

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 6-98:

POLSON CLASSIFIED EMPLOYEES')
ASSOCIATION, MEA/NEA,)
Complainant,)
vs.)
POLSON PUBLIC SCHOOLS,)
ELEMENTARY & HIGH SCHOOL)
DISTRICT NO. 23, LAKE COUNTY,)
MONTANA,)
Respondent.)

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

* * * * *

I. INTRODUCTION

On August 11, 1997, the Polson Classified Employees' Association (the Association), an affiliate of the Montana Education Association and the National Education Association, filed an unfair labor practice charge with the Montana Board of Personnel Appeals alleging that the Polson Public Schools, Elementary and High School District No. 23 of Lake County, Montana (the School District), violated § 39-31-401(1) and (5), MCA, by refusing to bargain in good faith with the exclusive collective bargaining representative.

The complaint asserted that the School District unilaterally changed working conditions by revising job descriptions for the duties of instructional, non-instructional and paraprofessional aides without bargaining with the Association. The complaint further alleged that after refusing to bargain with the Association, the School District attempted to bargain with

1 individual members of the collective bargaining unit, thereby
2 bypassing the exclusive representative.

3 The School District responded that under the collective
4 bargaining agreement, it had the authority to implement the
5 changes in the affected job descriptions.

6 On December 25, 1997, the Board of Personnel Appeals issued
7 its investigation report and determined probable merit to the
8 charge. Pursuant to § 39-31-405, MCA, this case was referred to
9 the Hearings Bureau and ultimately assigned to Hearing Officer
10 Gordon D. Bruce on February 10, 1998.

11 By stipulation of the parties, a hearing was held in the
12 Small Conference Room of the Lake County Courthouse on June 18,
13 1998. Jacob Block, Superintendent of the School District, Tom
14 Gigstad, MEA/NEA representative, Rick D'Hooge, retired
15 representative for the Montana School Boards Association (MSBA),
16 Hazel McAlear, President of the Association and paraprofessional
17 employee of the School District, and John Oberlitner, retired
18 math instructor for the School District, gave sworn testimony at
19 the hearing.

20 Karl J. Englund represented the Association and Arlyn L.
21 Plowman (MSBA) represented the School District.

22 Parties agreed that the record would be complete with the
23 filing of simultaneous post-hearing submissions, and the Hearing
24 Officer received final arguments on August 3, 1998.

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1 **II. FINDINGS OF FACT**

2 **The History Of The Dispute:**

3 1. The Association is the exclusive representative for
4 custodians, bus drivers, mechanics, secretaries and other
5 clerical employees, instructional aides, non-instructional aides,
6 and paraprofessional aides employed by the School District
7 (Exhibit 1, Article I).

8 2. In 1992, as the result of a unit determination petition
9 and subsequent election, the Association was certified as
10 exclusive representative for a bargaining unit for certain of the
11 School District's employees employed as bus drivers, custodians,
12 and secretaries (Testimony of Gigstad).

13 3. Following certification, the parties engaged in
14 negotiations which resulted in an initial contract between the
15 School District and the Association covering the 1992-1993 and
16 1993-1994 school years. During the negotiations, Gigstad, a
17 UniServ consultant employed by the Association's parent
18 organization, the Montana Education Association (MEA), an
19 affiliate of the National Education association, represented the
20 Association. Rick D' Hooge represented the School District
21 (Testimony of Gigstad).

22 4. Gigstad is an experienced negotiator who had been
23 employed for more than 20 years in his current capacity in which
24 he represents affiliated labor organizations in negotiations and
25 other aspects of collective bargaining (Testimony of Gigstad).

26 5. During the course of the negotiations, the Association
27 made a proposal which required job descriptions for each
28 bargaining unit position and incorporated the descriptions into

1 the collective bargaining agreement. The School District
2 resisted the proposal and the Association was unsuccessful in its
3 attempt to make job descriptions, or the requirement part of the
4 contract between the parties (Exhibit 16D, p. 10 and Exhibit 16E,
5 p. 16).

6 6. The contract finally negotiated by the parties
7 contained the following provisions:

8 **5.3 Work Day - Work Year - Work Week - Breaks**

9 The School District will assign hours of work, number
10 of days of work, length of work, job responsibility,
11 and/or duties. The hours of work, number of days of
12 work, the length of work, job responsibility, and/or
13 duties may be changed by the School District after
14 seeking the Association's input.

15 **10.1 Changes in Agreement**

16 No change shall be made in any provision of this
17 agreement unless by mutual consent of the parties.

18 **10.2 Compliance of Individual Contract**

19 Any individual contract between the Board and an
20 employee shall be subject to and consistent with
21 the terms and conditions of this Agreement. If an
22 individual contract contains any language
23 inconsistent with this Agreement, this Agreement
24 will be controlling.

25 **10.5 Effect of Agreement**

26 This Agreement constitutes complete agreement between
27 the School Board and the Association. This Agreement
28 supersedes any prior agreement, rules or practices
concerning the terms and conditions of employment, in
so far as they may be in conflict with this Agreement.
Nothing in this Agreement shall be construed to
obligate the School District to continue or discontinue
any past practice or start a new practice.

ARTICLE XI - MANAGEMENT RIGHTS

Nothing in this agreement shall be construed to
prohibit the School District from exercising all
management rights and prerogatives except those
expressly waived in this agreement. The Board has all
rights to manage the School District except those
expressly waived by this agreement or limited by law.

1 It is recognized that, except as expressly provided in
2 this agreement, the District shall retain whatever
3 rights and authority are necessary for it to operate
4 and direct affairs of the District in all of its
5 various aspects, including but not limited to the right
6 to direct the working forces; to determine the methods,
7 means, organization and number of personnel by which
8 such operations and services are to be conducted; to
9 assign and transfer employees; to schedule working
10 hours and to assign overtime; to determine whether
11 goods or services should be made or purchased; to hire,
12 promote, suspend, discipline, or discharge, to make and
13 enforce rules and regulations; and to change or
14 eliminate existing methods, equipment or facilities.

9 The School District originally proposed that the language in
10 Section 5.3 provide that the hours of work and job
11 responsibilities "may be changed by the School District" without
12 restriction; however, the foregoing language has not been changed
13 in subsequent negotiations and remains part of the Agreement
14 (Exhibit 1, pp. 14 and 15).

15 7. A successor agreement was negotiated in 1994 covering
16 the 1994-1995 school year. Gigstad represented the Association
17 and newly-hired superintendent Block represented the School
18 District (Testimony of Gigstad and Block).

19 8. In July 1995, a second classified bargaining unit was
20 formed when instructional aides, non-instructional aides and
21 paraprofessionals voted to unionize. In August 1995, the
22 Association and the School District agreed to negotiate a single
23 collective bargaining agreement covering the employees of the two
24 units. An agreement was negotiated for the 1995-1996, 1996-1997
25 and 1997-1998 school years. Gigstad represented the Association
26 and Block represented the School District (Exhibit 1 and
27 testimony of Gigstad).

1 9. The first two collective bargaining agreements covered
2 transportation and clerical employees. The third agreement
3 included instructional aides, non-instructional aides and
4 paraprofessionals (Testimony of Gigstad and Block and Exhibit 1).

5 10. During the course of the negotiations for a successor
6 agreement in May of 1994, the Association proposed to eliminate
7 the last sentence of the first paragraph of Section 5.3 as
8 follows:

9 The School District will assign hours of work, number
10 of days of work, length of work, job responsibility,
11 ~~and/or duties. The hours of work, number of days of~~
12 ~~work, the length of work, job responsibility, and/or~~
13 ~~duties may be changed by the School District after~~
14 ~~seeking the Association's input.~~

15 (Exhibit 17, p. 2)

16 11. The Association made the proposal in an effort to
17 correct a concern that the existing language allowed the School
18 District to make changes without bargaining. The School District
19 negotiators responded that the language the Association proposed
20 for deletion actually offered the Association some protection.

21 12. Based on these negotiations, the Association understood
22 the existing language to require negotiation prior to any change
23 in job duties or responsibilities. The Association agreed to
24 retain the language based on that understanding. Because the
25 Association understood this language to require bargaining prior
26 to any change in job duties or responsibilities, it abandoned its
27 proposal that job descriptions be attached to the contract and
28 that the School District not assign duties "outside" an
employee's job description (Exhibits 16D, 16E, and 16F and
testimony of Gigstad).

1 13. The third round of negotiations -- the 1995
2 negotiations -- began prior to the certification election for the
3 aide and paraprofessional unit and prior to the agreement to
4 combine the transportation/clerical unit with the
5 aide/paraprofessional unit. When the aide/paraprofessional unit
6 was certified, the new unit decided to avoid protracting
7 negotiations. Thus, the Association kept its bargaining
8 proposals to a minimum. The aides and paraprofessionals made a
9 series of proposals designed to include the new unit with the
10 existing unit, including a proposal to amend the recognition
11 clause to list specifically "teacher aides (instructional and
12 non-instructional) and paraprofessionals" as separate job
13 categories (Testimony of Gigstad and Exhibits 18A, 18B, and 18C).

14 14. The School District responded with a proposal to delete
15 any reference to paraprofessionals (Exhibit 18D). The School
16 District argued that there should be no distinction between aides
17 and paraprofessionals. The Association rejected that idea, based
18 in part on the fact that the unit, as certified by the Board of
19 Personnel Appeals, consisted of all aides and paraprofessionals
20 (See Attachment A).

21 15. The Association was willing to establish a committee to
22 study the job duties of the paraprofessional (Exhibit 18F). It
23 was not willing to agree to abandon all distinctions between the
24 dwindling ranks of the paraprofessionals and the aides. In
25 response, the School District proposed including in the
26 recognition clause the job classification of paraprofessionals
27 "as may be defined by the District" (Exhibit 18G).

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1 16. The Association did not agree to the proposal because
2 this language allowed the School District unlimited right to
3 define the job of the paraprofessional. The Association proposed
4 again that paraprofessionals be included in the recognition
5 clause as a separate job classification (Exhibit 18H). Finally,
6 the School District relented and the contract listed
7 paraprofessionals and aides as two separate job classifications
8 (Exhibit 1, Article I).

9 17. During subsequent negotiations, some discussion
10 occurred regarding the "paraprofessional" job title. Although
11 that term does not appear in the resultant collective bargaining
12 agreement's wage schedule (Exhibit 1, p. 18, Appendix A), it is
13 listed with aides in the agreement's Seniority and Reduction in
14 Force provisions (Exhibit 1, pp. 2 and 3).

15 18. The School District hired McAlear in 1974 for her
16 accounting abilities. She became a paraprofessional in 1981 with
17 an assignment to work with Oberlitner in the mathematics
18 department. As such, she assisted with the math instructional
19 program by coordinating computer programs with the math
20 curriculum, scheduling students into a computer lab, and
21 maintaining 25 computers. She also provided training and
22 technical assistance to staff. She and Oberlitner attended and
23 made presentations regarding their program to educational
24 conferences and other meetings, including the Montana Education
25 Association Convention (Testimony of McAlear and Oberlitner).

26 19. In late 1996, the job descriptions for classroom,
27 library, special education and playground aides and
28 paraprofessionals were adopted as school board policy. The job

1 descriptions had been board policy and had remained unchanged for
2 several years. As delineated in the job descriptions, the School
3 District's paraprofessionals acted as assistant teachers, and
4 were not assigned custodial-type duties (Exhibit 2).

5 20. The School District discontinued McAlear's math
6 department paraprofessional position prior to the formation of
7 the paraprofessional and instructional/non-instructional aides'
8 bargaining unit, its inclusion in the Association's bargaining
9 unit, and the resultant coverage under collective bargaining
10 agreement. This reassignment and the elimination of the School
11 District's only paraprofessional position occurred when the
12 School District hired an additional certified mathematics teacher
13 who had a master's degree (Testimony of McAlear and Block).

14 21. Although the reassignment did not affect McAlear's
15 wage, it changed her job duties. Her new position was more like
16 the work of an aide (Exhibit 12). For the 1996-97 school year,
17 the School District assigned McAlear lunch room duties. The new
18 job description at issue here included lunch room duties
19 (Testimony McAlear).

20 22. In late 1996, the school board deleted the job
21 descriptions from board policy. In October 1996, when the board
22 was considering this topic, Association president Hazel McAlear
23 wrote School District superintendent Jacob Block. She asked
24 about the impact of this decision and whether "current job
25 descriptions, or other working conditions" would be changed
26 (Exhibit 3). In response, Block assured the Association that
27 "current job assignments/duties would not be materially affected
28 by this action" (Exhibit 4).

1 23. On November 25, 1996, the Association (McAlear) wrote
2 again to Block to "make sure we understand what impact the
3 deletion of job descriptions from Board Policy will have. . . .
4 Are we correct in understanding that the *only* change resulting
5 from such action will be to reclassify job descriptions from
6 'Board Policy' to 'Administrative Policy'?" (Exhibit 5) Block
7 did not respond. The Association interpreted Block's lack of
8 response as an indication that the Association's understanding
9 was correct and there were no substantive changes in the job
10 descriptions as a result of the board's decision to delete the
11 descriptions from board policy (Testimony McAlear).

12 24. In its November 25, 1996 letter to Block, the
13 Association stated that because "job descriptions are considered
14 a mandatory subject of bargaining," any revisions or changes to
15 existing job descriptions "needs to involve the Association as
16 the employees' exclusive representative." *Id.*

17 25. In January 1997, the Association heard rumors that the
18 School District administration was drafting new job descriptions
19 for aides and paraprofessionals (Testimony McAlear).
20 Consequently, on January 28, 1997, McAlear wrote Block and
21 requested information (Exhibit 6).

22 26. On January 28, 1997, Block wrote a letter to McAlear
23 and a memorandum to all the aides and paraprofessionals enclosing
24 a single combined job description for "instructional aide, non-
25 instructional and paraprofessional instructional aide" (Exhibits
26 7 and 8). In his memorandum, Block invited the aides and
27 paraprofessionals to a meeting "to discuss this draft"
28 (Exhibit 8). In his letter to McAlear, Block invited her to the

1 same meeting "as PCEA President for purposes of Association
2 input" (Exhibit 7). He wrote that following the general meeting
3 with all the aides, he would schedule a time to further secure
4 association input regarding the proposed job description. Id.

5 27. Gigstad and McAlear understood this to mean that the
6 School District would hear first from all the affected employees
7 and then would negotiate with the Association (Exhibit 12). The
8 Association had no objection to this two-step process. To insure
9 that the School District understood its duty to deal separately
10 with the Association, McAlear wrote Block and informed him that
11 although she would attend the meeting, "I will be wearing my non-
12 union hat" (Exhibit 19).

13 28. The School District held a meeting with the interested
14 aides on February 4, 1997 (Exhibit 9). After that meeting, the
15 School District administration redrafted the proposed job
16 description. Id. On March 13, 1997, Block invited the
17 Association to his office "to secure input." Id.

18 29. The Association established a committee to work on the
19 issues involved in the new job description. In advance of its
20 meeting with Block, the committee formulated a set of questions
21 to ask Block (Exhibit 11).

22 30. The committee, with Gigstad as its spokesman, met with
23 Block in early April and asked its questions. It presented no
24 arguments for or against the administration's proposal and it
25 offered no alternatives or proposals of its own. The committee
26 members listened to Block's responses to the questions. The
27 committee intended to use the information learned at the meeting
28

1 to develop a position for bargaining with the School District
2 (Testimony of Gigstad).

3 31. There were no negotiations nor exchange of ideas or
4 proposals at the meeting. The Association had questions about
5 the new job descriptions. It asked those questions and it
6 listened to the answers. At the conclusion of the meeting, the
7 committee told Block of its intentions (Testimony of Gigstad and
8 McAlear).

9 32. On May 5, 1997, Block sent McAlear a slightly revised
10 job description (Exhibit 12). The cover letter said, "Inasmuch
11 as we are near the end of the school term, the effective date of
12 this job description will be July 1, 1997." Id.

13 33. On May 12, 1997, McAlear wrote Block that the new job
14 description was not acceptable to the Association (Exhibit 13).
15 She detailed some of the Association's concerns and, as she had
16 done in November 1996, served "notice of our request to bargain
17 over changes in the job descriptions prior to implementation."
18 Id.

19 34. On May 30, 1997, Block responded, "It is deemed that
20 sufficient and appropriate input has been sought and received,
21 and the District has no intention of bargaining duties or job
22 descriptions" (Exhibit 14). Block iterated that "it is the
23 intent of the District to implement the job descriptions as they
24 have been revised, prepared and sent to you with a cover memo on
25 May 5, 1997." Id.

26 35. On July 16, 1997, Block wrote each aide and
27 paraprofessional and attached a "copy of the job description
28 which will become effective with the 97-98 term" (Exhibit 15).

1 He wrote that the job description "remains open for comment and I
2 invite any further responses from you." Id.

3 36. The new job descriptions went into effect on July 1,
4 1997 (Exhibit 12). The new job description is a substantial
5 departure from the terms of the former job descriptions, in at
6 least the following ways:

7 a) While formerly there was a separate job
8 description for aides and paraprofessionals,
9 Exhibit 2, the new job description combines these
10 classifications under one job description.
11 Exhibit 12. The effect of combining aides and
12 paraprofessionals under one job description is to
13 eliminate any distinction between these two very
14 different classifications. Under the new job
15 description, the School District has assigned
16 custodial-type duties to the paraprofessional,
17 including cleaning lunch-room tables, who had not
18 assigned similar duties in her twenty-four year
19 history with the School District.

20 b) The new job description changes the
21 qualifications for both aides and
22 paraprofessionals. For example, the former job
23 description lists "interest in working with
24 children" as the sole qualification for an aide.
25 Exhibit 2. The new job description contains four
26 additional qualifications. Exhibit 12. The
27 former job description contained very specific
28 qualifications for paraprofessionals, Exhibit 12,
while the new job description eliminates many of
those qualifications. Exhibit 12.

c) The former job descriptions contained very
specific terms of employment for both aides and
paraprofessionals, Exhibit 2, that have been
totally eliminated from the new job description.

(Exhibit 12)

24 37. The contract does not contain a separate starting wage
25 rate for paraprofessionals. Id., Appendix A. This is because
26 only one paraprofessional is employed by the School District and,
27 during the 1995 negotiations, the School District made very clear
28 its intentions not to hire additional paraprofessionals in the

1 foreseeable future. Thus, there was no reason to debate and
2 establish a starting wage rate which would not apply to any
3 employee (Testimony of Block).

4 **III. DISCUSSION**

5 The Association contends that the School District committed
6 an unfair labor practice by refusing to bargain with the
7 Association over the job description for certain bargaining unit
8 positions and by sending a letter to members of the bargaining
9 unit asking for their individual input. The School District
10 denies that it was required to bargain over these issues, that
11 the Association waived any right it had to bargaining, and that
12 the direct contact with unit members was permissible.

13 Section 39-31-401(5), MCA, provides that it is an unfair
14 labor practice for an employer to "refuse to bargain collectively
15 in good faith with an exclusive representative." Collective
16 bargaining is:

17 The performance of the mutual obligation of the public
18 employer or his designated representative and the
19 representative of the exclusive representative to meet
20 at reasonable times and negotiate in good faith with
21 respect to wages, hours, fringe benefits and other
22 conditions of employment. . . .

23 Good faith bargaining is defined in § 39-31-305, MCA, as the
24 performance of the mutual obligation of the public employer or
25 his designated representative and the representatives of the
26 exclusive representative to meet at reasonable times and
27 negotiate in good faith with respect to wages, hours, fringe
28 benefits, and other conditions of employment or the negotiation
of an agreement or any question arising under an agreement. The
obligation does not compel either party to agree to a proposal or

1 require the making of a concession. See NLRB v. American
2 National Insurance Company, 30 LRRM 2147, 343 US 395 (1952); NLRB
3 v. Bancroft Manufacturing Company, Inc., 106 LRRM 2603, 365 F.2d
4 492 (5th Cir. 1981); NLRB v. Blevins Popcorn Company, 107 LRRM
5 3108, 659 F.2d 1173 (D.C. Cir. 1981); Struthers Wells Corporation
6 v. NLRB, 114 LRRM 3553, 721 F.2d 465 (3rd Cir. 1980).

7 The U.S. Supreme Court has established three categories of
8 bargaining proposals. NLRB v. Wooster Division of the Borg-
9 Warner Corp., 356 U.S. 342, 42 LRRM 2034 (1958). Mandatory
10 subjects are those which regulate wages, hours and other
11 conditions of the employment relationship, and over which both
12 parties must bargain in good faith. Permissive subjects are
13 those which deal with matters other than wages, hours, and
14 working conditions, and over which neither party is required to
15 bargain. Illegal subjects are those which would require an
16 unlawful act or an act inconsistent with the basic public policy
17 of the Act. See ULP #43-79 Bozeman Education Association v.
18 Gallatin County School District No. 7, Bozeman, MT.

19 The Board of Personnel Appeals stated in ULP #5-77,
20 Florence-Carlton Unit of the Montana Education Association v.
21 Board of Trustees of School District No. 15-6, Florence-Carlton,
22 MT: "As the question of what is a mandatory subject of
23 bargaining and what is not has continued to plague negotiators,
24 the question has frequently been referred to state public
25 employees relations boards and the courts. In order to deal with
26 the difficulty of defining the terms, the boards and courts have
27 generally adopted a balancing approach."
28

1 The balancing test adopted by the Kansas Supreme Court in
2 1973 (NEA v. Shawnee Mission Board of Education, 512 P.2d 426,
3 84 LRRM 2223) and later by the Pennsylvania Supreme Court
4 (Pennsylvania Labor Relations Board v. State College Area School
5 District, 337 A.2d 262, 90 LRRM 2081) is one which, if
6 judiciously applied, should result in the greatest benefit to all
7 concerned. The Kansas Court said,

8 It does little good, we think, to speak of
9 negotiability in terms of "policy" versus
10 something which is not "policy". Salaries are a
11 matter of policy, and so are vacation and sick
12 leaves. Yet we cannot doubt the authority of the
13 Board to negotiate and bind itself on these
14 questions. The key, as we see it, is how direct
15 the impact of an issue is on the well being of the
16 individual teacher, as opposed to its effect on
17 the operation of the school system as a whole.

18 [Emphasis added] The line may be hard to draw,
19 but in the absence of more assistance from the
20 legislature the courts must do the best they can.
21 The similar phraseology of the N.L.R.A. has had a
22 similar history of judicial definition. See
23 Fiberboard Corporation v. Labor Board, 379 U.S.
24 203, 13 L.Ed. 2d 233, 85 S. Ct. 398, 57 LRRM 2609
25 and especially the concurring opinion of Stewart,
26 J. at pp. 221-222.

27 Job duties and responsibilities are mandatory subjects of
28 bargaining. Mandatory subjects of bargaining are those matters
"plainly germane to the 'working environment'" and "not among
those managerial decisions which lie at the core of
'entrepreneurial control'." Ford Motor Co. v. NLRB, 441 U.S.
488, 498 (1979) quoting Fiberboard Corp. v. NLRB, 370 U.S. 203,
222-223 (1964) (Stewart, J. concurring). What an employee does
while on the job is clearly germane to the working environment.
Job descriptions are not among that class of decisions which lie
at the core of entrepreneurial control because they do not
involve "the commitment of investment capital" or "the basic

1 scope of the enterprise." Id. Only "those management decisions
2 which are fundamental to the basic direction of a corporate
3 enterprise or which impinge only indirectly upon employment
4 security" are excluded from the collective bargaining process.
5 Id. Accordingly, job descriptions and job duties are mandatory
6 subjects of bargaining. Unless a waiver exists, the School
7 District violated § 39-31-401(1) and (5), MCA, by failing to
8 bargain with the Association prior to implementing the new job
9 description.

10 An employer violates its duty to bargain if, without
11 bargaining to impasse, it effects a unilateral change in an
12 existing term or condition of employment. See NLRB v. Katz,
13 369 U.S. 736 (1962) (stating that such action is "a circumvention
14 of the duty to negotiate which frustrates the objectives of
15 § 8(a)(5) much as does a flat refusal"); Bigfork Area Education
16 Association v. Board of Flathead and Lake County School District
17 No. 38, ULP #20-78. The vice of a unilateral change was
18 explained by the court in NLRB v. McClatchy Newspapers, 964 F.2d
19 1153, 1162 (D.C. Cir. 1992):

20 A unilateral change not only violates the plain
21 requirement that the parties bargain over "wages,
22 hours and other terms and conditions" but also
23 injures the process of collective bargaining
24 itself. Such unilateral action minimizes the
influence of organized bargaining. It interferes
with the right to self organization by emphasizing
to the employees that there is no necessity for a
collective bargaining agreement.

25 Also at issue is whether the Association has waived its
26 right to bargain over the changes in the job description(s) by
27 agreeing to 1) Article 5.3, Work Day - Work Year - Work Week -
28 Breaks; 2) Article XI, the Management Rights clause in the CBA;

1 and Article 3) 10.5, Effect of Agreement. The School District
2 argues that the language contained in these articles is clear and
3 unmistakable and waived the right to bargain. Further, the
4 School District argues the Association specifically waived the
5 right to negotiate employees' job responsibilities or duties when
6 the Association agreed to and accepted Article 5.3.

7 The Developing Labor Law, Third Edition, Patrick Hardin,
8 Ed., the Bureau of National Affairs, Washington, D.C., 1992
9 contains the following observations about the issue of waiver of
10 bargaining rights: 1) "A party may contractually waive its right
11 to bargain about a subject. Where such a waiver is claimed, the
12 test applied has been whether the waiver is in 'clear and
13 unmistakable' language" (p. 700). "In determining whether a
14 contractual waiver exists, the Board considers the bargaining
15 history of the contract language and the parties' interpretation
16 of the language" (p. 701). 2) "When a 'management rights' clause
17 is the source of an asserted waiver, it is normally scrutinized
18 by the Board to ascertain whether it affords specific
19 justification for unilateral action" (p. 703). 3) "Broad
20 'zipper' clauses . . . standing alone, [do] not constitute a
21 sufficiently clear and unmistakable waiver as to a specific
22 bargaining item" (p. 702).

23 The Association has the right to notice and the opportunity
24 to bargain over mandatory subjects. It has the power to waive
25 this right. The waiver of a statutory right will not be inferred
26 from general contractual provisions; rather, such waivers must be
27 clear and unmistakable. Metropolitan Edison Co. v. NLRB,
28 460 U.S. 708 (1983). The NLRB has repeatedly held that generally

1 worded management rights clauses or "zipper" clauses will not be
2 construed as waivers of bargaining rights. Suffolk Child
3 Development Center, 277 NLRB 1345 (1985); Kansas National
4 Education Association, 275 NLRB 638 (1985); Bozeman Deaconess
5 Foundation, 322 NLRB No. 196 (1997). Waiver may be evidenced by
6 bargaining history, but the matter at issue must have been fully
7 discussed and consciously explored during negotiation and the
8 union must have consciously yielded or clearly and unmistakably
9 waived its interest in the matter. Rockwell International Corp.,
10 260 NLRB 1346, 1347 (1982). In the present case, the bargaining
11 history shows that in agreeing to section 5.3 of the collective
12 bargaining agreement, the Association did not consciously,
13 clearly or unmistakably waive its right to bargain over changes
14 in the duties and responsibilities of the unit members. In fact,
15 the Association, in 1992 and again in 1994, stated its
16 understanding of section 5.3 as requiring bargaining prior to the
17 implementation of changes in duties or responsibilities.

18 The School District's argument was counter to one of the
19 oldest rules of contract interpretation, the "Peerless Ship Rule"
20 first announced in Raffles v. Wichelhaus, 159 Eng. Rep 375
21 (1864). This case is a classic illustration of the proposition
22 in contract law that if in the making of an agreement, one party
23 asserts a certain meaning to a contract and the other party
24 assents or does not disagree, the other party should not be able
25 to avoid that meaning. Here, when the Association stated its
26 understanding that section 5.3 required bargaining, and the
27 School District did not disagree, the meaning of the contract was
28 firmly established.

1 Further, the bargaining history shows that the Association
2 did not clearly and unmistakably waive its right to bargain over
3 the duties and responsibilities of aides and paraprofessionals.
4 The Association understood that the proposal required bargaining
5 prior to material changes in job duties or responsibilities.

6 The record concerning the bargaining history shows specific
7 agreement that the paraprofessional job classification would be
8 distinct from the aide job classification and that the School
9 District made several attempts to eliminate the paraprofessional
10 job classification, but did not succeed.

11 An employer cannot alter a collective bargaining agreement
12 without the union's consent. Permitting such a result would
13 undermine the labor policy that parties to a collective
14 bargaining agreement "must have reasonable assurances that their
15 contract will be honored." W.R. Grace & Co. v. Rubber Workers
16 Local 759, 461 U.S. 757, 771 (1983). § 39-31-306(3), MCA. By
17 changing the job descriptions to eliminate all distinctions
18 between aides and paraprofessionals, the School District has
19 effectively eliminated the paraprofessional job classification in
20 violation of Article I of the parties' collective bargaining
21 agreement.

22 In addition, the bargaining history shows that the
23 Association did not agree that the employer could deal directly
24 with employees concerning matters related to job responsibilities
25 and duties. The record shows that in 1992 the School District
26 proposed that it be allowed to change job duties and
27 responsibilities after seeking "input" from the "employees," but
28 the Association protested based on its role as the exclusive

1 representative of the employees. Accordingly, the School
2 District changed its proposal.

3 It is clear that an employer must bargain exclusively with
4 the bargaining representative of the employees. An employer who
5 deals directly with its unionized employees or with any
6 representative other than the designated agent regarding terms
7 and conditions of employment violates § 39-31-401(1) and (5),
8 MCA. Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944).
9 Direct dealing need not take the form of actual bargaining.
10 Modern Merchandising, 284 NLRB 1377 (1987). The School
11 District's July 16, 1997 letter to all aides and
12 paraprofessionals asking for their individual input appears to be
13 an attempt to bypass the union in violation of § 39-31-401(1) and
14 (5), MCA.

15 Even if a union waives its right to bargain over a
16 particular topic so as to permit unilateral action by the
17 employer, the employer cannot deal directly with the employees on
18 that topic. Allied-Signal, Inc., 307 NLRB 752, 754 (1992). When
19 a union waives its right to bargain, the employer is not free to
20 deal directly with the employees.

21 IV. CONCLUSIONS OF LAW

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

24 2. The School District violated § 39-31-401 (1) and (5),
25 MCA, by refusing to bargain with the Association over changes in
26 the job description and duties for instructional, non-
27 instructional and paraprofessional aides.

28

1 3. The School District's July 16, 1997 letter to all aides
2 and paraprofessionals asking for their individual input was an
3 attempt to bypass the union in violation of § 39-31-401(1) and
4 (5), MCA.

5 **V. RECOMMENDED ORDER**

6 The Polson Public Schools, Elementary and High School
7 District No. 23 of Lake County, Montana, its agents, school board
8 members and employees shall:

9 1) Cease and desist from refusing to bargain with the
10 Polson Classified Employees' Association, MEA/NEA, as the
11 exclusive representative of the appropriate bargaining unit of
12 the School District's classified employees, by bypassing the
13 Association and dealing directly with bargaining unit employees;

14 2) Cease and desist from refusing to bargain with the
15 Polson Classified Employees' Association, MEA/NEA, concerning job
16 descriptions for and the job duties of aides and
17 paraprofessionals;

18 3) Cease and desist from unilaterally changing the terms
19 of employment of aides and paraprofessionals by implementing new
20 or altered job descriptions for unit employees without first
21 providing the Association notice and opportunity to bargain;

22 4) Rescind all unilateral changes made to the terms and
23 conditions of employment of unit aides and paraprofessionals by
24 rescinding the job description that became effective July 1, 1997
25 for instructional aide, non-instructional and paraprofessional
26 instructional aide.

* * * * *

CERTIFICATE OF MAILING

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 depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Jacob Block, Superintendent
Polson Elementary & High School District No. 23
111 4th Avenue East
Polson, MT 59860

Tom Gigstad, UniServ Director
Montana Education Association, NEA
1001 SW Higgins #101
Missoula, MT 59803

Arlyn Plowman, Labor Relations Specialist
Montana School Boards Association
One South Montana Avenue
Helena, MT 59601

Karl J. Englund
Attorney at Law
P.O. Box 8358
Missoula, MT 59807

DATED this 30th day of September, 1998.

Carol A. Larkin

RECEIVED

MAR 10 1999

HEARINGS BUREAU

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 6-98:

POLSON CLASSIFIED EMPLOYEES')
ASSOCIATION, MEA/NEA,)

Complainant,)

vs.)

ORDER

POLSON PUBLIC SCHOOLS, ELEMENTARY)
& HIGH SCHOOL DISTRICT NO. 23,)
LAKE COUNTY, MONTANA,)

Respondent.)

The above-captioned matter came before the Board of Personnel Appeals on January 28, 1999. The Respondent appealed from the Findings of Fact, Conclusions of Law and Order issued by a Department hearing officer, dated September 30, 1998.

Appearing before the Board were Arlyn Plowman, representing the Respondent, and Karl J. Englund, attorney for the Complainant. They participated in person.

After review of the record and consideration of the arguments by the parties, the Board concludes that the Department hearing officer's findings of fact are supported by substantial evidence. Certain conclusions of law and the rationale expressed by the hearing officer in the "Discussion" portion of his ruling, however, are deemed legally incorrect. Specifically, the Board finds as incorrect Conclusions of Law #2 and #3, together with that portion of the "Discussion" running from page 19, line 10 through page 20, line 5 and from page 20, line 22 through page 21, line 20.

As a result of the above conclusions the Board orders as follows:

1. **IT IS HEREBY ORDERED** that:

This case is remanded to the Department hearing officer with directions to comport his ruling to the following conclusions of the Board:

- A. That section 5.3 of the contract constituted a valid waiver to bargain by the Association on the issues expressly set forth therein;
- B. That the School District complied with the terms of Section 5.3 when it sought the input of the Association regarding the District's efforts to modify duties and responsibilities of the aides and paraprofessionals; and

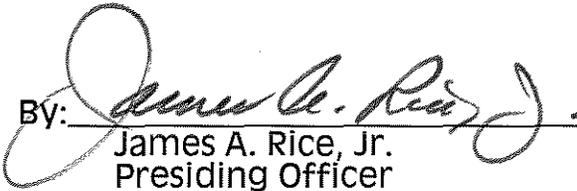
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4
5 C. The district did not bypass the association and deal
6 inappropriately or directly with the employees.

7
8 **2. IT IS FURTHER ORDERED** that:

9 A. the Department hearing officer shall, on remand, determine
10 whether any other unilateral actions by the School District
11 exceeded the express waiver contained within section 5.3 of the
12 contract. If so, such behavior could constitute an unfair labor
13 practice.

14 DATED this 16 day of February, 1999.

15 **BOARD OF PERSONNEL APPEALS**

16 By: 
17 James A. Rice, Jr.
18 Presiding Officer

19 * * * * *

20 Board members Rice, Talcott and Vagner concur.
21 Board members Schneider and Perkins dissent.

22 * * * * *

23 * * * * *

24 **CERTIFICATE OF MAILING**

25 I, , do hereby certify that a
26 true and correct copy of this document was mailed to the following on the 18th
27 day of February, 1999:

28 **KARL J ENGLUND**
ATTORNEY AT LAW
PO BOX 8358
MISSOULA MT 59807-8358

ARLYN PLOWMAN
MONTANA SCHOOL BOARDS ASSOCIATION
ONE SOUTH MONTANA AVE
HELENA MT 59601

* * * * *

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 6-98:

POLSON CLASSIFIED EMPLOYEES')
ASSOCIATION, MEA/NEA,)

Complainant,)

vs.)

POLSON PUBLIC SCHOOLS,)
ELEMENTARY & HIGH SCHOOL)
DISTRICT NO. 23, LAKE COUNTY,)
MONTANA,)

Respondent.)

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

* * * * *

I. INTRODUCTION

On August 11, 1997, the Polson Classified Employees Association (Association), an affiliate of the Montana Education Association and the National Education Association, filed an unfair labor practice charge with the Montana Board of Personnel Appeals (Board) alleging that the Polson Public Schools, Elementary and High School District No. 23 of Lake County, Montana (School District), violated § 39-31-401(1) and (5), MCA, by refusing to bargain in good faith with the exclusive collective bargaining representative.

The complaint asserted that the School District unilaterally changed working conditions by revising job descriptions for instructional, non-instructional, and paraprofessional aides without bargaining with the Association. The complaint further alleged that after refusing to bargain with the Association, the School District

attempted to bargain with individual members of the collective bargaining unit, bypassing the exclusive bargaining representative.

The School District responded that under the collective bargaining agreement, it had the authority to implement the changes in the affected job descriptions. In particular, the School District pointed to Section 5.3 of the collective bargaining agreement and contended that it waived the Association's right to bargain about changes in job duties and responsibilities.

On December 25, 1997, the Board issued its investigation report and determined probable merit to the charge. Pursuant to § 39-31-405, MCA, this case was referred to the Hearings Bureau, and Hearing Officer Gordon Bruce conducted an evidentiary hearing on June 18, 1998.

In September 1998, the Hearing Officer issued findings of fact, conclusions of law and recommended order, concluding that the School District refused to bargain with the Association over changes in job descriptions and duties and attempted to bypass the Association and bargain directly with individual bargaining unit members. The School District filed exceptions to the Hearing Officer's decision, and the matter was argued before the Board on January 28, 1999. The Board adopted the Hearing Officer's findings of fact, but amended the conclusions of law and issued an order holding:

- A) That section 5.3 of the parties' collective bargaining agreement constituted a valid waiver by the Complainant of any obligation the Defendant may have had to bargain on the issues exactly expressly set forth therein;
- B) That the Defendant complied with the terms of section 5.3 when it sought the Complainant's input; and
- C) The Defendant did not bypass the Complainant and deal directly with bargaining unit members.

Thereafter, the Board remanded the matter to the Hearing Officer to determine whether any other unilateral actions by the School District exceeded the express waiver contained within Section 5.3 of the parties' collective bargaining agreement.

Pursuant to a March 18, 1999 order and a subsequent April 1, 1999 rescheduling order, Hearing Officer Gordon Bruce held a telephone conference on April 6, 1999. At the conference, the representatives of the parties stipulated to the following:

The issue to be determined on remand is whether the employer/defendant exceeded the express waiver contained in Section 5.3 of the collective bargaining agreement when it discontinued or combined job titles referenced in the unit description, and if so, whether such behavior constitutes an unfair labor practice.

That the record is sufficient for a decision on the merits without any further fact finding hearing.

The findings of fact in the decision on remand from the Board are incorporated by reference in this decision and may be repeated for clarification. The Hearing Officer has made some additional findings of fact derived from the record of the hearing.

II. FINDINGS OF FACT

1. In August of 1995, the Association and the School District agreed to negotiate a single collective bargaining agreement covering the affected employees. The School District eliminated its only paraprofessional position when it hired a new mathematics teacher. This change occurred before the Association was certified as the exclusive representative for any of the School District's employees. Eventually, the parties reached a three-year agreement covering both units, covering the 1995-

1996, 1996-1997 and 1997-1998 school years. The parties had three collective bargaining agreements, two covering transportation and clerical employees, and a third covering transportation and clerical employees and instructional, non-instructional aides, and paraprofessionals.

2. The third round of negotiations in 1995 began prior to the certification election for the aide and paraprofessional unit and prior to the agreement to combine the transportation and clerical unit with the aide and paraprofessional unit. When the aide/paraprofessional unit was certified, the new unit made a series of proposals designed to include the new unit members in with the existing unit, including a proposal to amend the recognition clause of the contract and specifically list "teacher aides (instructional and non-instructional) *and* paraprofessionals" as separate job categories.

3. The School District responded with a proposal to delete any reference to paraprofessionals. The School District argued that there should be no distinction between aides and paraprofessionals. The Association rejected that idea, based in part on the fact that the unit as certified by the election and by the Board consisted of two separate job classifications -- aides and paraprofessionals. While the Association was willing to establish a committee to study the job duties of the paraprofessional, it was not willing to agree to abandon all distinctions between the dwindling ranks of the paraprofessionals and the aides.

4. In response, the School District proposed including in the recognition clause the job classification of paraprofessionals "as may be defined by the District." The Association did not agree with this language because of its perception that it allowed the School District unlimited right to define the job of the paraprofessional. The Association proposed again that paraprofessionals be listed in the recognition clause as a separate job classification. Finally, the School District agreed and the

contract lists paraprofessionals and aides as separate job classifications. The paraprofessionals acted as assistant teachers.

5. The School District assigned the former paraprofessional position duties similar to those of an aide. Before the School District developed the new job descriptions, it assigned the paraprofessional employee lunchroom duty for the 1996-97 school year. The School District did not make significant changes in the former paraprofessional's duties under the job description when it included custodial-type duties, including cleaning lunchroom tables.

III. DISCUSSION

The Board has jurisdiction over this unfair labor practice charge. § 39-31-406, MCA. The School District is a public employer as that term is defined in § 39-31-103(10), MCA, its employees are public employees as that term is defined in § 39-31-103(9), MCA, and the Association is an exclusive representative as that term is defined in § 39-31-103(4), MCA.

Section 39-31-401(5), MCA, provides that it is an unfair labor practice for an employer to "refuse to bargain collectively in good faith with an exclusive representative." An employer violates its duty to bargain if, without bargaining to impasse, it changes unilaterally an existing term or condition of employment which is a mandatory subject of bargaining. See NLRB v. Katz, 369 U.S. 736 (1962) (stating that such action is "a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal"); Bigfork Area Education Association v. Board of Flathead and Lake County School District No. 38, ULP #20-78.

The waiver of a statutory right must be clear and unmistakable. Metropolitan Edison Co. v. NLRB, 460 U.S. 708 (1983). Generally worded management rights clauses or "zipper" clauses will not be construed as waivers of bargaining rights.

Suffolk Child Development Center, 277 NLRB 1345 (1985); Kansas National Education Association, 275 NLRB 638 (1985); Bozeman Deaconess Foundation, 322 NLRB No. 196 (1997). Waiver may be evidenced by bargaining history, but the matter at issue must have been fully discussed and consciously explored during negotiation and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter. Rockwell International Corp., 260 NLRB 1346, 1347 (1982).

The bargaining unit description in the parties' collective bargaining agreement is found in the second paragraph of Article I where it states:

The appropriate unit shall include all custodians, maintenance workers, bus drivers, mechanics, secretaries, and other employees performing work of a clerical nature, including but not limited to hot lunch aide and office aide, all teacher aides (instructional and non-instructional) and paraprofessionals employed by the Polson Elementary and High School District No. 23, excluding cooks, dishwashers, food servers, the superintendent's secretary, the clerk/business manager and assistant, the transportation director and any employee excluded by 39-31-103, MCA.

The Complainant contends that because the initial bargaining unit certified by the Board included both aides and paraprofessionals, the School District could not unilaterally discontinue or combine job duties in the unit.

In Newspaper Printing Corporation v. National Labor Relations Board, 692 F.2d 615, 111 LRRM 2824 (6th Cir. 1982), the Sixth Circuit Court of Appeals stated:

We believe that the following comment by the [National Labor Relations] Board regarding unit certification, quoted with approval by the Supreme Court, applies as well to voluntary recognition and places this dispute in the proper light:

"[A] Board certification in a representation proceeding is not a jurisdictional award; it is merely a determination that a majority of the employees in an appropriate unit have selected a particular labor organization as their representative for purposes of collective bargaining. It is true that such certification presupposes a determination that the group of employees involved constitute an appropriate unit for collective bargaining purposes, and that in making such a determination the Board considers the general nature of the duties and work tasks of such employees. However, unlike a jurisdictional award, this determination by the Board does not freeze duties or work tasks of the employees in the unit found appropriate. Thus, the Board's unit finding does not per se preclude the employer from adding to, or subtracting from, the employees' work assignments." (Emphasis added)

The unit description found in Article I of the parties' collective bargaining agreement specifies those employees who are members of the bargaining unit represented by the exclusive representative, the Association. The unit description does not establish any wages, hours or working conditions; it merely identifies those employees represented by the Association. The unit description does not preclude the School District from adding to, or subtracting from, the employees' work assignments. Newspaper Printing Corporation v. National Labor Relations Board, supra, Bridgeport and Port Jefferson Steamboat Company, 313 NLRB 63, 145 LRRM 1004 (1993); Alamo Cement Company, 277 NLRB 108, 121 LRRM 1131 (1985).

Although the School District had previously eliminated its last paraprofessional position, paraprofessionals were included in the bargaining unit certified by the Board in July 1995. The previous job title and job description were for a job that no longer existed and the new job description and job title more accurately reflected the incumbent's current job duties and responsibilities.

The Complainant also contends that the School District could not discontinue or combine position titles because of the "zipper" clause contained in the collective bargaining agreement.

The fact that the positions were included in the unit determination does prevent the School District from altering the duties of the position. However, the Board has already determined that the Association waived its right to bargaining about job descriptions, discontinuation or combination of job titles, and work assignments with the following contract language in Section 5.3, Work Day - Work Year - Work Week - Breaks, as follows:

The School District will assign hours of work, number of days of work, length of work, job responsibility, and/or duties. The hours of work, number of days of work, the length of work, job responsibility, and/or duties may be changed by the School District after seeking the Association's input.

Here, the Board determined that the language in Section 5.3 constituted a valid waiver by the Association of any obligation the School District may have had to bargain on the issues expressly set forth therein. Job responsibilities and duties are expressly set forth in Section 5.3. If the Association waived its right to bargaining regarding job responsibilities and job duties, it follows that the document describing those duties, the job description, is also within the scope of the waiver.

The Association proposed contract language to limit the School District's § 39-31-303, MCA, rights to direct and assign employees, determine the job classifications and personnel by which District operations were to be conducted, when it proposed to negotiate job descriptions for each bargaining unit position. The Association's proposal regarding job descriptions and its failure to have them included in the contract establishes that the School District successfully protected its employer's § 39-31-303, MCA, prerogatives. This bargaining history constitutes an

additional waiver on the whole issue of job descriptions, Radioear Corporation, 199 NLRB 137, 87 LRRM 1330 (1974); Westinghouse Electric Corporation, 150 NLRB 136, 58 LRRM 1257 (1965).

There is nothing in the parties' collective bargaining agreement nor in the record that requires the School District to maintain obsolete job titles or job descriptions. In summary, the School District did not exceed the waiver contained in Section 5.3 of the collective bargaining agreement when it discontinued or combined job duties referenced in the unit description.

IV. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this unfair labor practice charge. § 39-31-406, MCA.
2. The School District did not violate § 39-31-401 (1) and (5), MCA, when it discontinued or combined job titles referenced in the unit description.

V. RECOMMENDED ORDER

Unfair Labor Practice Charge No. 6-98 is hereby Dismissed.

DATED this 13th day of July, 1999.

BOARD OF PERSONNEL APPEALS

By: Gordon D. Bruce
GORDON D. BRUCE
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to ARM 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. § 39-31-406(6), MCA. Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

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

* * * * *

CERTIFICATE OF MAILING

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 depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Karl J. Englund
Attorney at Law
P.O. Box 8358
Missoula, MT 59807-8358

Arlyn Plowman
Montana School Boards Association
One South Montana Avenue
Helena, MT 59601

DATED this 13th day of July, 1999.

Sandy Duncan



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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 6-98

POLSON CLASSIFIED EMPLOYEES)
ASSOCIATION, MEA/NEA,)
Appellant / Complainant,)
- vs -)
POLSON PUBLIC SCHOOLS,)
ELEMENTARY & HIGH SCHOOL)
DISTRICT NO. 23, LAKE COUNTY,)
MONTANA,)
Respondent / Defendant.)

FINAL ORDER

The above-captioned matter came before the Board of Personnel Appeals on December 9, 1999. Karl Englund, attorney for the Complainant/Appellant, appealed from the Findings of Fact, Conclusions of Law and Recommended Order issued by a Department hearing officer, dated July 13, 1999.

Appearing before the Board were Karl Englund, attorney for the Complainant/Appellant and Arlyn Plowman of the Montana School Boards Association representing the Defendant/Respondent. Both parties participated in person.

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

- 1. **IT IS HEREBY ORDERED** that the Board adopts the Findings of Fact, Conclusion of Law, and Recommended Order issued by the Hearing Officer.
- 2. **IT IS FURTHER ORDERED** that the Exceptions to Proposed Findings of Fact; Conclusions of Law and Order on Remand are dismissed.

DATED this 17~~th~~ day of December, 1999.

BOARD OF PERSONNEL APPEALS

By: 
Jack Holstrom
Presiding Officer

Board members Holstrom, Talcott and Schneider concur.
Alternate member Doney concurs.
Board member Perkins dissents.

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 Jacobsen, do hereby certify that a true and correct copy of this document was mailed to the following on the 20th day of December, 1999:

ARLYN L. PLOWMAN
PERSONNEL SERVICES DIRECTOR
MONTANA SCHOOL BOARDS ASSOCIATION
ONE SOUTH MONTANA AVE
HELENA MT 59601

KARL J ENGLUND
ATTORNEY AT LAW
PO BOX 8358
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