STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 1-2007:

FRAZER EDUCATION ASSOCIATION, Affiliated with the MONTANA EDUCATION ASSOCIATION-MONTANA FEDERATION OF TEACHERS, NEA, AFL-CIO,	)	Case No. 135-2007
Complainant,	)	
vs.	)	
FRAZER BOARD OF TRUSTEES,	)	
Defendant.	)	

FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER

I. INTRODUCTION

On July 21, 2006, complainant Frazer Education Association (the association) filed an unfair labor charge with the Board of Personnel Appeals (the Board), alleging that defendant Frazer Board of Trustees (the district) implemented proposals in June 2006 without having bargained in good faith with the association, in violation of Mont. Code Ann. § 39-31-401(5). The district denied any unfair labor practice. On September 5, 2006, the Board's investigator found probable merit and referred the case to the Hearings Bureau for a hearing.

Hearing Officer Terry Spear convened the contested case hearing on November 30, 2006. Richard A. Larson represented the association. Michael Dahlem represented the district, and Rick D'Hooge attended as the district's designated representative. The post-hearing order of December 4, 2006, includes lists of the witnesses who testified and the exhibits offered, admitted, refused or withdrawn. The parties filed their respective post-hearing filings as scheduled and the Hearing Officer deemed this matter submitted for decision.

Based on the evidence adduced at hearing and the closing briefs of the parties, the following findings of fact, conclusions of law, and recommended order are made.

II. ISSUES

1. Did the district impose upon the association's members unilateral changes in wages, hours, fringe benefits and other conditions of employment, in the absence of true impasse, thereby refusing to bargain in good faith?

2. If the district committed the unfair labor practice described above, what remedy should be imposed?

III. FINDINGS OF FACT

1. The association is a labor organization that is and has been the exclusive bargaining representative of the district's teachers for more than 25 years.

2. The district is a public employer, and has recognized the association as the exclusive representative of its teachers.

3. On January 13, 2005, the parties signed a Collective Bargaining Agreement (CBA), covering the 2004-05 school year.

4. The parties negotiated for a successor agreement beginning approximately June 1, 2005. The association's bargaining team was led by one of the teachers employed by the district, Carroll "Jim" DeCoteau. The district hired Rick D'Hooge, a seasoned negotiator, to bargain on its behalf.

5. DeCoteau, the high school special education teacher, was in his fifth year at the school. This was his first teaching position. DeCoteau was a member of the association throughout his employment at the school. He volunteered to be the chair of the association's negotiating team for the 2005-2006 school year. He had been a member of the negotiating team the previous year. He had no training in labor negotiations. The available negotiator for the MEA-MFT, area Field Consultant Maggie Copeland, did not participate on behalf of the association in any of the negotiations.

6. D'Hooge had represented the district in negotiations with the association in some previous years. In one instance, D'Hooge represented the district for a period of nearly five years (from about 1990 to 1995) during which no CBA was agreed

upon by the parties. D'Hooge had a wealth of experience in negotiating labor agreements.

7. There had been other periods during which parties had maintained a working relationship without a current CBA. In all such periods, the parties adhered to provisions of their last effective agreement and continued to negotiate. Before 2006, the district had never declared impasse or implemented proposals unilaterally.

8. The district made its first bargaining proposal on June 1, 2005. Each district proposal, including that initial proposal, contained multiple proposed changes to the existing CBA. The district proposed changes to the CBA that would increase its power (a) to assign, direct and evaluate teachers; (b) to make retention and termination decisions; and (c) to increase the salary of the lower-paid junior teachers. Two representative examples were a change to the grievance provision to conform it to an interpretation which an arbitrator had previously rejected as the meaning (advocated by the district in the arbitration) of the current provision and a change to rights of nontenured teachers from the current CBA rights to the (more restrictive) statutorily required rights.

9. The association made its first bargaining proposal on July 6, 2005. Its proposals likewise contained multiple proposed changes to the existing CBA. The association proposed changes that would expand health insurance coverage, increase leave time and provide pay increases.

10. The district superintendent at the time of the negotiations, Richard Whitesell, or the school principal (once, in the superintendent's absence), took notes at bargaining sessions. The notes were transcribed and copies generally given to the association's bargaining team at or before the next session.

11. By mutual agreement, February 22, 2006, was the deadline for either party to present new proposals. On that date, the "table was closed to" new proposals. The last new proposals were brought to the table by the association.

12. As negotiations progressed, the parties reached agreements on some proposals, and were unable to agree or to compromise on others. Some of the proposals about which there was disagreement were withdrawn. Others were reproposed for subsequent bargaining. The parties continued to negotiate, exchanging written proposals and responses to the other party's proposals as well as meeting at negotiating sessions.

13. As the parties identified specific proposals still on the table as to which neither side was changing its position, the parties used terms such as "impasse," "dug in," "stuck," "deadlock," "no flexibility," "no movement," "holding strong," "hard line," and "loggerheads" to describe the state of those negotiations. These were district proposals involving changes to provisions of the CBA that had worked well for the association. The association repeatedly refused district proposals to change these provisions, and the district did not withdraw those proposals.

14. DeCoteau regularly met with members of the association to present the district's latest proposals and solicit feedback. The association members felt that the district kept reproposing the same items that the association had already rejected, while adding new items. DeCoteau continued to reject the items his members had previously rejected. He told D'Hooge that the association was "not budging" in response to the district "throwing the same thing back to us over and over again."

15. At the May 23, 2006, bargaining session, DeCoteau, untrained as a negotiator, reiterated to D'Hooge that there was no change in the association's position on any of the specific district proposals previously rejected. DeCoteau believed that the bargaining process was flexible and that the parties would continue to discuss both association and district proposals, even after he indicated that the association was rejecting and would continue to reject the specific district proposals.

16. D'Hooge, with extensive experience in all phases of public sector labor relations, suggested during the May 23, 2006, bargaining that the district might impose a contract upon reaching impasse. D'Hooge did not characterize the district's renewed proffer of the specific district proposals as a "last, best and final offer," but nonetheless, at the May 23, 2006, bargaining session the district did tell the association that it might take unilateral action regarding the specific proposals. DeCoteau responded to D'Hooge that the association was not changing its position on specific district proposals.

17. By a letter dated June 2, 2006, Whitesell notified DeCoteau that the parties had reached a bargaining impasse on several specific district proposals: Articles 4.4 (requiring "just cause" for tenure teacher discipline); 7.1.1 (defining "grievance"); 7.2.4 (regarding the Association's right to submit grievances); 7.4 Step IIIA (arbitration procedure); 8.5 (evaluation conditions); 8.6 (number of evaluations); 8.7.1 (evaluation timeframe); 8.7.2 (evaluation timeframe); 8.9 (post-evaluation conference); 9.1 ("considerations prior to termination"); 9.2 (notice of non-tenure nonrenewal); 9.5 (notice of re-election); 10.1.2 (teacher assignments); 10.3 (transfers); 17.9 (leave approval or notification); 18.1 (salary schedule – but not proposed salary increases); and 20.3 (continuity of health insurance coverage).

18. Whitesell's June 2, 2006, letter advised the association that the district's Board of Trustees would be asked in their next meeting – on June 14, 2006 – to implement the district's proposals regarding the "impasse" articles. The letter closed by stating that the district was "not refusing to meet and bargain on all subjects of bargaining as required by law," noting that the parties "still have a bargaining session scheduled for ... June 13, 2006."

19. When she saw Whitesell's June 2, 2006, letter, Melanie Blount, the president of the association, contacted Copeland. Copeland faxed and mailed a letter to Whitesell on June 2, 2006. She stated that imposing proposals could be an unfair labor practice, and asked for copies of "bargaining minutes" and "board proposals." Copeland appreciated the seriousness of the district's declaration of impasse on the specific proposals and intent to impose those proposals. She wanted to prepare the association to address the specific proposals anew at the June 13, 2006, bargaining session, perhaps to undercut the basis for the declaration of impasse and avoid imposition of the specific proposals by the district.

20. By response dated June 7, 2006, Whitesell refused to provide the requested materials, because the association (DeCoteau) already had received them.

21. Copeland had tried unsuccessfully to get the material from the association. The school year was ending and association members were leaving for the summer.

22. On June 10, 2006, Copeland made a final effort to obtain the information from Whitesell, by a second faxed request. On June 12, 2006, Whitesell refused her request. Copeland did not attend the June 13, 2006, bargaining session. She eventually did receive (from the association) the information she had requested from the district, apparently before the June 13, 2006, bargaining session.

23. On June 14, 2006, the district's Board of Trustees adopted Whitesell's recommendation and implemented the specific proposals, effective August 1, 2006.

24. The parties continued to meet and negotiate both before and after the August 1, 2006, effective date of the district's action. Neither the district nor the association requested or otherwise invoked mediation at any point during negotiations. During bargaining sessions on June 28, July 11 and July 26, 2006, the parties did not reach agreement on any of the specific proposals the district was going to implement on August 1, 2006, nor have they since August 1, 2006.

25. The district also implemented the proposals on which the parties had reached agreement, resulting in some increases in salaries and benefits for the association's members during the pendency of the ongoing negotiations and this unfair labor practice charge.

26. During the course of these negotiations, the district has never refused to (a) meet; (b) reduce its proposals to writing; or (c) sign any tentative agreements. The district has not bargained to impasse on any subject of permissive bargaining nor made any illegal or regressive proposal.

27. The positions of the parties, with regard to the 17 specific proposals the district imposed on June 13, 2006, and implemented on August 1, 2006, were:

a. Prior Article 4.4: "No tenured teacher shall be disciplined, reprimanded, suspended, reduced in rank or compensation, adversely evaluated, transferred, dismissed, non-renewed, terminated, or otherwise deprived of any professional advantage without just cause."

District position: "Change to read in total: 'No tenured teacher shall be suspended without pay, reduced in rank or compensation, dismissed, non-renewed, or terminated without just cause.'"

Association position: "The FEA has not changed its position and rejects this proposal."

b. Prior Article 7.1.1: "A grievance is defined as claim based upon an event or condition which affects the condition or circumstances under which a teacher works, allegedly caused by misinterpretation or inadequate application or non-application of the terms of this negotiated agreement."

District position: "A grievance is defined as an alleged violation(s) of the terms of this negotiated agreement."

Association position: "The FEA has voted to keep as written in current contract."

c. Prior Article 7.2.4: "The Association on its own may continue and submit to arbitration any grievance filed and later dropped by a

grievant, provided that the grievance involves the application or interpretation of the Agreement."

> District position: "Change to read in total: 'The association on its own may continue and submit to arbitration any grievance filed and later dropped by a grievant, provided that the grievance involves an alleged violation of this Agreement.'"
>
> Association position: "The FEA has voted to keep as written in current contract."

d. Current Article 7.4 step III A, second and third sentences: "If the Association determines that the grievance involves the interpretation, meaning, or application of any provisions of this Agreement, it may, by written notice to the Board within fifteen (15) School days after receipt of the request from the aggrieved person, submit the grievance to binding arbitration. If any questions arise as to arbitrability, such questions will first be ruled upon by the arbitrator selected to hear the dispute."

> District position: "Change to read in total: 'If the Association determines that the grievance involves an alleged violation of any provisions of this Agreement, it may, by written notice to the Board within fifteen (15) School days after receipt of the request from the aggrieved person, submit the grievance to binding arbitration. If any question arises as to arbitrability, such questions will be submitted to the district court.'"
>
> Association position: "The FEA has voted to keep as written in current contract."

e. Prior Article 8.5: "<u>Conditions of Evaluation</u> Due consideration shall be given to any factors which may affect teaching performance including, but not limited to, class size, student ability level, or physical distractions. All evaluation shall be conducted openly. The use of covert surveillance shall be strictly prohibited."

> District position: "add to end, 'Any and all formal and informal observation and/or interactions may be noted on

any evaluation. Some evaluation items are subject to an on going and continue formal and/or informal observation and maybe noted on any evaluation.'"

Association position: "(5-22-06) The FEA has voted to keep as written in current contract. However, the FEA will agree to alter 8.1 (a) to reflect the needs of an ongoing evaluation. 'to assess the teacher's instructional, ongoing professional responsibilities, and ongoing interpersonal skills."

f. Prior Article 8.6: "Number of Evaluations Evaluation will continue regularly through the teacher's service. Non tenure teachers shall be evaluated at least twice yearly, the first formal evaluation to be completed by December 15, and the second no later than March 15. Both evaluations must occur in the same school year. Tenure teacher shall be evaluated formally at least once during each school year, this evaluation to be completed no later than March 15. Additional evaluations for any teacher may be conducted."

District position: "add to end, 'Failure by the District to meet the above listed evaluation deadline shall entitle a teacher and/or the Association to file a grievance. However, the failure to meet the above listed evaluation deadline may not be cited as a reason to grieve a non renewal decision unless the District fails to provide the missing evaluation(s) within fifteen (15) days after the date of the grievance.'"

Association position: "The FEA has voted to keep as written in current contract."

g. Prior Article 8.7.1: "First yearly formal evaluation: May occur only after written notification from the Administration to the teacher that such evaluation is to occur and no sooner than one P.I. and/or P.I.R. day following such notification; following notification and the one day interim, evaluation may occur at any time for the next seven (7) P.I. and/or P.I.R. days. . . ."

District position: "delete from first sentence '; following notification and the one day interim, evaluation may occur at any time for the next seven (7) P. I. and/or P.I.R. days.'"

Association position: "following notification and the one day interim, evaluation may occur at any time for the next 10 P. I. and/or P.I.R. days."

h. Prior Article 8.7.2: "Second yearly formal evaluation: May occur only after written notification from the Administration to the teacher that such evaluation is to occur and no sooner than one (1) P.I. and/or P.I.R. day following such notification; following this procedure, evaluation may occur at any time for the next ten (10) P.I. and/or P.I.R. days. . . ."

District position: "delete from first sentence '; following this procedure, evaluation may occur at any time for the next ten (10) P.I. and/or P.I.R. days.'"

Association position: "The FEA has voted to keep as written in current contract."

i. Prior Article 8.9 (second paragraph): "Should a teacher disagree with any portion of the evaluation, the teacher may, within five (5) P.I. and/or P.I.R. days of receipt of a copy of the evaluation, write and submit to the Administration rebuttal comments which must then be attached to the evaluation. . . ."

District position: "second paragraph, at end of first sentence add: 'This rebuttal shall be the only recourse an employee has to any and/or all judgments, statements and/or conclusions contained in the employee's evaluation.'"

Association position: "The FEA has voted to keep as written in current contract."

j. Prior Article 9.1: "Consideration Prior to Termination
Prerequisite to the consideration of termination of a teacher's services, the following steps will have been taken:
1. The teacher has been observed and written evaluation reports have been made in accordance with Article VIII of this Agreement.
2. These observations and evaluation reports have been made by appropriate evaluators who shared the reports with the teacher being evaluated. Every effort was made by the evaluator to point out specific weaknesses, if any existed, and to assist the teacher in overcoming such deficiencies. A report of such deficiencies shall follow the steps outlined in the evaluation procedure, as specified in Article VIII.
3. Any incident or situation that arose during the current School year, that could possibly be cited as reason for termination of a teacher's services was discussed promptly with the teacher."

District position: "change in total to read. 'The non-renewal of a tenured teacher contract. The non-renewal of a tenured teacher contract shall be as stated in State Law and the Teacher has all the rights under State Law, Section 20-4-204 MCA.'"

Association position: "The FEA has voted to keep as written in current contract."

k. Prior Article 9.2: "Notice of Non renewal (Non tenure)
1. The Board shall provide written notice to all non tenure teachers who have been re-elected by the first (1st) day of May. Any non tenure teacher who does not receive notice of re-election/termination shall be automatically re-elected for the ensuing school fiscal year. Any non tenure teacher who received notification of their re-election for the ensuing school fiscal year shall provide the Board with their written acceptance of the conditions of such re-election within (20) days after receipt of the notice of re-election. Failure to so notify the Board within twenty (20) days may be considered nonacceptance of the tendered position. The provisions of this section do not apply to

cases in which a non tenure teacher is terminated when the financial condition of the School District requires a reduction in the number of teachers employed and the reason for termination is to reduce the number of teachers employed.

2. When the Board notifies a non tenure teacher of termination, the teacher may within ten (10) days after receipt of such notice make a written request of the Board for a statement in writing of the reasons for termination of employment. Within ten (10) days after receipt of the request of the teacher the Board shall furnish such statement to the teacher.

3. Subject to the May 1 notification requirement, the trustees may non-renew the employment of a nontenure teacher with or without cause, in accordance with State Law.

4. Dismissal procedures during the school year will conform in all respects with the School Laws of the State of Montana. No dismissal for teacher inability due to incompetence will be made without a conference between the administrators, supervisors, and teacher, and an attempt made to correct such problems through a supervised plan of improvement."

District position: "change in total to read: '<u>The non-renewal of a non-tenured teacher contract.</u> The non-renewal of a non-tenured teacher contract shall be as stated in State Law and the Teacher has all rights under State Law, Section 20-4-206 MCA.'"

Association position: "The FEA has stated our position in our own 9.2 proposal." [See Exhibit 121.]

1. Prior Article 9.5: "Notification of re-election for all teachers shall be given on or before May 1 of each school year."

District position: "<u>Notice of re-election and acceptance for Tenured and non-tenure teachers.</u>" Change sentence to read 'Notification of non-renewal and/or re-election for all teachers shall be as stated in State Law. For all teachers,

the acceptance of any notice of re-election shall be as stated in State Law, Sections 20-4- 205 and/or 206 MCA.'"

Association position: "The FEA has voted to keep as written in current contract."

m. Prior Article 10.1.2: "All teachers shall be given written notice of their tentative schedules for the forthcoming year no later than the last day of instruction of the current school year. In the event that subsequent changes in such schedules are presented, all teachers affected shall be given reasonable notification of the proposed change and shall be consulted as to the nature and extent of the change."

District position: "[Tentative Schedule], change to read 'Elem class room teachers shall be given written notice of their tentative schedule for the forthcoming year no later than the last day of instruction of the current school year. In the event that subsequent changes in such schedule are presented, all teachers affected shall be given at least 7 calendar days notification.'"

Association position: "The FEA has voted to keep as written in current contract."

n. Prior Article 10.3: "Transfers
When transfers between buildings and changes in teaching discipline are necessitated by sound educations practices for the welfare of students, the following procedures shall be adhered to:
1. Information on proposed changes shall be made available to all teachers with sufficient details on job descriptions to allow qualified persons to volunteer for these changes.
2. All persons affected by changes as a result of administrative decision shall be invited to a meeting where the purpose, need, and job description shall be explained.

The persons in attendance shall be given the opportunity to record their preferences. The ultimate administrative decision shall give due regard to these stated preferences."

District position: "Delete. [Transfers]."

Association position: "The FEA has voted to keep as written in current contract."

o. Prior Article 17.9: "All requests for leave under this Article, excepting requests for sick leave, maternity leave, or bereavement leave are subject to the approval of the superintendent. In the event a teacher exercises his/her sick leave privileges, he/she shall give notice to the appropriate designated person on or before 7:00 A.M. of the first class day in which they exercise sick leave. In the event a teacher exercises maternity leave, the teacher shall notify the superintendent at least one (1) month before the anticipated commencement of such leave. In the event a teacher exercises bereavement leave, he/she shall notify the superintendent as soon as possible."

District position: "Change to read: 'All requests for leave under this Article are subject to the approval of the Teacher's immediate supervisor. In the event a teacher exercises his/her sick leave privileges, he/she shall give notice to the appropriate designated person on or before 7:00 A.M. of the first class day in which they exercise sick leave. In the event a teacher exercises maternity leave, the teacher shall notify the superintendent at least one (1) month before the anticipated commencement of such leave. In the event a teacher exercises bereavement leave, he/she shall notify the superintendent as soon as possible.'"

Association position: "The FEA has voted to keep as written in current contract."

p. Prior Article 18.1: "<u>Salary Schedule</u>
1. The salaries of teachers covered by this Agreement are set forth in Addendum B which is attached to and incorporated in this Agreement.

2. The salary schedule shall be effective for the school year 2004-05 and shall remain in effect thereafter for the life of this Agreement.
3. The salary schedule shall not reduce existing salaries at any level."

District position: "$25,000 year 1, $26,000 year 2, $26,910 year 3 at Attainment level 4. Change last sentence of Article 18.3.1 to read: 'The salary schedule is based on an MEA/MFT attainment level 4.'"

Association position: "FEA 6-13-06: Attainment level 5; 3 year contract; year 1 $25,000 base, year two $26,000 base; year 3 $27,000 base; Increase retroactive from July 1, 2005."

q. Prior Article 20.3: "Continuity of Coverage
All insurance coverage under this Article shall remain if [sic] force during the life of this Agreement and until a successor agreement has been ratified."

District position: "Delete. [Continuity of Coverage]"

Association position: "The FEA has voted to keep as written in current contract."

28. To summarize: on June 13, 2006, the association's position regarding 13 of the 17 specific proposals on which the district declared impasse was that it had voted to maintain the current language of the CBA regarding each such item. The association had offered counter-proposals on four items, which the district rejected, reoffering the original proposals.

IV. DISCUSSION[1]

Mont. Code Ann. § 39-31-305, provides that a public employer and an exclusive representative shall have the authority and the duty to bargain collectively in good faith. This duty requires both parties to:

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

> [M]eet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

Imposing unilateral changes in wages, hours, fringe benefits and other conditions of employment in the absence of true impasse constitutes a refusal to bargain in good faith. *NLRB v. Katz* (1962), 369 U.S. 736.[2]

The Montana Supreme Court has not defined "impasse,"[3] a word that is likewise not defined by statute. Although BOPA has not adopted a rule defining "impasse," it has defined the term in some of its contested case decisions. Citing the NLRB,[4] BOPA defined a bargaining impasse as a "deadlock reached by bargaining parties 'after good faith negotiations have exhausted the prospects of concluding an agreement.'" *Bigfork A. Ed. Assoc. v. Bd. of Flathead and Lake County S.D. No. 38* (1979), ULP No. 20-78. In applying the definition to determining whether there was a bona fide impasse that would permit the employer to implement a unilateral change in a mandatory subject of bargaining, BOPA considered the bargaining history, the good faith of the parties in negotiations, the length of those negotiations, the importance of the issue or issues as to which there was disagreement and the contemporaneous understanding of the parties as to the state of negotiations. *Bigfork A. Ed. Assoc.*[5]

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[2] When interpreting Montana public employee collective bargaining law, BOPA and the Montana Supreme Court apply federal court and NLRB precedent, as appropriate. ***See, e.g.,*** *Brinkman v. State* (1986), 224 Mont. 238, 729 P.2d 1301; *City of Great Falls v. Young (Young III)*, 211 Mont. 13, 686 P.2d 185 (1984); *Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals*, 195 Mont. 272, 635 P.2d 1310 (1981); ***and*** *State ex rel. Board of Personnel Appeals v. District Court*, 183 Mont. 223, 598 P.2d 1117 (1979).

[3] "Impasse" was discussed in an appeal involving UI benefits, addressing the "focal question" of "whether an impasse had been reached during the 1972 negotiations between the parties which would exclude the employees from unemployment compensation benefits," *Montana Ready Mixed Concrete Assoc. v. BOPA* (1977) 175 Mont. 143, 572 P.2d 915, 917. "We conclude that good faith negotiations between representatives of management and labor, where the facts show that the bargaining is in a fluid state and no impasse has occurred, gives neither party the right to declare a labor dispute." 572 P.2d ***at*** 918. This does not provide a working definition of "impasse."

[4] *Taft Broadcasting Co.* (1967), 163 NLRB 475, 478, ***pet. for rev. den. sub nom.*** *Am. Fed. of T. & R. Artists v. NLRB* (D.C. Cir. 1968).

[5] ***See also,*** *I.U.O.E. Local 400 and Teamsters Local No. 2 vs. Flathead County Commiss'rs* (1989), ULP Nos. 7-1989 and 9-1989.

Impasse exists when "the parties, despite the best of faith, are simply deadlocked." *Lab. H. & W. Trust v. Adv. Lightweight Concrete* (9th Cir. 1985), 779 F.2d 497, 500; ***cited with approval***, *Walnut Creek Honda Assoc. 2 v. NLRB* (9th Cir. 1996), 89 F.3d 645, 649 (emphasis added). Surface bargaining, "going through the motions" without any real intent to reach an agreement, negates good faith. ***See, e.g.***, *K Mart Corp. v. NLRB* (9th Cir. 1980), 626 F.2d 704, 706 ("[T]he bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition. .... As long as there are unions weak enough to be talked to death, there will be employers who are tempted to engage in the forms of collective bargaining without the substance.")

To bargain in good faith, a party is not required to agree to a proposal or to make a concession. *I.U.O.E. Local 400 vs. Flathead County Commissions* (1989), ULP Nos. 7-1989 and 9-1989 ("A hard bargaining position . . . in and of itself does not constitute an unfair labor practice"); *Kalispell P. P. Assoc. vs. City of Kalispell* (1978), ULP No. 27-1977 ("Not moving from a bargaining position, in itself, is not an unfair labor practice"). Whether a party has engaged in unlawful "surface bargaining" as opposed to lawful "hard bargaining" cannot be inferred from the position that the party has taken on a single bargainable issue or set of issues. *Horsehead Resource Development Co.* (1996), 321 NLRB 1404, 1416. The continued insistence of the district upon the 17 proposals eventually imposed after the declaration of impasse, on the facts in this record, was hard bargaining and does not alone establish the absence of good faith bargaining on the part of the district.

A party's failure to bargain in good faith is found when the "totality" of its bargaining conduct reveals an intention to frustrate or avoid reaching an agreement. *Soule Glass & Glazing Co. v. NLRB* (1st Cir. 1981), 652 F.2d 1055, 1103; *Greensboro News Co.* (1976), 222 NLRB 144, ***enf. per curium***, (4th Cir. 1977), 549 F.2d 308; ***and*** *Joy Silk Mills, Inc. v. NLRB*, (D.C. Cir. 1950), 185 F.2d 732, ***cert. den.***, (1951) 341 U.S. 914. The district's negotiator, D'Hooge, clearly bargained hard. He was adamant in seeking the changes embodied in the 17 specific proposals. The union was equally adamant in rejecting the 17 proposals, with very limited efforts to seek any compromise (as recounted in finding 25, subsections "e," "g," "k" and "p"). This failure to reach agreement, or make progress toward any agreement on these 17 proposals, continued for almost a year before declaration of impasse, while the parties made progress and even reached agreements on other proposals.

Refusal to furnish requested information is evidence of surface bargaining and an independent violation of the duty of a party to bargain in good faith. *Queen Mary Rest. Corp. v. NLRB* (9th Cir. 1977), 560 F.2d 403, 408 (unjustified four month

delay in providing the union with the employer's current health and welfare plan and five month delay in providing seniority information shows failure to bargain in good faith). The district did refuse to provide Copeland with copies of bargaining minutes and board proposals in May 2006. However, unlike the kind of information involved in *Queen Mary* and other cases[6], the district was not refusing to provide information the association needed to bargain – instead, the district was refusing to provide additional copies of information already provided to the association. This is not a sufficient basis for finding a breach of the duty to bargain in good faith.

An employer may declare impasse and impose some proposals while the parties continue to bargain regarding others. *Financial Employees Local 1182 v. NLRB* (1984), 738 F.2d 1038; *Taft Broadcasting*, ***op. cit.***; *Dallas G. D. W. & H. v. NLRB* (D.C. Cir. 1966), 355 F.2d 842, 845. The district did so, and that does not indicate a lack of good faith bargaining.

Disagreement between the parties about whether impasse exists does not prove the absence of impasse. A mere offer to hold further meetings, without indications of the concessions the party is willing to make, is not enough to defeat a declaration of impasse. *Truserv Corp. v. NLRB* (D.C. Cir. 2001), 254 F.3d 1105. Absent conduct demonstrating a willingness to compromise further, disagreement by one party to the negotiations about the existence of impasse does not disprove impasse.

When the association received written notice that the district was declaring impasse and intended to impose the 17 specific proposals the day after the next bargaining session, the association was taken by surprise. However, in the flurry of activity that followed, the association gave no meaningful indication that it wanted to propose other alternatives to the 17 specific proposals. After holding firm against the specific proposals during almost a year of bargaining, the association apparently wanted to continue bargaining on the specific proposals without changing its position that it, in essence, would never accept any of them and had no new alternative proposals. With neither party moving, the parties were at impasse.

BOPA should not weigh the advisability of the parties' proposals to determine if good faith bargaining occurred. *NLRB v. Tomco Communications* (9th Cir 1978), 567 F.2d 871, ***den. enf. to*** 229 NLRB 636. It is speculation, unsupported by substantial credible evidence, that D'Hooge and the district manipulated the association and its inexperienced and untrained negotiator into a seeming impasse, while engaging in surface bargaining. The bargaining history during these

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[6] *Emeryville Research Center v. NLRB* (9th Cir. 1971), 441 F.2d 880; *NLRB v. Acme Ind. Co.* (1967), 385 U.S. 432; *NLRB v. Truitt Manufacturing Co.* (1956), 351 U.S. 149.

negotiations, the apparent good faith of the parties in their negotiations, the length of the negotiations and the importance of the issue or issues as to which there was disagreement all support the district's declaration of impasse. The absence of mutual contemporaneous understanding of the parties as to the status of the negotiations, until May 13, 2006, is not enough to support a determination that the district was pretending to negotiate while making a record to allow it to declare impasse. The district was entitled to declare impasse and impose the specific conditions.

V. CONCLUSIONS OF LAW

1. BOPA has jurisdiction over this case. Mont. Code Ann. §§ 39-31-405 and 39-31-406.

2. When the district declared impasse and when the district imposed the 17 specific proposals as to which it had declared impasse, neither the district nor the association indicated any willingness to make concessions of substance regarding any of the 17 conditions. The parties had reached impasse on the 17 specific proposals.

3. The district did not commit an unfair labor practice when it declared impasse and subsequently imposed the 17 specific proposals.

VI. RECOMMENDED ORDER

The Frazer Education Association, affiliated with the Montana Education Association-Montana Federation of Teachers, NEA, AFL-CIO, failed to prove that the Frazer Board of Trustees committed an unfair labor practice when it declared impasse on 17 specific collective bargaining proposals and subsequently imposed those proposals upon the association. The Board of Personnel Appeals dismisses the association's complaint.

DATED this 9th day of May, 2007.

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. 24.26.215 within twenty (20) days after the day the decision of the hearing officer 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 shall be mailed to:

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

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

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:

Richard Larson
Attorney at Law
P.O. Box 1152
Helena, MT 59624-1152

Michael Dahlem
Attorney at Law
851 South Kihei Road B-206
Kihei, HI 96753

DATED this 9th day of May, 2007.

Sandy Duncan

FRAZER.FOF.TSD

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

RECEIVED
HEARINGS BUREAU

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 1-2007:

FRAZER EDUCATION ASSOCIATION, MEA-MFT, Complainant - vs - FRAZER BOARD OF TRUSTEES, Defendant.	)	REMAND ORDER

* *

The above-captioned matter came before the Board of Personnel Appeals (Board) on July 26, 2007. The matter was before the Board for consideration of the Exceptions filed by the Complainant to the Findings of Fact, Conclusions of Law and Recommended Order issued by Terry Spear, Hearing Officer, dated May 9, 2007.

Richard Larson, attorney for the Complainant, appeared in person before the Board and Michael Dahlem, attorney for the Defendant, presented oral argument via telephone conference call.

In the matter at bar, the Frazer Board of Trustees declared impasse and implemented provisions of a collective bargaining agreement. The Association argued that Section 39-71-307, MCA, requires mediation before either party to negotiations over a collective bargaining agreement can declare impasse. The Association noted that in the Board's decision in Columbia Falls Education Association v. Columbia Falls School District No. 6 (1978), ULP No. 25-1976, the Board had adopted a sixth test for determining whether parties are at an impasse, that is whether mediation has taken place. The District first responded that the Association's argument was untimely in that it had not been raised at the Hearing. The District then argued that in the several impasse cases the Board had decided since the Columbia Falls case, the Board had never formally adopted the mediation test, and had instead relied on the five-part test for determining impasse set forth in the case of Bigfork Education Association v. Board of School District No. 28 (1979), ULP NO. 20-78. Finally, the District argued that mediation was not explicitly required by statute as a prerequisite to one party declaring impasse. Having considered these arguments and matters of record, the Board carefully weighed the options of remanding the issue or modifying the conclusions of law to specifically address the issue of whether mediation is required before a party can declare impasse. The Board determined that it would be appropriate for the parties to have the opportunity to fully brief the issue and allow the Hearing Officer to amend his conclusions of law and recommended order to address the mediation issue. Now therefore,

IT IS HEREBY ORDERED that the matter be remanded to the Hearing Officer to determine whether mediation must be requested pursuant to 39-31-307, MCA, before a party to collective bargaining agreement negotiations can declare an impasse.

DATED this 1st day of August, 2007.

BOARD OF PERSONNEL APPEALS

By: /S/
Jack Holstrom
Presiding Officer

Board members Johnson, Audet, Whiteman, Reardon and Chair Holstrom concur.

****

CERTIFICATE OF MAILING

I, John Andrew, do hereby certify that a true and correct copy of this document was mailed to the following on the 1st day of August, 2007:

RICHARD LARSON
ATTORNEY AT LAW
PO BOX 1152
HELENA MT 59624-1152

MICHAEL DAHLEM
ATTORNEY AT LAW
851 SOUTH KIHEI ROAD B-206
KIHEI HI 96753

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 1-2007:

FRAZER EDUCATION ASSOCIATION, Affiliated with the MONTANA EDUCATION ASSOCIATION-MONTANA FEDERATION OF TEACHERS, NEA, AFL-CIO,	)	Case No. 135-2007
Complainant,	)	
vs.	)	
FRAZER BOARD OF TRUSTEES,	)	
Defendant.	)	

ON REMAND: REVISED RECOMMENDED DECISION

I. REVISED INTRODUCTION

On July 21, 2006, complainant Frazer Education Association (the association) filed an unfair labor charge with the Board of Personnel Appeals (the Board), alleging that defendant Frazer Board of Trustees (the district) implemented proposals in June 2006 without having bargained in good faith with the association, in violation of Mont. Code Ann. § 39-31-401(5). The district denied any unfair labor practice. On September 5, 2006, the Board's investigator found probable merit and referred the case to the Hearings Bureau for a hearing.

Hearing Officer Terry Spear convened the contested case hearing on November 30, 2006. Richard A. Larson represented the association. Michael Dahlem represented the district, and Rick D'Hooge attended as the district's designated representative. The post-hearing order of December 4, 2006 includes lists of the witnesses who testified and the exhibits offered, admitted, refused or withdrawn. The parties filed their respective post-hearing filings as scheduled and the Hearing Officer deemed this matter submitted for decision.

After the issuance of the Hearing Officer's original proposed decision, the Board remanded for further consideration of whether the district could, under Montana law, declare impasse and implement its proposals in June 2006 without first requesting mediation pursuant to Mont. Code Ann. § 39-31-307. The parties agreed no further evidence was required and fully briefed this issue. The Hearing Officer, having fully considered the law and the parties' arguments, now concludes that he must hold that, as a matter of law, the district could not declare impasse and implement its proposals without first requesting mediation pursuant to the statute. Based on the evidence adduced at hearing, the closing briefs of the parties, the order of remand, the briefs submitted on remand and the response of the district to the notice of the proposed revised decision, the following findings of fact, revised conclusions of law, revised discussion and revised recommended order are made.

II. ISSUES

1. Did the district impose upon the association's members unilateral changes in wages, hours, fringe benefits and other conditions of employment, in the absence of true impasse, thereby refusing to bargain in good faith?

2. If the district committed the unfair labor practice described above, what remedy should be imposed?

III. FINDINGS OF FACT

1. The association is a labor organization that is and has been the exclusive bargaining representative of the district's teachers for more than 25 years.

2. The district is a public employer, and has recognized the association as the exclusive representative of its teachers.

3. On January 13, 2005, the parties signed a Collective Bargaining Agreement (CBA), covering the 2004-05 school year.

4. The parties negotiated for a successor agreement beginning approximately June 1, 2005. The association's bargaining team was led by one of the teachers employed by the district, Carroll "Jim" DeCoteau. The district hired Rick D'Hooge, a seasoned negotiator, to bargain on its behalf.

5. DeCoteau, the high school special education teacher, was in his fifth year at the school. This was his first teaching position. DeCoteau was a member of the

association throughout his employment at the school. He volunteered to be the chair of the association's negotiating team for the 2005-2006 school year. He had been a member of the negotiating team the previous year. He had no training in labor negotiations. The available negotiator for the MEA-MFT, area Field Consultant Maggie Copeland, did not participate on behalf of the association in any of the negotiations.

6. D'Hooge had represented the district in negotiations with the association in some previous years. In one instance, D'Hooge represented the district for a period of nearly five years (from about 1990 to 1995) during which no CBA was agreed upon by the parties. D'Hooge had a wealth of experience in negotiating labor agreements.

7. There had been other periods during which parties had maintained a working relationship without a current CBA. In all such periods, the parties adhered to provisions of their last effective agreement and continued to negotiate. Before 2006, the district had never declared impasse or implemented proposals unilaterally.

8. The district made its first bargaining proposal on June 1, 2005. Each district proposal, including that initial proposal, contained multiple proposed changes to the existing CBA. The district proposed changes to the CBA that would increase its power (a) to assign, direct and evaluate teachers; (b) to make retention and termination decisions; and (c) to increase the salary of the lower-paid junior teachers. Two representative examples were a change to the grievance provision to conform it to an interpretation which an arbitrator had previously rejected as the meaning (advocated by the district in the arbitration) of the current provision and a change to rights of nontenured teachers from the current CBA rights to the (more restrictive) statutorily required rights.

9. The association made its first bargaining proposal on July 6, 2005. Its proposals likewise contained multiple proposed changes to the existing CBA. The association proposed changes that would expand health insurance coverage, increase leave time and provide pay increases.

10. The district superintendent at the time of the negotiations, Richard Whitesell, or the school principal (once, in the superintendent's absence), took notes at bargaining sessions. The notes were transcribed and copies generally given to the association's bargaining team at or before the next session.

11. By mutual agreement, February 22, 2006 was the deadline for either party to present new proposals. On that date, the "table was closed to" new proposals. The last new proposals were brought to the table by the association.

12. As negotiations progressed, the parties reached agreements on some proposals, and were unable to agree or to compromise on others. Some of the proposals about which there was disagreement were withdrawn. Others were reproposed for subsequent bargaining. The parties continued to negotiate, exchanging written proposals and responses to the other party's proposals as well as meeting at negotiating sessions.

13. As the parties identified specific proposals still on the table as to which neither side was changing its position, the parties used terms such as "impasse," "dug in," "stuck," "deadlock," "no flexibility," "no movement," "holding strong," "hard line," and "loggerheads" to describe the state of those negotiations. These were district proposals involving changes to provisions of the CBA that had worked well for the association. The association repeatedly refused district proposals to change these provisions, and the district did not withdraw those proposals.

14. DeCoteau regularly met with members of the association to present the district's latest proposals and solicit feedback. The association members felt that the district kept reproposing the same items that the association had already rejected, while adding new items. DeCoteau continued to reject the items his members had previously rejected. He told D'Hooge that the association was "not budging" in response to the district "throwing the same thing back to us over and over again."

15. At the May 23, 2006 bargaining session, DeCoteau, untrained as a negotiator, reiterated to D'Hooge that there was no change in the association's position on any of the specific district proposals previously rejected. DeCoteau believed that the bargaining process was flexible and that the parties would continue to discuss both association and district proposals, even after he indicated that the association was rejecting and would continue to reject the specific district proposals.

16. D'Hooge, with extensive experience in all phases of public sector labor relations, suggested during the May 23, 2006 bargaining that the district might impose a contract upon reaching impasse. D'Hooge did not characterize the district's renewed proffer of the specific district proposals as a "last, best and final offer," but nonetheless, at the May 23, 2006 bargaining session the district did tell the association that it might take unilateral action regarding the specific proposals.

DeCoteau responded to D'Hooge that the association was not changing its position on specific district proposals.

17. By a letter dated June 2, 2006, Whitesell notified DeCoteau that the parties had reached a bargaining impasse on several specific district proposals: Articles 4.4 (requiring "just cause" for tenure teacher discipline); 7.1.1 (defining "grievance"); 7.2.4 (regarding the Association's right to submit grievances); 7.4 Step IIIA (arbitration procedure); 8.5 (evaluation conditions); 8.6 (number of evaluations); 8.7.1 (evaluation timeframe); 8.7.2 (evaluation timeframe); 8.9 (post-evaluation conference); 9.1 ("considerations prior to termination"); 9.2 (notice of non-tenure nonrenewal); 9.5 (notice of re-election); 10.1.2 (teacher assignments); 10.3 (transfers); 17.9 (leave approval or notification); 18.1 (salary schedule – but not proposed salary increases); and 20.3 (continuity of health insurance coverage).

18. Whitesell's June 2, 2006 letter advised the association that the district's Board of Trustees would be asked in their next meeting – on June 14, 2006 – to implement the district's proposals regarding the "impasse" articles. The letter closed by stating that the district was "not refusing to meet and bargain on all subjects of bargaining as required by law," noting that the parties "still have a bargaining session scheduled for ... June 13, 2006."

19. When she saw Whitesell's June 2, 2006 letter, Melanie Blount, the president of the association, contacted Copeland. Copeland faxed and mailed a letter to Whitesell on June 2, 2006. She stated that imposing proposals could be an unfair labor practice, and asked for copies of "bargaining minutes" and "board proposals." Copeland appreciated the seriousness of the district's declaration of impasse on the specific proposals and intent to impose those proposals. She wanted to prepare the association to address the specific proposals anew at the June 13, 2006 bargaining session, perhaps to undercut the basis for the declaration of impasse and avoid imposition of the specific proposals by the district.

20. By response dated June 7, 2006, Whitesell refused to provide the requested materials, because the association (DeCoteau) already had received them.

21. Copeland had tried unsuccessfully to get the materials from the association. The school year was ending and association members were leaving for the summer.

22. On June 10, 2006, Copeland made a final effort to obtain the information from Whitesell, by a second faxed request. On June 12, 2006, Whitesell refused her

request. Copeland did not attend the June 13, 2006 bargaining session. She eventually did receive (from the association) the information she had requested from the district, apparently before the June 13, 2006 bargaining session.

23. On June 14, 2006, the district's Board of Trustees adopted Whitesell's recommendation and implemented the specific proposals, effective August 1, 2006.

24. The parties continued to meet and negotiate both before and after the August 1, 2006 effective date of the district's action. Neither the district nor the association requested or otherwise invoked mediation at any point during negotiations. During bargaining sessions on June 28, July 11, and July 26, 2006, the parties did not reach agreement on any of the specific proposals the district was going to implement on August 1, 2006, nor have they since August 1, 2006.

25. The district also implemented the proposals on which the parties had reached agreement, resulting in some increases in salaries and benefits for the association's members during the pendency of the ongoing negotiations and this unfair labor practice charge.

26. During the course of these negotiations, the district has never refused to (a) meet; (b) reduce its proposals to writing; or (c) sign any tentative agreements. The district has not bargained to impasse on any subject of permissive bargaining nor made any illegal or regressive proposal.

27. The positions of the parties, with regard to the 17 specific proposals the district imposed on June 13, 2006, and implemented on August 1, 2006, were:

a. Prior Article 4.4: "No tenured teacher shall be disciplined, reprimanded, suspended, reduced in rank or compensation, adversely evaluated, transferred, dismissed, non-renewed, terminated, or otherwise deprived of any professional advantage without just cause."

District position: "Change to read in total: 'No tenured teacher shall be suspended without pay, reduced in rank or compensation, dismissed, non-renewed, or terminated without just cause.'"

Association position: "The FEA has not changed its position and rejects this proposal."

b. Prior Article 7.1.1: "A grievance is defined as claim based upon an event or condition which affects the condition or circumstances under which a teacher works, allegedly caused by misinterpretation or inadequate application or non-application of the terms of this negotiated agreement."

> District position: "A grievance is defined as an alleged violation(s) of the terms of this negotiated agreement."
>
> Association position: "The FEA has voted to keep as written in current contract."

c. Prior Article 7.2.4: "The Association on its own may continue and submit to arbitration any grievance filed and later dropped by a grievant, provided that the grievance involves the application or interpretation of the Agreement."

> District position: "Change to read in total: 'The association on its own may continue and submit to arbitration any grievance filed and later dropped by a grievant, provided that the grievance involves an alleged violation of this Agreement.'"
>
> Association position: "The FEA has voted to keep as written in current contract."

d. Current Article 7.4 step III A, second and third sentences: "If the Association determines that the grievance involves the interpretation, meaning, or application of any provisions of this Agreement, it may, by written notice to the Board within fifteen (15) School days after receipt of the request from the aggrieved person, submit the grievance to binding arbitration. If any questions arise as to arbitrability, such questions will first be ruled upon by the arbitrator selected to hear the dispute."

> District position: "Change to read in total: 'If the Association determines that the grievance involves an alleged violation of any provisions of this Agreement, it may, by written notice to the Board within fifteen (15) School days after receipt of the request from the aggrieved

person, submit the grievance to binding arbitration. If any question arises as to arbitrability, such questions will be submitted to the district court.'"

Association position: "The FEA has voted to keep as written in current contract."

e. Prior Article 8.5: "Conditions of Evaluation Due consideration shall be given to any factors which may affect teaching performance including, but not limited to, class size, student ability level, or physical distractions. All evaluation shall be conducted openly. The use of covert surveillance shall be strictly prohibited."

District position: "add to end, 'Any and all formal and informal observation and/or interactions may be noted on any evaluation. Some evaluation items are subject to an on going and continue formal and/or informal observation and maybe noted on any evaluation.'"

Association position: "(5-22-06) The FEA has voted to keep as written in current contract. However, the FEA will agree to alter 8.1 (a) to reflect the needs of an ongoing evaluation. 'to assess the teacher's instructional, ongoing professional responsibilities, and ongoing interpersonal skills."

f. Prior Article 8.6: "Number of Evaluations Evaluation will continue regularly through the teacher's service. Non tenure teachers shall be evaluated at least twice yearly, the first formal evaluation to be completed by December 15, and the second no later than March 15. Both evaluations must occur in the same school year. Tenure teacher shall be evaluated formally at least once during each school year, this evaluation to be completed no later than March 15. Additional evaluations for any teacher may be conducted."

District position: "add to end, 'Failure by the District to meet the above listed evaluation deadline shall entitle a teacher and/or the Association to file a grievance. However, the failure to meet the above listed evaluation deadline may not be cited as a reason to grieve a non renewal

decision unless the District fails to provide the missing evaluation(s) within fifteen (15) days after the date of the grievance.'"

Association position: "The FEA has voted to keep as written in current contract."

g. Prior Article 8.7.1: "First yearly formal evaluation: May occur only after written notification from the Administration to the teacher that such evaluation is to occur and no sooner than one P.I. and/or P.I.R. day following such notification; following notification and the one day interim, evaluation may occur at any time for the next seven (7) P.I. and/or P.I.R. days. . . ."

District position: "delete from first sentence '; following notification and the one day interim, evaluation may occur at any time for the next seven (7) P. I. and/or P.I.R. days.'"

Association position: "following notification and the one day interim, evaluation may occur at any time for the next 10 P. I. and/or P.I.R. days."

h. Prior Article 8.7.2: "Second yearly formal evaluation: May occur only after written notification from the Administration to the teacher that such evaluation is to occur and no sooner than one (1) P.I. and/or P.I.R. day following such notification; following this procedure, evaluation may occur at any time for the next ten (10) P.I. and/or P.I.R. days. . . ."

District position: "delete from first sentence '; following this procedure, evaluation may occur at any time for the next ten (10) P.I. and/or P.I.R. days.'"

Association position: "The FEA has voted to keep as written in current contract."

i. Prior Article 8.9 (second paragraph): "Should a teacher disagree with any portion of the evaluation, the teacher may, within five (5) P.I. and/or P.I.R. days of receipt of a copy of the evaluation, write and submit to the Administration rebuttal comments which must then be attached to the evaluation. . . ."

District position: "second paragraph, at end of first sentence add: 'This rebuttal shall be the only recourse an employee has to any and/or all judgments, statements and/or conclusions contained in the employee's evaluation.'"

Association position: "The FEA has voted to keep as written in current contract."

j. Prior Article 9.1: "Consideration Prior to Termination
Prerequisite to the consideration of termination of a teacher's services, the following steps will have been taken:
1. The teacher has been observed and written evaluation reports have been made in accordance with Article VIII of this Agreement.
2. These observations and evaluation reports have been made by appropriate evaluators who shared the reports with the teacher being evaluated. Every effort was made by the evaluator to point out specific weaknesses, if any existed, and to assist the teacher in overcoming such deficiencies. A report of such deficiencies shall follow the steps outlined in the evaluation procedure, as specified in Article VIII.
3. Any incident or situation that arose during the current School year, that could possibly be cited as reason for termination of a teacher's services was discussed promptly with the teacher."

District position: "change in total to read. 'The non-renewal of a tenured teacher contract. The non-renewal of a tenured teacher contract shall be as stated in State Law and the Teacher has all the rights under State Law, Section 20-4-204 MCA.'"

Association position: "The FEA has voted to keep as written in current contract."

k. Prior Article 9.2: "Notice of Non renewal (Non tenure)
1. The Board shall provide written notice to all non tenure teachers who have been re-elected by the first (1st) day of May. Any non tenure teacher who does not receive notice of re-election/termination shall be automatically re-elected for the ensuing school fiscal year. Any non tenure teacher who received notification of their re-election for the ensuing school fiscal year shall provide the Board with their written acceptance of the conditions of such re-election within (20) days after receipt of the notice of re-election. Failure to so notify the Board within twenty (20) days may be considered nonacceptance of the tendered position. The provisions of this section do not apply to cases in which a non tenure teacher is terminated when the financial condition of the School District requires a reduction in the number of teachers employed and the reason for termination is to reduce the number of teachers employed.
2. When the Board notifies a non tenure teacher of termination, the teacher may within ten (10) days after receipt of such notice make a written request of the Board for a statement in writing of the reasons for termination of employment. Within ten (10) days after receipt of the request of the teacher the Board shall furnish such statement to the teacher.
3. Subject to the May 1 notification requirement, the trustees may non-renew the employment of a nontenure teacher with or without cause, in accordance with State Law.
4. Dismissal procedures during the school year will conform in all respects with the School Laws of the State of Montana. No dismissal for teacher inability due to incompetence will be made without a conference between the administrators, supervisors, and teacher, and an attempt made to correct such problems through a supervised plan of improvement."

District position: "change in total to read: 'The non-renewal of a non-tenured teacher contract. The non-renewal of a non-tenured teacher contract shall be as stated in State Law and the Teacher has all rights under State Law, Section 20-4-206 MCA.'"

Association position: "The FEA has stated our position in our own 9.2 proposal." [See Exhibit 121.]

l. Prior Article 9.5: "Notification of re-election for all teachers shall be given on or before May 1 of each school year."

District position: "Notice of re-election and acceptance for Tenured and non-tenure teachers." Change sentence to read 'Notification of non-renewal and/or re-election for all teachers shall be as stated in State Law. For all teachers, the acceptance of any notice of re-election shall be as stated in State Law, Sections 20-4- 205 and/or 206 MCA.'"

Association position: "The FEA has voted to keep as written in current contract."

m. Prior Article 10.1.2: "All teachers shall be given written notice of their tentative schedules for the forthcoming year no later than the last day of instruction of the current school year. In the event that subsequent changes in such schedules are presented, all teachers affected shall be given reasonable notification of the proposed change and shall be consulted as to the nature and extent of the change."

District position: "[Tentative Schedule], change to read 'Elem class room teachers shall be given written notice of their tentative schedule for the forthcoming year no later than the last day of instruction of the current school year. In the event that subsequent changes in such schedule are presented, all teachers affected shall be given at least 7 calendar days notification.'"

Association position: "The FEA has voted to keep as written in current contract."

n. Prior Article 10.3: "Transfers
When transfers between buildings and changes in teaching discipline are necessitated by sound educations practices for the welfare of students, the following procedures shall be adhered to:
1. Information on proposed changes shall be made available to all teachers with sufficient details on job descriptions to allow qualified persons to volunteer for these changes.
2. All persons affected by changes as a result of administrative decision shall be invited to a meeting where the purpose, need, and job description shall be explained. The persons in attendance shall be given the opportunity to record their preferences. The ultimate administrative decision shall give due regard to these stated preferences."

District position: "Delete. [Transfers]."

Association position: "The FEA has voted to keep as written in current contract."

o. Prior Article 17.9: "All requests for leave under this Article, excepting requests for sick leave, maternity leave, or bereavement leave are subject to the approval of the superintendent. In the event a teacher exercises his/her sick leave privileges, he/she shall give notice to the appropriate designated person on or before 7:00 A.M. of the first class day in which they exercise sick leave. In the event a teacher exercises maternity leave, the teacher shall notify the superintendent at least one (1) month before the anticipated commencement of such leave. In the event a teacher exercises bereavement leave, he/she shall notify the superintendent as soon as possible."

District position: "Change to read: 'All requests for leave under this Article are subject to the approval of the Teacher's immediate supervisor. In the event a teacher

exercises his/her sick leave privileges, he/she shall give notice to the appropriate designated person on or before 7:00 A.M. of the first class day in which they exercise sick leave. In the event a teacher exercises maternity leave, the teacher shall notify the superintendent at least one (1) month before the anticipated commencement of such leave. In the event a teacher exercises bereavement leave, he/she shall notify the superintendent as soon as possible.'"

Association position: "The FEA has voted to keep as written in current contract."

p. Prior Article 18.1: "Salary Schedule
1. The salaries of teachers covered by this Agreement are set forth in Addendum B which is attached to and incorporated in this Agreement.
2. The salary schedule shall be effective for the school year 2004-05 and shall remain in effect thereafter for the life of this Agreement.
3. The salary schedule shall not reduce existing salaries at any level."

District position: "$25,000 year 1, $26,000 year 2, $26,910 year 3 at Attainment level 4. Change last sentence of Article 18.3.1 to read: 'The salary schedule is based on an MEA/MFT attainment level 4.'"

Association position: "FEA 6-13-06: Attainment level 5; 3 year contract; year 1 $25,000 base, year two $26,000 base; year 3 $27,000 base; Increase retroactive from July 1, 2005."

q. Prior Article 20.3: "Continuity of Coverage
All insurance coverage under this Article shall remain if [sic] force during the life of this Agreement and until a successor agreement has been ratified."

District position: "Delete. [Continuity of Coverage]"

Association position: "The FEA has voted to keep as written in current contract."

28. To summarize: on June 13, 2006, the association's position regarding 13 of the 17 specific proposals on which the district declared impasse was that it had voted to maintain the current language of the CBA regarding each such item. The association had offered counter-proposals on four items, which the district rejected, reoffering the original proposals.

IV. REVISED DISCUSSION[1]

Mont. Code Ann. § 39-31-305 provides that a public employer and an exclusive representative shall have the authority and the duty to bargain collectively in good faith. This duty requires both parties to:

> [M]eet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

Imposing unilateral changes in wages, hours, fringe benefits and other conditions of employment in the absence of true impasse constitutes a refusal to bargain in good faith. *NLRB v. Katz* (1962), 369 U.S. 736.[2]

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

[2] When interpreting Montana public employee collective bargaining law, BOPA and the Montana Supreme Court apply federal court and NLRB precedent, as appropriate. ***See, e.g.,*** *Brinkman v. State* (1986), 224 Mont. 238, 729 P.2d 1301; *City of Great Falls v. Young (Young III)*, 211 Mont. 13, 686 P.2d 185 (1984); *Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals*, 195 Mont. 272, 635 P.2d 1310 (1981); ***and*** *State ex rel. Board of Personnel Appeals v. District Court*, 183 Mont. 223, 598 P.2d 1117 (1979).

The Montana Supreme Court has not defined "impasse,"[3] a word that is likewise not defined by statute. Although BOPA has not adopted a rule defining "impasse," it has defined the term in some of its contested case decisions. Citing the NLRB,[4] BOPA defined a bargaining impasse as a "deadlock reached by bargaining parties 'after good faith negotiations have exhausted the prospects of concluding an agreement.'" *Bigfork A. Ed. Assoc. v. Bd. of Flathead and Lake County S.D. No. 38* (1979), ULP No. 20-78. In applying the definition to determining whether there was a bona fide impasse that would permit the employer to implement a unilateral change in a mandatory subject of bargaining, BOPA considered the bargaining history, the good faith of the parties in negotiations, the length of those negotiations, the importance of the issue or issues as to which there was disagreement and the contemporaneous understanding of the parties as to the state of negotiations. *Bigfork A. Ed. Assoc.*[5]

Impasse exists when "the parties, <u>despite the best of faith</u>, are simply deadlocked." *Lab. H. & W. Trust v. Adv. Lightweight Concrete* (9th Cir. 1985), 779 F.2d 497, 500 ; ***cited with approval***, *Walnut Creek Honda Assoc. 2 v. NLRB* (9th Cir. 1996), 89 F.3d 645, 649 (emphasis added). Surface bargaining, "going through the motions" without any real intent to reach an agreement, negates good faith. ***See, e.g.***, *K Mart Corp. v. NLRB* (9th Cir. 1980), 626 F.2d 704, 706 ("[T]he bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition. .... As long as there are unions weak enough to be talked to death, there will be employers who are tempted to engage in the forms of collective bargaining without the substance.")

To bargain in good faith, a party is not required to agree to a proposal or to make a concession. *I.U.O.E. Local 400 vs. Flathead County Commissions* (1989), ULP Nos. 7-1989 and 9-1989 ("A hard bargaining position . . . in and of itself does not constitute an unfair labor practice"); *Kalispell P. P. Assoc. vs. City of Kalispell*

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[3] "Impasse" was discussed in an appeal involving UI benefits, addressing the "focal question" of "whether an impasse had been reached during the 1972 negotiations between the parties which would exclude the employees from unemployment compensation benefits," *Montana Ready Mixed Concrete Assoc. v. BOPA* (1977) 175 Mont. 143, 572 P.2d 915, 917. "We conclude that good faith negotiations between representatives of management and labor, where the facts show that the bargaining is in a fluid state and no impasse has occurred, gives neither party the right to declare a labor dispute." 572 P.2d ***at*** 918. This does not provide a working definition of "impasse."

[4] *Taft Broadcasting Co.* (1967), 163 NLRB 475, 478, ***pet. for rev. den. sub nom.*** *Am. Fed. of T. & R. Artists v. NLRB* (D.C. Cir. 1968).

[5] ***See also***, *I.U.O.E. Local 400 and Teamsters Local No. 2 vs. Flathead County Commiss'rs* (1989), ULP Nos. 7-1989 and 9-1989.

(1978), ULP No. 27-1977 ("Not moving from a bargaining position, in itself, is not an unfair labor practice"). Whether a party has engaged in unlawful "surface bargaining" as opposed to lawful "hard bargaining" cannot be inferred from the position that the party has taken on a single bargainable issue or set of issues. *Horsehead Resource Development Co.* (1996), 321 NLRB 1404, 1416. The continued insistence of the district upon the 17 proposals eventually imposed after the declaration of impasse, on the facts in this record, was hard bargaining and does not alone establish the absence of good faith bargaining on the part of the district.

A party's failure to bargain in good faith is found when the "totality" of its bargaining conduct reveals an intention to frustrate or avoid reaching an agreement. *Soule Glass & Glazing Co. v. NLRB* (1st Cir. 1981), 652 F.2d 1055, 1103; *Greensboro News Co.* (1976), 222 NLRB 144, ***enf. per curium***, (4th Cir. 1977), 549 F.2d 308; ***and Joy Silk Mills, Inc. v. NLRB***, (D.C. Cir. 1950), 185 F.2d 732, ***cert. den.***, (1951) 341 U.S. 914. The district's negotiator, D'Hooge, clearly bargained hard. He was adamant in seeking the changes embodied in the 17 specific proposals. The union was equally adamant in rejecting the 17 proposals, with very limited efforts to seek any compromise (as recounted in finding 27, subsections "e," "g," "k" and "p.") This failure to reach agreement, or make progress toward any agreement on these 17 proposals, continued for almost a year before declaration of impasse, while the parties made progress and even reached agreements on other proposals.

Refusal to furnish requested information is evidence of surface bargaining and an independent violation of the duty of a party to collective bargaining to bargain in good faith. *Queen Mary Rest. Corp. v. NLRB* (9th Cir. 1977), 560 F.2d 403, 408 (unjustified four month delay in providing the union with the employer's current health and welfare plan and five month delay in providing seniority information shows failure to bargain in good faith). The district did refuse to provide Copeland with copies of bargaining minutes and board proposals in May 2006. However, unlike the kind of information involved in *Queen Mary* and other cases[6], the district was not refusing to provide information the assocation needed to bargain – instead, the district was refusing to provide additional copies of information already provided to the association. This is not a sufficient basis for finding a breach of the duty to bargain in good faith.

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[6] *Emeryville Research Center v. NLRB* (9th Cir. 1971), 441 F.2d 880; *NLRB v. Acme Ind. Co.* (1967), 385 U.S. 432; *NLRB v. Truitt Manufacturing Co.* (1956), 351 U.S. 149.

An employer may declare impasse and impose some proposals while the parties continue to bargain regarding others. *Financial Employees Local 1182 v. NLRB* (1984), 738 F.2d 1038; *Taft Broadcasting*, ***op. cit.***; *Dallas G. D. W. & H. v. NLRB* (D.C. Cir. 1966), 355 F.2d 842, 845. The district did so, and that does not indicate a lack of good faith bargaining.

Disagreement between the parties about whether impasse exists does not prove the absence of impasse. A mere offer to hold further meetings, without indications of the concessions the party is willing to make, is not enough to defeat a declaration of impasse. *Truserv Corp. v. NLRB* (D.C. Cir. 2001), 254 F.3d 1105. Absent conduct demonstrating a willingness to compromise further, disagreement by one party to the negotiations about the existence of impasse does not disprove impasse.

BOPA should not weigh the advisability of the parties' proposals to determine if good faith bargaining occurred. *NLRB v. Tomco Communications* (9th Cir 1978), 567 F.2d 871, ***den. enf. to*** 229 NLRB 636. It is speculation, unsupported by substantial credible evidence, that D'Hooge and the district manipulated the association and its inexperienced and untrained negotiator into a seeming impasse, while engaging in surface bargaining. The bargaining history during these negotiations, the apparent good faith of the parties in their negotiations, the length of the negotiations and the importance of the issue or issues as to which there was disagreement all support the district's declaration of impasse. The absence of mutual contemporaneous understanding of the parties as to the status of the negotiations, until May 13, 2006, is not enough to support a determination that the district was pretending to negotiate while making a record to allow it to declare impasse. The district, pursuant to the five-part test adopted by the Board from the federal cases, would have been entitled to declare impasse and impose the specific conditions, but for a sixth condition now applicable to impasse declarations.

The Hearing Officer acts on behalf of the Board in hearing a contested case and presenting a proposed decision. Mont. Code Ann. § 39-31-406. In acting for the Board, the Hearing Officer is bound by the Board's rules.

In *Safeway, Inc. v. Montana Petroleum Release Compensation Board* (1997), 281 Mont. 189, 194, 931 P.2d 1327, 1330, the Montana Supreme Court noted that an agency's interpretation of a statute under its domain, embodied in a regulation adopted by that agency, is controlling (***quoting*** *Christenot v. State Dept. of Comm.* (1995), 272 Mont. 396, 401, 901 P.2d 545, 548). The Court went on to note that a district court must validate the regulation, or rule, if it is "consistent and not in conflict with the statute." ***Id., quoting*** Mont. Code Ann. § 2-4-305(6)(a). A district court may overrule and invalidate an administrative rule which is clearly shown to be

"out of harmony" with the applicable legislation" because it "adds requirements which are contrary to the statutory language or that it engrafts additional provisions not envisioned by the legislature." ***Id., quoting*** *Christenot* at 400, 931 P.2d at 548; ***which quotes*** *Board of Barbers v. Big Sky College, Etc.* (1981), 192 Mont. 159, 161, 626 P.2d 1269, 1270-71; **citing also** Mont. Code Ann. § 2-4-305(5) and (6).

A district court can decide the validity of the Board's existing interpretation of Mont. Code Ann. § 39-31-307, embodied in Admin. R. Mont. 24.26.695, as permissive rather than mandatory. The Board itself can repeal or amend the regulation. The Hearing Officer has no power to do anything except to apply the regulation as it exists. It expressly contemplates that parties are not required to seek mediation every time that a dispute remains after the parties have bargained for a reasonable time.

This interpretation of the statute, necessary in light of the Board's rule, does not resolve the question presented by this case. The Board, by its regulation, has decided that the law does not require the district to request mediation because a dispute still existed over the conditions of employment that the district continued to advance in the negotiations. On the other hand, the Board has also adopted a requirement that before declaring impasse a public employer covered by the Act must first request mediation. *Columbia Falls Ed. Assoc. v. Columbia Falls S.D. No. 6* (1978), ULP No. 25-1976 (consolidated with case nos. 26, 27 and 36-1976) (adopting the proposed decision that "another test" should be added to the same five-part test the Hearing Officer used in this case, regarding whether mediation or fact finding had been called). Although the Board had not cited this decision in some cases subsequent to *Columbia Falls*, it has done so in this present case. Consistent with *Columbia Falls*, to which the Board has directed the Hearing Officer, a public employer must request mediation before declaring impasse. Therefore, the district's imposition in this case of selected bargaining proposals without first requesting mediation violated Mont. Code Ann. § 39-31-401(5).

On remand, the Hearing Officer has no new evidence regarding this matter. The district suggested, in responding to the Hearing Officer's notice of intent to issue this decision, that the status quo to be restored should be the "last actual, peaceable, noncontested condition which preceded the pending controversy," in accord with existing case law. *Benefis Healthcare v. Great Falls Clinic, LLP*, ¶ 14, 2006 MT 254, 334 Mont. 86, 146 P.3d 714. The district has also argued persuasively that the association should be able to retain any part of the 17 imposed contract conditions that may benefit association members (citing Board and NLRB authority).

The district made the suggestions and arguments because, as its attorney pointed out, "the salary provided to each bargaining unit member under the imposed salary schedule during each of the past three years is greater than the salary the employee would have received if the district had complied with the salary schedule set forth in the 2004-05 contract." The original decision found that the district had imposed its proposed Article "18.1 (salary schedule – but **not** proposed salary increases)" [Finding of Fact No. 17, p. 4] and that the district had "also implemented the proposals on which the parties had reached agreement, resulting in some increases in salaries and benefits for the association's members during the pendency of the ongoing negotiations and this unfair labor practice charge" [Finding of Fact No. 25, p. 6]. Thus, the decision on remand will include recognition that the salary and benefit increases adopted or imposed by the district will remain in place and in effect unless and until the association files a timely objection to retention of these increases and the Board sustains the objection and modifies the decision as adopted to revert to the status quo ante regarding these increases.

V. REVISED CONCLUSIONS OF LAW

1. BOPA has jurisdiction over this case. Mont. Code Ann. §§ 39-31-405 and 39-31-406.

2. When the district declared impasse and imposed the 17 specific proposals as to which it had declared impasse, despite the fact that neither the district nor the association indicated any willingness to make concessions of substance regarding any of the 17 conditions, the district could not in good faith declare impasse without first requesting mediation. Mont. Code Ann. § 39-31-307.

3. The district committed an unfair labor practice when it declared impasse and imposed the 17 specific proposals. Mont. Code Ann. § 39-31-401(5).

4. Imposition of an order requiring the district to cease and desist from imposition of the 17 conditions and to restore the status quo ante[7], is appropriate, together with a requirement that the district post the notice in Appendix A. Mont. Code Ann. § 39-31-406(4).

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[7] Except that increases in salaries and benefits implemented by the district together with the imposition of the 17 conditions will remain in full force and effect unless the association files a timely objection with the Board to this aspect of the proposed decision, in which case the Board can either maintain the increases and benefits implemented by the district (by overruling the objection) or restore the prior salary and benefit structure (by sustaining the objection) and require negotiation from the prior structure, by modifying the proposed order accordingly.

VI. REVISED RECOMMENDED ORDER

The Frazer Board of Trustees is hereby ORDERED:

1. To cease immediately from continued imposition of the 17 conditions unilaterally imposed after its declaration of impasse, except to maintain increases in salaries and benefits for the association's members adopted during the pendency of the ongoing negotiations and this unfair labor practice charge;

2. To restore, with the exception noted in paragraph 1, the status quo ante regarding the 17 conditions unilaterally imposed, making any payments to the members of the Frazer Education Association, to which they are entitled by reason of restoration of the status quo ante;

3. 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 school 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; and

4. Immediately to negotiate regarding the 17 conditions unilaterally imposed in addition to any and all other unresolved conditions to a new collective bargaining agreement and to seek mediation before declaring impasse on any provisions in dispute.

DATED this 21st day of February, 2008.

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. 24.26.215 within twenty (20) days after the day the decision of the hearing officer 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 shall be mailed to:

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

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

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:

Richard Larson
Attorney at Law
P.O. Box 1152
Helena, MT 59624-1152

Michael Dahlem
Attorney at Law
10 Upper Kimo Drive
Kula, HI 96790

DATED this 21st day of February, 2008.

Sandy Duncan

FRAZER - REMAND.FOF.TSD

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 the Board of Trustees of this, the Frazer School District, has violated the Montana Collective Bargaining for Public Employees Act and has ordered us to post and abide by this notice.

1. Except for increases in salaries and benefits implemented together with the imposition of the 17 conditions unilaterally imposed by the district in June 2006, we are restoring the status quo by complying with the 17 conditions as they existed under the 2004-05 Collective Bargaining Agreement;

2. We are making any payments to the members of the Frazer Education Association, to which they are entitled by reason of restoration of the status quo ante;

3. We are immediately negotiating regarding the 17 conditions unilaterally imposed in addition to any and all other unresolved conditions to a new collective bargaining agreement;

4. Before we declare impasse on any provisions in dispute in bargaining, in addition to meeting the five-part test adopted by the Board from the federal cases, we will seek mediation regarding those provisions.

Dated this ___ day of _____, 2008.

FRAZER PUBLIC SCHOOLS

By: _____
Board Chair

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 1-2007 (135-2007):

FRAZER EDUCATION ASSOCIATION, MEA-MFT,	)	
Complainant	)	
- vs -	)	FINAL ORDER
FRAZER BOARD OF TRUSTEES,	)	
Defendant.	)	

The above-captioned matter came before the Board of Personnel Appeals (Board) on April 24, 2008. The matter was before the Board for consideration of the defendant's Exceptions to a Revised Recommended Order issued by Terry Spear, Hearing Officer, on February 21, 2008.

Richard Larson, attorney for the complainant, Frazer Education Association MEA-MFT (Association), appeared in person and Michael Dahlem, attorney for the defendant, Frazer Board of Trustees (District), presented oral argument via telephone conference call.

This matter originally came before the Board after the Association filed an unfair labor practice (ULP) charge against the District on July 21, 2006. The Association alleged that the District violated Section 39-31-401(5), MCA, when it failed to bargain in good faith after declaring impasse and implementing provisions of a collective bargaining agreement. Following a contested case hearing, the Hearing Officer (Terry Spear) issued Findings of Fact, Conclusions of Law, and Recommended Order. In this May 9, 2007 Recommended Order, Hearing Officer Spear concluded that the District did not commit an unfair labor practice and recommended dismissal of the complaint. The Association filed Exceptions with the Board.

Following oral argument on the Association's Exceptions, the Board remanded the matter back to the Hearing Officer to determine whether "mediation must be requested pursuant to Section 39-31-307, MCA, before a party to a collective bargaining agreement can declare an impasse." [1] A Revised Recommended Order was issued on February 21, 2008.

In the Revised Order, Hearing Officer Spear concluded that the Board had adopted a "sixth test" requirement in the Columbia Falls case back in 1978. [2] Columbia Falls Ed. Assoc. v. Columbia Falls S.D. No. 6 (1978), ULP No. 25-1976 (consolidated with Case Nos. 26, 27 and 36-1976). In the Columbia Falls case, the Board had analyzed the traditional five-part test to determine whether an impasse existed, but then stated that "another test" should be added. Id. at 16. Specifically, the Board considered whether mediation or fact-finding had been called. Id.

Given the express language in the Columbia Falls case, the Hearing Officer concluded that, in this case, the District could not in good faith have declared impasse without first requesting mediation. The District filed Exceptions with the Board.

In argument to the Board, the District asserted Exceptions that fall into three basic categories. First, the District argued that that the plain language of Section 39-31-307, MCA, does not require mediation prior to a declaration of impasse. Second, the District contended that the hearing officer misinterpreted the Board's decision in Columbia Falls, and then failed to properly apply the controlling precedent set forth in I.U.O.E Local 400 v. Flathead County Commission, ULP Nos. 7-1989 and 9-1989. Finally, the District argued that the Hearing Officer's interpretation of Section 39-31-307, MCA, and the Columbia Falls case inappropriately created a new obligation to request mediation prior to declaring impasse. It is the District's position that it would be "illegal" for the Board to retroactively apply this new interpretation to a complaint that had already been filed.

In response, the Association argued that the language of the Columbia Falls case is controlling and requires that there be a request for mediation prior to a declaration of impasse.

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[1] Section 39-31-307, MCA states: "If, after a reasonable period of negotiation over the terms of an agreement or upon expiration of an existing collective bargaining agreement, a dispute concerning the collective bargaining agreement exists between the public employer and a labor organization, the parties shall request mediation."

[2] Through case history a "five-part" test for impasse has been developed: (1) the bargaining history; (2) the good faith of the parties in negotiations; (3) the length of the negotiations...; (4) the importance of the issue as to which there is a disagreement...(5) the contemporaneous understanding of the parties as to the state of the negotiations. Columbia Falls, at 16 (citing Taft Broadcasting Co., 163 NLRB, No. 55, aff'd 395 F.2d 622.)

After careful and due consideration, the Board initially determined that the Hearing Officer erred in his conclusion that the Board of Labor Appeals had, in effect, adopted a "sixth test" in the Columbia Falls case for determining whether there was an impasse. Having rejected the legal conclusion of the Revised Order, the Board then reconsidered the Findings of Fact, Conclusions of Law, and Recommended Order issued by the Hearing Officer on May 9, 2007. Upon reconsideration, the Board affirmed this Recommended Order in full.

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1. IT IS HEREBY ORDERED that the Revised Recommended Order issued February 21, 2008, is rejected in its entirety.

2. IT IS FURTHER ORDERED the Findings of Fact, Conclusions of Law, and Recommended Order issued May 9, 2007, is affirmed.

The parties 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.

DATED this 10th day of ~~May~~ June, 2008.

BOARD OF PERSONNEL APPEALS

By: Alan Joscelyn
Alan Joscelyn
Presiding Officer

Board members: Johnson, Audet, Dudley, Reardon and Alternate Chair Joscelyn concur.

CERTIFICATE OF MAILING

I, Sonya McCormack, do hereby certify that a true and correct copy of this document was mailed to the following on the 11th day of June, 2008:

MICHAEL DAHLEM
ATTORNEY AT LAW
10 UPPER KIMO DR
KULA HI 96790

RICHARD LARSON
ATTORNEY AT LAW
PO BOX 1152
HELENA MT 59624-1152