

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 34-98:

JORDAN EDUCATION ASSOCIATION,  
MEA/NEA,

Complainant / Appellant,

- vs -

JORDAN UNIFIED SCHOOL DISTRICT,

Defendant / Respondent.

FINAL ORDER

\*\*\*\*\*

The above-captioned matter came before the Board of Personnel Appeals (Board) on December 9, 1999. The matter was before the Board for consideration of the Complainant/Appellant's Exceptions to the Hearing Officer's Findings of Fact, Conclusions of Law and Proposed Order filed by Karl Englund, attorney for the Complainant/Appellant. Hearing Officer Gordon D. Bruce, had issued his Findings of Fact, conclusions of Law and Proposed Order on April 29, 1999.

Appearing before the Board were Michael Dahlem, attorney for the Defendant/Respondent, and Karl Englund, attorney for the Complainant/Appellant. Mr. Dahlem participated by telephone while Mr. Englund made oral argument in person.

The arguments presented, both written and oral, reflected that two distinct issues were pursued by the Complainant/Appellant in support of its position that an unfair labor practice occurred. The first of these issues consisted of a claim that the Defendant/Respondent unilaterally reduced teacher preparation time via the elimination of the elementary school physical education program. The second issue was that the Defendant/Respondent either made a material misrepresentation of its financial condition or engaged in surface bargaining. For the sake of clarity the Board addressed these issues separately.

After review of the record and consideration of the arguments by the parties, the Board concludes and orders as follows:

1. **IT IS ORDERED** that the Hearing Officer's findings of fact are supported by the substantial credible evidence of record and are hereby affirmed.
2. **IT IS FURTHER ORDERED** that the Hearing Officer's "DISCUSSION" properly applied the facts to the appropriate law and came to the correct legal conclusion with respect to both "failure to negotiate" and "misrepresentation" issues. The Hearing Officer's discussion of the "misrepresentation" issue does contain some inappropriate speculation regarding the intent or effect of representations made by the school district's negotiators. Such speculation is unsupported in the record. Therefore, that portion of the discussion commencing with the word "However" on line 9 of page 11 and ending with the word "proposal" on line 17 of page 11 is hereby excepted and disapproved.

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2  
3 3. **IT IS FURTHER ORDERED** that the Hearing Officer's "DISCUSSION"  
4 erroneously applied the facts to the appropriate law and came to the incorrect  
5 legal conclusion with respect to the "surface bargaining" issue. Accordingly, the  
6 Hearing Officer's discussion of this issue is modified as follows:

7 A. That portion on the discussion commencing with the work "Although" on  
8 line 6 of page 14 and ending with the word "agreement" on line 9 of page  
9 14 is hereby excepted and the following substituted in its place:

10 *The net effect of the school board's offer upon some of the impacted  
11 employees, however, was to effectively render any proposed increase  
12 negligible.*

13 B. The discussion of this issue is further supplemented by the following new  
14 paragraph, which shall be inserted immediately following the substituted  
15 language set forth above.

16 *When considering whether surface bargaining took place, it must be  
17 remembered that 39-31-401(5), MCA, requires the school board to  
18 "bargain collectively in good faith" with the association. The "good faith"  
19 standard "requires that the parties involved deal with each other with an  
20 open and fair mind and sincerely endeavor to overcome obstacles or  
21 difficulties existing between the employer and the employees." NLRB v.  
22 Boss Mfg. Co., 118 F.2d 187, 189 (7<sup>th</sup> Cir. 1941). Towards this end,  
23 there must be a "rational exchange of facts and arguments that will  
24 measurably increase the chance for amicable agreement." General  
25 Electric Co., 150 NLRB 192 (1964), enforced, 418 F.2d 736, 750 (2<sup>nd</sup> Cir.  
26 1969), cert. denied, 397 U.S. 965 (1970). Thus, "sham discussions in  
27 which unsubstantiated reasons are substituted for genuine arguments  
28 should be anathema." Id.*

*Viewed in isolation, the school board's pay proposal would likely not  
comprise surface bargaining. When taken in context, however, this is not  
the case. The context which leads to the inescapable conclusion that  
surface bargaining took place include first, the school boards expressed  
disinclination to even bargain with an association that had ongoing  
litigation with it. Second, the school board's repeated statements that no  
money existed for allowing a raise in employee pay. While, as noted  
earlier in this decision, such statements cannot be classified as  
"misrepresentations", they nevertheless do constitute the substitution of  
an unsubstantiated reason for a genuine argument.*

3 4. **IT IS FURTHER ORDERED** that the Hearing Officer's conclusion of law #1 is  
legally correct and hereby approved. Conclusion of law #2 is legally incorrect  
and is hereby modified to read as follows:

Excepting from said conclusion of law the language beginning with the  
word "The" on line 13 of page 14 and ending with the word "refusing" on  
line 14 of page 14 and substituting in its place the following:

*The District violated 39-31-401(5), MCA, when it refused . . .*

1  
2 5. **IT IS FINALLY ORDERED** that the Hearing Officer's recommended order will  
3 neither be accepted nor endorsed by this Board. Instead, it is this Board's order  
4 that the unified board of trustees of the Garfield County District High School and  
5 the Jordan Elementary School District Number One, its agents, school board  
6 members and employees shall cease and desist from refusing to bargain in  
7 good faith with the Jordan Education Association, MEA/NEA concerning  
8 mandatory subjects of bargaining.

9  
10 DATED this 1st day of February, 2000.

11 BOARD OF PERSONNEL APPEALS

12  
13 By:   
14 Jack Holstrom  
15 Presiding Officer

16 .....  
17 On preparation time issue:

18 \*\*\*\*\*  
19 Board members Holstrom, Schneider and Talcott concur.  
20 Alternate member Doney concurs.  
21 Board member Perkins dissents.  
22 \*\*\*\*\*

23 On misrepresentation/surface bargaining issue – motion to reverse the order and find the  
24 District guilty of surface bargaining:

25 \*\*\*\*\*  
26 Board members Holstrom, Perkins and Schneider concur.  
27 Board member Talcott dissents.  
28 Alternate member Doney dissents.  
29 \*\*\*\*\*

30 .....  
31 NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be  
32 obtained by filing a petition for Judicial Review with the District Court no later  
33 than thirty (30) days from the service of this Order. Judicial Review is pursuant  
34 to the provisions of Section 2-4-701, et seq., MCA.  
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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 14<sup>th</sup> day of February, 2000:

KARL J ENGLUND  
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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 34-98:

JORDAN EDUCATION )  
ASSOCIATION, MEA, NEA, )  
Complainant, )  
vs. )  
JORDAN UNIFIED SCHOOL )  
DISTRICT, )  
Defendant. )

**FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
AND RECOMMENDED ORDER**

\* \* \* \* \*

**I. INTRODUCTION**

On June 15, 1998, the Jordan Education Association, MEA/NEA (the Association), filed an unfair labor practice charge against the Jordan Unified School District (the District) alleging a unilateral change in working conditions without notice and an opportunity to bargain, misrepresentation of school district finances and surface bargaining in violation of § 39-31-401(1) and (5), MCA. Hearing Officer Gordon D. Bruce conducted a contested case hearing on January 13, 1999 in Jordan, Montana. The Association was represented by Karl Englund. The District was represented by Michael Dahlem.

Judy Billing, Wendy Lindford, Carrie Murnion, Kimberely Cohn, teachers, and Tom Bilodeau, Research Director of the Montana Education Association, gave sworn testimony at the hearing. The parties agreed that the record would be complete with the filing of post-hearing briefs, and the Hearing Officer received final submissions on March 10, 1999.

1 **II. FINDINGS OF FACT**

2 1. The Association is the exclusive bargaining  
3 representative for teachers employed by the District (Complainant  
4 Exhibit 3).

5 2. The school board did not negotiate with the Association  
6 before it established the K-12 PE/Health program or before it  
7 increased preparation time for K-5 teachers (Testimony of  
8 Lindford).

9 3. The Association and the District have been parties to a  
10 series of collective bargaining agreements, with the latest one  
11 effective from July 1, 1997 through June 30, 1998 and yearly  
12 thereafter unless superseded by a new agreement. Id. at Article  
13 II, Section 2.2. When they negotiated this agreement, the  
14 parties agreed that the only subjects open for negotiations for  
15 the 1998-1999 school year would be salary, insurance and binding  
16 arbitration. Id.

17 4. When the 1997-1998 contract was negotiated, the  
18 Association and the District agreed to a salary freeze; however,  
19 teachers received step and lane increases during that period.

20 5. The parties began negotiations for the 1998-1999 school  
21 year on February 18, 1998 (Complainant Exhibit 4(b)). They  
22 established ground rules (Complainant Exhibit 4(a)). One of the  
23 ground rules concerned minutes. Id. They agreed that  
24 Association bargainer Kim Cohn would prepare minutes and the  
25 Association and the District would approve them. Id.

26 6. At the first bargaining session, the parties agreed to  
27 follow the collective bargaining agreement and limit negotiations  
28

1 to the issues of salary, binding arbitration and insurance  
2 (Complainant Exhibit 4(b)).

3 7. The jointly-approved minutes of the first bargaining  
4 session state, "The members of the Unified Board of Trustees had  
5 a question regarding court papers filed by the JEA against the  
6 school board" (Complainant Exhibit 4(b)). The "court papers"  
7 refer to a motion to compel arbitration of a grievance concerning  
8 the indefinite suspension of a tenured teacher. This was a long-  
9 standing and contentious issue in which a teacher had been  
10 suspended and a grievance filed. The Association bargainers were  
11 not involved in processing the grievance. The "question" posed  
12 by one board member to the Association was why it should bargain  
13 with the Association "when you are suing us."

14 8. Because the Association had agreed to a salary freeze  
15 in the 1997-1998 school year, it proposed a significant increase  
16 in salary for the 1998-1999 school year (Complainant  
17 Exhibit 4(c)). Even prior to presenting a salary or insurance  
18 offer to the Association, the District stated, "[T]here is no  
19 money in the budget for a raise" (Complainant Exhibit 4(d)).

20 9. The possibility of elimination of the K-12 PE/Health  
21 (PE) program had been discussed at a number of board meetings  
22 during the spring of 1997 and 1998 which Association  
23 representatives attended (Exhibit D-1 and Testimony of Lindford).

24 10. The District initially decided to eliminate the PE  
25 program for the 1997-98 school year, but reconsidered its  
26 decision after a teacher volunteered to teach grades 1 and 2  
27 without an aide. The assignment was unsuccessful and the  
28

1 District hired an aide during the 1997-98 school year (Testimony  
2 of Lindford).

3 11. The parties conducted negotiations on February 18,  
4 March 17, April 14, May 26, June 10, and June 30, 1998  
5 (Complainant Exhibits 4(a) - 4(h)). They participated in a  
6 mediated bargaining session on October 28, 1998 (Complainant  
7 Exhibits 4(j) and 4(k)).

8 12. The Association's first economic offer was presented at  
9 the second bargaining session on March 17 and proposed an  
10 increase in the base salary from \$17,700 per year to \$19,158 with  
11 the existing 3.75 attainment level (Complainant Exhibit 4(c)).  
12 The Association did not propose any increase in the District's  
13 contribution to insurance because neither the District nor the  
14 Association believed the insurance premium would increase  
15 (Complainant Exhibit 4(d)).

16 13. On April 8, 1998, the District voted to eliminate the  
17 PE program for the 1998-99 school year at a meeting attended by  
18 Association representatives. The Association never requested  
19 negotiations with the District over the effects of the program  
20 elimination even though it knew that the District's decision  
21 would result in a reduction in preparation time for K-5 teachers  
22 (Exhibit D-1 and Testimony of Billing, Lindford and Kohn).

23 14. In May 1998, teacher Carrie Murnion appeared at a board  
24 meeting and requested the board to reconsider its decision to  
25 abolish the K-12 PE program. She was not well received by one of  
26 the Board members, but in all events, Murnion was not the  
27 exclusive representative of the Association.

28

1           15. The Association thought that it could not request  
2 negotiations over the effects of the program elimination because  
3 the parties had agreed to limit negotiations to Articles V, XI,  
4 and XII. The Association was aware that the District requested  
5 negotiations on Article VI.2, a provision concerning the deadline  
6 for notifying teachers of contract renewal (Exhibits 4b and 4e  
7 and Testimony of Lindford).

8           16. The reduction in preparation time for five K-5 teachers  
9 did not alter the length of the school day as provided for in  
10 Article 9.4(a) of the agreement. Preparation time is work time,  
11 and as provided by agreement, the work day still begins at  
12 8:00 a.m. and ends at 4:00 p.m. (Testimony of Kohn).

13           17. All District financial records are a matter of public  
14 information, and the District never denied any representative of  
15 the Association access to those records (Exhibit D-1 and  
16 Testimony of Lindford and Murnion).

17           18. In January 1998, the MEA prepared a detailed analysis  
18 of the District's past revenues and expenditures available to  
19 Association representatives during the course of negotiations  
20 (Testimony of Bilodeau).

21           19. The District presented its first economic offer at the  
22 third bargaining session on April 14 and proposed a base salary  
23 of \$18,000 and proposed to decrease the attainment level from  
24 3.75 to 3.5 (Complainant Exhibit 4(e)). The combination of the  
25 small raise in the base and the lower attainment level meant that  
26 some of the teachers would receive very little increase in  
27 salary.

1           20. On June 10, 1998, during the fifth bargaining session,  
2 the Association proposed to increase the base salary to \$18,700,  
3 with the existing attainment level (Complainant Exhibit 4(h)).  
4 The Association proposed an increase in the District's insurance  
5 contribution by \$8.00 per month because the premium had increased  
6 by that amount. Id. On June 30, 1998, the Association reduced  
7 its offer to 5.6% in base teacher salary. Since then, it has  
8 made no further offers (Exhibits 4c and 4g and Testimony of  
9 Murnion and Lindford). The average statewide increase in base  
10 teacher salary for the 1998-99 school year has been 2% and the  
11 Jordan elementary and high school district budgets are within the  
12 minimum and maximum levels established by law (Exhibit 8 and  
13 Testimony of Bilodeau).

14           21. Throughout negotiations, the District indicated that it  
15 could not afford a 5.6% increase in base teacher salary in  
16 addition to step and lane increases. In effect, the District  
17 maintained it could not afford to give the teachers a raise in  
18 their salaries (Defendant Exhibit 1). Both the Jordan elementary  
19 district and the Garfield County high school district have at  
20 least a five year history of not spending all of their budgets  
21 (Exhibit 8).

22           22. During a mediation session on October 28, 1998, the  
23 Association increased the cost of its salary proposal by asking  
24 that first year teachers be hired at step 2 on the salary  
25 schedule. The Association also increased the cost of its health  
26 insurance proposal by \$18.20 a month after offering to accept no  
27 increase in the District's contribution in April 1998. The  
28 \$18.20 requested by the Association covered not only an increase

1 in the cost of existing benefits, but also a vision benefit that  
2 was not provided under the former policy (Exhibits 4d and 4j;  
3 Testimony of Lindford and Kohn). During mediation, the District  
4 offered to increase its contribution for health insurance by  
5 \$8.00 per month (Exhibit 4j).

6 23. The Association's mediation proposal also provided that  
7 new teachers hired at step 2 on the salary schedule would be  
8 frozen at that level for three years. An Association  
9 representative acknowledged that, if adopted, the proposal would  
10 probably make it impossible for the District to recruit new  
11 teachers (Exhibit 4j and Testimony of Kohn).

12 24. The Association had actual notice on April 8, 1998,  
13 that the pending reduction in force would reduce the amount of  
14 preparation time during the affected teachers' workday. In all  
15 events, the Association knew that fact on June 10, 1998, when it  
16 filed this ULP and noted that: "Elimination of the K-12 PE  
17 program results in a fifty (50) percent loss of preparation time  
18 for all K-6 teachers."

### 19 III. DISCUSSION

#### 20 A. Failure to Bargain

21 Section 39-31-401(5), MCA, provides that it is an unfair  
22 labor practice for an employer to "refuse to bargain collectively  
23 in good faith with an exclusive representative." The Association  
24 argues, however, that there was a duty to bargain over the  
25 effects of the program elimination. Nevertheless, it is well  
26 established that before a bargaining duty arises, there must be a  
27 request to bargain. National Labor Relations Board v. Oklahoma  
28 Fixture Co., 79 F.3d 1030, 151 LRRM 2919 (10th Cir. 1996). In

1 order for bargaining to be meaningful, the employer must give  
2 timely notice of its intended action. The union, however, can  
3 waive its right to bargain by failing to timely request  
4 bargaining.

5 "A concomitant element of 'meaningful' bargaining  
6 is timely notice to the union of the decision to  
7 close, so that good faith bargaining does not  
8 become futile or impossible," . . . . The Board,  
9 without supporting evidence, determined that OFC  
10 did not afford the Union a meaningful opportunity  
11 to bargain about the effects of the subcontracting  
12 decision . . . . The Board expressly did not  
13 determine how many days' notice would constitute a  
14 meaningful opportunity to bargain, only holding  
15 that OFC's '1-day notice' was 'clearly  
16 insufficient.' Id. at n.5. Whether an employer  
17 has provided meaningful and timely notice is  
18 essentially a question of fact, and the Board's  
19 findings in this regard are to be accepted if  
20 supported by substantial evidence. Emsing's  
21 Supermarket, 872 F.2d at 1287.

22 . . . .  
23 Once the company provides appropriate notice to  
24 the Union, the onus is on the Union to request  
25 bargaining over subjects of concern.  
26 NLRB v. Island Typographers, Inc., 705 F.2d  
27 employer of violating its statutory duty to  
28 bargain. Island Typographers, 705 F.2d at 51.  
Further, the filing of an unfair labor practice  
charge does not relieve the Union of its  
obligation to request bargaining. Associated Milk  
Producers, 300 N.L.R.B. at 564 ('[I]t [i]s  
incumbent on the Union to request bargaining--not  
merely to protest or file an unfair labor  
practice charge.').

29 . . . .  
30 The Union's failure to raise an issue does not  
31 constitute waiver of its right to bargain over  
32 the issue if the Union is led to believe that an  
33 attempt to bargain over the issue would be futile.  
34 Intermountain, 984 F.2d at 1568; accord  
35 NLRB v. National Car Rental Sys., Inc.,  
36 672 F.2d 1182, 1189 (3rd Cir. 1982). However, in  
37 this case there was no indication that the company  
38 would refuse to bargain over effects . . . .

39 In American Diamond Tool, Inc., 306 N.L.R.B. 570  
40 (1992), the Board held that Union waived its right

1 to bargain over layoffs despite the lack of any  
2 prior notice of the layoffs. The Board found the  
3 combination of three factors constituted waiver:  
4 (1) the Union had actual notice of the layoffs  
5 after they took place; (2) the Union had an  
6 opportunity to object to these layoffs at  
7 subsequent bargaining sessions; and (3) the  
8 company engaged in good faith bargaining, and  
9 there was no evidence that it would not have  
10 bargained about the layoffs. Id. at 570. The  
11 Board noted that the absence of notice was an  
12 'important fact' suggesting the unlawfulness of  
13 the layoffs, but the Union subsequently led the  
14 company to believe that it did not object,  
15 constituting waiver. Id. at 571.

16 With respect to the adequacy of an employer's notice to the  
17 union, the Seventh Circuit Court of Appeals has held that: "[A]  
18 union, which has notice of a proposed change which affects a  
19 mandatory bargaining subject, must make a timely request to  
20 bargain. Moreover, formal notice is not necessary as long as the  
21 union has actual notice. A union's failure to assert its  
22 bargaining rights will result in a waiver of these rights."  
23 W.W. Grainger v. NLRB, 860 F.2d 244, 248 (7th Cir. 1988).

24 The facts in this case show that the Association waived its  
25 bargaining rights when it failed to request negotiations over the  
26 effects of the elimination of the K-12 PE/Health program.  
27 Association witnesses admitted that they had actual notice of the  
28 program elimination on April 8, 1998, and understood that  
29 decision would result in a reduction in preparation time. This  
30 understanding led to the filing of an unfair labor practice  
31 charge on June 10, 1998. As noted above, however, the filing of  
32 a charge does not relieve the Association of its duty to request  
33 negotiations over the effects of the program elimination. Its  
34 failure to make any request cannot be excused by the claim that  
35 Association members did not understand their legal rights. The

1 Association cannot simply ignore its responsibility to initiate  
2 bargaining over the effects of the District's decision and  
3 thereafter contend the District violated its statutory duty to  
4 bargain. The District's request to negotiate on a subject  
5 unrelated to wages, benefits or arbitration clearly demonstrated  
6 that such a request was possible.

7 Clearly, a public employer is not required to bargain over a  
8 decision to reduce the number of employees, and Article 4.1 of  
9 the parties' collective bargaining agreement provides that: "The  
10 Association agrees that all management rights, functions and  
11 prerogatives, not expressly delegated in this Agreement, but  
12 guaranteed by law, are reserved to the Board." These  
13 prerogatives include the right to "relieve employees from duties  
14 because of lack of work or funds or under conditions where  
15 continuation of such work be inefficient and nonproductive."  
16 § 39-31-303(3), MCA.

17 Article 9.3 of the agreement provides that: "Upon written  
18 request, representatives of the Board and representatives of the  
19 Association shall meet and confer concerning matters of concern  
20 to the parties which are not covered by the Agreement." The  
21 record reflects the elimination of the K-12 PE program was under  
22 consideration by the school board for more than a year, yet the  
23 Association never asked to meet and confer about the matter  
24 pursuant to Article 9.3.

25 There is nothing in the record conclusively showing that  
26 bargaining would have been futile. Furthermore, the  
27 Association's professional staff cannot claim to be ignorant of  
28 the law on "effects" bargaining. Here, the Association has never

1 chosen to bargain over the subject of preparation time, and  
2 cannot now claim that the school board acted improperly in  
3 assigning teachers in a manner consistent with state law and the  
4 terms of the collective bargaining agreement.

5 B. Misrepresentation

6 The Association contends that the District negotiators  
7 misrepresented District finances when they told the Association  
8 that the District could not afford the Association's wage and  
9 benefit proposal. However, there is no showing in the record of  
10 forgery or concealment, and the documents are open to public  
11 inspection. Statements such as those attributed to their  
12 negotiators appear to represent an opinion about the wisdom of a  
13 spending proposal, rather than a representation concerning  
14 District finances. The inference by the District in this case  
15 that it cannot afford a particular proposal should not be  
16 construed to mean that it is absolutely impossible to fund the  
17 proposal. Clearly, if the District chose to rearrange its  
18 budget, it could probably have funded the Association request;  
19 however, that does not make the statements attributed to board  
20 members a misrepresentation of District finances.

21 The Association also contends that the school board could  
22 have asked voters to approve a 4% increase in elementary and high  
23 school district general fund budget authority. Although that  
24 action appears within the realm of possibilities, it appears the  
25 District chose not to make such a request and is not an issue  
26 properly before the Hearing Officer.

27 The Association further contends that the District has a  
28 history of not spending every dollar it has budgeted. The

1 overall record shows this to be true, but the Association did not  
2 present any case law or legal authority supporting its  
3 contentions that this therefore constitutes an unfair labor  
4 practice.

5 Nothing in the record shows the Association was ever denied  
6 access to the District's financial records. Further, Association  
7 negotiators had available to them a detailed analysis of the  
8 District's financial history throughout the course of  
9 negotiations. The availability of this analysis does not support  
10 the Association's claim their negotiators were misled to their  
11 detriment by the statements in question. The fact that the  
12 Association has continued to reject the board's wage and benefit  
13 proposal shows that the Association did not rely on those  
14 statements.

15 Finally, even if one believed that the school board could  
16 "misrepresent" public documents that have been fully disclosed to  
17 the Association, the documents are not in evidence. In order for  
18 the Association's argument concerning misrepresentation to  
19 succeed, it is necessary to review three documents, 1) the  
20 1998-99 elementary district budget; 2) the 1998-99 high school  
21 district budget and 3) a cost analysis of the Association's wage  
22 and benefit proposal. Without these documents, it is impossible  
23 to determine if there are sufficient funds within the wage and  
24 benefit line items of the adopted budgets to cover the cost of  
25 the Association's proposal. Absent this evidence, it is  
26 impossible to conclude that the board's response misrepresented  
27 the state of District finances in any respect.

28

1 In sum, the most the Association can show is that the board  
2 could have asked the voters for more budget authority and that,  
3 given its expenditure history, the board might be able to fund  
4 the Association's wage and benefit proposal. However, having  
5 made this point, the Association cannot demonstrate why the board  
6 should be required to provide its teachers with a wage increase  
7 far greater than that provided by other school districts.  
8 Because the Association has failed to demonstrate any fraudulent  
9 misrepresentation upon which it has relied to its detriment, this  
10 charge should be dismissed as without merit.

11 C. Surface Bargaining

12 The Association also contends that the District engaged in  
13 surface bargaining. Its main contention is that several trustees  
14 voiced their concerns about why the District should have to  
15 bargain with the Association when the Association was suing the  
16 District in an effort to compel arbitration. The Association  
17 also points out that the school board did not increase its wage  
18 offer during the course of negotiations.

19 The record reflects, however, that the District never  
20 refused to meet and negotiate with the Association. Nor did the  
21 District ever violate any of the ground rules agreed to at the  
22 beginning of negotiations. Furthermore, the parties have reached  
23 agreement on several issues, including a binding arbitration  
24 provision which the District agreed to implement prior to the  
25 conclusion of negotiations.

26 The law is clear that neither party is required to make a  
27 concession. See § 39-31-305(2), MCA; Edmondson v. City of  
28 Kalispell, ULP #14-87 (1988); NLRB v. McClatchy Newspapers,

1 140 LRRM 2249 (1992). Here, the Association made one reduction  
2 in its wage proposal, from an admittedly "unrealistic" base  
3 increase of 8.2% to a base increase of 5.6%. On the other hand,  
4 the school board offered, in addition to step and lane increases,  
5 to raise base teacher pay by 1.7% in return for a slight  
6 reduction in the schedule's attainment level. Although the  
7 Association argues that the District can afford more, it has not  
8 shown that the board's proposal was motivated by bad faith or a  
9 desire to avoid agreement.

10 **IV. CONCLUSIONS OF LAW**

11 1. The Board has jurisdiction over this unfair labor  
12 practice charge. § 39-31-406, MCA.

13 2. The District did not violate § 39-31-401(1) and (5),  
14 MCA, by refusing to bargain in good faith with the exclusive  
15 bargaining representative.

16 **V. RECOMMENDED ORDER**

17 In conclusion, the unfair labor practice charge is without  
18 merit and is dismissed.

19 DATED this 29<sup>th</sup> day of April, 1999.

20 BOARD OF PERSONNEL APPEALS

21 By: Gordon D. Bruce  
22 GORDON D. BRUCE  
23 Hearing Officer  
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1 NOTICE: Exceptions to these Findings of Fact, Conclusions of Law  
2 and Recommended Order may be filed pursuant to ARM 24.26.215  
3 within twenty (20) days after the day the decision of the hearing  
4 officer is mailed, as set forth in the certificate of service  
5 below. If no exceptions are timely filed, this Recommended Order  
6 shall become the Final Order of the Board of Personnel Appeals.  
7 § 39-31-406(6), MCA. Notice of Exceptions must be in writing,  
8 setting forth with specificity the errors asserted in the  
9 proposed decision and the issues raised by the exceptions, and  
10 shall be mailed to:

11 Board of Personnel Appeals  
12 Department of Labor and Industry  
13 P.O. Box 6518  
14 Helena, MT 59624-6518

15 \* \* \* \* \*

16 CERTIFICATE OF MAILING

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

22 Karl J. Englund  
23 Attorney at Law  
24 P.O. Box 8358  
25 Missoula, MT 59807

26 Michael Dahlem, Esq.  
27 1986 Ridge Crest Drive  
28 Whitefish, MT 59937-3317

DATED this 29<sup>th</sup> day of April, 1999.

Sandy Duncan