

1 Department of Labor and Industry
2 Board of Personnel Appeals
3 PO Box 201503
4 Helena, MT 59620-1503
5 (406) 444-0032
6
7

8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10
11 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 34-2015

12
13 POPLAR EDUCATION SUPPORT)
14 PERSONNEL (PESSO), MEA-MFT,)
15 NEA/AFT,)
16 Complainant,)
17 -vs-)
18)
19 WANDA KIRN and MIKE GORDER,)
20 ACTING AS REPRESENTATIVES OF)
21 THE POPLAR BOARD OF TRUSTEES.)
22 Defendant.)
23

INVESTIGATIVE REPORT
AND
NOTICE OF INTENT TO DISMISS

24
25 **I. Introduction**

26
27 On June 30, 2015, Maggie Copeland, MEA-MFT Field Consultant, filed an unfair labor
28 practice charge with the Board of Personnel Appeals on behalf of the Poplar Education
29 Support Staff Organization, hereinafter PESSO or Union, alleging that the Poplar Board
30 of Trustees, through its agents, violated 39-31-401, MCA.¹ The complaint specifically
31 alleges that "Unilateral Implementation of Video Surveillance without bargaining to
32 agreement or impasse with PESSO is an Unfair Labor Practice as set forth in **39-31-401**
33 **Unfair labor practices of public employer.**" Michael Dahlem represents the Poplar
34 Board of Trustees, hereinafter District, and on behalf of the District denied that an unfair
35 labor practice had been committed.
36

37
38 John Andrew was assigned by the Board to investigate the charge and has reviewed
39 the information submitted by the parties and communicated with them as necessary in
40 the course of the investigation.
41

42 **II. Findings and Discussion**

43
44 PESSO is the exclusive representative for a bargaining unit consisting of custodians
45 working for the District in its three buildings located on the school campus in Poplar,
46 Montana. The events leading to this charge concern a bargaining unit member who
47

48
49 ¹ The charge is framed with no specific references to, for instance, 39-31-401(1) or 39-31-401(5). Neither
50 in the information submitted with the complaint, nor in any other communication has PESSO implicated in
any fashion any violation of 39-31-401 (2), (3), or (4), MCA.

1 was disciplined by the District. In the interest of possible privacy concerns, for purposes
2 of this report the individual will be referred to as Worker X.
3

4 Beginning in approximately 2000, the District installed video cameras in school
5 buildings. Cameras were installed with the full knowledge of District staff and the public
6 in general. There was nothing secretive about the cameras. They are visible on
7 campus and have been upgraded as necessary, again with the knowledge of all
8 concerned.
9

10
11 Worker X is a nighttime custodian, working primarily in the elementary school. He is
12 supervised by Mike Gorder. On Thursday, April 23, 2015, Mr. Gorder observed Worker
13 X in Worker X's car at approximately 4:45 p.m. At 5:30 p.m. that same day Mr. Gorder
14 observed Worker X walking on the bike path adjacent to Highway 2. In reviewing the
15 time card for Worker X for that date, Mr. Gorder discovered Worker X had punched in at
16 4:26 p.m. Discovering this discrepancy, Mr. Gorder then reviewed time records of
17 Worker X for the period 4/13 through 4/24/15 and compared them to the video
18 recordings for the same period of time. The time reported as work time on the time
19 cards did not coincide with the time Worker X could be observed on the videos.
20

21
22 Mr. Gorder documented his findings and met in his office with Worker X on April 29,
23 2015. No witnesses were at this meeting, but Mr. Gorder told the investigator that he
24 presented Worker X with his written findings², including the approximate 30 hour
25 difference between the work time shown on the time cards and the video. According to
26 Mr. Gorder, Worker X did not disagree with the findings, including the 30 hour time
27 discrepancy. In fact, on April 29, 2015, Worker X signed off on PESSO #2. Further,
28 when presented with all this, according to Mr. Gorder, Worker X additionally agreed that
29 30 hours would be deducted from his annual leave bank³ in order to cover the 30 hours.
30

31 PESSO has charged that this case is a matter of unilateral implementation without
32 bargaining to impasse. Specifically, PESSO argues that videos were not to be used for
33 disciplinary purposes. Then, although evidence exists for disciplinary action based on
34 observations separate and apart from the videos, PESSO further contends that not only
35 were the videos used for purposes not agreed to, but they were additionally used as the
36 basis for removing annual leave from the leave bank of Worker X.
37
38

39 The collective bargaining agreement between the District and PESSO was in full force
40 and effect for the period of time when this incident occurred. No grievance was filed
41 over the action taken by the District, although as a remedy PESSO requests that
42 Worker X essentially be made whole for the time deducted from the leave bank and/or
43 time off without pay. PESSO, in e-mails to the District, also indicates that by the time
44
45
46
47

48 ² The findings were submitted by PESSO along with the ulp complaint and are identified as PESSO #2.

49 ³ Although the date on the form appears to be April 28 and not April 29, Worker X did sign a "non-teacher
50 request for leave" form authorizing the use of annual leave and leave without pay to replace the 30 hours
of work time reported on the time cards.

1 the incident came to the attention of the exclusive bargaining agent, any grievance, if
2 one were filed, would have to be filed outside the timelines of the grievance procedure.⁴
3

4 In asserting that this is a matter of unilateral imposition PESSO contends there was an
5 agreement with the District that video cameras would not be used for purposes other
6 than safety and security. The District denies any such agreement was ever a part of the
7 bargaining or a part of the bargaining agreement. The agreement itself, at Article 6.3
8 provides:
9

10
11 All monitoring or observation of the Employee's activities shall be conducted
12 openly and with the Employee's full knowledge and awareness.
13

14 Other than a request for a cease and desist order from the Board, as well as a posting
15 notice, the remedies requested by PESSO are those that would be requested of an
16 arbitrator. Thus, rather than this being a matter of an employer unilaterally
17 implementing a change not addressed in some fashion in the bargaining agreement,
18 this charge is more akin to a request that BOPA determine bargaining history and
19 contract language. Put another way, this a question, not of unilateral implementation,
20 but rather, a question of contract interpretation and bad faith bargaining in not following
21 the contract. As pointed out by the District a different standard applies than were this
22 an issue of a change in the status quo upon contract expiration. As authority for this
23 proposition the District points the investigator to two decisions – *American Electric*
24 *Power, et al and IBEW, System Council U-9 et al*, 362 NLRB 92 (2015) and *Bath Iron*
25 *Works Corp.*, 345 NLRB 499,502 (2005), affd. sub nom. *Bath Marine Draftsmen's*
26 *Assoc. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).
27
28

29 The investigator agrees with the argument offered by the District. Ultimately, this is a
30 matter of contract interpretation, not unilateral implementation. In reviewing the contract
31 language the investigator finds that language could be interpreted in the way offered by
32 the District or in the manner offered by the Union. Either position can be supported.
33 However, absent substantial evidence being offered by the Union, the position offered
34 by the District is the more likely interpretation, particularly when there is evidence of
35 previous improper behavior of an employee other than Worker X, the basis of which
36 was demonstrated using video evidence. Although not directly on point to Worker X's
37 situation, nonetheless, a video was used to substantiate, and remedy, improper
38 workplace behavior by a District employee. Beyond this, what the cited cases
39 demonstrate quite clearly is that when workplace behavior, even behavior of an illegal
40 nature, is captured on video, the video recording can be used for disciplinary purposes
41 without such use being deemed an unfair labor practice.
42
43

44 Arguments and evidence of the parties being duly considered, the investigator does not
45 find substantial evidence to warrant a finding of probable merit to the charge.
46
47
48
49

50 ⁴ Actually, in a note to the District requesting additional clarification, Ms. Copeland writes the “. . . option at this point is to reserve the right to file a grievance beyond the timelines.”

1 **III. Recommended Order**

2
3 It is hereby recommended that Unfair Labor Practice Charge 34-2015 be dismissed as
4 without merit.
5

6
7 DATED this 28th day of September 2015.
8

9
10
11 BOARD OF PERSONNEL APPEALS

12
13 By: 
14 _____
15 John Andrew
16 Investigator
17

18
19 NOTICE

20
21 Pursuant to 39-31-405 (2), MCA, if a finding of no probable merit is made by an agent of
22 the Board, a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss
23 may be appealed to the Board. The appeal must be in writing and must be made within
24 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the
25 Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to
26 dismiss becomes a final order of the Board.
27

28
29
30 *****

31 CERTIFICATE OF MAILING

32
33 I, Windy Knutson, do hereby certify that a true and correct copy
34 of this document was mailed to the following on the 28th day of September
35 2015, postage paid and addressed as follows:
36

37
38
39 MAGGIE COPELAND
40 MEAMFT
41 PO BOX 1008
42 GLENDIVE MT 59330
43

44 MICHAEL DAHLEM
45 ATTORNEY AT LAW
46 335 BISMARCK
47 KALISPELL MT 59901
48
49
50