

BEFORE THE BOARD OF PERSONNEL APPEALS

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IN THE MATTER OF COMMITTEE FOR
FREEDOM OF DETERMINATION,
an unincorporated association,

Petitioner,
vs-

MONTANA PUBLIC EMPLOYEES ASSOCIATION and
THE MONTANA UNIVERSITY SYSTEM, BOARD OF
REGENTS,

Respondents.

) UM-5-1976.

) FINDINGS OF FACT
) CONCLUSIONS OF LAW AND
) RECOMMENDED ORDER.

* * * * *

On March 2, 1976, a petition for unit clarification and/or unit decertification was filed with this Board by the Committee for Freedom of Determination, an unincorporated association of University of Montana nonacademic staff members. The petition sought decertification of the Montana Public Employees Association, the present bargaining representative of the University of Montana nonacademic staff, so certified on June 26, 1974, by this Board. That certification was a result of two representation elections, one held on May 13, 1974, and a runoff election held on June 6, 1974.

The original petition, filed by the Petitioner was amended on motion of the petitioner, severing the alternative forms of relief requested, treating each count of the petition separately.

A hearing was held on April 6, 1976, concerning the first count, decertification. At the hearing the following seven stipulations were entered into by both parties:

1. That an order dated April 22, 1976, from the Chairman of the Board of Personnel Appeals did certify all eligible nonacademic employees of the University of Montana as a bargaining unit.
2. On May 13, 1974, an election was held by the Board of Personnel Appeals to determine the representative of that bargaining unit, or to determine if the unit wanted no representation.
3. A runoff election was required and, on June 6, 1974, the election was held. Out of 401 eligible voters, 107 cast their ballot for Montana Public Employees Association, 38 cast their ballot for no representation.
4. Prior to that election, nine (9) Notice of Election were posted on May 31, 1974, by Jesse K. Dove, Director of Personnel Services. These notices announced the runoff election and were posted in conformity with rule 24-3.8(10)-S8040 of the Board of Personnel Appeals.

1 5. On June 26, 1974, Montana Public Employees Association was certified
2 by the Board of Personnel Appeals as the bargaining representative of
the University of Montana nonacademic staff.

3 6. There is a contract presently in effect between the university system
4 nonacademic employees of the University of Montana, dated September 4, 1975.

5 7. The terms of the contract are that it shall be in full force and effect
6 from the date of July 1, 1975, to and including June 30, 1977.

7 From evidence and testimony presented at the hearing, the following are
8 my findings of facts aside from those facts stipulated to by counsel for both
9 parties:

10 1. In the first election 224 ballots were cast: 111 for MPEA, 48 for
11 AFSCME and 65 for No Representation.

12 2. In addition to the nine (9) posted notices posted in compliance with
13 the Board's rules, the University Personnel Services sent a letter concerning
14 the first election through campus mail addressed to individuals. That letter
15 stated the date of the election, the ramifications of the election, and
16 directed any questions concerning the election to the Director or Assistant
17 Director of Personnel Services at the University.

18 3. Montana Public Employees Association, in its election campaign sent
19 out notices of the first and runoff elections to members of the bargaining
20 unit, announcing the dates of the elections. It is, however, undetermined
21 exactly which list MPEA used for its mailings and how extensive the mailings
22 were.

23 4. There was much confusion prevalent among the members of the bargaining
24 unit as to the significance and the resulting affect of the certification elec-
25 tion.

26 5. The petitioner does not desire to become the bargaining representative
27 to the unit of nonacademic staff members.

28 DISCUSSION

29 There were two significant issues argued:

30 1. Whether or not there was sufficient notice and information prior to
31 the certification election and the runoff election to guarantee the unit members
32 their requisite due process.

2. Whether or not this Board should waive its rule MAC 24-3.8(14)-S8090
(1)(b) and allow this premature decertification.

1 I will discuss each issue separately.

2 As to the first issue: At the hearing it was argued that the Board's
3 rule on notice was complied with, but for as large a bargaining unit as the
4 University of Montana nonacademic staff, the Board's notice requirement is not
5 sufficient. In addressing that argument all the notice that the members of
6 the unit received concerning the election must be taken into consideration.
7 My findings of fact show that as to the first election, not only were the
8 required notices posted, but in addition the University Personnel Services
9 sent through the campus mail an extensive letter giving the date of the
10 election and advising the employees involved where to call to get information.
11 MPEA sent out notices of the election to various employees. However, it
12 cannot be determined how extensive that mailing was or to whom the letters
13 were sent. In that election, 224 persons voted: 111 for MPEA, 48 for AFSCME,
14 and 65 for No Representation. There seems little doubt that the first elec-
15 tion was extensively noticed.

16 The petitioners, however, argue that they did not "have sufficient relev-
17 ant information relating to the consequences of the election to make any kind
18 of informed choice" which resulted in a denial of due process. It is, however,
19 as in the case of any election, the electorate's duty to become informed.
20 Ample opportunity was afforded every voter to call this Board, Personnel
21 Services of the University, AFSCME, or MPEA and have his questions answered.

22 The biggest complaint elicited from the witnesses and affidavits was
23 that the employees were unaware that an agency shop agreement would be ne-
24 gotiated. An agency shop agreement is not a mandatory clause for a labor
25 agreement and therefore giving notice of any such agreement would be speculative.
26 Furthermore, an election cannot be overturned because an agency shop agree-
27 ment is included in an agreement.

28 Petitioners argue that collective bargaining at the time of the election
29 was in such an embryonic stage which only added to the confusion. There is no
30 doubt that this election took place at the very beginning of collective
31 bargaining in the public sector.

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1 However, this Board is legislatively mandated by 59-1601 to remove the
2 recognized sources of strife and unrest in public labor relations. To attain
3 that goal this Board has established rules to allow for recognition of a
4 bargaining representative and rules to protect that representative. To waive
5 those rules for other than a substantial reason would in essence destroy the
6 purposes of having the rules. We cannot create a double standard for first-
7 time elections. We must place on all voters the duty to become informed.

8 A question still not resolved is whether or not there was sufficient
9 notice as to the runoff election. My findings show that the Board's rules
10 were complied with. There was, however, no mailing by the University Personnel
11 Services. MPEA sent out literature, but to whom and how extensive the mailing
12 was not determined.

13 Although I do conclude that this Board's rule for notice is sufficient
14 in most elections, I must conclude, however, that considering the size,
15 diversity, and the widespread locations on the campus of the unit members,
16 nine (9) notices posted in conspicuous places by itself would be questionable
17 notice. There was, however, notice from the previous elections that a runoff
18 election would be held. To obtain the specific date, voters were on notice
19 to watch for the posted notice or they could have called personnel or the
20 Board and requested that information.

21 Petitioners further argue that our rule requiring objections to an elec-
22 tion be made within five days of the election should not be a bar to this
23 challenge. Rule MAC 24-3.8(18)-S8260 provides that any objection to an elec-
24 tion must be made 5 working days after the tally of ballots. Again, this rule
25 serves the purpose of removing strife and unrest by making the election pro-
26 cess final and not subject to constant attack.

27 Petitioner's argue that the rule began to run only after discovery of
28 the wrong inflicted. The wrong inflicted was the alleged lack of the runoff
29 election notice. I conclude, however, that everyone was on notice that there
30 would be a runoff election. The announcement of the runoff election results
31 was when everyone should have been aware of the lack of notice. To attack
32 the election only after an agency shop clause is agreed to, 8 months later,
is totally unwarranted. And for this Board to allow the attack would result
in a breach of our legislative mandate to prevent strife and unrest in public
labor relations.

1 The last argument concerning this issue offered by Petitioner takes issue
2 with the date that the runoff election was held, June 6--the middle of final
3 week. Petitioners allege that the employee turnover was very large. Naturally
4 this allegation raised a point of concern with this hearing examiner. There-
5 fore Jesse Dove, Personnel Director, was specifically asked by myself at the
6 hearing what the staffing pattern during final week is like. His response
7 was that all positions had to be manned during final week, as with any other
8 week. Although Mr. Dove agreed that staff members are often busy this week,
9 he could not testify to a large turnover as alleged in Petitioners' brief.
10 There was no testimony offered which refuted Mr. Dove's testimony. Therefore,
11 we can find no merit to that argument.

12 The second issue to be decided concerns the contract bar and should MAC
13 24-3.8(14)-S8090(1)(b) be waived by this Board. That rule states:

14 "The petition must be filed not more than ninety (90) days
15 before, and not less than sixty (60) days before the
16 termination date of the previous collective bargaining
17 agreement, or upon the termination date thereof."

18 Again the purpose of the rule is to prevent strife and unrest by not making
19 the bargaining representative and the labor agreement subject to challenge
20 except on a very limited basis, thereby providing for stability and preventing
21 constant strife.

22 The Petitioners argue that the rule in question ought to be waived on the
23 theory of schism citing Hershey Chocolate Co. 42 LRRM 1460, a NLRB decision
24 discussing a five criteria test to establish schism. Although this Board is not
25 obligated to follow NLRB decisions, we oftentimes turn to them for example out
26 of respect for their vast experience in labor law.

27 The Hershey case states:

28 "The Board has held that a schism removing a contract as an elec-
29 tion bar exists where: (1) there is a basic intra-union conflict;
30 (2) as a result of this basic intra-union conflict, the employees
31 in the bargaining unit have taken action that has created such
32 confusion in the bargaining relation that stability can be restored
only by an election; (3) there has been an open meeting, with due
notice to members, for the purpose of considering disaffiliation;
(4) a disaffiliation vote is taken within a 'reasonable period'
of time the conflict arises; (5) the employers are faced with
conflicting representation claims."

1 The facts of this case show that we are faced with a widespread upheaval
2 as a result of an agency shop clause in a labor agreement. It no doubt came
3 as a shock to many employees that if they did not pay union fees they could
4 lose their positions. This, of course, made the employees look more closely
5 and take more seriously the collective bargaining aspect of their employment.
6 The result was the formation of the Committee for Freedom of Determination,
7 the Petitioners, whose goal is to decertify the union. The Petitioners do
8 not want to become the bargaining representative of the unit. The Petitioners
9 in fact want no part of any type of union activity.

10 With all that in mind we'll apply the 5 criteria test for schism as stated
11 in Hershey: There is no doubt that there is an intra-union conflict taking
12 place as required in item one. And there is also no doubt that a disaffilia-
13 tion meeting has taken place as well as a disaffiliation vote as required in
14 3 and 4. We cannot, however, find that criterion 2 exists; that is, confusion
15 resulting from this disaffiliation which can only be solved by an election.
16 Nor is there any confusion that MPEA is the only bargaining representative for
17 the unit, contrary to the requirement in criterion 5. The Petitioners are
18 not making the claim that they are the bargaining representative.

19 A schism deals with a group of employees within a unit, who because of
20 corruption of leaders, political affiliations of the leaders, or some other
21 major deficiency in the present leadership, disaffiliates with the present
22 bargaining representative and forms its own unit representative and demands
23 the employer deal with it. The result is confusion of with whom the employer
24 is to bargain with. The resulting disruption is so great, the only solution
25 is an election.

26 That is not at all what we are dealing with here. The petitioning em-
27 ployees are dissatisfied with the bargaining representative but have not dis-
28 affiliated with the bargaining representative, but only wish to get a chance
29 for a new election to vote the representative out. This amounts to a
30 "recall election" under the guise of an election challenge.

31 Our rules do not allow for a "recall election." A democratic election
32 for a bargaining unit must stand if it goes unchallenged within the five (5)

1 day period as required by our rules, until a proper decertification petition
2 can be brought not more than 90 days nor less than 60 days before the present
3 contract's termination date again. This is mandatory for stability.

4 It should be pointed out that stability in labor relations and prevention
5 of strife and unrest are not the only goals of our Board. We are not callous
6 to employees' desires as to representation. That is of paramount concern
7 to us. We cannot, however, lightly set aside an election result because of
8 a disagreement with the bargaining unit's representative. The vote of the
9 majority who participated in the election must also be protected.

10 For the above reasons the following are my Conclusions of Law:

- 11 1. The notices given for the elections concerned were adequate.
- 12 2. The Petitioners failed to timely challenge the election as required
13 by MAC 24-3.8(18)-S8260.
- 14 3. There has been no denial of due process or equal protection as
15 protected under the Federal and State Constitutions.
- 16 4. There has been no showing of schism by the Petitioners.
- 17 5. There has been no good cause shown why this Board should waive its
18 contract bar rule, MAC 24-3.8(14)-S8090(1)(b).

19 O R D E R

20 The petition by the Committee for Freedom of Determination for decert-
21 ification is dismissed.

22 Dated this 26th day of May, 1976.

23 BOARD OF PERSONNEL APPEALS

24 BY

Jerry L. Painter
25 Jerry L. Painter