

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 32-98:

FRENCHTOWN PUBLIC SCHOOLS,
DISTRICT NO. 40,
Complainant,

vs.

FRENCHTOWN EDUCATION
ASSOCIATION, MEA/NEA
Respondent.

FINAL ORDER

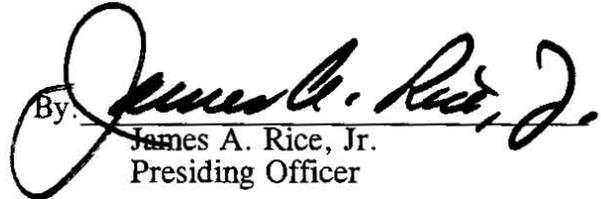
The above-captioned matter came before the Board of Personnel Appeals on October 22, 1998. Complainant appealed from the June 8, 1998, Investigation Report and Notice of Intent to Dismiss. Appearing before the Board were Karl Englund, attorney for Respondent, appearing in person, and Don K. Klepper, representing the Complainant, participating by telephone.

After review of the record and consideration of the arguments by the parties, the Board concludes that the record supports the decision of the investigator. Accordingly, the Board orders as follows:

1. **IT IS HEREBY ORDERED** that the Board upholds the Investigation Report and Notice of Intent to Dismiss issued by investigator.
2. **IT IS FURTHER ORDERED** that the appeal to the Investigation Report and Notice of Intent to Dismiss is dismissed.

DATED this 29 day of December, 1998.

BOARD OF PERSONNEL APPEALS

By: 
James A. Rice, Jr.
Presiding Officer

Board members Rice, Schneider, Talcott, Hagan and Perkins concur.

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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 30th day of December, 1998:

DON K KLEPPER
THE KLEPPER COMPANY
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 32-98

FRENCHTOWN PUBLIC SCHOOLS
DISTRICT NO. 40, FRENCHTOWN, MT

Complainant,

-vs-

FRENCHTOWN EDUCATION
ASSOCIATION, MEA/NEA

Defendant.

INVESTIGATION REPORT
AND
NOTICE OF INTENT TO DISMISS

* * * * *

I. INTRODUCTION

On March 16, 1998, the Frenchtown Public School, District No. 40, Frenchtown, Montana filed an unfair labor practice charge with this Board alleging that the Frenchtown Education Association had violated Section 39-31-402 (2) MCA. The Defendant denied any violation of the above cited law.

II. ISSUES

An investigation was conducted which included contact with the parties involved. The Complainant alleges that: "The Defendant has committed an Unfair Labor Practice when it violated 39-31-401 (2) MCA by refusing to abide by the language within the Master Contract that was agreed to by the parties." The alleged contract violation occurred when members of the Frenchtown Education Association (FEA) placed copies of "Evaluation of Leadership" questionnaires in the mailboxes of Certified and Classified Staff of the Complainant School District. The material in question was prepared by a school board candidate. The Complainant alleges that "The FEA as a willing distributor of this unauthorized and unethical superintendent's evaluation instrument sought to bypass the board's clear right to manage the superintendent and to become a partner with Mr. Jordan in a secretive, subversive evaluation." The Complainant asserts that such actions are a violation of Article II "Powers of the Board," of the Master Contract.

1 The Complainant also alleges a violation of Article III, "Association and Teacher Rights",
2 Section 3.3, "Association Business" of the Master Contract because the Association members did not
3 secure permission from the principal or superintendent for leave time prior to placing the "Evaluation
4 of Leadership" questionnaire in the mailboxes during the school day.

5 Similarly, the Complainant cites a violation of Section 3.4 "Association Use of Facilities"
6 which states in part: "The Association will be allowed to use teacher mail boxes to distribute official
7 Association information." The Complainant disputes the categorization of the "Evaluation of
8 Leadership" questionnaire as official FEA business and points out that the Association members
9 placed the material in the mailboxes of both certified and classified personnel even though the groups
10 are in different bargaining units and the classified CBA does not contain similar provisions for use of
11 mailboxes.

12 "The complainant seeks an order from the Board of Personnel Appeals that directs the
13 respondent to comply with the Master Contract that was bargained by the Board in good faith and
14 which is in full force and effect."

15 The Defendant disagrees with the assertion that "... the Association violated the management
16 rights clause of the contract by distributing a superintendent evaluation form when the contract
17 provides that the school board has authority to supervise the employees, and therefore the authority
18 to evaluate the superintendent. This assertion misses the mark because while the contract is very
19 clear that the board hires, evaluates and directs the superintendent, it does not prohibit others from
20 expressing their opinion about the superintendent's performance. Thus, assuming *arguendo* the
21 Association erred in distributing this literature in this manner, its actions in no way deprives the board
22 of its statutory and contractual duty or authority to evaluate the superintendent."

23 "Second, the school district alleges that the Association violated the contract by distributing
24 the material during the school day. In fact, the material was distributed during the lunch hour when
25 the employees were relieved of their teaching duties."

26 "Third, The school district's complaint in this regard is justified only in that it elevates form
27 over substance. ... If material was placed in mailboxes that should not have been placed in mailboxes,
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1 the remedy for the school district is to do exactly what it did in this case -- remove the material from
2 the mailboxes.”

3 “Finally, when the school district removed the offending material, the Association responded
4 in a responsible manner.” [e.g. did not file a grievance or unfair labor practice charge.] “The only
5 purpose to be served by the continuation of this charge is to continue a dispute that has ended. For
6 these reasons, the charge should be dismissed.”

8 III. DISCUSSION

9 The Montana Supreme Court has approved the practice of the Board of Personnel Appeals
10 in using Federal Court and National Labor Relations Board (NLRB) precedents as guidelines in
11 interpreting the Montana Collective Bargaining for Public Employees Act as the state act is so
12 similar to the Federal Labor Management Relations Act, State ex rel. Board of Personnel Appeals
13 vs. District Court., 183 Montana 223, 598 P.2d 1117, 103 LRRM 2297; Teamster Local No. 45
14 v. State ex rel. Board of Personnel Appeals, 1985 Montana 272, 635 P.2d 1310, 110 LRRM
15 2012; City of Great Falls v. Young (III), 683 P.2d 185, 119 LRRM 2682, 21 Montana 13.

16 Because the basis for this complaint resides in the language of the CBA, the usual and
17 customary action for this board would be to apply the doctrine of *Collyer* and defer to the
18 grievance and arbitration clause of the contract. In the instant case, however, the Complainant
19 does not have access to this procedure and this matter is properly before the Board of Personnel
20 Appeals. The Complainant argues that the Defendant has refused “... to abide by the language
21 within the Master Contract that was agreed to by the parties.”

22 The Defendant responds that “... not all isolated and technical violations of a collective
23 bargaining agreement constitute failure to bargain in good faith. In this case, a careful reading
24 of the contract does not indicate that the Association violated the contract and even if it did so,
25 the remedy for the school district was to exercise its control over the mailboxes and remove the
26 offending material.”

27 The Complainant agrees that the material was removed from the mailboxes before the
28 campaign literature was distributed to classified and certified staff. The Complainant pointed out

1 that a meeting occurred with representatives of the school district and the Association Co-
2 Presidents over this issue, and the matter was resolved with no further action taken by the
3 Defendant.

4 Good faith bargaining is defined in Section 39-31-305 MCA, as the performance of the
5 mutual obligation of the public employer or his designated representative and the representatives
6 of the exclusive representative to meet at reasonable times and negotiate in good faith with respect
7 to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an
8 agreement *or any question arising thereunder in the execution of a written contract incorporating*
9 *any agreement reached*. Such obligation does not compel either party to agree to a proposal or
10 require the making of a concession. (Emphasis added). See NLRB v. American National
11 Insurance Company, 30 LRRM 2147, 343 US 395, 1952; NLRB v. Bancroft Manufacturing
12 Company, Inc., 106 LRRM 2603, 365 F.2d 492, 1981 CA 5; NLRB v. Blevins Popcorn
13 Company, 107 LRRM 3108, 659 F.2d 1173, 1981 CA DC; Struthers Wells Corporation v.
14 NLRB, 114 LRRM 3553, 721 F.2d 465, 1980 CA 3.

15 During the course of this investigation, the representative for the Complainant responded
16 that although this particular type of incident did not reoccur, it was not resolved because of the
17 totality of the circumstances surrounding this and other actions of the Defendant. The
18 Complainant asserted during this investigation that there is a pattern of ignoring the CBA and
19 seeking forgiveness for violations after the fact, and that the instant case was just one of a number
20 of examples that demonstrate bad faith bargaining. The Complainant seeks relief from this board
21 in the form of an order directing the Defendant to comply with the Master Contract because such
22 an order is needed to end this alleged pattern of violations and restore a stable collective
23 bargaining relationship.

24 While there is little or no evidence to support the allegations that the campaign literature
25 constituted an attempt to deprive the Complainant of the right to manage the superintendent, based
26 on the chronology of events, there was an apparent violation of the CBA by the Defendant.
27 Advance permission to distribute the campaign materials was not obtained and the Association
28 placed the materials in the mailboxes with no explanation. While an argument can be constructed

1 that these were allowable activities under the CBA, the distribution of this material to the
2 mailboxes of another bargaining unit was clearly not allowed. There remains, however, the
3 threshold question of whether or not the Defendant's actions constitute a failure to bargain in good
4 faith.

5 According to *The Developing Labor Law, Third Edition*, Patrick Hardin, Editor in Chief,
6 BNA Publications, Washington, D.C., 1992: "The obligation to bargain collectively is not
7 limited to the negotiation of an agreement. In some instances bargaining can and must be carried
8 on during the term of an existing agreement. In the words of the Supreme Court: 'Collective
9 bargaining is a continuing process. Among other things, it involves day to day adjustments in the
10 contract and other working rules, resolution of problems not covered by existing agreements, and
11 the protection of employee rights already secured by contract.'" [citations omitted] (p. 733).

12 In the instant case, the parties met over the issue of the campaign material placement and
13 resolved the issue by removing the offending material from the mailboxes. There has been no
14 recurrence of this type of violation nor has the Defendant pressed the issue with the Complainant.
15 This particular contractual disagreement has been resolved and there was no violation of the
16 obligation to bargain in good faith over "any question arising thereunder in the execution of a
17 written contract incorporating any agreement reached during negotiations." Given the particular
18 construction of the grievance procedure, this meeting was the appropriate method for resolving
19 the dispute.

20 The assertion that violations of the Master Contract are routine and continuing remains
21 troubling, but not persuasive. There is no record of BOPA adjudication in the Complainant school
22 district to support the allegations of patterned violations sufficient to warrant the requested remedy.
23 Day to day adjustments in contract interpretation and work rules are contemplated by the Act. While
24 the event that gave rise to this charge may demonstrate carelessness on the part of the Defendant, the
25 evidence fails to establish a violation of good faith bargaining. In ULP #11-79, this board held that
26 "...[V]iolation of a contract provision is not per se an unfair labor practice..." At this point in time,
27 the contract violation remains distinguishable from an unfair labor practice.

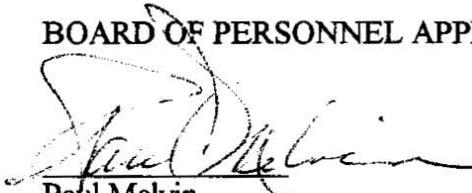
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1 IV. DETERMINATION

2 Based on the foregoing, the record does not support a finding of probable merit to the
3 charge and this matter must be dismissed.

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5 DATED this 8th day of June, 1998.

6 BOARD OF PERSONNEL APPEALS

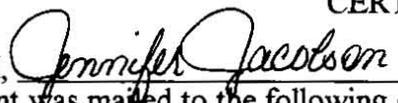
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8 By: 
9 Paul Melvin
10 Investigator

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12 NOTICE

13 ARM 24.26.680B (6) provides: As provided for in 39-31-405 (2), MCA, if a finding of no
14 probable merit is made, the parties have ten (10) days to accept or reject the Notice of Intent to
15 Dismiss. Written notice of acceptance or rejection is to be sent to the attention of the Investigator
16 at P.O. Box 6518, Helena, MT 59604-6518. The dismissal becomes a final order of the board unless
17 either party requests a review of the decision to dismiss the complaint.

18 * * * * *

19 CERTIFICATE OF MAILING

20 I, , do hereby certify that a true and correct copy of this
21 document was mailed to the following on the 8th day of June, 1998:

22 John Hargrove, Superintendent
23 Frenchtown School District No. 40
24 P.O. Box 117
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