

1 **BOARD OF PERSONNEL APPEALS**
2 **PO BOX 6518**
3 **HELENA MT 59604-6518**
4 **Telephone: (406) 444-2718**
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6 STATE OF MONTANA
7 BEFORE THE BOARD OF PERSONNEL APPEALS

8 IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 17-2001:

9 BROWNING FEDERATION OF TEACHERS,)
10 MEA-MFT/AFL-CIO,)

11 Complainant,)

12 - vs -)

13 BROWNING PUBLIC SCHOOLS,)

14 Defendant)

15 FINAL ORDER

16 *****

17 The above-captioned matter came before the Board of Personnel Appeals on October 11, 2001.
18 The matter was before the Board for consideration of the Complainant's Objection to Summary Dismissal
19 filed by Richard Larson, attorney for the Complainant, to the Investigative Report and Notice of Intent to
20 Dismiss issued by Joseph Maronick, Investigator, dated August 20, 2001.

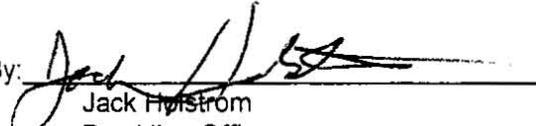
21 Appearing before the Board were Richard Larson, attorney for the Complainant, and Catherine
22 Swift, attorney for the Defendant. Both parties appeared in person.

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

- 25 1. IT IS HEREBY ORDERED that the Complainant's Objection to Summary Dismissal is
26 hereby dismissed.
- 27 2. **IT IS FURTHER ORDERED** that the Investigative Report and Notice of Intent to Dismiss
28 is affirmed with the following exceptions and substitutions:
- 29 A. Lines 47 through 50 on page 3; lines 1 through 3 on page 4 are hereby excepted and
30 deleted from the decision;
 - 31 B. Line 10 on page 4, is hereby excepted and deleted from the decision; and
 - 32 C. The word "and" is excepted and deleted from the end of the sentence found on line 8
33 of page 4 of the decision and a period substituted in its place.

34 DATED this ~~26~~ day of November, 2001.

35 BOARD OF PERSONNEL APPEALS

36 By: 

37 Jack Holstrom
38 Presiding Officer

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

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 26th day of November, 2001:

CATHERINE M. SWIFT
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RICHARD LARSON
CHRONISTER MOREEN & LARSON PC
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2 Board of Personnel Appeals
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7

8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 17-2001

11
12 BROWNING FEDERATION OF TEACHERS,)
13 MEA-MFT/AFL-CIO)
14 Complainant,)
15 -vs-)
16 BROWNING PUBLIC SCHOOLS,)
17 Defendant.)
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INVESTIGATIVE REPORT
AND
NOTICE OF INTENT TO DISMISS

23 * * * * *

24 **I. Introduction**

25 On June 27, 2001, the Browning Federation of Teachers, MEA-MFT/AFL-CIO, filed an unfair
26 labor practice charge with this Board alleging that Browning Public Schools were violating Montana
27 Collective Bargaining Act for public employees by unilaterally advertising and refusing to bargain "signing
28 bonuses." The Defendant denied any violation of the Act and requests that the charge be dismissed.
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33 **II. Background**

34 The Board of Personnel Appeals has jurisdiction over this matter under Sections 39-31-103 and
35 39-31-405, MCA. Defendant sought and was granted a time extension through August 10, 2001 for its
36 response to the instant charge. Defendant counsel, under 39-31-301, MCA, has been designated as the
37 authorized representative in this matter.
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42 **III. Discussion**

43 Public employees under Section 39-31-201, MCA, are protected in and can exercise the right of
44 self-organization, to form, join, assist any labor organization, to bargain collectively through
45 representatives of their choosing on questions of wages, hours, fringe benefits, and other conditions of
46 employment, and to engage in other concerted activities for the purpose of collective bargaining or other
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1 mutual aid or protection free from interference, restraint, or coercion. Good faith bargaining is defined in
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3 Section 39-31-305, MCA as the performance of the mutual obligation of the public employer or his
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5 representative and the representatives of the exclusive representative to meet at reasonable times and
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7 negotiate in good faith with respect to wages, hours, fringe benefits and other conditions of employment
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9 or the negotiation of an agreement or any question arising there under in the execution of a written
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11 contract incorporating any agreement reached. Such obligation does not compel either party to agree to
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13 a substantive proposal or require the making of a concession. See NLRB v. American National Insurance
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15 Company, 30 LRRM 2147, 343 US 395, (1952); NLRB v. Bancroft Manufacturing Company, Inc., 106
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17 LRRM 2603, 365 DF.2d 492, CA 5 (1981); and Daily News of Los Angeles v. NLRB, 73 F.3d 406, 414,
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19 151 LRRM 2242 (1996).

19 The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in
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21 using Federal Court and National Labor Relations Board (NLRB) precedents as guidelines in interpreting
22
23 the Montana Collective Bargaining for Public Employees Act, State ex rel. Board of Personnel Appeals
24
25 vs. District Court, 183 Montana 223 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 vs. State
26
27 ex rel. Board of Personnel Appeals, 185 Montana 272, 635 P.2d 185, 119 LRRM 2682; and AFSCME
28
29 Local No. 2390 vs. City of Billings, Montana 555 P.2d 507, 93 LRRM 2753.

30 The parties are subject to a 3-year collective bargaining agreement (July 1, 2000 through June
31
32 30, 2003) ratified on March 28, 2001. Section "**XVII. FUTURE NEGOTIATIONS**" of the CBA indicates
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34 item presentation for negotiation will occur no later than the second Monday of December 2002 and
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36 bargaining will begin no later than the third Monday of January of 2003. The current CBA as well at the
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38 previous agreement, which ran from July 1, 1997 through June 30, 2000, set forth a "meet and confer"
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40 provision which allows the parties to discuss issues during the term of the contracts.

41 The Defendant has had and continues to have staff recruitment problems. Beginning in the
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43 Spring of 1999, the Defendant provided pre-employment monetary inducements to prospective teachers.
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45 The union chief negotiator and union president were both aware of this practice. The union chief
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47 negotiator, present at a school board meeting March 13, 2001, commented in a board discussion of
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49 incentive bonuses that the union's concern is the signing bonus is evenly disbursed and offered to all
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positions.

1 Payment of pre-employment incentives to unit members from 1999 through the 2000 – 2003
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3 contract ratification occurred with the knowledge of the bargaining unit members and without any request
4 to bargain the item. The union did not identify pre-employment inducements, as expressly required by
5 Article XVII of the CBA, as an item for bargaining in their identification of areas of the contract for
6 negotiation prior to December 13, 1999, which is the second Monday of December 1999. The Defendant
7
8 contends the Complainant condoned the district practice of pre-employment incentives and has not timely
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10 identified the item for negotiation, pre-employment incentives are not conditions of employment and
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12 therefore not within the bargaining obligation of the Defendant and finally such payments are not
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14 mandatory subjects of bargaining and therefore cannot be demanded to be bargained. Under application
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16 of contract terms, as the Defendant see it, the Complainant is precluded from opening the contract at this
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18 point for consideration of the inducements.
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21 The position of the NLRB and BPA is clear regarding the right to bargain regarding an employer
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23 practice about which the union has notice. See NLRB v. Oklahoma Fixture Co., 79 F.3d 1030, 1037, 151
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25 LRRM 2919 (10th Cir. 1996) and In the Matter of Unfair Labor Practice No. 34-98, Jordan Education
26
27 Association, MEA/NEA vs. Jordan Unified School District, April 29, 1999 Gordon Bruce, p.8. :

28 Once the company provides appropriate notice to the Union, the onus is on the Union
29 to request bargaining over subjects of concern.
30

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32 The union had notice of pre-employment incentives, did not request bargaining and specifically
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34 expressed understanding and support for the program. As pointed out in the Defendant charge response;

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36 "If the union has actual notice of the employers action, and fails to take timely action to
37 assert its bargaining rights, such rights are waived. W. W. Grainger v. NLRB, 860 f.2d
38 244, 248 (7th Cir. (1998). As noted in one Montana decision involving this same union,
39 "The Association cannot simply ignore its responsibility to initiate bargaining over the
40 effects of the District's decision and thereafter contend the District violated its statutory
41 duty to bargain." In the Matter of the Unfair Labor Practice No. 34-98, Jordan Education
42 Association, MEA/NEA vs. Jordan Unified School District, April 29, 1999 (Gordon Bruce).
43 See also, NLRB v Oklahoma Fixture Co, supra, at 1037. In the Jordan case, the issue
44 over which the charge was filed had been "under consideration by the school board for
45 more than a year, yet the Association never asked to meet and confer about the
46 matter..." (p. 10) In the Oklahoma Fixture case, the Circuit Court said four days was
47 sufficient notice to the union to provide "ample time to request bargaining."

48
49 As an alternative to the waiver and failure to timely request bargaining, the Defendant argues that
50 pre-employment inducements are not a mandatory subject of bargaining. The logic of the Defendant
position is that, until employed the prospective employee is not a unit member. He or she is induced to

1 become an employee by the PRE-employment inducement. Therefore no obligation to negotiate exists
2
3 until employment begins and there is no effect or impact on the working conditions of unit members.

4 The information offered relating to this ULP charge shows:

- 5
6 1. the complainant waived its right to negotiate the pre-employment inducements and/or
7 failed to timely identify this item as a subject of negotiation and
8
9 2. pre-employment inducements are not a mandatory subject of bargaining.
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11 **IV. Determination**

12 Based upon the foregoing, the record does not support a finding of probable merit to the instant
13
14 charge and therefore this matter must be dismissed.
15

16 DATED this 20th day of August 2001.
17

18
19 BOARD OF PERSONNEL APPEALS

20
21 By: Joe Maronick
22

23 Joe Maronick
24 Investigator

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26 NOTICE

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28 ARM 24.26.680B(6) provided for in 39-31-405(4), MCA, if a finding of no probable merit is made, the
29 parties have ten (10) days to accept or reject the Notice of Intent to Dismiss. Written notice of
30 acceptance or rejection is to be sent to the attention of the investigator at PO Box 6518, Helena MT
31 59604-6518. The Dismissal becomes the final order of the Board unless either party requests a review of
32 the decision to dismiss the complaint
33

34 CERTIFICATE OF MAILING

35 I, Windy Knutson, do hereby certify that a true and correct copy of this
36 document was mailed to the following on the 20th day of August 2001:
37

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