

BEFORE THE BOARD OF PERSONNEL APPEALS

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, AFL-CIO,
Complainant,
-vs-
EMPLOYMENT SECURITY DIVISION, MONTANA
STATE DEPARTMENT OF LABOR AND INDUSTRY,
AND JESS C. FLETCHER, DEPUTY
ADMINISTRATOR AND BUREAU CHIEF,
Respondent.

ULP-9-1974
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

The above-entitled matter came on for hearing before the Board of Personnel Appeals in Helena, Montana on August 9, 1974 pursuant to a complaint filed by the Complainant in accordance with section 59-1607, R.C.M., 1947, MAC 24-3.8(26)-S8280 and 24-3.8(26)-S8260. Copies of the Complaint, the Respondent's Answer and the Notice of Hearing were duly served on both parties. The Complainant was represented by Donald R. Judge, Field Representative of the American Federation of State, County, and Municipal Employees, AFL-CIO, Helena, Montana. The Respondent was represented by Moody Brickett, Esq., Employment Security Division, Department of Labor and Industry, Helena, Montana.

Basically at issue here is whether the Respondent interfered with organizational rights guaranteed public employees by sending a letter to certain of its employees during an election campaign.

Upon the entire record in this case we make the following

FINDINGS OF FACT

1. The Employment Security Division consists of three bureaus. One of these bureaus, the Bureau of Employment Service, employs approximately three hundred people who are located in twenty-three local employment service offices throughout the State and at the administrative headquarters in Helena. Jess C. Fletcher is the Bureau Chief of the Bureau of Employment Service. (transcript, pages 21 and 22)
2. Fletcher sent a letter to each of twenty-three local employment service offices in his bureau on July 9, 1974. One of the employment service offices is located in Helena; the other twenty-two offices are located outside of Helena. The letter was addressed to "All Employment Service Personnel" and its subject was "2% Cost of Living Increase". The purpose of the letter, according to its author,

1 was to forewarn employment service personnel that their first check in the new
2 fiscal year would not reflect a two per cent cost of living pay increase granted
3 by the State Legislature, and to boost the morale of employees who were disappointed
4 with the rate of the pay increase. One of the paragraphs of the letter reads as
5 follows:

6 We have had a number of conversations with Tom Schneider,
7 the MPEA Director, regarding the possibility of court
8 action being instigated by MPEA in connection with the
9 2% restriction and the Attorney General's opinion. As
10 we understand it, the Association is exploring the
11 possibility of court action. However, in the meantime
12 we will all just have to deal with the daily cost of
13 living increases with the silly and ridiculous 2%
14 restriction on salary changes.

15 (Respondents' Exhibit A; transcript, pages 16, 17, 30, and 31)

16 The Complainant finds this paragraph offensive and charges that it interferes with
17 collective bargaining rights guaranteed public employees under the Public Employees
18 Collective Bargaining Act. Complainant contends that the paragraph reflected the
19 Complainants' favoritism toward Montana Public Employees Association and during
20 the election campaign it implied a "promise or benefits" if the employees voted
21 for MPEA; that is, that MPEA would take legal action on the two per cent cost of
22 living pay increase, while other unions such as the Complainant impliedly would
23 not. (Unfair Labor Practice Complaint and Complainants' August 9th Brief, page 2)

24 Donald Judge, Complainant's Representative at the hearing, testified in
25 answer to a Board member's question that the July 9th letter could not have in-
26 fluenced the actual outcome of the election. (transcript, page 41)

27 3. Tom Schneider, Executive Director of Montana Public Employees Association
28 had discussed HB 747, the Bill that granted state employees a two per cent cost
29 of living pay increase, with Jess Fletcher several times prior to the election.
30 Schneider advised Fletcher during these discussions that the Executive Board of
31 Montana Public Employees Association had decided to pursue legal action to deter-
32 mine whether the State Legislature had the right to circumvent existing state
salary plans by enacting HB 747. Schneider testified that MPEA had retained an
attorney to look into legal aspects relating to HB 747 and the reinstatement of
existing state salary plans. (transcript, pages 26 and 27)

4. The Board of Personnel Appeals conducted a representative election for

1 employees of the Employment Security Division during July, 1974. Employees at
2 the Helena central office and twenty-three employees eligible to vote at the
3 Helena Employment Services Field Office voted at the Highway Auditorium in Helena
4 on July 15, 1974. Employees at the twenty-two employment services field offices
5 located outside of Helena voted by mail ballot which had to be postmarked no later
6 than July 8, 1974. The mail ballots were held in a post office box until after
7 the balloting July 15th, at which time the mail ballots and the ballots cast in
8 the Highway Auditorium were combined and counted. The official results of the
9 election were as follows:

10	Montana Public Employees Association	193
11	American Federation of State, County, and Municipal Employees, AFL-CIO	39
12	Teamsters Union	10
13	No Representative	17
14	Invalid Votes	2
15	Challenged Ballots	1

16 (transcript, pages 16, 17, 18, and 41)
17

18 DISCUSSION

19 Section 3 of the Public Employees Collective Bargaining Act (Title 59,
20 Chapter 16, R.C.M., 1947) provides in part as follows:

21 Public employees shall have, and shall be protected in
22 the exercise of, the right of self-organization, to
form, join or assist any labor organization...

23 Section 5(1) (a) of the Act makes it an unfair labor practice for a public employer
24 to "interfere with, restrain, or coerce employees in the exercise of the rights
25 guaranteed in section 3." The Complainant contends that Fletcher's July 9th letter
26 interfered with Division employees's section 3 rights.¹ We believe certain

27 ¹We note that the Complainant contends that the offensive paragraph in
28 Fletcher's July 9th letter contains by implication a "promise or benefit" if employees
29 vote for Montana Public Employees Association. It is apparent that the Complainant
has relied on section 8(c) of the Federal Labor Management Relations Act which pro-
vides as follows:

30 The expressing of any views, argument, or opinion, or the dissemination
thereof, whether in written, printed, graphic, or visual form, shall
31 not constitute or be evidence of an unfair labor practice under any
of the provisions of this Act if such expression contains no threat
or reprisal or force or promise or benefit. 29 U.S. C. 5158(c) (Emphasis supplied)

32 While we often times look to the precedents of the National Labor Relations Board
for guidance, we must emphasize that their precedent is in no way binding upon us,
and since we do not have a provision similar to 8(c) in the Public Employees Collec-
tive Bargaining Act we are wary of the cases cited by the Complainant in his brief
(and the Respondent as well) which construe section 8(c).

1 statements, whether written or oral, made by an employer during an election
2 campaign could constitute sufficient interference to set aside the election. In
3 considering any particular case we must balance countervailing rights: The
4 right of employees to an untrammelled choice versus the employers's right to
5 freedom of speech.² We find it difficult, in this case, to find that Fletcher's
6 letter in any way affected the employees's section 3 rights. The offensive
7 paragraph in Fletcher's July 9th letter does not, if read literally, suggest
8 interference, coercion or restraint. Nor do the words take on any hint or veiled
9 suggestion of interference, coercion, or restraint--particularly when the letter
10 is placed in the setting in which it was written. There is no evidence of a back-
11 ground of general hostility towards the Complainant or any other labor organization
12 on the part of the Respondent. Quite to the contrary, the record is replete with
13 evidence which shows that the Respondent was impartial and made efforts to co-
14 operate with the labor organizations in their campaign activities. Moreover,
15 the paragraph is merely a true statement which was inserted in the letter to inform
16 employees of what type of activities were being undertaken to fight an unpopular
17 cost of living pay increase.

18 Most employees received the July 9th letter after they had voted since most
19 employment service employees are located out of Helena and had to have their mail
20 ballots postmarked no later than July 8th. The record shows that only twenty-
21 three employees received the letter prior to the time that they cast their ballot,
22 and there is no evidence whatsoever that their knowledge of the contents of the
23 letter in any way affected the election. In fact, Don Judge, the Complainant's
24 representative at the unfair labor practice hearing, admitted that the letter
25 could not have affected the final results of the election.

26 The most that could be found here is that the paragraph was a plug for
27 Montana Public Employees Association, and even if we so found, such conduct would
28 not warrant the setting aside of the election. While the Board firmly believes
29 that it has the responsibility of providing a proper atmosphere conducive to
30 allowing public employees to exercise their full and complete freedom of choice

31 ²The employer's right to freedom of speech is provided by the U. S.
32 Constitution, Amendment 1 and the Montana Constitution, Article II, Section 7.

1 in selecting a bargaining representative, we will not lightly set aside an
2 election conducted by secret ballot by the Board of Personnel Appeals. To do so
3 might upset the work routine of the public employer or upset stable management-
4 labor relations. Moreover, we recognize that election campaigns can be hotly
5 contested--although that does not seem to be the case here--and parties might
6 overstate their case, engage in name calling, or communicate half-truths, without
7 essentially impairing the proper atmosphere for an organizational campaign or
8 election. In a case, such as here, where the objectionable communication so
9 minimally affects the employees's section 3 rights, we cannot set aside the
10 election.

11 We recognize that one of our regulations allows a party to "file with the
12 Board objections to conduct affecting the results of the election" which could
13 result, in our opinion, in the setting aside of an election even though such
14 conduct did not amount to an unfair labor practice. MAC 24-3.8(28)-S8260. How-
15 ever, we do not believe, for many of the reasons enumerated above, that grounds
16 exist for setting aside the election under any statute or regulation.

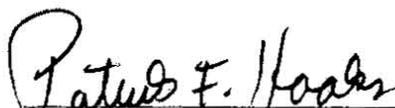
17 CONCLUSIONS OF LAW

18 The allegations of the Complaint that Respondent has engaged in an unfair
19 labor practice within the meaning of section 59-1605(1)(a), R.C.M., 1947, or that
20 the representative election conducted by the Board of Personnel Appeals should
21 be set aside because of conduct affecting the results of the election have not
22 been sustained by the Complainant.

23 ORDER

24 It is ordered, upon the basis of the foregoing Findings of Fact, Conclusions
25 of Law, and upon the entire record in the case, that the Respondents's Motion to
26 Dismiss be granted and that the Complaint be dismissed in its entirety.

27
28 DATED this 27th day of September 1974.

29
30 
31 Patrick F. Hooks, Chairman
32 Board of Personnel Appeals

CERTIFICATE OF MAILING

I CERTIFY that I mailed a true copy of the above Findings of Fact, Conclusions
of Law, and Order to

Moody Brickett, Esq.
Counsel for Respondent
Employment Security Building
Helena, Montana 59601

Donald R. Judge
Counsel for Complainant
600 North Cooke
Helena, Montana 59601

on this 24 day of September 1974.

BY Robert R. Jensen