STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 20-90:

TERRY FINK and LAUREL CLASSIFIED EMPLOYEES, MEA/NEA,	)	
Complainant,	)	
- vs -	)	FINAL ORDER
LAUREL PUBLIC SCHOOLS,	)	
Defendant.	)	

* * * * * * * * * * * * * * * * * * *

The Findings of Fact; Conclusions of Law; and Recommended Order were issued by Joseph V. Maronick, Hearing Examiner, on June 13, 1991.

Exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order were filed by Emilie Loring, Attorney for the Complainants on July 1, 1991.

Oral argument was scheduled before the Board of Personnel Appeals on Wednesday, September 11, 1991.

After reviewing the record, considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED that the Exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order are hereby denied.

2. IT IS ORDERED that this Board therefore adopts the Findings of Fact; Conclusions of Law; and Recommended Order of Hearing Examiner Joseph V. Maronick as the Final Order of this Board.

DATED this 25th day of September, 1991.

BOARD OF PERSONNEL APPEALS

By _____
ROBERT A. POORE
CHAIRMAN

* * * * * * * * * * * * * * * * * * * *

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

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CERTIFICATE OF MAILING

I, Jennifer Jacobson, do certify that a true and correct copy of this document was mailed to the following on the 30th day of September, 1991:

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

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 20-90

TERRY FINK AND LAUREL CLASSIFIED EMPLOYEES ASSOCIATION, MEA, NEA,	)	
Complainant,	)	
-vs-	)	FINDINGS OF FACT; CONCLUSIONS OF LAW; RECOMMENDED ORDER
LAUREL PUBLIC SCHOOLS, YELLOWSTONE COUNTY SCHOOL DISTRICTS #7 & 7-70,	)	
Defendant.	)	

* * * * * * * * * *

I. INTRODUCTION

A hearing on the above-captioned matter was held in Laurel, Montana on February 19, 1991 in the Laurel School District offices. The hearing was conducted by Joseph V. Maronick, duly appointed hearing examiner of the Board of Personnel Appeals. Parties present, duly sworn and offering testimony included Terry Fink (complainant), David Sexton (Montana Education Association), Wayne Severtson (Superintendent of Schools), Norma Cleveland (School Board member), and Carol Manley (School District Clerk). The complainant was represented by Emilie Loring, Attorney at Law and the Defendant by Rick D'Hooge, representative, Laurel Public Schools. Final brief was received April 22, 1991.

II. FINDINGS OF FACT

1. A petition was filed with the Board of Personnel Appeals February 28, 1990 for a new unit determination. An election was conducted on May 7, 1990. Ballots were counted on May 7, 1990 with initial results showing Montana Education Association, MEA, would be certified as the exclusive bargaining representative. On May 16, 1990, MEA was certified as the exclusive bargaining representative.

2. An Unfair Labor Practice Charge was filed August 24, 1990 alleging the defendant unilaterally changed working conditions of complainant Terry Fink without bargaining with the exclusive bargaining representative regarding a mandatory subject of bargaining. Such changes were due in part allegedly in retaliation for Mr Fink's union activities and a violation of Section 39-31-401(1)(3) and (5) MCA.

3. Mr. Fink began employment in the 1978-79 school year. No employee insurance was provided that year. In the 1979-80 school year, employee insurance was available but the employees paid 100% of premiums due. Thereafter, the school district paid all or part or a pro-rated share of insurance premiums for Mr. Fink until May 8, 1990 when Mr. Fink was notified in a letter dated May 4, 1990 (Exhibit P-1) that he would thereafter be responsible for payment of the entire $233.98 monthly insurance premium. The change was made because Mr. Fink's hours of work were averaging, according to the school district, 9.56 hours per week.

The school district insurance policy published in January, 1986, provided that up to June 30, 1986 employees working less than 20 hours per week would pay a pro-rated share of insurance coverage or elect not to purchase coverage. Employees working 20 hours per week or more received full premium contribution from the district. Eligibility for any insurance required an employee be regularly working at least 15 hours per week. Beginning July 1, 1986, all staff including the complainant who were presently receiving insurance were grandfathered and continued to be covered. Beginning on that date, staff who worked less than 20 hours per week did not qualify for any insurance benefits.

4. Mr. Fink's hours of work for the years 1979-80 through 1989-90 as recorded on Exhibits A-L were never, except for a very, very, very rare occasion greater than about 12 hours per week and most normally less than 10 hours per week. For the school years 1985-86 and thereafter, the record shows Mr. Fink's weekly work average including extracurricular driving was as follows:

1985-86	10.43 hours*
1986-87	10.61 hours
1987-88	8.28 hours
1988-89	8.65 hours
1989-90	8.53 hours

*These averages are based on hours worked each day as shown on Exhibits A-L and N, adding extracurricular driving and dividing by the actual weeks worked.

5. The School District each year reviewed Mr. Fink's work hours and estimated his hours for the following year. At that time the District's contribution and/or Mr. Fink's eligibility for insurance coverage was determined. The School District Clerk who

reviewed Mr. Fink's time record knew he was not working 15 hours per week. She took no action regarding application of the insurance policy which provided, beginning July 1, 1986, that persons working less than 20 hours per week or under grandfathering working less than 15 hours per week did not qualify for insurance coverage.

In cross-examination, the Board Clerk testified:

COUNSEL: Would you take 32 hours per 9 months perhaps?

DIST. CLERK: Well you see the policy, the insurance policy which requires 15 hours per week average, has been in effect all this time and so that has to be considered also in this as well as the amount of money that the employer and employee paid for the insurance premium.

COUNSEL: As I understand it, you re-figured it each spring or early summer as to whether your estimate of the previous year was close to being accurate, is that not right?

DIST. CLERK: That is correct.

COUNSEL: And you have known for some years, that Terry was not working 15 hours a week?

DIST. CLERK: Well that's true, but I had to estimate every year, I had to estimate his hours every year, and I knew that, but yet, I mean how would I know that the following year, he would not work more than 15 hours per week, because I would never know that until the end of the year.

COUNSEL: But you did know that for the current year that you were looking at, he had never made 15 hours.

DIST. CLERK: Well I was always a year behind with this calculation.

COUNSEL: Well, yes. But you did realize some years ago that he was not averaging 15 hours a week?

DIST. CLERK: That is correct.

COUNSEL: I have nothing further.

6. Mr. Fink's insurance premium was paid or partially paid during his entire period of employment following his insurance availability in school year 1978-79 except for the first school year 1978-79.

7. Mr. Fink received a notification on May 8, 1990 regarding his eligibility for insurance. The notice was received one day after the School District was initially aware that MEA would be certified as the exclusive bargaining representative. Mr. Fink petitioned the School Board requesting the School Board continue to pay his insurance premium as it had in the past. This request was made because the School Board had paid for insurance premium for the past 11 school years 1979-80 through 1989-90 and 4½ years after adoption of the School District insurance policy which did not allow for such premium payment.

8. If required to pay the premium following the School District's policy and completely changing its past practice, Mr. Fink would have been required to pay a premium deduction of $233.98 per month. This amount would need to be paid by Mr. Fink from his average monthly wage of about $227.46. [8.53 hours per week x 40 weeks (September-May) = 341.20 hours x $6.00 per hour = $2,047.20 ÷ 9 months = $227.46 per month] If averaging 9.5 hours per week, as indicated by the School Board, the calculation would be: 9.5 hours x 40 weeks = 380 hours x $6.00 = $2,280 ÷ 9 = $253.33.

9. At the May 21, 1990 meeting of the School Board, the Board decided not to continue as it had in the past paying part of Mr. Fink's insurance premium and to enforce the insurance policy it adopted in 1986. The School Board minutes included the following:

> **INSURANCE PREMIUM CONCERN - TERRY FINK**
>
> Terry Fink expressed concern about the letter he received mentioning that he must now pay 100% of a health and accident insurance premium because he is below the minimum working hours for the District to pay a portion of the premium.
>
> Since the classified staff has now a bargaining unit, the Board cannot bargain with an individual of that unit. The matter should be brought to the bargaining table.
>
> After discussion, the trustees agreed not to change their policy.

10. In January, 1989, another error in application of the School District's insurance policy was reported to the School Board by the School District Clerk. The School Board immediately corrected the error in January, 1989.

III. DISCUSSION

1. The question for determination in this case is whether there was a unilateral change in a mandatory subject of bargaining. Additionally, the question is raised as to whether past practice which is not in comformance with express contract terms can become

a contract term by action of the parties outside the bargaining arena.

2. The timing of all the occurrences may be suspicious or simply coincidental. The record presented is insufficient to conclude the defendant's actions in insurance premium responsibility change was, in violation of Section 39-31-401(3) MCA., because of Mr. Fink's union activity, if any occurred.

3. The insurance policy adopted in January, 1986 is clear. Mr. Fink was not eligible for insurance based on his actual hours of work. The School Board Clerk knew Mr. Fink was not working enough hours per week to qualify for insurance coverage. She also knew, as demonstrated by her action regarding another employee and application of the insurance policy, that if Mr. Fink was not eligible for insurance coverage the matter should be reported to the School Board.

4. The policy while requiring Mr. Fink to pay his own insurance was never enforced with regard to Mr. Fink. Unexplained is why the School Board Clerk while aware Mr. Fink was not averaging enough hours to qualify for insurance coverage, did not report this matter to the School Board. This is especially confusing given the fact that the School Board Clerk did report another employee regarding insurance premium eligibility in February of 1989 but not Mr. Fink.

5. There is no dispute a policy was written and published precluding payment of insurance coverage premium for Mr. Fink by the defendant. There is no dispute that, in error, the policy was not applied to Mr. Fink or that Mr. Fink was subjected to a significant material change beginning May 8, 1990. Mr. Fink charges the School Board unilaterally changed a working condition without bargaining as required. That change was made effective by the Board at a time when the Board by its own admission realized the "matter should be brought to the bargaining table". (management exhibit 2 - May 21, 1990 Board minutes) This comment related, it would appear, to changing the policy which the Board had just begun to enforce to not enforcing or perhaps eliminating or again not enforcing an existing policy.

6. The Board Clerk did not have authority to change the terms of the insurance policy. Her error(s) did not obligate the Board. Kenyon Noble Lumber Company v. School District No. 4, 40 Mont. 123, 105 Pac. 551. Some argument may be offered that past practice gave rise to a contract term. Where the contract terms are clear and unambiguous, the contract terms control. In 79 LA 658, 661 Louisiana-Pacific Corp., W. Eaton, 9/16/82 is found the following:

> It is axiomatic that where language is clear and unambiguous, an arbitrator must give that language effect

> ... 'nevertheless, an arbitrator is confined to interpretation and application of the Collective Bargaining Agreement; he does not sit to dispense his own brand of industrial justice. He may , of course, look for guidance from many sources, yet his award is legitimate only so song as it draws its essence from the Collective Bargaining Agreement. When an arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse to enforcement of the award. (Steelworkers v. enterprise Wheel and Car Corporation. 363 U.S. 593, 80 Sup.Ct. 1358, 34 LA 569, [1960])'...'an Arbitrator cannot resort to interpretation or construction if there is no ambiguity in fact' in the language being construed. 'To do otherwise' Arbitrator Shipman stated, 'would, in effect, be to change or alter the Agreement through indirection', which the arbitrator was not empowered to do. Lionel Corp., 9 LA 716, 717-718 (1948).' ..Other arbitrators have agreed that past practices are of no probative value when the language is unambiguous and definite. (citations omitted)

7. The foregoing analysis shows there was not a unilateral change made in a term of employment but action taken to follow a term of employment agreed to or as published in the insurance policy. As indicated above insufficient record was presented to conclude any action was taken against Mr. Fink based on his union activity if any.

IV. CONCLUSION OF LAW

The defendant, Laurel Public Schools, Yellowstone Public School Districts #7 & 7-70 did not violate Section 39-31-401(1), (3) or (5) MCA. The above captioned Unfair Labor Practice should be dismissed.

V. RECOMMENDED ORDER

IT IS ORDERED that Unfair Labor Practice Charge 20-90 be dismissed.

VI. SPECIAL NOTE

In accordance with Boards rule ARM 24.25.107(2), the above RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless written exceptions are filed within twenty (20) days after service of these FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER upon the parties.

Dated this 13 day of June, 1991.

BOARD OF PERSONNEL APPEALS

Joseph V. Maronick

JOSEPH V. MARONICK
Hearing Examiner

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CERTIFICATE OF MAILING

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

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HILLEY & LORING
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Rick D'Hooge
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1 S. Montana Avenue
Helena, MT 59601

DATED this 13th day of June, 1991.

Christine A. Noland

SP321.19