

1
2 **BOARD OF PERSONNEL APPEALS**
3 **PO BOX 6518**
4 **HELENA MT 59604-6518**
5 **Telephone: (406) 444-2718**
6 **Fax: (406) 444-7071**

7 STATE OF MONTANA
8 BEFORE THE BOARD OF PERSONNEL APPEALS

9 IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 10-2001:

10 BEAVERHEAD FEDERATION OF TEACHERS, MEA-MFT,)
11 NEA, AFT, AFL-CIO,)

12 Complainant,)

13 - VS -)

14 BEAVERHEAD COUNTY HIGH SCHOOL DISTRICT,)

15 Defendant.)

16 FINAL ORDER

17 * * * * *

18 The above-captioned matter came before the Board of Personnel Appeals (Board)
19 on October 24, 2002. The matter was before the Board for consideration of the Notice of
20 Exceptions to Findings of Fact; Conclusions of Law; and Recommended Order filed by
21 Richard Larson, attorney for the Complainant, to the Findings of Fact; Conclusions of Law;
22 and Recommended Order issued by Gordon D. Bruce, Hearing Officer, dated February 7,
23 2002.

24 Appearing before the Board were Richard Larson, attorney for the Complainant,
25 and Debra A. Silk, attorney for the Defendant. Both parties appeared in person.

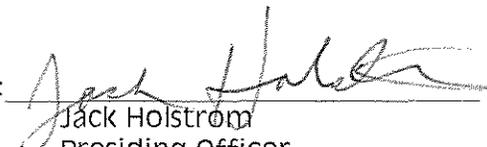
26 After review of the record and consideration of the arguments by the parties, the
27 Board concludes and orders as follows:

28 1. **IT IS HEREBY ORDERED** that the Complainant's Notice of Exceptions to
Findings of Fact; Conclusions of Law; and Recommended Order is hereby dismissed.

2. **IT IS FURTHER ORDERED** that the Findings of Fact; Conclusions of Law; and
Recommended Order is affirmed.

DATED this 29~~th~~ day of October, 2002.

BOARD OF PERSONNEL APPEALS

BY: 
Jack Holstrom
Presiding Officer

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Board members Holstrom, Johnson, O'Neill, Reardon and Schneider concur.

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.

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify that a true and correct copy of this document was mailed to the following on the 30th day of October, 2002:

DEBRA A. SILK
MONTANA SCHOOL BOARDS ASSOCIATION
ONE SOUTH MONTANA AVE
HELENA MT 59601

RICHARD LARSON
CHRONISTER MOREEN & LARSON PC
PO BOX 1152
HELENA MT 59624

Tustin, Gary Love, and Dr. Kenneth Piippo, gave sworn testimony. Exhibits J-1 through J-10 were admitted into the record, as were the following:

Union's Exhibits:

- #1 June 7, 2001 Memo from Brett Carver to Gary Love re: Change in Driver's Education Classes
- #3 November 1, 2000 Evaluation of Butch Donovan by Dr. Piippo
- #4 Traffic Education Programs summary

District's Exhibits:

- A. BCHS and BFT Employment Agreement (July 1, 2000 - June 30, 2001)
- B. Agenda (October 24, 2000) - Impact Study Team
- C. December 14, 2000 Traffic Education Packet received by BCHS from David C. Huff, Director of Traffic Education at the Office of Public Instruction
- D. "Traffic Education Standards/Requirements/Procedures for High School Driver Education Programs" published by the Division of Traffic Education at OPI
- F. February 26, 2001 letter from David Huff to Dr. Piippo (with attachments)
- H. Driver's Education Program 2000-2001 Spreadsheet
- I. Driver's Education Program 2000-2001 Spreadsheet
- J. BCHS Board Minutes - February 2001 - June 2001
- K. January 4, 2001 memorandum from Camy Paffhausen, BFT Secretary to BCHS Board of Trustees re: negotiations
- L. March 30, 2001 memorandum from BFT Negotiations Committee to School Board Negotiations Committee re: items of negotiation
- M. BCHS Board of Trustees Negotiations Committee - items of negotiation
- O. Results of BFT/BCHS Final Negotiations Session - May 21, 2001
- P. Board Minutes - January 8, 2001
- Q. January 29, 2001 memorandum from Dr. Piippo to BCHS Board of Trustees re: Proposed 2001-2001 Master Schedule
- R. BCHS Impact Study Team Report - 2000

At the conclusion of the hearing, the parties waived oral argument and agreed to submit their respective positions to the Hearing Officer in the form of written

Proposed Findings of Fact, Conclusions of Law and Decision, and the record was closed on December 17, 2001.

II. ISSUES

1. Whether the District's Motion For Summary Judgment and dismissal should be granted.

2. Did the District engage in an unfair labor practice in violation of § 39-31-401(3) and (5), MCA, by eliminating the traffic education program offered during the day and restructuring the program to be offered outside of the regular curricular program?

III. RULING ON MOTION FOR SUMMARY JUDGMENT

The District filed its Motion For Summary Judgment and brief on November 6, 2001, requesting that this matter be dismissed. The Union filed its response to the motion on November 13, 2001. Because the hearing on the merits was set to be held on November 15, 2001, the Hearing Officer decided to rule on the motion on the hearing date and allow oral arguments. Following the arguments, the Hearing Officer denied the motion for the following reasons.

The party moving for summary judgment has the initial burden of establishing both the absence of genuine issue of material fact and the entitlement to judgment as matter of law. The moving party must satisfy this burden or summary judgment is improper. Only after the party moving for summary judgment satisfies this initial burden does the burden shift to the opponent to present evidence raising a genuine issue of material fact. Bowen v. McDonald, 276 Mont. 193, 196, 915 P.2d 201, 204 (1996). Here, the District asks the Hearing Officer to rule on the motion based on affidavits. However, contested case procedures in place favor a fact-finding hearing to determine whether the District committed an unfair labor practice act as alleged by the Union. Further, no specific Board of Personnel Appeals rules authorize summary disposition of unfair labor practice charges following the decision by the Board's

investigator. In order to determine whether the District committed an unfair labor practice, the Hearing Officer must determine not only whether the District had an obligation to bargain, but also whether the Union waived its bargaining rights in regard to the transfer of the driver's training program. Because a factual record was necessary in order to decide the issues, summary judgment was not proper.

IV. FINDINGS OF FACT

1. The Beaverhead Federation of Teachers, MEA-MFT, NEA, AFT, AFL-CIO, is a "labor organization" within the meaning of § 39-31-103(6), MCA.

2. The Beaverhead County High School District is a "public employer" within the meaning of § 39-31-103(10), MCA.

3. At all times relevant to this matter, the Negotiation Agreement between the Board and the Beaverhead Federation of Teachers (BFT) for the 2000-2001 school year was in effect. (Testimony of Gary Love; Exhibit A)

4. In November 2000, the District's Superintendent, Dr. Kenneth Piippo, evaluated William Donovan, the District's traffic education teacher, and his course. Among Piippo's recommendations was a request for Donovan to "provide an analysis to administration as to what an after-school/summer program would look like as a result of enrollment and funding issues." (Testimony of Piippo and Donovan; Exhibit 3)

5. An Impact Study Team, which Piippo organized to discuss "at risk" programs, such as the traffic education course, met a total of six times in 2000. (Testimony of Piippo; Exhibit R)

6. Piippo placed the 2001-2002 Master Schedule, including the rescheduling of the traffic education course, on the faculty meeting schedule from January through March of 2001 and the Master Schedule was developed over four months, from January through March of 2001. Meetings regarding the Master

Schedule were held on January 11 and 16, 2001. The meetings were an attempt to "collapse the Master Schedule, while minimizing the impact." (Testimony of Piippo)

7. On January 18, 2001, Piippo met with Assistant Principal, Wyatt Tustin, and two of the District's guidance counselors. Robert Pebbles, guidance counselor, was one of the designated negotiators for the Union. Piippo, Tustin, Nancy Stout, and Pebbles reviewed and discussed the 2001-2002 Master Schedule. (Testimony of Piippo and Tustin)

8. On January 19, 2001, Piippo distributed the Master Schedule to all of the District's staff. On January 29, 2001, Piippo held a staff meeting to discuss the Master Schedule. (Testimony of Piippo)

9. In February 2001, Piippo spoke with David Huff, Director of Traffic Education Programs with the Office of Public Instruction (OPI). Huff sent the District OPI's traffic education program requirements, as well as OPI's statistical information regarding traffic education programs. (Testimony of Piippo; Exhibits C, D and F)

10. On February 12, 2001, the Board held a regularly scheduled meeting. The minutes of the meeting indicate that Pebbles, one of the negotiators for the Union, attended the meeting. During the meeting, Piippo presented the Board with the proposed 2001-2002 Master Schedule and options for the next year's schedule, indicating that the traffic education program was a program under consideration for a potential scheduling change. (Testimony of Piippo; Testimony of Love; Exhibits J and Q)

11. On February 21 and 22, 2001, Piippo analyzed the costs associated with the traffic education course using a spreadsheet. On March 6, 2001, Piippo again met with Tustin, Stout, and Pebbles to establish registration procedures for the Master Schedule. (Testimony of Piippo and Tustin; Exhibits H and I)

12. On March 12, 2001, the Board held a regularly scheduled meeting and discussed the proposed traffic education course scheduling change. Stout, a Union member, attended the meeting. During the meeting, the Board discussed the preliminary budget for the 2001-2002 school year. The Board voted to hold the traffic education program outside of the school day. The Board also directed Piippo to investigate the possibility of conducting the traffic education program after school or during the summer months. (Testimony of Piippo and Love; Exhibit J)

13. On March 13, 2001, Piippo, Tustin, Stout, Pebbles and the building secretary met to review the course description book for corrections and accuracy. The course description book provided that the driver's education program was no longer part of the curricular day and would be taught after school, weekends, holidays, and so on. Neither Stout nor Pebbles stated any objection to the District's decision to eliminate the driver's education program during the regular school day. (Testimony of Tustin)

14. On March 21, 2001, Piippo met with Donovan regarding the traffic education course description. On March 22, 2001, Piippo discussed the traffic education program with Donovan and indicated to him that he could teach the course for \$20.00 during the summer. Donovan indicated that he would not teach the course for \$20.00 per hour. On March 29, 2001, Piippo again met with Donovan to verify he would not accept the position for \$20.00 per hour. (Testimony of Piippo and Donovan)

15. On April 5, 2001, the District held a curriculum committee meeting. The committee discussed the traffic education course, including the cost of the program. (Testimony of Piippo)

16. On April 9, 2001, the Board held a regularly scheduled meeting. The minutes show Brett Carver (BFT) attended the meeting. Based upon Donovan's unwillingness to teach the traffic education program during the summer for \$20.00

per hour, the Board instructed Piippo to advertise the position of traffic education instructor at \$20.00 per hour based on 90 hours as an after school program.

(Testimony of Piippo and Love and Exhibit J-5)

17. On April 10, 2001, Piippo met with Donovan to discuss the traffic education course. Piippo also suggested to Donovan that he apply to teach the traffic education program. (Testimony of Piippo)

18. On April 18, 2001, Piippo met with the Union's president to discuss Donovan's dissatisfaction with the Board's elimination of the traffic education course during the curricular day. Piippo provided the president with a chronological history of the decision to reschedule, and offered him the opportunity to review Piippo's file. On April 19, 2001, at the request of the Union president, the group met again to discuss Donovan's concerns. (Testimony of Piippo and Carver)

19. The Union never pursued Donovan's grievance beyond informal discussions with Piippo. The Union dropped the grievance and then filed this unfair labor practice charge. Donovan expects the outcome of the unfair labor practice to be a remedy for his grievance. (Testimony of Carver and Donovan)

20. On April 29, 2001, the Board held a special meeting. One of the items on the agenda was negotiations with the Union. At the meeting, the Union did not request to negotiate over the rescheduling of the traffic education course. Also, on May 4, 2001, the Board's negotiation team met with the Union's negotiation team and completed negotiations for the 2001-2002 school year. The Union did not raise the issue of the traffic education course. (Testimony of Piippo and Love; Exhibits K, L and M)

21. On May 4, 2001, the Board and the Union negotiating team met to complete negotiations for the 2001-2002 school year. The Board's elimination of the traffic education course during the curricular day was not discussed. (Testimony of Piippo; Exhibits J, K, L, M and O)

22. The Board received a certified letter dated May 11, 2001 from the Union advising the Board that the Union had filed an unfair labor practice charge against the District. (Testimony of Love; Exhibit J)

23. The Board has eliminated other programs from the Master Schedule (e.g., German, Vo-Ag, Typing, Instrumental Music). However, the Union has never negotiated with the Board over the elimination or reduction of school programs, and the Union has never filed an unfair labor practice over the Master Schedule. (Testimony of Love)

24. Even though the traffic education course was eliminated during the school day and a restructuring of the program outside of the regular curriculum was established, no employee in the Union's bargaining unit (including Donovan) was laid off or reduced in hours, rank or salary. In addition, no member of the bargaining unit was assigned to a position for which he or she was not qualified. The District assigned Donovan to teach physical education, a position for which he is endorsed. (Testimony of Piippo, Love and Donovan)

25. At the June 11, 2001 Board meeting, the Board again addressed the driver education position. The notes of the meeting indicate that: "BCH had advertised for a Drivers Education teacher for the summer program and no one applied. Joe Konen asked about one of the new staff members hired that had a drivers ed endorsement. It was stated that he had prior commitments and would be too busy with his athletic assignments." (Exhibit J)

26. The Union and its negotiators had knowledge of the proposed modification to the traffic education schedule from the time it was first considered and discussed. However, at no time prior to the filing of the unfair labor practice did the Union request to negotiate over the elimination of the traffic education program during the regular school day. (Testimony of Piippo, Tustin and Carver; Exhibits L, M and O)

27. After the unfair labor practice charge was filed, Carver sent a memorandum to Piippo dated June 7, 2001, indicating that the Union remained open to bargain over the proposed changes to "how driver's Education services are provided." However, for unexplained reasons, Piippo never received the memo. (Testimony of Carver, Piippo, and Love; Exhibit 1)

V. DISCUSSION

Montana law requires a public employer to bargain collectively in good faith with labor organizations representing their employees on issues of wages, hours, fringe benefits, and other conditions of employment. § 39-31-301(5), MCA. The failure to bargain collectively in good faith is a violation of § 39-31-401(5), MCA. The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using federal court and National Labor Relations Board (NLRB) precedent as guidance in interpreting the Montana Collective Bargaining for Public Employees Act. State ex rel. Board of Personnel appeals v. District Court, 183 Mont. 223, 598 P.2d 1117 (1979); City of Great Falls v. Young (Young III), 211 Mont. 13, 686 P.2d 185 (1984). The Union contends that the District committed an unfair labor practice by removing the driver education program from the Master Schedule in which the program was taught during the regular curriculum. Montana's Collective Bargaining Act vests public employers with management rights. Section 39-31-303, MCA, provides as follows:

Public employees and their representatives shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to: (1) directing employees; (2) hiring, promoting, transferring, assigning, and retaining employees; (3) relieving employees from duties because of lack of work or funds or under conditions where continuation of such work be inefficient and nonproductive; (4) maintaining the efficiency of government operations; (5) determining the methods, means, job classifications, and personnel by which government operations are to be conducted; (6) taking whatever

actions may be necessary to carry out the missions of the agency in situations of emergency; and (7) establishing the methods and processes by which work is performed.

The Collective Bargaining Act provides in § 39-31-304, MCA, that: "Nothing in this chapter shall require or allow boards of trustees of school districts to bargain collectively upon any matter other than matters specified in 39-31-305(2)." Section 39-31-305(2), MCA, provides that:

For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or his designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

Here, the District argues in response to the unfair labor practice charges that: (1) the traffic education course is outside the purview of § 39-31-305(2), MCA, as the Board of Trustees has sole discretion and the District is not required to negotiate over establishing the Master Schedule or the scheduling of individual programs; (2) even if it was required to bargain over the changes in the traffic education course, the Union waived its rights because it failed to request bargaining at any time prior to filing the ULP charges alleging the District failed to bargain.

Collective Bargaining

The Superintendent of Public Instruction is responsible for developing, administering, and supervising a program of instruction in traffic education. § 20-7-502, MCA. The school board trustees have a duty to implement the rules promulgated by the Superintendent of Public Instruction. § 20-3-324(27), MCA.

A school district that elects to establish and maintain a traffic education course must follow § 20-7-503, MCA, which provides as follows:

The traffic education course shall be: (1) for students who are 15 years old or older or will have reached their 15th birthday within 6 months of the course completion; (2) taught by a teacher of traffic education; (3) conducted in accordance with the basic course requirements established by the superintendent of public instruction; and (4) taught during regular school hours, after regular school hours, on Saturdays, or as a summer school course, at the option of the trustees.

The Montana Supreme Court has held that "The statute granting power must be regarded both as a grant and a limitation upon the powers of the board. This is the rule of construction applicable to all statutes granting and defining the powers of such municipal or quasi municipal bodies." McNair v. School Dist. No. 1, 87 Mont. 423, 425-26, 288 P. 188, 189 (1930). Section 20-7-503, MCA, appears to mandate that the scheduling of the "traffic education course shall be . . . at the option of the trustees."

In this case, the District's decision to eliminate the traffic education course during the regular curriculum and restructure it outside of the school day was within the sole authority of the District as established in § 20-7-503, MCA. Further, it does not appear that the Board could have delegated its decision, nor that it was required to bargain with the Union about the scheduling of the traffic education program.

Here, the District retained the discretion to reschedule the traffic education course, and the Union's charge that the District failed to bargain in good faith is not supported in the record.

Waiver

The record in this matter shows that the Union never requested to negotiate over the scheduling of the traffic education program prior to the Union filing the unfair labor practice against the District. The District therefore contends that before a union can exercise its rights pursuant to the Collective Bargaining Act, it first must give notice.

Before a bargaining duty arises, there must be a request to bargain. NLRB v. Oklahoma Fixture Co., 151 LRRM 2919 (10th Cir. 1996). In that case, the Court held that: "Once the company provides appropriate notice to the Union, the onus is on the Union to request bargaining over subjects of concern. If the Union fails to request bargaining, the Union will have waived its right to bargain over the matter in question. A waiver of a statutory bargaining right must be clear and unmistakable." The Court also stated that, "a union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain."

Moreover, the Court also has ruled that formal notice is not necessary as long as the union has actual notice. "A union's failure to assert its bargaining rights will result in a waiver of them." W. W. Grainger v. NLRB, 860 F.2d 244, 248 (7th Cir. 1988.) The Board also ruled that the filing of an unfair labor practice charge does not relieve the Union of its obligation to request bargaining. The Board has also held that it is "incumbent on the Union to request bargaining--not merely to protest or file an unfair labor practice charge." Associated Milk Producers, 300 NLRB at 564 (1990).

The Board of Personnel Appeals recently applied the principle of waiver in Browning Federation of Teachers, MEA-MFT/AFL-CIO v. Browning Public Sch., Unfair Labor Practice Charge No. 17-2001. The Board of Personnel Appeals dismissed the union's charge of unfair labor practices, holding that the union waived

its rights under the Collective Bargaining Act to challenge the school's decision to unilaterally advertise, and its refusal to bargain over signing bonuses.

The Union argues that Browning is unpersuasive in this case because the Union does not believe there was clear and unmistakable conduct on the part of the Union to support a waiver. However, it is clear that the Union was completely aware from the onset that the District was proposing to eliminate the traffic education program during the regular curriculum. Piippo held several meetings with several people associated with the Union prior to the Board's decisions. Donovan, incumbent in the position in question, was certainly aware of pending schedule changes in the program as early as January. The Union never requested to negotiate.

The Union contends that the District's decision to eliminate the traffic education program from the regular curriculum was "fait accompli." However, the decision was not one made in haste or without the input of administrators and staff members and at several Board meetings. The District informed all its employees in one manner or another of its concern about maintaining the program on its present basis, and its final decision to change the schedule for the program. There does not appear to have been any intent on the part of the District to mislead the Union concerning its decision on the program, nor is there any indication of union animus on the part of the District.

Even if the Union's position that the Board had a duty to negotiate was accepted, the Union waived its right to challenge the District's decision to eliminate the traffic education program from the curricular day and restructure the program to be offered outside of the regular school day.

VI. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to § 39-31-405, MCA.

2. The Complainant, Beaverhead Federation of Teachers, MEA-MFT, NEA, AFT, AFL-CIO, has failed to show that the Defendant, Beaverhead County High School District, engaged in an unfair labor practice in violation of § 39-31-401(3) and (5), MCA, by eliminating the traffic education program offered during the day and restructuring the program to be offered outside of the regular curricular program.

VII. RECOMMENDED ORDER

It is hereby Ordered that this matter is Dismissed With Prejudice.

DATED this 2nd day of February, 2002.

BOARD OF PERSONNEL APPEALS

By: 
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:

Richard A. Larson
Attorney at Law
PO Box 1152
Helena, Montana 59624

Debra A. Silk
Attorney at Law
One South Montana Avenue
Helena, Montana 59601-5197

DATED this 7th day of February, 2002.

Sandy Duncan