than two months after  
21 the beginning of negotiations does not constitute a failure to  
22 bargain in good faith. Moreover, consistent with the Court's  
23 pronouncement in Katz, the Montana Public Employees Collective  
24 Bargaining Act was adopted to encourage public employers and  
25 employee unions to determine the terms and conditions of employment  
26 at the **bargaining table**. Clearly, the bargaining history herein  
27 reflects both SVTA and the board made good faith efforts to resolve  
28

1 the dispute over this very important language issue. NLRB v. Katz,  
2 369 U.S. 736 (1962).

3 22. Here, the school board essentially argues that Forsyth  
4 should be overturned, and SVTA argues it is controlling and must  
5 stand. The parties have provided citation to and discussion of a  
6 number of cases supporting their contentions on that matter. In  
7 this case, however, as before concluded from the facts, all of the  
8 factors (Length of Negotiations; Good Faith of Parties; Importance  
9 of the Issue; Contemporary Understanding) indicating impasse are  
10 present. The parties are at **impasse**.

11 23. **Arguendo**, if there was absence of impasse in this matter,  
12 as contended by the SVTA, the Hearing Officer would be bound by  
13 precedents established by the Board of Personnel Appeals for whom  
14 he is conducting the hearing. Clearly, Forsyth sets forth  
15 precedent that must be followed by the Department of Labor and  
16 Industry. Certainly, the Hearing Officer in this matter has no  
17 authority to reverse established principles of law or to reverse a  
18 decision of the Montana Supreme Court.

19 24. Furthermore, as pointed out by the SVTA, the school board  
20 provided no citations to any authority holding that the Hearing  
21 Officer has such power to overturn the Board. Moreover, in Chester  
22 School District No. 33. et. al v. Montana Education Association  
23 et. al, Declaratory Ruling No. 1-94, the School District asked the  
24 Board to revisit the Forsyth holding and the Board declined to do  
25 so. SVTA also points out that House Bill 264 was introduced in the  
26 recently completed legislature to overturn Forsyth and ultimately  
27 failed.

1 25. Here, having concluded the parties are at impasse,  
2 Forsyth is not controlling. In Forsyth the Montana Supreme Court  
3 held in part:

4 While the appellant School district argued the BPA had ordered  
5 it to **automatically grant** teachers' wage increases under the  
6 terms of the expired contract, **we find no such ruling** by the  
7 BPA in its order. It simply ordered that, **in the absence of**  
8 **an "impasse," the provisions of the expired contract may not**  
9 **be unilaterally changed by the employer.**

8 *Id.* at 365 (Emphasis added)

9 26. Based on the overall record, the Smith Valley school  
10 board has not violated Section 39-31-401(1) or (5), MCA. The  
11 school board has not engaged in surface or regressive bargaining,  
12 nor did it refuse to bargain in good faith.

13 **RECOMMENDED ORDER**

14 This unfair labor practice charge is dismissed and the  
15 requested relief is denied.

16 **SPECIAL NOTICE**

17 NOTICE: You are entitled to review of this Order pursuant to  
18 Section 39-31-406, MCA. Review may be obtained by filing a written  
19 notice of appeal with the Board of Personnel Appeals postmarked no  
20 later than September 20, 1995. This time period  
21 includes the 20 days provided for in Section 39-31-406(6), MCA, and  
22 the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service  
23 of this Order is by mail.

24  
25  
26  
27  
28 . . . . .

1 The notice of appeal shall consist of a written appeal of the  
2 decision of the hearing officer which sets forth the specific  
3 errors of the hearing officer and the issues to be raised on  
4 appeal. Notice of appeal must be mailed to:

5 Board of Personnel Appeals,  
6 Department of Labor and Industry  
7 P.O. Box 6518  
8 Helena, MT 59604

9 DATED this 28<sup>th</sup> day of August, 1995.

10 DEPARTMENT OF LABOR & INDUSTRY  
11 HEARINGS BUREAU

12 Gordon D. Bruce  
13 Gordon D. Bruce  
14 Hearing Officer

15 CERTIFICATE OF MAILING

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

20 Michael Dahlem, Staff Attorney  
21 Montana School Boards Association  
22 One South Montana Avenue  
23 Helena, MT 59601

24 Karl Englund  
25 Attorney at Law  
26 P.O. Box 8142  
27 Missoula, MT 59807

28 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 means of  
the State of Montana's Deadhead mail service.

DATED this 28<sup>th</sup> day of August, 1995.

Christina R. Roland