

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 10-2014:

GLENDIVE EDUCATION ASSOCIATION, ) Case No. 1231-2014  
MEA-MFT, NEA/AFT, )

Complainant, )

vs. )

SUPERINTENDENT ROSS FARBER, )  
AND GLENDIVE PUBLIC SCHOOLS, )

Defendants. )

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

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**I. INTRODUCTION**

The Glendive Education Association, MEA-MFT, NEA/AFT (“Association”) filed ULP Charge No. 10-2014 on January 16, 2014 alleging the Glendive Public Schools (“District”) and Superintendent Ross Farber committed an unfair labor practice (“ULP”) by making unilateral changes in employee working conditions and refusing to bargain a mandatory subject of collective bargaining when they adopted and implemented new and different evaluation processes and evaluation criteria (a.k.a. “evaluation tool,” “evaluation instrument,” etc.) for teacher evaluations on or about November 4, 2013. The District and Farber denied any ULP.

The contested case hearing was held on October 29, 2014, before Hearing Officer Terry Spear in Billings, Montana (by mutual agreement of the parties). The Association was represented by attorney Vicki Nelson McDonald, McDonald Law Firm, LLC. The District and Farber were represented by Jeffrey A. Weldon, Felt, Martin, Frazier & Weldon, P.C.

Laurie Ann Nelson, NaDean Brown, Maggie Copeland, Penny Gill Denning, and Ross Farber each testified under oath. The November 3, 2014 Post-Hearing Order accurately identified the exhibits admitted during the hearing.

**II. ISSUE**

The key issue herein is whether the District and/or Farber committed unfair labor practices against the Association in violation of Mont. Code Ann. § 39-31-401, as alleged in the Association’s complaint, and if so, what remedy is appropriate. The Montana Board of Personnel Appeals (BOPA) has authority over this issue pursuant to Mont. Code Ann. § 39-31-401 et seq.

### III. FINDINGS OF FACT

1. The Glendive Education Association, MEA-MFT, NEA/AFT (“Association”) is a “labor organization” pursuant to Mont. Code Ann. § 39-31-103(6), and is the exclusive bargaining representative for the K-12 certified teachers and specialists employed by the Glendive Public Schools, Dawson County (“the District”).

2. The District is a public school system organized and operated pursuant to Montana law and a public employer pursuant to Mont. Code Ann. § 39-31-103(10), acting through its elected Board of Trustees (“Board”). Ross Farber (“Farber”) is the Superintendent of the District, in his third year. The District has employed Farber as an administrator for 17 years. At all times pertinent to the alleged ULP, Farber, as the Superintendent of the District, is and has been a management official pursuant to Mont. Code Ann. § 39-31-104, able within the scope of his authority to act as agent and representative of the District in dealing with, among others, the Association.

3. The Association and the District collectively bargained and reached a series of successive Collective Bargaining Agreements (“CBAs,” also called “master agreements”) since the mid-1970s, including the CBA effective July 1, 2012 through June 30, 2013. This CBA, covering the 2012-13 school year, remained in full force and effect until a successor agreement was reached between the Association and the District. For the Association, the membership has the collective power to agree to a CBA. For the District, the Board has the collective power to agree to a CBA. Typically, the District and the Association separately appoint their respective negotiating “teams,” and those teams then meet and negotiate over the terms and conditions of the next CBA. Each team reports back to its respective constituencies and gets feedback from its constituency regarding further negotiations. Agreements between the teams are subject to approval by the members of the Association and by the members of the Board. At no time pertinent to this dispute had the Board given Superintendent Farber authority to engage in bargaining with the Association on the District’s behalf.

4. From May 2013 until early January 2014, when an agreement was reached, the Association and the District were engaged in bargaining a CBA covering the School Year 2013-14. Ex. J-10. Thereafter, the Association and the District commenced bargaining over a CBA covering the School Years 2014-15 and 2015-16, which was signed by the parties’ representatives in June 2014. Ex. J-2.

5. In May 2013, Montana’s Office of Public Instruction (“OPI”) issued a memorandum instructing Montana’s school districts to have in place by August 2014 a teacher and principal evaluation system in compliance with Montana’s revised accreditation standards. Montana’s accreditation standards mandated which “domains” were required to be included in any teacher and principal evaluation system. The “new” applicable requirements for evaluation of licensed staff were

adopted by amendment of Admin. R. Mont. 10.55.701(4),<sup>1</sup> with notice of that amendment given in M.A.R. Not. 10-55-262, No. 19 (10/11/2012), “Notice of Adoption and Amendment: In the matter of the adoption of New Rule I and New Rule II and the amendment of ARM 10.55.601 through 10.55.606, 10.55.701 through 10.55.711, 10.55.713 through 10.55.717, 10.55.801 through 10.55.805, 10.55.901 and 10.55.902, 10.55.904 through 10.55.910, 10.55.1001, and 10.55.1003 relating to accreditation standards.” Thus, the content of the applicable rule that would take effect on July 1, 2013 had been known to the Montana educational community since October 2012. The OPI edict provided some particulars about what school districts would have to do to comply, and when they might be expected to be in compliance.

6. Prior to the May 2013 memorandum, the District had used the same teacher evaluation process for many years, with the same evaluation instrument used from 1998 to Spring 2013, with the agreement of the Association to this continued use of the same process.

7. Shortly after the beginning of the 2013-14 school year, on or about September 12, 2013, Farber sent an email to Laurie Nelson, co-president of the Association for approximately a year at that time, requesting her to come to his office. When Nelson came to his office, Farber suggested that the District and the Association create a committee to develop teacher evaluation processes and criteria to comply with the OPI memorandum and state accreditation standards (an “Evaluation Development Committee”<sup>2</sup>). According to Nelson, Farber said that he would select District administrators for the “Evaluation Development Committee” and that the Association could select Association members for the “Evaluation Development Committee,” and that the “Evaluation Development Committee” would then begin meeting to discuss an appropriate evaluation process and evaluation criteria.

8. At this meeting, Farber provided Nelson with three examples of evaluation criteria. One example was recommended by the State. Joint Ex. 3. The second example was utilized in a Wyoming school district where Farber had been previously employed. Union Ex. 7. The third example was utilized by the Miles City school district. Union Ex. 6. Nelson understood Farber to be asking the Association to pick the evaluation criteria it preferred or if it did not like any of the three, to develop its own evaluation criteria to suggest to the District.

9. Farber led Nelson to believe that the Association’s choice of evaluation criteria would be important to the adoption of the required new evaluation process and criteria. Leaving that meeting with Farber, Nelson believed that the District was

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<sup>1</sup> The complete text of the amended 10.55.701(4) appears on pp. 16-17, *infra*.

<sup>2</sup> In a later written communication with the Association, Farber used this name for the committee. Exhibit 13, November 25, 2013, response by Farber to Nelson, first paragraph, first page.

interested in developing both an evaluation process and evaluation criteria that would be mutually acceptable to the Association and to the District. She also believed that Farber expected that developing mutually evaluation acceptable process and evaluation criteria probably would take months. Leaving the meeting with Farber, she expected that the "Evaluation Development Committee" would provide an avenue for bargaining, through the District administrators and Association members participating on the committee, about the evaluation process and evaluation criteria the District was required to adopt, leading to a joint recommendation from the "Evaluation Development Committee" to both bargaining teams about the process and tool to use.

10. Nelson testified that over the years, the Association and the District had formed committees to deal with issues they faced – for instance, to consider health insurance coverage for employees. She testified that such committees were typically formed with the Association selecting its half of the committee and the District selecting its half of the committee, and that once formed, the committee would meet and attempt to formulate a method for addressing the issue involved. Nelson stated that this practice has occurred for years. Nelson testified that this "joint committee" approach was utilized for collective bargaining issues.

11. On the other hand, Trustee Penny Gill Denning, a member of the Board for 14½ years, who had participated in collective bargaining with the Association for approximately 10 years, testified the Association formed committees to assist its bargaining team, but the District did not participate in the work of those Association committees. The 2013-2014 Master Agreement made reference to one committee – an Association-designated sick leave bank committee. Joint Exhibit 10, p. 11. The 2014-2016 Master Agreement includes the same reference and no other committee is recognized in that agreement. Joint Exhibit 2, p. 15. There is no evidence in this record of any recognition, in any prior CBAs, of any joint committees that were deciding or recommending particular terms and conditions of employment that were subjects of bargaining.

12. The evidence of record makes it more likely than not that Superintendent Farber did tell Nelson during that September 2013 meeting that the District was interested in finding an evaluation process and/or evaluation criteria mutually acceptable to both the Association and District. The evidence of record does not establish that Farber told Nelson that the "Evaluation Development Committee" would be the vehicle for bargaining over a mutually agreeable evaluation process and/or evaluation criteria. The evidence of record does not establish that Farber specifically told Nelson that the District expected to and was willing to take months, if necessary, to develop a mutually agreeable evaluation process and/or evaluation criteria. The evidence of record does prove that Farber asked Nelson to go back to the Association, find out what the Association preferred for evaluation processes

and/or tools, and share that information at the next meeting of the "Evaluation Development Committee" (see Finding No. 8). The evidence of record does not establish that Farber specifically told Nelson that he, Farber, on behalf of the District, was authorized to bargain and was commencing through the "Evaluation Development Committee" to bargain the development of a teacher evaluation process and evaluation criteria within the new legal requirements.

13. The Board had not authorized Farber to engage in bargaining with the Association and had not authorized him to make any commitments to the Association about bargaining teacher evaluations.

14. After leaving Farber's office, Nelson discussed the matter with the other Association co-president, NaDean Brown. Nelson then appointed the Association's representatives to the "Evaluation Development Committee," one of whom was Brown. Nelson and Brown both expected that the "Evaluation Development Committee" would engage in a cooperative effort to reach a consensus about the evaluation process and/or evaluation criteria, for the consideration of the Association and the District.

15. The designated "Evaluation Development Committee" members (for both Association and District) participated in a training session sponsored by OPI regarding what "was expected," *i.e.*, what elements an acceptable evaluation process and evaluation criteria were expected to have. Thereafter, the "Evaluation Development Committee" met to discuss suggestions and preferences for teacher evaluations. Farber attended the meeting, at which he believed that both the Association's members of the "Evaluation Development Committee" and the District's members of the "Evaluation Development Committee" had full opportunities to present suggestions and preferences regarding teacher evaluations. Brown attended that meeting, at which she believed that the Association's members of the "Evaluation Development Committee" had almost no opportunities to present their suggestions and preferences, instead spending most of the meeting listening to what the District's members of the "Evaluation Development Committee" preferred and thought would be best for an acceptable evaluation process and acceptable evaluation criteria.

16. On or about November 4, 2013, the "Evaluation Development Committee" met again, and Superintendent Farber turned the meeting over to the District's members of the "Evaluation Development Committee," to explain what the District had decided its evaluation process and evaluation criteria would be. At that meeting, the Association members first had reason to doubt whether there were going to be any "collaborative" joint efforts, because it appeared that the District had made its decision regarding the new evaluations (process and criteria) and did not intend to bargain about it.

17. On Friday, November 22, 2013, at 12:22 p.m., Nelson emailed to Farber:

Ross,

When I came down and met with you and you gave me the three examples of the evaluation tools, I was led to believe by you that you wanted a group of teachers to look through those examples and come up with a tool that was acceptable to us and you would have the administrators come up with a tool that was acceptable to them; then, we would meet to come up with one evaluation tool to use by using input from both sides. You also told me that this was a mandatory issue and that eventually we would be needing to implement this in our Master Agreement for 2014. I have since been informed that at the meeting, the tool being implemented has not been agreed upon by both entities. My questions are why were we asked to be a part of the process and why has this been implemented without agreement?

Thank you,

Laurie

Exhibit 11.

18. Farber responded that same day at 3:35 p.m., as follows:

Laurie,

I can't respond in full at the moment so I will get back to you next week.

Thanks,

Ross

*Id.*

19. That same day at 3:45 p.m., Nelson sent the following email to Farber:

Ross,

Here are two notifications for you and the board regarding the evaluation issue and bargaining.

Thank you,

Laurie

Exhibit 12, first page.

20. The first of the two attachments consisted of a letter to Farber from Association co-presidents Nelson and Brown, stating that "this fall" the Association "agreed to work with the District when evaluation was required under the Accreditation Standards" and "agreed to convene a team to work with the administration to create a tool and process which would then be forwarded to our

respective bargaining teams with a 'do pass' recommendation when the contract opened next." Exhibit 12, second page, first paragraph. The letter went on to state that "When we agreed to work with the District, we agreed the document and process would be included in the Master Agreement [CBA] as Evaluation is a mandatory subject of bargaining." After that, the letter said, "We understand that the District is experimenting with a new evaluation tool. This is not acceptable to" the Association "and we will be forced to file an Unfair Labor Practice if the District uses the new tool/process prior to bargaining with" the Association. The letter then repeated "Evaluation is a mandatory subject of bargaining and since we've demanded to bargain, the process and tool cannot be implemented without first bargaining with" the Association. Exhibit 12, second page, second paragraph. The letter went on to state that the Association "recently learned from the administrators on the" Evaluation Development Committee "that the tool and process would not be included in our" CBA. The letter went on to say "This is contrary to our understanding, so this is our notice that" the Association "is demanding to bargain Evaluation and will present proposals in the 2014 bargain." The letter next added "The District is not free to implement any evaluation tools or processes until bargaining has occurred." Exhibit 12, second page, third paragraph. The letter, in its final paragraph, stated that "At this point our members are not going to engage in any further discussions at the evaluation committee level and will decline to attend any more meetings unless it is clearly understood that the tool and procedure will in fact be included in the" CBA "and that our members on that committee have an equal voice in the process." Exhibit 12, second page, fourth paragraph.

21. The second of the two attachments consisted of a notification to Farber as Superintendent and to the Glendive Unified School Board, signed by Association co-presidents Nelson and Brown, that the Association would be requesting to bargain the 2014-15 CBA, bargaining which the Association stated, in the notification, "should begin taking place as soon as the contract for the 2013-14 [school year] has been settled." Exhibit 12, third page.

22. On November 25, 2013, Farber responded in writing to Exhibit 11, Brown's November 22, 2013 12:22 p.m. email, as follows [**Farber's excerpts from Brown's email are in bold** and *Farber's responses to each "point" are in italics*].

On November 22, 2013, you sent me an email regarding the development of the evaluation process. In the initial paragraph you cited the original conversation we had prior to the inception of the evaluation development committee. I will respond to the various points in your message in the order in which they were presented.

1. **"Met with you and you gave me the three examples of the evaluation tools."** *Yes, we did meet on September 12,*

2013, to talk about the changes coming to the evaluation process. In that meeting we talked about the new rules we must follow as per the Chapter 55 – Evaluation of Staff or ARM 10.55.701. The state is recommending that we follow the Danielson model, a copy of which I shared with you, or we can develop one of our own if it includes the four domains. The other examples I shared with you were ones developed by other schools in response to the new rules.

2. **“I was led to believe by you that you wanted a group of teachers to look through these examples and come up with a tool that was acceptable to us and you would have the administrators come up with a tool that was acceptable to them; then we would meet to come up with one evaluation tool to use by using input from both sides.”** *I believe that we have done that as an administrative group. The teachers were invited to the table, as it were, to be there as the tool was developed. We ALL met with Tony, a presenter from PESA, on September 12<sup>th</sup> to go through the Montana Educator Performance Appraisal System (Montana-EPAS) and the state model for evaluation so that we could understand what was expected. We adjourned after the training and agreed to set up the next available date to meet again. We met again on October 8<sup>th</sup> to bring the respective ideas to the table. When we came together the teachers brought forth their version of the evaluation tool as did the administration. During the initial portion of the meeting the teachers stated many times that there was no need to continue as they had developed the instrument already. Many of the points from each perspective were the same and put into the document as agreed. However, the administration felt that some key elements were not included in the teacher model and added those. The administration also felt it was important to include formative as well as summative components. We all agreed that was a work in progress and that it would need to be tried first to determine where improvements can be made.*
3. **“You also told me that this was a mandatory issue and that eventually we would be needing to implement this in our Master Agreement for 2014.”** *Yes, I did say that it was a mandatory issue. Please refer to the statement in*

point #1. However, at no time did I say that this would become part of the master agreement [CBA] nor did any of the other administrators state this to the best of my knowledge. It was said many times by representative [sic] from the teachers' organization. Bear in mind that we were under no legal obligation to include the teachers in the development of an evaluation tool. This was a professional courtesy extended to the GEA [Association] as a measure of good faith. Administratively, however, we are required to evaluate the staff on an annual basis as required by Board Policy 5222 and now by ARM 10.55.701. We have a timeline that must be followed to the best of our abilities. Although this process has taken longer to develop than anticipated, the administrators still felt it was necessary to be in compliance with board policy, especially with the new teachers.

4. "I have since been informed that at the meeting, the tool being implemented has not been agreed upon by both entities." The tool HAS NOT been implemented totally as we know that there will be some things that will need to be adjusted. However, until we have "test driven" the instrument in actual evaluations there is no way for the administration – or the teachers – to see what is working and what is not. It should be noted that during the October 8<sup>th</sup> meeting this was all explained to the people in attendance. It was acknowledged at that time that we would try the instrument knowing full well that adjustments would probably be needed.

In conclusion, the evaluation procedure that the district will currently use follows the guidelines established by the Chapter 55 Process. This process was developed after extensive discussion at the state level with input from MEA-MFT, SAM, and other organizations. We believe that we have the right to develop the evaluation tool and further understand that you have the right to bargain over the impact of that evaluation process. It is the union's responsibility to articulate the impacts of the evaluation process.

Exhibit 13.

23. The November 25, 2013 email marked the first time that Farber shared with the Association the District's assertion that there was no right to bargain the development of the evaluation process and criteria (only to bargain "the impact" of

the evaluation process). In the November 25, 2013 email, Farber admitted that “representative[s] from the teachers’ organization” “said many times” that an agreed upon evaluation process “would become part of the master agreement [CBA].” Farber response to point #3, Exhibit 13. Until November 25, 2013, the District had never communicated to the Association that the District did not agree with those statements.

24. On November 26, 2013, MEA-MFT Field Representative Maggie Copeland, on behalf of the Association, wrote to Farber in an attempt to resolve the issues regarding the development of both the evaluation process and the evaluation criteria. She asked about and commented on three positions the Association now could see that the District was asserting.

- (1) She asked for confirmation that the District asserted the development of an evaluation process and evaluation criteria (“evaluation tool and process”) was not a mandatory subject of bargaining – that the Association only had the right to bargain about the impact of the unilaterally adopted “tool and process;”
- (2) She noted that it seemed the District was aware throughout the “Evaluation Development Committee” interactions that the Association believed development of the evaluation tool and process was being bargained. She asked, if that was the case, why the District hadn’t told the Association at the onset that inclusion of the Association in the interactions was only a “professional courtesy,” and then reiterated that same information every time an Association member of the “Evaluation Development Committee” manifested the belief that development of the evaluation tool and process was being bargained, instead of waiting until November 25, 2013, to make this disclosure.
- (3) She asked whether it was actually the District’s position that it could unilaterally implement its new evaluation process and criteria and evaluate teachers with it in 2013 without first bargaining the development and implementation of the process and criteria with the Association. In conjunction with this question, she pointed out existing CBA provisions, unchanged for at least a decade, that provided:
  - (a) That during its term the CBA could only be altered, changed, added to, deleted from, or modified through the voluntary, mutual consent of the parties memorialized in a written and signed amendment to the CBA (Article XV-Miscellaneous Provision A).

- (b) That all existing district policies involving terms and conditions of professional service, matters relating directly to the employer-teacher relationship, and other terms of employment not specifically referenced in the CBA “shall be maintained at not less than the highest minimum standards in effect in the district at the time this agreement is signed, provided that such conditions shall be improved for the benefit of teachers as required by the express provisions of this Agreement” (Article XV-Miscellaneous Provision D) and
- (c) That the District’s unilateral implementation of a new evaluation process and criteria, changing from the evaluation process, criteria and timeline in effect in the District for the last decade (thereby the standard established by policy and practice between the parties) would give rise to both an unfair labor practice complaint and a grievance.

Exhibit 14.

25. The District did assert and still may assert that determining evaluation process and criteria was and is not a mandatory subject of bargaining – that the Association only had the right to bargain about any impact of the unilaterally adopted process and criteria upon its members. The District did assert and still may assert that unilateral implementation of any new evaluation process and criteria for teacher evaluations was and is a right the District has had all along and still has, which it properly exercised in 2013, and which it can exercise again in the future, at its sole discretion. The District never asserted during the contested case hearing that at any time in the “Evaluation Development Committee” meeting the Association and the District agreed that the evaluation process and criteria [as the District had determined they would be] were “a work in progress . . . that . . . would need to be tried first to determine where improvements can be made.” Farber response to point #4, Exhibit 13.

26. The District asserted, in its briefing herein, that even if teacher evaluation may play a role in renewal and termination decisions regarding a teacher, that role is severely limited because of the extensive due process rights given to tenure teachers and teachers under contract under Montana law and the Master Agreement. Mont. Code Ann. §§ 20-4-204 and 207. However, the District did not present evidence from which the Hearing Officer could find that it is more likely than not that teacher evaluations have little or no practical effect upon employment conditions and security of the teachers evaluated. The teacher evaluations involved were required to be conducted according to a regular schedule for all tenured staff and to

include “an assessment of the educator’s effectiveness in supporting every student in meeting rigorous learning goals through the performance of the educator’s duties.”<sup>3</sup> On its face, such an evaluation could and very likely would have an enormous impact upon the employment conditions and employment security of any teacher found to be ineffective in supporting every student in meeting rigorous learning goals through the performance of his or her duties.

27. In addition, the scope of decisions the District can make regarding teacher evaluations is substantially constrained by the express requirements imposed in Admin. R. Mont. 10.55.701(4) (*infra*, p. 16-17). These constraints demonstrate that the District decision-making regarding teacher evaluations cannot be analogous to decisions by a private employer about the commitment of investment capital and the basic scope of the enterprise, and thus actually outside of the scope of bargaining about other conditions of employment. Requiring bargaining on this other condition of employment does not encroach unduly upon managerial decisions which lie at the core of the District’s control of the school.

28. As of the time of submission of this case for proposed decision, the District had unilaterally implemented the “Miles City” evaluation tool for the 2013-2014 school year, and then unilaterally applied a new evaluation tool for the 2014-15 school year, all without bargaining teacher evaluation process and criteria with the Association.

29. The Association made good faith efforts to engage the District in bargaining over the teacher evaluation issues. Finally, this ULP was filed on January 14, 2014.

#### IV. DISCUSSION

The Montana Public Employees Collective Bargaining Act, Mont. Code Ann., Title 39, Chapter 31, requires the District, a public employer, and the Association, the exclusive representative for a bargaining unit of the District’s public employees, to meet at reasonable times and negotiate in good faith about the Association members’ wages, hours, fringe benefits, and other conditions of employment. Mont. Code Ann. § 39-31-305(2). If development of the teacher evaluation process and criteria under the new OPI standards involved “other conditions of employment” for the teachers, refusal to bargain was an Unfair Labor Practice.

##### 1. The District’s Unilateral Development and Implementation of Evaluation Process and Criteria Was Subject to Mandatory Bargaining

The Montana Supreme Court explored the meaning of “other conditions of employment” in *Bonner School District No. 14 v. Bonner Education Association*,

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<sup>3</sup> Admin. R. Mont. 10.55.701(4)(a)(v).

2008 MT 9, 341 Mont. 97, 176 P.3d 262, a unanimous 7-0 decision written by Justice Morris. That case involved whether teacher transfers and assignments were mandatory subjects of bargaining under the Montana Collective Bargaining for Public Employees Act. *Bonner at* ¶13.

The *Bonner* opinion noted the mandate of Mont. Code Ann. § 39-31-305(2), obligating a public employer and public employees' representatives to bargain "in good faith with respect to wages, hours, fringe benefits, and other conditions of employment" was "virtually identical to the collective bargaining mandate" set forth in 29 U.S.C. 158(d) of the National Labor Relations Act (NLRA).<sup>4</sup> *Bonner at* ¶17. Also noting that failure or refusal to bargain in good faith about, among other things, "other conditions of employment" is an unfair labor practice pursuant to the terms of Mont. Code Ann. § 39-31-401(5), the Montana Supreme Court commented that "neither the Montana Collective Bargaining for Public Employees Act, nor the NLRA defines 'other conditions of employment,'" and that the Montana Supreme Court had "not had the opportunity yet to examine the scope of 'other conditions of employment.'" *Id.*

Citing earlier Montana decisions, the Montana Supreme Court noted in *Bonner* that it had "looked previously to federal courts' construction of the NLRA as an aid to interpretation of the Montana Public Employees Collective Bargaining Act. *Small v. McRae*, 200 Mont 497, 502, 651 P.2d 982, 985 (1982) (*citing State, Dept of Hwys. v. Public Employees Craft Coun.*, 165 Mont. 349, 529 P.2d 785 (1974)). The similarity between § 39-31-305(2), MCA, and 29 U.S.C. § 158(d), and the fact that we have not yet explored the scope of 'other conditions of employment,' lead us to look to these federal decisions for instruction." *Bonner at* ¶18.

Agreeing with federal case history, the Montana High Court found that "conditions of employment" should be construed "broadly for purposes of the collective bargaining mandate." *Bonner at* ¶19. *Bonner* cited U.S. Supreme Court decision as authority for the principle that fostering "industrial peace" is a primary consideration in classifying a bargaining subject as a condition of employment. *Id.*, *citing Fibreboard Corp. v. NLRB*, 379 U.S. 203, 209-16, 85 S. Ct. 398, 402-05, 13 L. Ed. 2d 233, 238-41.

*Fibreboard* was decided by Justices Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, and White, without participation from Justice Goldberg. *Fibreboard at* 204, 85 S. Ct. *at* 400, 13 L. Ed. 2d *at* 235. Chief Justice Warren wrote the decision and Justices Black, Clark, Brennan, and White joined in the Chief's decision. Justice Stewart, joined by Justices Douglas and Harlan, wrote a concurring opinion. *Id. at* 217, 85 S. Ct. *at* 406, 13 L. Ed. 2d *at* 242. All eight of

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<sup>4</sup> 29 U.S.C. 158(d) provided that the employer and the union must negotiate "in good faith with respect to wages, hours, and other terms and conditions of employment."

the participating Justices agreed that encouraging negotiation and discussion (bargaining) for as broad a category as “other conditions of employment” could reasonably cover was proper given this “primary consideration” of the NLRA.

*Bonner* also cited *Ford Motor Co. v. NLRB*, 441 U.S. 488, 99 S.Ct. 1842, 60 L.Ed.2d 420 (1979), in which the NLRB found that the setting of prices for in-plant meals available to workers was a mandatory subject of bargaining under the particular facts of the case. *Bonner at* ¶19:

In *Ford*, the U.S. Supreme Court held that the setting of food prices for in-plant meals for employees constituted a condition of employment, describing conditions of employment as matters “plainly germane to the working environment,” and “not among those managerial decisions which lie at the core of entrepreneurial control.” *Ford at* 498, 99 S. Ct. *at* 1850 [60 L.E.2d 426] (*citing Fibreboard at* 222-23, 85 S. Ct. *at* 409 [13 L.Ed.2d *at* 233]) (internal quotation marks omitted) (Stewart, A.J., concurring).

Considering whether teacher transfers and assignments were mandatory subjects of bargaining under Montana law, *Bonner* observed that the federal courts and the NLRB had “determined that a diverse range of issues qualify as conditions of employment, and thus constitute mandatory bargaining subjects.” *Bonner*, ¶20, *citing Pepsi-Cola Bottling Co. of Fayetteville*, 330 N.L.R.B. 900, 902-03 (2000) (holding that telephone access, break policies and accounting for product shortfalls all qualified as conditions of employment under the NLRA). *Id.* *Bonner* also noted that free agency and reserve issues in professional baseball constituted conditions of employment under the NLRA, *Silverman v. Major League Baseball Player Comm.*, 67 F.3d 1054, 1060-62 (2d Cir. 1995), and that rental rates for company houses were also conditions of employment. *American Smelting & Refining Co. v. NLRB*, 406 F.2d 552, 553-55 (9th Cir. 1969). *Id.*

*Bonner* then examined the teacher transfer issue therein. The Court concluded that the issue involved conditions of employment, but did not concern the “basic scope of the enterprise” because it did not implicate “the core of entrepreneurial control.” The language used in this analysis was taken from the *Fibreboard* concurring opinion. *Bonner at* ¶¶21-24:

The federal courts and the NLRB, in early cases interpreting the scope of the NLRA, specifically have held that employee transfers constitute conditions of employment that must be bargained under the NLRA. In *Rapid Roller Co. v. NLRB*, 126 F.2d 452, 457-60 (7th Cir. 1942), the court determined that transferring employees from department to department constituted a condition of employment that required collective bargaining. The

NLRB held in *In re U.S. Automatic Corp.*, 57 N.L.R.B. 124, 133-35 (1944), that even transfers of non-union employees presented proper subjects of mandatory collective bargaining. And in *Inland Steel Co. v. NLRB*, 170 F.2d 247, 252-53 (7th Cir. 1948), the court determined that a related bargaining subject, seniority, posed a mandatory bargaining subject because requiring negotiation provides “protection of employees against arbitrary management conduct in connection with hire, promotion, demotion, transfer and discharge . . . .” (emphasis added).

We agree with those early federal NLRA decisions that employee transfers and reassignments, like those at issue in this case, constitute conditions of employment. The teacher transfers in Bonner were “plainly germane to the working environment,” perhaps more plainly so than the in-plant meal prices for employees in *Ford Motor Co. Ford Motor Co.*, 441 U.S. at 498, 99 S. Ct. at 1850. The involuntarily transferred Bonner teachers experienced changes in the subjects they were expected to teach, the number of subjects they were expected to teach, and the abilities and special needs of the students they were expected to teach. The Board recognized the importance of a teacher’s particular assignment. The Board noted the expertise that teachers acquire over years of teaching the same subject, the supplies and materials pertinent to each subject (sometimes purchased with their own funds), and the value of the continuing education unique to their particular subject or grade level.

The teacher transfers did not concern the “basic scope of the enterprise,” and thus did not lie “at the core of entrepreneurial control.” *Fibreboard Corp.*, 379 U.S. at 223, 85 S. Ct. at 409. The transfers did not concern the subjects being taught at the school. The transfers concerned who would teach those subjects. The transfers did not concern which grades were taught at the school. The transfers concerned who would teach those grades. The scope of the school’s enterprise remained the same – educating students in grades kindergarten through eight. The conditions changed under which its employees were expected to work.

We hold that teacher transfers and reassignments constitute “other conditions of employment” as contemplated by § 39-31-305(2), MCA. This interpretation comports with the policy goals pronounced by the legislature in enacting the

collective bargaining statutes. Section 39-31-101, MCA, articulates that the overarching policy behind the Collective Bargaining for Public Employees Act encourages “the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and the employees.” This policy mirrors the U.S. Supreme Court’s decision in *Fibreboard*, in which it held that fostering “industrial peace” must be a primary consideration in determining whether an issue constitutes a condition of employment under the NLRA. *Fibreboard Corp.*, 379 U.S. at 209-15, 85 S. Ct. at 402-06.

The teacher evaluation mandate that led these parties to this dispute appears in Admin. R. Mont. 10.55.701(4), effective July 1, 2013:

(4) The local board of trustees shall have written policies and procedures for regular and periodic evaluation of all regularly employed personnel. The individual evaluated shall have access to a copy of the evaluation instrument, the opportunity to respond in writing to the completed evaluation, and access to his or her files. Personnel files shall be confidential.

(a) The evaluation system used by a school district for licensed staff shall, at a minimum:

(i) be conducted on at least an annual basis with regard to nontenure staff and according to a regular schedule adopted by the district for all tenure staff;

(ii) be aligned with applicable district goals, standards of the Board of Public Education, and the district’s mentorship and induction program required under ARM 10.55.701(5)(b);

(iii) identify what skill sets are to be evaluated;

(iv) include both formative and summative elements; and

(v) include an assessment of the educator’s effectiveness in supporting every student in meeting rigorous learning goals through the performance of the educator’s duties.

(b) The Superintendent of Public Instruction shall develop and publish model evaluation instruments that comply with this rule in collaboration with the MEA-MFT, Montana Rural Education Association, Montana School Boards Association, School Administrators of Montana, and Montana Small School Alliance. A school district adopting and using one of the model instruments shall be

construed to have complied with this rule, though use of one of the models shall not be required provided that the district's evaluation instrument and process substantially conforms to the requirements set forth in this section.

The reasoning of *Bonner* applies here, leading to the conclusion that the evaluation of the teachers in this school district involves "other conditions of employment" so that development of a new evaluation process and new evaluation criteria both require collective bargaining. Requiring bargaining for teacher transfer, for seniority practices or rules, and for evaluation process and criteria, are all necessary, because requiring that such conditions be bargained provides "protection of employees against arbitrary management conduct in connection with hire, promotion, demotion, transfer and discharge and evaluation."

Justice Stewart's concurrence in *Fibreboard* articulates in more detail the basic analysis actually being applied by the NLRB (and when relying upon federal practices, by BOPA).

. . . . In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment. What one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment. There are other less tangible but no less important characteristics of a person's employment which might also be deemed "conditions" -- most prominently the characteristic involved in this case, the security of one's employment. On one view of the matter, it can be argued that the question whether there is to be a job is not a condition of employment; the question is not one of imposing conditions on employment, but the more fundamental question whether there is to be employment at all. However, it is clear that the Board and the courts have on numerous occasions recognized that union demands for provisions limiting an employer's power to discharge employees are mandatorily bargainable. Thus, freedom from discriminatory discharge, seniority rights, the imposition of a compulsory retirement age, have been recognized as subjects upon which an employer must bargain, although all of these concern the very existence of the employment itself.

*Fibreboard* at 222, 85 S. Ct. at 409, 13 L. Ed. 2d at 245.

The concurrence describes other circumstances in which employer decisions that may affect employment security are not properly subject to mandatory bargaining, such as decisions “concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales.” All of these management decisions could impact the security of workers’ jobs, but Justice Stewart argues persuasively that “it is hardly conceivable that such decisions so involve ‘conditions of employment’ that they must be negotiated with the employees’ bargaining representative.” *Id.* at 223, 85 S. Ct. at 409, 13 L. Ed. 2d at 245.

Justice Stewart then summarizes this line of reasoning:

In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not “with respect to . . . conditions of employment.” Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If . . . the purpose of §8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.

*Fibreboard* at 223, 85 S. Ct. at 409-10, 13 L. Ed. 2d at 245-46 (emphasis added).

Now, even when an employer is required to bargain, there is no loss of management decision-making power. Being required to bargain is not the same as being required to surrender decision-making power. The District simply must first bargain to completion (by agreement or impasse). At impasse, the District still has the right to resort to unilateral decision-making.

The teacher evaluation processes and evaluation criteria unilaterally chosen by the District for 2013-14 and 2014-15 were “plainly germane to the working environment.” They actually have become a regular part of the working environment of the professional staff, being conducted on “at least an annual basis with regard to nontenure staff and according to a regular schedule adopted by the district for all

tenure staff.” Admin. R. Mont. 10.55.701(4)(a)(i). Evaluation process and criteria must be “aligned with applicable district goals, standards of the Board of Public Education, and the district’s mentorship and induction program” [(*id. at* 10.55.701(4)(a)(ii)]. Evaluation process and criteria must “identify what skill sets are to be evaluated” [*id. at* 10.55.701(4)(a)(iii)]; “include both formative and summative elements” [*id. at* 10.55.701(4)(a)(iv)]; and also “include an assessment of the educator’s effectiveness in supporting every student in meeting rigorous learning goals through the performance of the educator’s duties” [*id. at* 10.55.701(4)(a)].

Evaluations of teachers based upon identified skill sets, looking at formative and summative elements of their teaching, and assessing their effectiveness in supporting every student’s ability to meet rigorous learning goals, through the teacher’s performance of his or her duties, certainly can and probably will impact their future assignments, their future promotions or wage increases, their future access to training, their future access to education, their future access to supplies, materials, and other kinds of teacher support, and their future retention. Thus, even if the teacher evaluations did concern the “basic scope of the enterprise,” the Association’s demand to bargain evaluation development involved employment security in a very direct way. The teacher evaluations did not concern the subjects being taught, but rather the scoring of the performances of the teachers who taught those subjects. The teacher evaluations did not concern which grades were taught at the schools, but rather the ratings of how well the teachers who taught those grades were performing their teaching. The scope of the school’s enterprise remained the same – educating students at all levels therein – but the conditions under which its employees were expected to work to provide that education to their students was being changed. Consistent with *Bonner*, spirit and letter, the development of evaluation processes and criteria for the Glendive Public Schools was and is a subject of mandatory bargaining.

There is no reasonable basis for the District to argue, in the specific circumstances of this case, that development of evaluation processes and criteria is much more than relevant to educating children, being the kind of decision-making that requires commitment of considerable funding (in lieu of “investment capital”) and is so closely tied to the basic scope of the enterprise that it is not in itself primarily about conditions of employment for the teachers being evaluated. In fact and law, the regular evaluation of teacher performance is much more closely aligned with teacher employment security than it is with management decisions fundamental to the basic direction of the entire District enterprise.

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## 2. BOPA Has Addressed This Particular Issue

Except for *Bonner*, the Montana courts have not directly addressed the scope of “other conditions of employment.” *Bonner* by itself is enough precedent to decide this case, but BOPA has also addressed “other conditions of employment” in the context of staff evaluation. *Billings Ed. Assoc. v. S.D. No. 2*, ULP No. 16-1975, “Findings of Fact, Conclusions of Law and Order” (Mar. 4, 1976), p. 16, lines 26-29. BOPA found that refusal to bargain over staff evaluations was an unfair labor practice:

School District No. 2 Billings, Montana, violated Sec. 59-1605(1)(e),<sup>5</sup> R.C.M., 1947 by refusing to bargain with the required good faith on the subject of a staff evaluation procedure and by unilaterally adopting such a procedure on August 11, 1975.

*Billings Ed. Assoc.* balanced the District’s right to manage the “basic scope of the enterprise” with regard to making decisions that lie “at the core of entrepreneurial control,” and the Association’s right to bargain over “other terms of employment.” The School District argued that staff evaluation was a non-negotiable item, so it could adopt a procedure for staff evaluation unilaterally. *Id.* at p. 10, line 22. The Association argued staff evaluation was an “other condition of employment” over which bargaining was required. *Id.*

In its discussion, BOPA found that staff evaluation was a subject of mandatory bargaining, but noted in passing that the School District had bargained whether staff could grieve the results of an evaluation.

The legislature has not left to presumption that public employers possess the prerogatives necessary to “manage their affairs.” We also note however, the Act is absent any express language which prohibits management from bargaining on just how those prerogatives are to be exercised or in fact how far they extend. We agree that a staff evaluation procedure involves management prerogative yet even the subject of wages involves management prerogative.

Further analyzing this problem, we note a basic inconsistency in the School District’s position. As aforementioned the collective bargaining agreement negotiated for the 1975-76 school year (School District Exhibit A) provides that the product of the staff evaluation procedure is subject to the grievance procedure and ultimately binding arbitration. The fact that the School District

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<sup>5</sup> Sec. 59-1605(1), R.C.M. 1947 reads: “(1) It is an unfair labor practice for a public employer to: . . . (5) refuse to bargain in good faith with an exclusive representative.”

has seen fit to collectively bargain both through the negotiations process and the grievance procedure on the product of the evaluation procedure and yet refuses to bargain on the substance of that procedure defies reason.

Further, an item which involves an employee's reasonable expectation of employment security such as an evaluation procedure, should not be arbitrarily excluded from the forum of collective bargaining. We also note that Standard for Accreditation No. 117 does not preclude the possibility of collective bargaining and does in fact recognize a need for teacher input.

*Billings Ed. Assoc.*, p. 10, line 22 through p. 13, line 3.

BOPA decided whether the School District had any justification for its refusal to bargain, given that a staff evaluation procedure was bargainable:

The second question that must be addressed is that since a staff evaluation procedure is bargainable, did the School District act unilaterally and in bad faith in its adoption of the procedure on August 11, 1975? The record shows that the Association had included in its first package of proposals in January of 1975, a specific proposal on staff evaluation. That proposal remained on the table well after August 11, 1975.

The [NLRB] provides useful insight into the problem at hand. In *NLRB Katz*, 369 US 736, [82 S. Ct. 1107, 8 L. Ed. 2d 230]<sup>6</sup> (1962), the U.S. Supreme Court gave express recognition of the NLRB's *per se* doctrine. The court characterized the employer's unilateral changes in conditions of employment in these terms on page 743 [82 S. Ct. *at* 1111, 8 L.Ed.2d *at* 236]:

A refusal to negotiate in fact as to any subject which is within §8(d),<sup>7</sup> and about which the union seeks to negotiate, violates §8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end.<sup>8</sup>

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<sup>6</sup> Full citation supplied for the reader.

<sup>7</sup> *Billings Ed. Assoc.* has a footnote at this point, setting forth the text of 29 U.S.C. §158(d), to show that the duty under the Montana Act to bargain over "wages, hours . . . and other conditions of employment" closed matched the duty under the federal law to bargain over "wages, hours, and terms and conditions of employment."

<sup>8</sup> The quotation from *Katz* that appeared in *Billings Ed. Assoc.* had some minor errors, and the exact original passage from *Katz* has been used in this quotation.

This reasoning has been further expanded and distinguished and in *Katz* the Court did note however, that certain circumstances might justify unilateral employer action (*i.e.* necessity, waiver, etc.). Yet the facts of the case at hand do not justify the School District's action and therefore do not exempt the School District from the duty to bargain with the Association on a staff evaluation procedure.

From the foregoing, it must be concluded that the School District has not bargained with the required good faith.

....

*Billings Ed. Assoc.*, p. 13, line 4 through p. 14, line 1. It is clear from this case as well as from *Bonner* that under Montana law, teacher evaluations are subjects of mandatory bargaining. Those decisions are based upon facts consistent with the pertinent facts in this case, and therefore the same decision is appropriate here. The distinctions the parties in this case jostled about (are the teacher evaluation process and the teacher evaluation criteria, or neither, or both, subjects of mandatory bargaining?) miss the point. Teacher evaluation by the District is a subject of mandatory bargaining.

### 3. Proposed Decision on the Merits

For all of these reasons, the Hearing Officer recommends that the Board of Personnel Appeals hold that the evaluation process and evaluation criteria to be applied in this District did and do constitute "other conditions of employment" as contemplated by Mont. Code Ann. § 39-31-305(2). This interpretation comports with the policy goals of Mont. Code Ann. § 39-31-101, articulating the overarching policy behind the Collective Bargaining for Public Employees Act as encouraging "the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and the employees." This policy mirrors the U.S. Supreme Court's decision in *Fibreboard*, in which it held that fostering "industrial peace" must be a primary consideration in determining whether an issue constitutes a condition of employment under the NLRA.

Counsel for the parties herein did capable and intelligent briefing of their clients' cases, digging deeply into a wide range of potentially relevant cases. The Hearing Officer did not find that wider discussion directly helpful, concluding that *Bonner* and *Billings Ed. Assoc.* were, between them, decisive herein.

BOPA can and should continue to utilize NLRB and federal court decisions regarding NLRA cases as good guidance for interpretations of the Montana Public Employees Collective Bargaining Act, particularly where there is no Montana precedent. But when there is Montana precedent on the issue at hand, as in this instance, Montana precedent is conclusive.

Mont. Code Ann. § 39-31-406(4) provides that when the Board finds that an employer has engaged in an unfair labor practice, the Board shall order the employer to cease and desist from the unfair labor practice, and to take such affirmative action as will effectuate the policies of the Collective Bargaining Act. There is no valid basis to separate the development of a teacher evaluation process from the development of teacher evaluation criteria.

Mandatory bargaining does not strip the District of its authority to make decisions on both the teacher evaluation process and the teacher evaluation criteria. Mandatory bargaining simply encourages the parties to attempt to arrive at friendly adjustment of any disputes between this public employer and these employees about teacher evaluation issues, thereby fostering “industrial peace” in this public school district.

#### 4. The Appropriate BOPA Order

Upon determining by a preponderance of the evidence that an unfair labor practice has occurred, the Board of Personnel Appeals shall issue and serve an order requiring the entity named in the complaint to cease and desist from the unfair labor practice. Mont. Code Ann. § 39-31-406(4). The Board shall further require the offending entity to take such affirmative action, which may include restoration to the status quo ante, “as will effectuate the policies of the chapter.” *Id.*

In *Billings Ed. Assoc.*, the parties had reached a subsequent agreement about staff evaluations, so there was no need for relief per se, but BOPA properly included a “cease and desist” order in its decision, *id. at* p. 17, lines 16-19:

It is hereby ordered that School District No. 2 Billings, Montana, and its officers, agents, and representatives shall:

1. Cease and desist from refusing to bargain with the Billings Education Association on the subject of a staff evaluation procedure and take notice of the continuing duty to bargain on said subject.

In addition, BOPA required the District to post a notice that it would bargain on staff evaluation thereafter:

We will cease and desist from refusing to bargain with the Billings Education Association on the subject of a staff evaluation procedure.

*Id. at* “Appendix,” second paragraph, lines 6-7.

In the present case, there has been no agreement resolving the dispute about teacher evaluation process and criteria. The appropriate remedy for the District’s

failure to bargain in good faith is therefore the issuance by BOPA of the "Recommended Order" herein.

Obviously, the parties can agree to changes in any or all of the provisions of this recommended order, and resolution of this matter by agreement between the parties would be better than enforcement of that order. As the complexity of the suggested remedy indicates, return to the prior status quo is complicated in this case, given the various evaluation processes and criteria and the range of possible evaluation consequences. The Hearing Officer has fashioned a suggested remedy that addresses the possible impacts of the District's unilateral actions regarding teacher evaluation, with the parties still having the freedom to agree to modify that remedy if they can only agree.

In its request for relief, the Association also requested an order requiring the District to reinstate leave time that individual employees used to participate in the hearing. That also is included in the recommended order.

There is little evidence and less authority to support holding Farber personally accountable for the District's unfair labor practice. Therefore, the proposed order includes his dismissal. His interactions with the Association, and his justifications of them in the record, pose some troubling questions, but this is not a suitable case to address those questions.

## V. CONCLUSIONS OF LAW

1. The Montana Board of Personnel Appeals has jurisdiction of this case. Mont. Code Ann. § 39-31-207.

2. A public employer may not refuse to bargain collectively in good faith with an exclusive representative of employees concerning other conditions of employment subject to mandatory bargaining requirements. Mont. Code Ann. §§ 39-31-305 and 39-31-401(5). An employer that makes unilateral changes during the course of a collective bargaining relationship concerning other conditions of employment has refused to bargain in good faith. *NLRB v. Katz*, *op. cit.* at 743, 82 S. Ct. at 1111, 8 L.Ed.2d at 236.

3. For purposes of Mont. Code Ann. § 39-31-401(5), the evaluation process and criteria for teachers employed by the District and holding membership in the Association are other conditions of employment, and constitute a mandatory subject of bargaining. A public employer cannot unilaterally change the evaluation processes or the evaluation criteria for its teachers without bargaining with the exclusive representative of those employees.

4. Neither Mont. Code Ann. § 39-31-303 nor the management rights clause of the Collective Bargaining Agreement between the parties gave the District the right to unilaterally change an evaluation process already in place and utilized by long term

practices of these parties, by adopting a new evaluation process and new evaluation criteria for its teachers without bargaining.

5. By unilaterally adopting a new teacher evaluation process and new teacher evaluation criteria without bargaining, the District committed an unfair labor practice, violating Mont. Code Ann. § 39-31-401(5).

6. To cure the effects of the unfair labor practice committed by the District, the Association is entitled to cease and desist orders, a return to the status quo ante, an order to make the members of the Association whole for their losses resulting from the unfair labor practice by reinstating any leave used to participate in the hearing of this matter, and an order to post and publish the notice set forth in Appendix A. The recommended order herein provides for all this relief.

## VI. RECOMMENDED ORDER

It is hereby ORDERED:

1. Glendive Public Schools must cease and desist refusing to bargain with the Glendive Education Association on the subject of teacher evaluation process and criteria, noting and honoring hereafter its continuing duty to bargain thereupon.

2. As soon as practicable, and in any event within 30 days of issuance of this order by BOPA, Glendive Public Schools must commence good faith negotiation with Glendive Education Association regarding teacher evaluation process and criteria, going forward with dispatch until EITHER an agreement between the two parties on teacher evaluation process and criteria and adoption of same OR Glendive Public Schools, having bargained to impasse with Glendive Education Association regarding teacher evaluation process and criteria, unilaterally develops and adopts teacher evaluation process and criteria for the 2015-16 school year.

3. Glendive Public Schools must cease and desist using any teacher evaluation process and criteria for the 2015-16 school year until completion of the requirements of Paragraph 2, immediately above.

4. Glendive Public Schools must cease and desist taking adverse employment actions against any teachers based upon existing evaluations under any pre-existing evaluation process and criteria unilaterally adopted for use in either the 2013-14 or 2014-15 school years.

5. Glendive Public Schools must:

(a) Rescind and remedy the effects of any adverse employment actions already taken against any teachers based upon existing evaluations under any pre-existing evaluation process and criteria unilaterally adopted by Glendive School District and used during either the 2013-14 or 2014-15 school years;

(b) Give notice that any teacher given an evaluation under the process and criteria used during the 2013-14 or 2014-15 school years can each elect:

EITHER (b-1) to have some or all of their individual evaluation(s) removed from the personnel and other records of the District and destroyed, being replaced with a simple notice that the evaluation(s) were removed and destroyed by order of BOPA because of Glendive School District's ULP herein, with no adverse employment action taken or to be taken against said teacher(s) because of the absence of the records of said evaluation(s);

OR (b-2) to have some or all of their individual evaluation(s) retained and utilized by Glendive School District as such evaluations were, are, and will be used in the ordinary conduct of Glendive School District's business

AND (c) Upon demand by any teacher, allow that teacher access to his or her teacher evaluation(s) during the 2013-14 or 2014-15 school years, through the present, before said teacher makes her or his election.

6. Glendive School District must:

(a) Reverse adverse actions (including but not limited to contract termination or nonrenewal) previously taken against any teachers, based upon completed and documented evaluations under either the 2013-14 or 2014-15 school years;

(b) Remove the documentation of any such adverse actions from the personnel and other records of the Glendive School District and destroy same, together with all other copies in the Glendive School District's possession;

AND (c) Take any reasonable actions to restore the *status quo ante* of any and all employees subjected to such adverse actions, and, upon written request from the employee, consider whether any further actions are necessary to address other harm suffered by the employee as a result of the adverse action(s) reversed and take any actions necessary.

7. Glendive School District must reinstate all leave time individual employees used to participate in the hearing herein.

8. Glendive School District must post copies of the notice contained in Appendix A at conspicuous places, including all places where notices to employees are customarily posted, at the school buildings for a period of 60 days while school is in

session and to take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

9. Superintendent Ross Farber is dismissed from this proceeding.

DATED this 7<sup>th</sup> day of July, 2015.

BOARD OF PERSONNEL APPEALS

By: \_\_\_\_\_

TERRY SPEAR  
Hearing Officer

**NOTICE:** Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to Admin. R. Mont. 24.26.684 within twenty (20) days after the day the recommended decision 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. Mont. Code Ann. § 39-31-406(6). 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 mailed to:

Board of Personnel Appeals  
Department of Labor and Industry  
P.O. Box 201503  
Helena, MT 59620-1503

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

Vicki McDonald  
Attorney at Law  
1714 Forest Meadow Court  
Billings, MT 59102

Jeffrey Weldon  
Attorney at Law  
P.O. Box 2558  
Billings, MT 59103-2558

DATED this 7<sup>th</sup> day of July, 2015.

Sandy Duncan

APPENDIX

NOTICE TO ALL TEACHERS

Pursuant to the Order of the Board of Personnel Appeals and in order to effectuate the policies of the Montana Public Employees Collective Bargaining Act, we hereby notify our employees that:

We will cease and desist from refusing to bargain with the Glendive Education Association on the subjects of teacher evaluation process and criteria.

We will not in any way interfere with your right to:

- ✓ Organize yourselves, or form, join or help unions
- ✓ Bargain for working conditions through a representative freely chosen by a majority of teachers in this District
- ✓ Act together for mutual aid or protection of your working conditions
- ✓ Refuse to do any or all of these things

Glendive Public Schools  
Glendive, Montana

By \_\_\_\_\_  
(Representative) (Title)

Dated: \_\_\_\_\_

This notice must remain posted for 60 consecutive days from the posting date and must not be altered, defaced, or covered by any other material. If teachers have questions about this notice or compliance with its provisions, they may communicate directly with the Board of Personnel Appeals, 1417 Helena Ave., Helena, Montana 59601, telephone 449-2890.



STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE NO. 10-2014 (1231-2014)

<p>GLENDIVE EDUCATION ASSOCIATION, MEA-MFT, NEA/AFT</p> <p style="text-align: center;">Complainants,</p> <p style="text-align: center;">- vs -</p> <p>SUPERINTENDENT ROSS FARBER AND GLENDIVE PUBLIC SCHOOLS,</p> <p style="text-align: center;">Respondents.</p>	<p>FINAL ORDER</p>
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**PROCEDURAL HISTORY**

In January 2014, Complainants (collectively, the Association) filed an unfair labor practice complaint with the Board of Personnel Appeals (the Board) alleging Respondents (collectively, the District) violated Mont. Code. Ann. § 39-31-401(5) by implementing new teacher evaluation criteria and a teacher evaluation process without first obtaining the Association's consent or bargaining with the Association to impasse.

The Board's investigator found probable merit that the District's actions constituted an unfair labor practice and transferred the matter to the Office of Administrative Hearings. Hearings Officer Terry Spear conducted a contested case hearing in October 2014, and then issued the Findings of Fact, Conclusions of Law and Recommended Order. Hearings Officer Spear found in favor of the Association and the District appealed to the Board.

On November 19, 2015, the parties briefed the issues and presented oral argument before the Board. Attorney Jeffrey Weldon represented the District while attorney Vicki McDonald represented the Association. Having reviewed the complete record and having taken the parties' arguments into consideration, the Board now enters the following order.

**STANDARD OF REVIEW**

The Board's review of a hearings officer's Findings of Fact; Conclusions of Law; and Recommended Order is directed by Mont. Code Ann. § 2-4-621(3):

The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

## DISCUSSION

The issue on appeal before the Board is whether evaluation criteria and process constitute a mandatory subject of bargaining. The Board answers this question in the affirmative.

Relying on the Montana Supreme Court's decision in *Bonner School District No. 14 v. Bonner Education Association*<sup>1</sup>, Hearings Officer Spear concluded that "other conditions of employment" should be construed broadly for the purposes of the collective bargaining mandate. Recommended Order, p. 13, citing *Bonner* at ¶ 19. The Board agrees that under such guidance teacher evaluation criteria and process, similar to teacher transfers and assignments, are mandatory subjects of bargaining. See Recommended Order, p. 13, citing *Bonner* at ¶ 20.

The District argues that teacher evaluation criteria, separate from the evaluation process, are directly related to the basic scope of any public school's enterprise, namely the Constitutional mandate to provide a quality education. Hearings Officer Spear concluded that even if the regular evaluation of teachers did concern the "basic scope of the enterprise," such evaluations are "much more closely aligned with teacher employment security than [they are] with management decisions fundamental to the basic direction of the entire District enterprise." Recommended Order, p. 19. Again, the Board agrees with Hearings Officer Spear on this conclusion.

Lastly, the Board has previously addressed the question of whether employment evaluations constitute a mandatory subject of bargaining in the matter of *Billings Ed. Assoc. v. S.D. No. 2*, ULP No. 16-1975. In concluding that refusal to bargain over staff evaluations was an unfair labor practice, the Board stated:

The fact that the School District has seen fit to collectively bargain both through the negotiations process and the grievance procedure on the product of the evaluation procedure and yet refuses to bargain on the substance of that procedure defies reason.

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<sup>1</sup> 2008 MT 9, 341 Mont. 97, 176 P.3d 262.

Further, an item which involves an employee's reasonable expectation of employment security such as an evaluation procedure, should not be arbitrarily excluded from the forum of collective bargaining.

*Id.* P. 12, line 23 through p. 13, line 1.

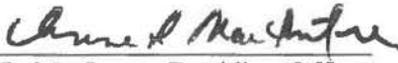
Following the above-cited case law, and for the purposes of Mont. Code. Ann. § 39-31-401(5), the Board concludes that the evaluation process and the criteria for teachers employed by the District and holding membership in the Association are other conditions of employment, and constitute a mandatory subject of bargaining.

**ORDER**

Pursuant to Admin. R. Mont. 24.26.224(3), the Board adopts the hearings officer's Findings of Fact; Conclusions of Law; and Recommended Order as the final agency decision in this matter.

DATED this 23<sup>rd</sup> day of November 2015.

BOARD OF PERSONNEL APPEALS

By:   
Anne L. MacIntyre, Presiding Officer

Moore, Nyman, Soumas and Verlanic concurred.

\*\*\*\*\*

NOTICE: You may be 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, Wendy Knutson, do hereby certify that a true and correct copy of this document was mailed to the following on the 23<sup>rd</sup> day of November 2015:

Jeffrey A. Weldon  
FELT, MARTIN, FRAZIER & WELDON, P.C.  
P.O. Box 2558  
Billings, MT 59103

Vicki Nelson McDonald  
McDONALD LAW FIRM, LLC  
1714 Forest Meadow Court  
Billings, MT 59102

JUN 16 2016

TAMMEHA HELMUTH  
CLERK OF DISTRICT COURT  
*T. Helmuth*

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**MONTANA SEVENTH JUDICIAL DISTRICT COURT  
DAWSON COUNTY**

GLENDIVE PUBLIC SCHOOLS  
AND SUPERINTENDENT ROSS FARBER,

Petitioners,

vs.

GLENDIVE EDUCATION ASSOCIATION, MEA-  
MFT, NEA/AFT, and STATE OF MONTANA,  
DEPARTMENT OF LABOR & INDUSTRY, BOARD  
OF PERSONNEL APPEALS

Respondents.

Cause No. DV 15-102

*Hon. Michael B. Hayworth*

**ORDER DENYING RELIEF  
REQUESTED BY PETITION  
FOR JUDICIAL REVIEW**

Petitioners are Glendive Public Schools and Superintendent Ross Farber (collectively, the "District"). Respondents are Glendive Education Association, MEA-MFT, NEA/NFT and State of Montana, Department of Labor & Industry, Board of Personnel Appeals (collectively, the "Association").

On or about January 16, 2014, the Association filed an unfair labor practice charge with the Board of Personnel Appeals against the District. The Association alleged that the District committed an unfair labor practice by making unilateral changes in the teachers' working conditions and by refusing to bargain teacher evaluation processes and criteria.

The Association and the District have since bargained the teacher evaluation processes. The District did not bargain the evaluation criteria (also referred to as the "evaluation tool"). The

1 Board of Personnel Appeals' investigator issued an investigation report and finding of probable  
2 merit against the District on May 12, 2014. The matter was transferred to the Office of  
3 Administrative Hearings.

4 On October 29, 2014, Hearings Officer Terry Spear conducted a contested case hearing.  
5 Hearings Officer Spear found in favor of the Association and on July 7, 2015, issued *Findings of*  
6 *Fact; Conclusions of Law; and Recommended Order* ("Recommended Order").

7 On July 27, 2015, the District filed exceptions and objections to the *Recommended*  
8 *Order*. On November 23, 2015, after reviewing the record and hearing oral argument, the Board  
9 of Personnel Appeals issued its *Final Order* adopting the *Recommended Order* as the final  
10 agency decision.

11 Now before the Court is: (1) the District's *Petition for Judicial Review* of a final agency  
12 decision filed pursuant to Section 2-4-702, MCA, and; (2) a counter-petition filed by the  
13 Association pursuant to Section 39-31-409, MCA, to enforce the *Final Order*. The District  
14 requests that the Court determine that the District did not commit an unfair labor practice and  
15 issue an order reversing the decision of the Board of Personnel Appeals. The Association  
16 requests an order enforcing the *Final Order*.

17 The Court notes that it is required to set a hearing on the counter-petition for enforcement  
18 of the *Final Order*. Sec. 39-31-409(2), MCA. However, because the Court is hereby denying the  
19 relief requested by the District's *Petition for Judicial Review*, a hearing will not be held as the  
20 counter-petition for enforcement has been rendered moot.

#### 21 Issue Presented

22 The issue before the Court is: Did the Board of Personnel Appeals correctly interpret the  
23 law when it concluded that the District committed an unfair labor practice in violation of Section  
24 39-31-401, MCA, by refusing to bargain the teacher evaluation tool?  
25  
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1 Discussion

2 A Montana public employer is statutorily required to bargain collectively in good faith  
3 over mandatory subjects of bargaining.<sup>1</sup> Mandatory subjects are: "wages, hours, fringe benefits,  
4 and other conditions of employment..."<sup>2</sup>

5 The parties' dispute centers on whether the teacher evaluation tool used by the District  
6 falls within the meaning of "other conditions of employment" under Montana's Collective  
7 Bargaining for Public Employees Act. The Montana Supreme Court's opinion in *Bonner Sch.*  
8 *Dist. No. 14 v. Bonner Educ. Ass'n*, 2008 MT 9, provides the primary authority on this question  
9 because the Act does not define the term "other conditions of employment."

10 The key inquiry under *Bonner* is whether the teacher evaluation tool is closely aligned  
11 with teachers' employment interests as distinguished from managerial decisions related to the  
12 basic scope of the District's enterprise. The Board of Personnel Appeals agreed with Hearing  
13 Officer Spear's conclusion that "even if the regular evaluation of teachers did concern the 'basic  
14 scope of the enterprise,' such evaluations are 'much more closely aligned with teacher  
15 employment security than [they are] with management decisions fundamental to the basic  
16 direction of the entire District enterprise.'" (*Final Order*, p. 2 quoting *Recommended Order*,  
p.19).

17 Thus, applying *Bonner* (and in agreement with Hearing Officer Spear's conclusions) the  
18 Board of Personnel Appeals found that teacher evaluation criteria are "other conditions of  
19 employment" and the District committed an unfair labor practice when it refused to bargain the  
20 teacher evaluation tool.<sup>3</sup>

21 The Court finds that the Board of Personnel Appeals correctly interpreted the law and its  
22 decision is supported by the record.<sup>4</sup> Moreover, the Board's interpretation of the phrase "other  
23

24 <sup>1</sup> Sections 39-31-305 and 39-31-401(5), MCA.

25 <sup>2</sup> Section 39-31-305(2), MCA.

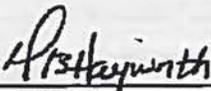
26 <sup>3</sup> See also *Billings Ed. Ass'n v. Sch. Dist. No. 2*, ULP No. 16-1975, 12:28 - 13:1 ("... an item which involves an  
employee's reasonable expectation of employment security such as an evaluation procedure, should not be  
arbitrarily excluded from the forum of collective bargaining.")

27 <sup>4</sup> Maggie Copeland, Field Consultant for Eastern Montana, MEA-MFT, testified that teacher evaluations are  
important to teachers because they are used for "promotion, assignment, retention...all kinds of different things...so  
28 the tool itself is extremely important. (Hrg. CD #1, Track 4). Further, Hearing Officer Spear noted: "...the District  
did not present evidence from which the Hearing Officer could find that it is more likely than not that teacher

1 conditions of employment" to include the teacher evaluation tool comports with the policy goals  
2 of Montana's collective bargaining statutes, i.e., "the practice and procedure of collective  
3 bargaining to arrive at friendly adjustment of all disputes between public employers and the  
4 employees." *Bonner* at ¶24.

5 NOW, THEREFORE, IT IS HEREBY ORDERED THAT: The District's *Petition for*  
6 *Judicial Review* is DENIED as to the relief requested.

7 DATED this 11<sup>th</sup> day of June, 2016.

8   
9 \_\_\_\_\_  
10 Michael B. Hayworth  
11 DISTRICT JUDGE

12 Cc: Counsel of record

13 **CERTIFICATE OF SERVICE**  
14 This is to certify that the foregoing was duly served by  
15 U.S. Mail or Email scan upon the parties or their  
16 attorneys of record at their last known address this  
17 \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_\_\_.

18 By \_\_\_\_\_  
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28 evaluations have little or no practical effect upon employment conditions and security of the teachers evaluated."  
29 (*Recommended Order*, p. 11, ¶26).

## CERTIFICATE OF SERVICE

This is to certify that an exact and true copy of the foregoing ORDER DENYING RELIEF REQUESTED BY PETITION FOR JUDICIAL REVIEW was duly served by mail upon the parties or their attorneys of record at the following addresses this 16 day of June, 2016.

Tamera Helmuth  
Clerk of District Court

---

Deputy Clerk of Court

Jeff Weldon  
Attorney at Law  
e-mailed  
[jweldon@feltmartinlaw.com](mailto:jweldon@feltmartinlaw.com)

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