STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 7-91:

MONA SISK AND LAUREL CLASSIFIED EMPLOYEES ASSOCIATION, MEA/NEA,	)	
Complainants,	)	
- vs -	)	
	)	FINAL ORDER
LAUREL PUBLIC SCHOOL, YELLOWSTONE COUNTY SCHOOL DISTRICT NO. 7-70,	)	
Defendant.	)	

* *

The Findings of Fact; Conclusions of Law; and Recommended Order were issued by Joseph V. Maronick on August 4, 1992.

Exceptions to the Findings of Fact, Conclusions of Law, and Recommended Order were filed by the Defendant Laurel Public School District 7 & 7-70 on August 24, 1992.

Oral argument was scheduled before the Board of Personnel Appeals on October 28, 1992.

Withdrawal of Exceptions were submitted by the Defendant on October 27, 1992.

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

1. IT IS ORDERED that the Board acknowledges receipt of the Withdrawal of Exceptions.

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

DATED this 25th day of November, 1992.

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 2040701 se seq., MCA.

* *

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify that a true and correct copy of this document was mailed to the following on the 2nd day of December, 1992:

Rick D'Hooge
Montana School Boards Association
One South Montana Avenue
Helena, MT 59601

Emilie Loring
HILLEY & LORING
500 Daly Avenue
Missoula, Montana 59801

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

IN THE MATTER OF UNFAIR LABOR PRACTICE CHANGE NO. 7-91:

MONA SISK AND LAUREL CLASSIFIED EMPLOYEES ASSOCIATION, MEA/NEA, Complainants,	
vs.	FINDINGS OF FACT; CONCLUSIONS OF LAW; RECOMMENDED ORDER
LAUREL PUBLIC SCHOOL, YELLOWSTONE COUNTY SCHOOL DISTRICT NO. 7-70, Defendant.	

* * * * * * * * * *

I. INTRODUCTION

On March 5, 1991, the Complainants filed an unfair labor practice charge against the Defendant which alleged violation of Section 39-31-401(1), (3), and (5) MCA. The charge defined the violation as the making of a unilateral change in a mandatory subject of bargaining, hours of work, without bargaining and taking such action as a result of complainant association president's union activities. The Defendant in Answer filed March 19, 1991, denied any violation of the laws cited.

Hearings were conducted in this matter in Laurel, Montana on January 23, 1992 and May 8, 1992. Final briefs submitted were received June 30, 1992. Documents admitted to the record included Complainant Exhibits 1 through 4, Defendant Exhibits R1 through R4 and Joint Exhibit 1.

Parties present, duly sworn and offering testimony included: Complainant, Mona Sisk, assisted in case presentation by legal counsel Emily Loring; Debra Horning; Wilma Engen; Carol Manley;

Denise Yonkin; Norma Cleveland; Chip Lowery; and Superintendent, Wayne Severtson. The Defendant was assisted in case presentation by Rick D'Hooge, Labor Relations Director, Montana School Boards Association.

II. FINDINGS OF FACT

1. Effective May 16, 1990, the Board of Personnel Appeals certified Montana Education Association, MEA/NEA as the exclusive representative for collective bargaining purposes for certain employees including Complainant, Mona Sisk, employed at Laurel Public School District No. 7-70 and 7.

2. In May 1989, the Complainant asked for and was allowed to begin working four ten hour days (four tens) rather than five eight hour days (five eights). Both Parties, initially, understood this change was on a trial basis. The Complainant thought the trail was for several weeks and the Defendant that the change was for an indefinite period of time.

3. From time to time during the year and a half while Ms. Sisk worked four tens, when time scheduling was discussed, Ms. Sisk stated she wished to continue her four tens scheduling. The Defendant did not at any time after initially granting Ms. Sisk's four tens advise her regarding the temporary basis of the change or any problems which the scheduling caused.

4. When granted the four tens in May 1989, Ms. Sisk was employed as an accounting clerk. In August 1991 Ms. Sisk transferred to work as a payroll clerk. This position had previously held by Wilma Engen from 1983 through August 1991. Ms. Engen normally worked five eights. During the summer of 1990 Ms. Engen, along with other staff, worked staggered shifts. When

working staggered shifts, staff worked four nine hour days, four hours on Friday with a full Friday off and worked a full Friday on a rotating basis. (Hearing tape 1, foot 210, testimony of Ms. Engen) Ms. Sisk did not participate in the staggered hours. She continued working four tens as she had since May 1989.

5. By letter dated October 4, 1990 the school Superintendent advised Ms. Sisk she must thereafter work five eights rather than four tens. When asked why the hours changed in October 1990, the school Superintendent indicated he changed the hours because he did not feel the "temporary" change was working out as he had anticipated and that scheduling was adversely affecting client service.

6. No formal school board action was taken when Ms. Sisk started four tens in May 1989 or was changed back to five eights in October 1990. Board member, Chip Lowery, testified he understood the change was on a trial basis and was aware of scheduling changes as they occurred.

7. The hour and day change to four tens and to five eights, did not cause Ms. Sisk any wage or benefit reduction. Ms. Sisk petitioned for added day care and travel expenses caused by the change back to five eight hour shifts. Ms. Sisk claims $12.00 per week, one additional day of day care, and 30 miles travel pay per week, travel to Billings and back for the 5th day of the five days week rather than a four day week, due her as "restoration" for expense suffered because of the schedule change back to the five day, eight hour work week.

8. Superintendent Severtson stated he changed back to five eights solely because "I had determined work ... we were having too

many people come in, I was hearing Denise telling people 'I am sorry Mona does not work on Friday, I am sorry she has left...' People did not adjust to the change in hours" (Hearing tape 2 Severtson foot 20)

9. Approximately in July 1989 Ms. Engen asked Superintendent Severtson as he walked by how Ms. Sisk's four ten scheduling was working. Ms. Engen recalled Superintendent Severtson's response as "He did not have any problems with it, nobody said anything, you know had any comments." (Hearing tape one foot 260 testimony Ms. Engen) Superintendent Severtson did not at any time advise Ms. Sisk that he had received any comment, good or bad, regarding her work scheduling.

10. A 1989-1990 school term cost out (Exhibit R3) of Ms. Sisk's hours computed by a member of the union negotiation committee, Mona Sisk's 1989-90 individual contract (Exhibit R2) and a March 28, 1992 salary schedule proposal (Exhibit R4) all show Ms. Sisk as working five eight hour days. The school district thus contended the five tens scheduling is shown as temporary because the parties figured Ms. Sisk's on a five day eight hour basis. Ms. Debra Horning testified that Ms. Sisk's hours were shown as five eights on the cost outs and contract so that Ms. Sisk's sick or annual leave would not be figured at ten hour days thus showing receipt of an unwarranted increase in fringe benefits. All parties knew and agreed that Ms. Sisk was working four tens from May 1989 through October 1990.

III. CONCLUSIONS OF LAW

1. The initial and pivotal determination needed in this case is whether Ms. Sisk's four tens scheduling was on an ongoing trial

basis or if the change had become permanent. Questions which must be answered include:

a. was the four ten hour day scheduling temporary on an ongoing basis?,

b. if temporary on any basis had the scheduling with time become permanent?,

c. if four tens had become a permanent term of employment was the change back to five eights required of Ms Sisk an unfair labor practice?,

d. if found to have committed an unfair labor practice, is the school district responsible to make Ms. Sisk whole even to the point of payment for travel and baby sitting expense? and

e. was the change in hours for Ms. Sisk taken by the Defendant as the result of Ms. Sisk's union activity?

2. The four ten hour day scheduling, initially on a trial basis, had become a permanent term of employment. The fact this scheduling may or may not cause service problems is found irrelevant. Additionally the record presented shows an inconsistence position of the school board. Superintendent Severtson testified he received or overheard several or ongoing complaints or comments regarding Ms. Sisk's scheduling. Over fifteen months, not once, it would appear, did the Superintendent express that concern to Ms. Sisk. On several occasions all parties agree that Ms. Sisk indicated that she wished to continue the four ten scheduling. If problems had arisen or were ongoing, it does not appear reasonable that Superintendent Severtson would not have commented during one of these discussions regarding some of the problems about which he was apparently aware.

3. The fact that Ms. Sisk's hours were listed on several documents on a five day eight hour shift basis does not support

the conclusion the four tens were temporary. The listing of Ms. Sisk as working five eights, is found to have occurred as a method of fiscally listing her pay but not reflecting either the permanency or temporary nature of the scheduling. The permanency is found based upon the length of time, 15 months, and the lack of any documents or concurrent comments from the Superintendent regarding the temporary nature of the change or complaints which were ultimately the basis for the change back to five eights.

4. As pointed out in the Complainant's brief, pages 3,4 and 5, the courts and the Montana Board of Personnel Appeals have held:

> ...A unilateral change, that is a change initiated by the employer without bargaining with the union, in a mandatory subject of bargaining is a refusal to bargain in good faith an is a per se unfair labor practice, NLRB v. Katz, 369 U.S. 736 (1962).
>
> The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using federal court and NLRB presidents a guidelines in interpreting the public employees collective bargaining act and the state act is so similar to LMRA State Department of Highways v. Public Employees Craft Council, 165 Mont. 349, 529 P2d 785, 87 LRRM 2101 (1974); AFSCME Local 2390 v. City of Billings, 171 Mont. 20, 555 P2d 507, 39 LRRM 2753 (1976); State ex rel. Board of Personnel Appeals v. District Court, 183 Mont. 23 598 P2d 1117, 103 LRRM 2297 (1979); Teamsters Local 45 v. State ex rel. Board of Personnel Appeals, 195 Mont. 272, 635 P2d 1310, 110 LRRM 2012 (1981); City of Great Falls v. Young (Young III), 211 Mont. 13, 686 P2d 185, 119 LLRM 2682, (1984).
>
> The Public Employees Collective Bargaining Act, follows Katz supra,
>
>> The U.S. Supreme Court held in 1962 that an employer's unilateral change in a condition of employment...may be held to violate Section 8(a)(5) [similar to Section 39-31-401(5) MCA] even in the absence of a finding that the employer was guilty of over-all bad faith bargaining because conduct amounts to a refusal to negotiate about the matter and must of necessity obstruct bargaining, AAUP v. Eastern Montana College, ULP 2-82 (1982).

> The Board similarly relied on Katz in finding that unilateral imposition of an in-district residency requirement was an unfair labor practice, MEA v. Mussellshell County School District (Roundup), ULP No. 6-77 (1977).
>
> > Once practices are established, and employer is "required to bargain in good faith; unilateral changes cannot... even if (the practices) are not contained in the contract; unless... there exists a waiver by the party to whom the duty to bargain is owed. In the instant case... (no waiver) was obtained by the Defendant prior to making the change in evaluation procedure." Bozeman Education Association v. Gallatin County School District No. 7 (Bozeman), ULP No. 43-79 (1981).
>
> The unilateral change in Ms. Sisk's hours without bargaining with the union was a per se refusal to bargain in good faith, an unfair labor practice.

The Complainant's position identified above is correct. The Defendant is found to have committed an unfair labor practice in violation of Section 39-31-401(1) and (5). The Defendant interfered with the Claimant's rights guanteed in Section 39-31-201 and refused to bargain in good faith.

5. The Defendant is not found responsible to reimburse Ms. Sisk for baby sitting and travel expense. No authority is found to support the granting of this part of the charge. If child care and travel expenses are to be included as something new and part of the contract wage considerations, the matter should be addressed by the Parties at the bargaining table and not by this court.

6. Information was not offered to support the allegation that any changes or actions taken by the Defendant were because or as a result of Ms. Sisk's union activities. A violation of Section 39-31-401(3) MCA is not found.

7. Laurel Public School, Yellowstone County School District 7-70, is found to have violated Section 39-31-401(1) and (5) MCA.

IV. RECOMMENDED ORDER

The Laurel School District is directed to restore Ms. Sisk's four tens until the matter is bargained in good faith with the Laurel Classified Employees Association.

V. SPECIAL NOTE

In accordance with Board 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 4 day of August, 1992.

BOARD OF PERSONNEL APPEALS

Joseph V. Maronick

Joseph V. Maronick
Hearing Examiner

* * * * * * * * * *

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:

Emilie Loring
HILLY & LORING
500 Daly Avenue
Missoula, MT 59801

Rick D'Hooge
Montana School Boards Association
One South Montana Avenue
Helena, MT 59601

DATED this 4th day of August, 1992.

Michele Bailly

dk321.10N