STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 5-2005:

FEDERATION OF MISSOULA COUNTY EMPLOYEES, MEA-MFT, AFT, AFL-CIO,	)	Case No. 155-2005
Complainant,	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**
vs.	)	
COUNTY OF MISSOULA,	)	
Defendant.	)	

* * * * * * * * * *

I. INTRODUCTION

On July 23, 2004, Complainant Federation of Missoula County Employees brought this charge alleging that Missoula County's unilateral decision to cease providing vision insurance to the members of its bargaining unit constituted an unfair labor practice in violation of Mont. Code Ann. § 39-31-401(1) and (5).

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this proceeding on September 7, 2005 in Missoula, Montana. Karl Englund, Attorney at Law, represented the Federation of Missoula County Employees. Michael Sehestedt, Deputy Missoula County Attorney, represented Respondent Missoula County. Bob Martin, President of the local union, and Tom Gigstad, Field Representative for MEA/MFT, testified under oath on behalf of the union. Steve Johnson, Human Resources Director for Missoula County, testified on behalf of the county. The parties stipulated to the admission of Complainant's Exhibits 1 through 7 and Defendant's Exhibits 1 through 5. Following the hearing, the parties timely submitted post-hearing briefs on October 11, 2005, and the record closed. Based on the evidence and argument adduced at hearing and in the post-hearing briefs, the hearing officer makes the following findings of fact, conclusions of law, and recommended order.

II. ISSUE

The issue in this case is whether Missoula County committed an unfair labor practice in violation of Mont. Code Ann. § 39-31-401(1) and (5) as alleged in the charge filed by the Federation of Missoula County Employees.

III. FINDINGS OF FACT

1. Missoula County is a public employer for purposes of the Public Employees Act, Title 39, Chapter 31 of the Montana Code Annotated. The Federation of Missoula County Employees is the exclusive representative for many of Missoula County employees, including the employees filing the instant charge.

2. The county and the federation have been parties to a series of collective bargaining agreements (CBAs). The pertinent agreements in this case are the CBA covering July 1, 2000 to June 30, 2002, the CBA covering July 1, 2002 to June 30, 2004 and the CBA covering July 1, 2004 to June 30, 2006.

3. Article 26 of the CBAs for both 2002-2004 and 2004-2006 provides:

> Section 1. The employer shall provide optical insurance to eligible employees under the terms of optical coverage generally available to county employees.
>
> Section 2. An eligible employee may purchase optical coverage for dependents or family members as made available by the Employer at applicable group rates.

4. Historically, the county had always paid the premiums for the vision insurance of employees. In addition, the county had always paid the premiums for the vision insurance of employees' dependents. In addition, the CBA between the federation and the county was unique in that it was the only CBA among the ten CBAs the county had with bargaining units that provided coverage of vision insurance.

5. During bargaining for the 2000-2002 CBA, the county requested that the CBA be changed to require the bargaining unit employees to pay for vision coverage of employees' dependants. To that end, the county drafted the Section 26 language noted above. The rationale for the county's request was that this particular bargaining unit was the only unit for which the county paid for the coverage for both

the employees and the dependants of employees. However, the county never mentioned during bargaining that the change was intended to permit the county to stop paying for vision coverage of employees. Indeed, it appears to have been the intent of the parties during bargaining that employee vision would continue to be covered under the language proposed for the 2002-2004 CBA.

6. The bargaining unit employees acceded to the county's request. The county, under the Article 26 language noted above, continued to pay for the vision coverage of employees as it had done in the past.

7. During the bargaining for the 2002-2004 CBA, there was no discussion between the parties about any change to vision coverage.

8. On June 15, 2004, the county commissioners determined that the county's self insurance trust fund, which covered all employee health insurance, including the vision insurance, was losing money and in danger of becoming insolvent. To alleviate this problem, the county determined that it could no longer provide vision coverage to the affected employees and decided to stop paying the premium for the vision coverage of employees.

9. The county notified all affected employees of the change by a memo dated June 16, 2004. That memo essentially stated that due to severe losses arising from health claims, the county had to implement changes, including the deletion of paying the premium for vision insurance coverage for the federation employees. The memo went on to state that, due to these loses, "***we*** [the county commissioners] ***have adopted*** the following measures: . . . ."

> 2. Effective July 1, 2004 Missoula County will no longer pay for vision insurance. County employees may continue vision insurance only via salary deduction . . . You must enroll and authorize salary deduction by 7/31/04." Claimant's Exhibit 4 (emphasis added).

The memo ends by telling the employees that the commissioners "deeply regret both the changes we must make and the short notice."

10. The language of the memo unequivocally communicated to the affected employees that deletion of the payment of the vision insurance premium was, to borrow a cliché, a "done deal" and there would be no bargaining on the subject. This memo was mailed to all affected employees at their respective home addresses. The language of the commissioners' memo convinced Martin and other union members

that cessation of the county's paying for the vision insurance premium was in fact a "done deal."

11. Johnson notified Martin by memo dated June 15, 2004 (and delivered on June 16, 2004) of the deletion of vision coverage. Complainant's Exhibit 3. The memo also directed Martin to meet with Johnson no later than June 18, 2004, just two days later, if the union wished to discuss the matter.

12. By 5:00 p.m. on June 18, 2005, Martin sent a letter to Johnson (Exhibit 5) indicating that the federation needed to meet with the county "to discuss . . . the need for these drastic changes." In that same letter, he also requested a meeting with the county commissioners. The county refused to set up a meeting between the county commissioners and the bargaining unit.

13. Because the county refused to set up a meeting with the commissioners and because of the language of the July 15 memo, the unit members believed that the deletion of the payment for the vision insurance was a "*fait accompli*."

14. The county and the federation met in a previously scheduled meeting on June 22, 2004 to open contract negotiations for the 2004-2006 CBA. The federation made an oral offer regarding wage increases for fiscal year 2005, but made no offer concerning optical insurance.

15. On June 25, 2004, Gigstad sent a letter to Johnson advising him of the union's position that the county's unilateral decision to stop paying the vision insurance premium was contrary to the terms of the collective bargaining agreement. Exhibit 6, Gigstad letter to Johnson. On June 28, 2004, Johnson wrote back to Gigstad that because the federation had "not made any proposals regarding optical insurance, . . . there was nothing to bargain over." Exhibit 7, June 28, 2004 Johnson letter to Gigstad. Johnson then stated that the changes would go into effect on July 1, 2004. *Id.*

16. On July 1, 2004, the county ceased paying the vision insurance premium as it had promised in the June 15, 2004 memo from the commissioners.

17. Beginning on July 22, 2004 and continuing twice each month thereafter until November, 2004, the county and the federation negotiated for a new collective bargaining agreement. At these bargaining sessions, the federation continued to assert that the collective bargaining agreement required the county to pay the employees' optical insurance premium. The parties finally entered into a new

contract that resolved all of the issues. With respect to the optical insurance, the parties agreed that the language would remain the same as it had in the 2000-2002 and 2002-2004 contracts. The parties agreed to disagree on the meaning of that language.

IV. DISCUSSION[1]

A. *The County Committed An Unfair Labor Practice.*

The union contends that the county engaged in an unfair labor practice when it unilaterally changed a mandatory subject of bargaining by refusing to pay the union's vision insurance premium after July 1, 2004. The county asserts that the union waived its right to bargain by failing to raise concerns about the cessation of the payment of the vision premium prior to July 1, 2004. The facts demonstrate that the county engaged in a *fait accompli* when it unilaterally eliminated payment of the union employees' vision insurance premium without permitting the federation to bargain about the issue and thus committed an unfair labor practice.

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals of using federal court and National Labor Relations Board (NLRB) precedents as guidance in interpreting the Montana collective bargaining laws. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

An employer engages in an unfair labor practice when that employer refuses to bargain collectively in good faith with an exclusive representative. Mont. Code Ann. § 39-31-401(5). Subjects of mandatory bargaining include fringe benefits such as insurance. Mont. Code Ann. § 39-31-305(2). An employer violates its duty to bargain in good faith when it unilaterally changes an existing term or condition of employment without bargaining that change to impasse. *NLRB v. McClatchy Newspapers* (D.C. Cir. 1992), 964 F. 2d 1153, 1162.

When a collective bargaining agreement is in place, an employer must obtain the union's consent before implementing any change to the agreement. If the employment conditions which the employer seeks to change are not in the agreement, the employer must notify the union of its intent to make a change and, upon the

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[1]Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

union's request, bargain the change in good faith to impasse. *Communications Workers* (1986), 280 NLRB 78, 82, *aff'd* 765 F.2d 175 (D.C. Cir. 1985). After a collective bargaining agreement has expired and while the parties are still negotiating for a successor agreement, an employer violates the duty to bargain if, without bargaining to impasse, it changes unilaterally a term or condition of employment that existed prior to the expiration of the contract. *NLRB v. McClatchy Newspapers*, ***supra*** (under the past practices rule, an employer and union who are bargaining without a collective bargaining agreement in effect generally must maintain the status quo with regard to mandatory subjects of bargaining). *See also, Forsyth School District No. 4 v. Board of Personnel Appeals,* (1984), 214 Mont. 361, 692 P.2d 1261.

A union is not required to go through the motions of requesting bargaining if it is clear that an employer has made its decision and will not negotiate. The union is not required to engage in a futile gesture because notice of a *fait accompli* is not the sort of timely notice upon which the waiver defense is predicated. *Regal Cinemas, Inc., v. NLRB* (D.C. App. 2003), 317 F. 3d 300, 314.

The county's assertion that there was any real opportunity for the union to bargain about the vision coverage is without merit. The county engaged in a *"fait accompli"* when it sent out the June 15 memo to not only the union leaders but to all union employees at their homes telling them that their vision insurance premium would no longer be covered by the county. The language of the memo demonstrates that the county's proposed action was not going to be conditioned upon any sort of bargaining with the union. The memo directly and unconditionally told the union members that the county's payment of the vision insurance premium would cease on July 1, 2004 and there was nothing to be done about it. Thus, the federation had no real opportunity after this time to bargain over the mandatory subject of the vision insurance premium that had until that time always been paid by the county. The existence of the *fait accompli* is underscored by Martin's testimony at the hearing.

The complainant also points out that the county failed to bargain to impasse. Having determined that the federation did not waive its right to bargain because it was never given an opportunity to bargain, the failure to bargain to impasse is a given in this case since the county's unilateral action precluded the federation from bargaining *at all*. Nonetheless, the federation is absolutely correct in noting that the county, which bears the burden to prove that the parties bargained to impasse, failed to carry that burden. Even if the hearing officer were to consider the June 22, 2004 meeting as an opportunity to bargain on the issue of the vision insurance, this single bargaining session was insufficient under the facts of this case to demonstrate bargaining to impasse.

Payment of the vision insurance premium was a mandatory subject of bargaining that the county had a duty to continue to pay until the issue had been bargained to impasse. Because the county unilaterally stopped paying the premium without any bargaining, the union has established by a preponderance of the evidence that the county committed an unfair labor practice.

After pointing out at length in its closing memorandum that the hearing officer has no call in this case to interpret the language of Article 26 of the CBA, the county nonetheless argues that the language of that agreement has always given the county the power to unilaterally cease paying the vision insurance premium.[2] The simple answer to this point is that even if the language so provided, the practice of the parties up to the expiration CBA had never been interpreted nor implemented by the parties in that fashion. Under this very language, the county had always paid the insurance premium. This practice in and of itself gave rise to the necessity to maintain the status quo of paying the premium until a new CBA could be reached. *NLRB v. McClatchy Newspapers*, ***supra***. The county failed to do this and in the process violated Mont. Code Ann. § 39-31-401(5) and committed a derivative violation of Mont. Code Ann. § 39-31-401(1).

B. *The Remedy For the Violation.*

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. See also, Keeler Die Cast* (1999), 327 NLRB 585, 590-91; *Los Angeles Daily News* (1994), 315 NLRB 1236, 1241.

As the federation correctly points out, the proper remedy here is to have the county reinstate the vision insurance premium payment, reimburse the cost of the

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[2] The county's legal theory in this case changed markedly between the time of hearing and the submission of the county's post-hearing brief. At the conclusion of the hearing in this matter, the county in a very cursory manner raised for the first time the argument that the union was required to file a grievance in this matter instead of filing an unfair labor practice. As the federation's counsel correctly notes, the county failed in any of its pre-hearing disclosure to articulate its legal contentions (as required by the pre-hearing schedule) and failed to appear for the final pre-hearing conference (which attendance was also required by the pre-hearing scheduling order).

insurance premiums that the affected union members have paid out in the interim until the county begins to pay the premium again, and have the county pay interest on those amounts paid out by the affected union members. The award of interest encourages more prompt compliance with Board orders and discourages the commission of unfair labor practices, thereby effectuating the legitimate ends of labor legislation. *Young III, **supra**,* citing *Florida Steel* (1977), 231 NLRB 651. In this instance, the award of interest on the premiums paid out by the union members between the time of the county's unilateral change and the time of the reinstatement of the county paying for the vision premium is appropriate. Interest is proper at a statutory rate of 10% pursuant to Mont. Code Ann. §§ 27-1-211 and 25-9-204.

In unfair labor practice cases, the Board also customarily awards a posting requirement and an order to reinstate any leave taken by members of the bargaining unit to participate in the hearing.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to Mont. Code Ann. § 39-31-405.

2. The Union has demonstrated by a preponderance of the evidence that the county's unilateral deletion of the vision insurance premium on July 1, 2004 was an unfair labor practice that violated Mont. Code Ann. § 39-31-401(1) and (5).

3. Imposition of an order requiring the county to cease and desist from making unilateral changes in the terms and conditions of employment for bargaining unit members, to reinstate the vision insurance premium, to reimburse the affected union employees for expenses they have incurred between July 1, 2004 and the date of the reinstatement of the county's paying for the vision insurance premium, to pay of interest on those expenses, to post the notice provided for in Appendix A, and to reinstate the leave taken by any bargaining unit members to participate in the hearing of this case is appropriate pursuant to Mont. Code Ann. § 39-31-406(4).

VI. RECOMMENDED ORDER

Missoula County is hereby ORDERED:

1. To cease immediately the practice of unilaterally altering terms and conditions of employment subject to the collective bargaining agreement without bargaining with the Federation of Missoula County Employees; and

2. Within 30 days of this order:

a. to reinstate payment of the vision insurance premium for the affected federation employees;

b. To calculate and pay to those employees their expenses for vision insurance ensuing from the unilateral change, and to pay simple interest to the affected employees on those expenses at a rate of 10%;

c. To reinstate all leave taken by unit members to participate in these proceedings;

d. To post copies of the notice contained in Appendix A at conspicuous places, including all places where notices to employees are customarily posted, at the County for a period of 60 days and to take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material.

DATED this 28th day of December, 2005.

BOARD OF PERSONNEL APPEALS

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than January 20, 2006. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE STATE OF MONTANA
BOARD OF PERSONNEL APPEALS

The Montana Board of Personnel Appeals has found that we violated the Montana Collective Bargaining for Public Employees Act by eliminating, without bargaining, the vision benefit previously provided to bargaining unit members, and has ordered us to post and abide by this notice.

We will not fail to bargain in good faith with the Federation of Missoula County Employees, MEA-MFT;

We will not unilaterally change the terms and conditions of employment of employees covered by the collective bargaining agreement with the Federation of Missoula County Employees, MEA-MFT;

We will reinstate the vision benefits, and reimburse unit members for any vision insurance expenses they paid plus interest on those expenses at a rate of 10%; and

We will reinstate all leave taken by employees to participate in the hearing of ULP 5-2005.

DATED this _____ day of January, 2006.

MISSOULA COUNTY

By:_____

BOARD OF PERSONNEL APPEALS
PO BOX 6518
HELENA MT 59604-6518
Telephone: (406) 444-2718
Fax: (406) 444-7071

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NOS. 5-2005 (155-2005):

FEDERATION OF MISSOULA COUNTY EMPLOYEES, MEA-MFT, AFT, AFL-CIO, Complainant	)	
- vs -	)	FINAL ORDER
COUNTY OF MISSOULA, Defendant.	)	

* *

The above-captioned matter came before the Board of Personnel Appeals (Board) on September 22, 2006. The matter was before the Board for consideration of the Defendant's Exceptions filed by Michael W. Sehestedt, Missoula County Deputy County Attorney, to the Findings of Fact; Conclusions of Law; and Recommended Order issued by Gregory L. Hanchett, Hearing Officer, dated December 28, 2005.

Karl Englund, attorney for the Complainant, and Michael Sehestedt, attorney for the Defendant, presented oral argument in person.

In reviewing this matter, the Board considered arguments of both counsel and reviewed the record to determine if the findings of fact were supported by competent, substantial evidence and the conclusions of law were correct in accordance with Section 2-4-621, MCA. The Board took note of the June 16, 2004, Notice to Plan Members from the County Commissioners and Health Plan Administrator regarding changes in the Members' health plan that would become effective on July 1, 2004. The Board reviewed portions of the hearing transcript with counsel to determine whether the employees' representative had been afforded an opportunity to bargain over the changes to the vision insurance plan, and, if so, whether that opportunity had been waived. Having carefully considered this matter,

1. IT IS HEREBY ORDERED that the Defendant's Exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order are hereby dismissed.

2. IT IS FURTHER ORDERED the Findings of Fact; Conclusions of Law; and Recommended Order are affirmed, with the exception that Finding of Fact No. 11 is changed in the second line after "Complainant's Exhibit 3" to read as follows: "The memo also directed Martin to notify Johnson in writing no later than June 18, 2004, just two days later, if the union wished to discuss the matter."

DATED this 3rd day of October, 2006.

BOARD OF PERSONNEL APPEALS

By: _____
Jack Holstrom
Presiding Officer

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Board members Audet and Whiteman concur.
Alternate board member Dwyer concurs.
Board member Holstrom dissents.
Alternate board member Dudley dissents.

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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 hereby certify that a true and correct copy of this document was mailed to the following on the 4th day of October, 2006:

MICHAEL W. SEHESTEDT
DEPUTY COUNTY ATTORNEY
MISSOULA COUNTY
200 WEST BROADWAY
MISSOULA MT 59802

KARL ENGLUND
ATTORNEY AT LAW
PO BOX 8358
MISSOULA MT 59807-8358

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