

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE

<p><b>ALEX BULMAHN, MFPE</b> Claimant, And <b>DAVE WHITSELL, Superintendent / Noxon School District</b> Respondent.</p>	<p>Case No.: 2022DRS00121  <b>INVESTIGATIVE REPORT</b> <b>AND</b> <b>NOTICE OF INTENT TO DISMISS</b></p>
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**I. Introduction**

On June 13, 2022, Alex Bulmahn, Montana Federation of Public Employees (MFPE), filed an unfair labor practice complaint on behalf of Noxon Education Association (NEA) with the Board of Personnel Appeals, against Dave Whitsell, Superintendent of Noxon School District. The claim was filed pursuant to Montana Code Annotated, (MCA) Title 39 Chapter 31 Part 402. The charge alleges Mr. Whitsell committed an Unfair Labor Practice by direct dealing with a member of the bargaining unit with regard to salary.

Mr. Bulmahn indicates Mr. Whitsell negotiated a placement in the salary matrix that is inconsistent with the Collective Bargaining Agreement, Article 14.2, without consulting with NEA. The ULP alleges Shannon Mercer was placed at step 9 of the salary matrix upon hire with no prior teaching experience.

Elizabeth A. Kaleva, Kaleva Law Offices, representative for Dave Whitsell, Noxon Schools filed a timely response on behalf of the Noxon School district on July 11, 2022.

In their response, Mr. Whitsell admits that Mr. Mercer was offered and accepted a teaching contract with the Noxon School District for the 2021–2022 school year and was given 9 years of experience on the salary matrix schedule. They also insist the Board of Trustees held a special board meeting which was noticed properly and open to the public. They argue this notified the community and NEA that the board would consider a recommendation from Superintendent Whitesell to hire Mr. Mercer as the industrial Arts Teacher.

Dave Luckey was assigned by the Board to investigate the charge and has reviewed the information submitted by the parties and communicated with them, as necessary.

**II. Discussion and findings**

In the original Unfair Labor Charge, Alex Bulmahn identifies that while this incident occurred as part of the hiring process in August 2021, the NEA first became aware of the situation on April 20, 2022 as part of the collective bargaining process.

He provides Article 14.2 as the contractual component that Mr. Whitesell inconsistently negotiated when Mr. Mercer was placed at a step 9 of the salary matrix.

Article 14.2 provides the following:

14.2 *"Prior Experience: One year must equal one FTE (full time equivalent) teaching outside the Noxon system or six months FTE (full time equivalent) successful teaching within the system. Outside experience may be up to ten years."*

Noxon School's response substantiates Mr. Mercer was offered and accepted the contract as prepared by the District and In an attempt to justify Mr. Mercer's experience, they indicate he has a class 4 license which is also based on hours of experience. They further explain he has over 10,000 hours of practical experience which in their opinion, far exceeds 9 years of teaching experience.

Noxon Schools contends that Mr. Bulmahn's allegations do not meet the legal burden to demonstrate that the employer committed an unfair labor practice and provides the following law to further establish their position.

MCA § 39-31-401:

**Unfair labor practice of public employer.** *It is an unfair labor practice for a public employer to:*

- (1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201;*
- (2) dominate, interfere, or assist in the formation or administration of any labor organization. However, subject to rules adopted by the board under 39-31-104, an employer is not prohibited from permitting employees to confer with the employer during working hours without loss of time or pay.*
- (3) discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in any labor organization;*
- (4) discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter; or*
- (5) refuse to bargain collectively in good faith with an exclusive representative.*

In closing, they contend, Mr. Mercer brought over 10,000 hours of experience with him to the District, and it remains to be extremely difficult to hire industrial arts teachers in Noxon and elsewhere in Montana. They acknowledge a decision was made to give Mr. Mercer credit for experience but argue it was justified by a legitimate substantial business need. Further, they insist, the decision did not interfere with, restrain, or coerce employees in any protected activity and if the Union did not agree with the assessment of Mr. Mercer's experience level, it could have and should have filed a grievance using the Collective Bargaining Agreement (CBA), which defines a grievance as "a claim based on an alleged violation, misinterpretation or misapplication of any specific provision of the agreement."

This investigator is assigned by the board to review information provided by the party and question the parties when the facts are unclear. On August 2, 2022, this investigator contacted Mr. Bulmahn to question why a grievance was not filed in this case. Mr. Bulmahn indicated they believed that this was both a contractual issue and direct dealing with a member, so they were of the mind-set to file a grievance and a ULP in combination; however, they did not file a grievance because by the time the Union was made aware of the situation there was not a reasonable remedy within the terms of the CBA. Mr. Bulmahn stated; "the only remedies would have been to reduce the pay of the

employee, which would have a negative impact on a unit member, or to increase the pay of all employees below him up to his level, which the District could not afford."

Mr. Bulmahn went on to say "For the ULP we are looking for acknowledgement that the CBA was violated and an assurance that it will not happen again."

Based on this information, this investigator asked the parties if they would be willing to resolve the issue through an agreement. Both parties agreed to try to resolve the issue outside of the ULP process. Elizabeth A. Kaleva, later contacted this investigator and explained the board had no interest in resolving the issue.

In the initial request for assistance filed by Mr. Bulmahn, he identified the details of the charge as "Direct dealing with a member of the bargaining unit with regard to salary". Noxon School's response reveals Mr., Whitesell did not negotiate with Mr. Mercer directly and clarifies the negotiated agreement was present by the school board during the public meeting.

After review of the contract this investigator questions as to whether Mr. Mercer was officially a Union member during the specified time frame of the alleged negotiations. Article 1 "Recognition" 1.2 of the CBA provides the following:

**Appropriate Unit Definition:** *Members of this unit consist of all contracted teachers of the School District No. 10 to exclude these positions which are primarily administrative, janitors, cooks, secretaries, District clerks, bus drivers and any person hired temporarily for plant maintenance.*

If Mr. Mercer was not a signed, contracted teacher during the hiring process, it is unlikely he was an official member of NEA, at that time.

In the Collective Bargaining agreement Article 4 identifies Board's Rights, it provides the Board with the ability to hire and fire, as well as the right to determine policy and the affairs of the District providing it is within the limits of applicable laws and the terms of the agreement. Article 4 BOARD RIGHTS provides the following:

*"The district reserves all rights to determine policy and operate the affairs of the district within the limits of applicable laws and the terms of this agreement. Said rights shall include those provided in 39-31-303 M.C.A.:*

*1) direct employees; 2) hire, promote, transfer, assign and retain employees 3) relieve employees from duties because of lack of work or funds or under conditions where continuation of such work would be inefficient and unproductive..."*

If in fact, Mr. Mercer was not a member of NEA during the period of time the hiring process took place, this investigator finds they were within the rights defined by the CBA to work out the terms and hire Mr. Mercer.

Noxon School's response identifies Mr. Bulmahn did not file his Unfair Labor Practice charge within the six month timeline, and there is no evidence he is claiming that service in the armed forces prevented him or any member of the NEA to file this charge in a timely manner. MCA §39-31-404, Sates the following:

***"Sixth -month limitation on Unfair Labor Practice complaint—exception.*** *A notice of hearing may not be issued based upon any unfair labor practice more than 6 months before the filing f the charge with the board unless the person aggrieved was prevented from filing the charge by reason of services in the armed forces, in which event the 6month period must be computed from the day of discharge."*

Noxon School's indicates, based on this legal requirement, the charge should be dismissed, and this investigator must agree, sufficient evidence cannot be found to merit hearing.

In his statements, Mr. Bulmahn acknowledged the grievance procedure provided in the CBA as a possible process in this case and identifies Article 14.2, as the article in question. This article clearly basses prior experience on teaching experience in and outside the system (Noxon Schools). Noxon School's response also acknowledges the grievance procedure and indicates the Union has confused the ULP process with the grievance process. It identifies Mr. Mercers 10 years of experience equate to the contractual requirement of "teaching experience". However, it must be noted, although Mr. Mercer is to be commended for his 10 years of experience, his certification is awarded for his experience as a welder, not to be confused with experience awarded for being a certified teacher.

This investigator provided Article 4, "Boards Rights" as a determining factor in this Preliminary Decision, it provides the Board with the ability to hire and fire, as well as the right to determine policy and the affairs of the District providing it is within the limits of applicable laws and the terms of the agreement. Although evidence exists to conclude Noxon School has had the right to hire Mr. Mercer, evidence also exists to conclude they had the obligation to abide by the terms of the agreement.

Upon review of information provided by both parties, it is highly likely Mr. Bulhahm would have been successful in establishing a contractual infraction occurred. However, Mr. Bulmahn failed to file a grievance in a timely manner as provided in Article 7.3 A, of the CBA.

A. *"First Step: An attempt will be made to resolve any grievance in informal, verbal discussion between the complainant and his/ her immediate supervisor within 30 working days of the date of the incident giving rise to the grievance, or from the date the alleged violation should have been known."*

### III. Recommended Order

It is hereby recommended this Unfair Labor Practice charge be dismissed without merit.

Dated this 20th day of OCTOBER, 2022

Board of Personnel Appeals

By: Dave Luckey  
Dave Luckey  
Investigator

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## NOTICE

Pursuant to 39-31-405 (2), MCA, if a finding of no probable merit is made by an agent of the Board, it may be appealed to the Board of Personnel Appeals. The appeal must be in writing and must be made within 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the Board at;

Board of Personnel Appeals  
Attn: INVESTIGATOR'S NAME  
P.O. 201503  
Helena, MT 59620-1503.  
FAX: 406-444-4140  
Email: dlierdbopa@mt.gov

If an appeal is not filed by November 1, 2022 the decision to dismiss becomes a final order of the Board.

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## CERTIFICATE OF SERVICE

The undersigned does certify a true and correct copy of this document was served upon the following on the 20th day of October, 2022, postage paid and addressed as follows:

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