

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF GWENDOLYN A. NEWMAN

Complainant,

-vs-

BATAVIA SCHOOL DISTRICT NO.26 and
BATAVIA BOARD OF TRUSTEES

Defendant.

ULP-8-1975

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
RECOMMENDED ORDER.

* * * * *

STATEMENT OF CASE

On July 28, 1975, Mrs. Gwendolyn A. Newman, a school teacher employed by Batavia School District No. 26, filed an unfair labor practice charge with the Montana State Board of Personnel Appeals against Batavia School District No. 26 and the Batavia Board of Trustees, (hereafter referred to as the School Board).

The charge alleges that Section 59-1605 (1)(c) R.C.M. 1947, was violated in that the School Board discriminated against Mrs. Newman with respect to wages and other conditions of employment in order to discourage membership in her affiliate labor organization. The charge further alleges that such discrimination interfered with and restrained Mrs. Newman from exercising her collective bargaining rights as guaranteed under Section 59-1603 R.C.M. 1947, and thus constitutes a violation of Section 59-1605 (1)(a) R.C.M. 1947.

The School Board filed an answer to the charge on August 18, 1975 which basically denied the allegation that the School Board had engaged in discrimination with respect to Mrs. Newman's wages and conditions of employment for purposes of discouraging membership in her affiliate labor organization.

A hearing was held on September 4, 1975, in the Schoolhouse at Batavia, Montana. Mr. Michael H. Keedy, Director, Uniserv Region I, Montana Education Association, represented Mrs. Newman. The School Board was represented by Mr. Emery Wittlake, Vice Chairman of the Batavia Board of Trustees.

As the duly appointed hearing examiner of the Board of Personnel Appeals, I conducted the hearing in accordance with the provisions of the Montana Administrative Procedures Act (Section 82-4201 to 82-4225, R.C.M. 1947.

1 After thorough review of the entire record of this case,¹ including the
2 sworn testimony of a number of witnesses, I make the following:

3
4 FINDINGS OF FACT

5 THE ALLEGED UNFAIR LABOR PRACTICE

6 1. Mrs. Newman is a class five, certificated teacher and has taught
7 third and fourth grade elementary education in Batavia School District No. 26
8 for some nine years. She is one of four teachers in this rural district and the
9 only member of the Montana Education Association, (hereafter referred to as MEA).²

10 On March 10, 1975, Mrs. Newman attended a meeting of the Batavia Board of
11 Trustees. She attended this meeting because she felt it necessary to discuss
12 with the School Board disciplinary problems within her classroom. Mrs. Newman
13 testified that sometime in October of 1974, someone on the Board of Trustees
14 had remarked that Mrs. Newman would be "sacked" or "canned"³ and this made it
15 difficult to discipline children in her classroom.

16 During the course of this Board meeting, Mrs. Newman was told to resign
17 or her contract would be terminated. Mrs. Newman also alleges that she was
18 degraded in front of two sets of parents. As a result of the position taken
19 by the Board of Trustees, Mrs. Newman contacted Mr. Keedy as Director of the
20 Montana Education Association's Uniserv Region I.

21 2. Mr. Keedy prepared a letter in behalf of Mrs. Newman which was sent
22 to the School Board on March 12, 1975. (Complainant's Exhibit A). The letter
23 informed the School Board that MEA represented Mrs. Newman and requested that
24 Mrs. Newman be furnished with a written notice of any charges or allegations
25 against her. It also requested sufficient time to prepare for and meet any
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- 27 1. *I had considerable difficulty with the tape recording of the record.*
28 *The equipment I brought with me malfunctioned and I was forced to*
29 *borrow a small tape recorder. Nevertheless, I obtained all but a few*
30 *minutes of the hearing which had to be continued. When the hearing did*
31 *continue I informed the parties of the small gap in the record, provided*
32 *a transcript of the hearing just before and after the gap and permitted*
the parties to fill in this gap to their satisfaction.
2. *More appropriately, Mrs. Newman is a member of the Flathead County*
Rural Teachers Association, an affiliate of the Montana Education Association
3. *Mr. Wittlake objected to this testimony as heresay. I overruled the*
objection as Mrs. Newman was attempting to give her reasons for attending
the March 10, 1975 Board Meeting. I am not concerned with the validity
of her allegation.

1 charges or allegations and "confront and cross-examine any detractors".

2 The Board did hold a meeting to consider the matter on March 17, 1975
3 over Mr. Keedy's protest that he could not be present to represent Mrs.
4 Newman. Mrs. Newman was advised by Mr. Keedy not to attend this meeting without
5 his accompaniment.

6 At the March 17 School Board meeting, it was decided that Mrs. Newman's
7 contract would not be renewed for the coming 1975-1976 school year and on
8 March 24, 1975, Mrs. Newman was handed a letter formally notifying her of this
9 decision (Complainant's Exhibit B). Cited as reasons for this decision were
10 frequent absence, complaints from parents, and Mrs. Newman's alleged inability
11 to control her classroom among other allegations. (Please refer to point of fact
12 #8). The letter was signed by all three Board members.

13 3. On April 7, 1975, the Board of Trustees held another meeting and
14 again considered the non-renewal of Mrs. Newman's contract. Mrs. Newman was
15 present and represented by Mr. Keedy. The result of the meeting (the meeting
16 was intended, I assume, to be a hearing in the most informal sense) was that the
17 Board decided to rescind its decision of March 17, 1975. At the April 7th
18 meeting, Mr. Wittlake stated that the Board would be "shot down" if they
19 pursued the matter further.⁴

20 Mrs. Newman received a letter dated April 9, 1975, which formally acknowledged
21 that the Board had rescinded its decision.

22 4. On June 9, 1975, the School Board held a meeting in order to issue in-
23 dividual contracts. At this meeting, the School Board passed out individual con-
24 tracts which specified various working conditions but did not specify salary
25 amounts. The record is exiguous as to just how individual teacher salaries are
26 determined⁵but it appears that at least one of the teachers had reached an informal

27 *4. I assume both complainant's Exhibit B and the hearing held April 17, 1975,*
28 *were a result of the School Board's attempt to comply with Section 75-6104,*
R.C.M. 1947, which addresses the termination of tenure teacher services.

29 *5. Although salary schedules are called for in policies set by the School*
30 *Board (Complainant's exhibit I), it appears that formal salary schedules*
are not maintained. It also appears that the School Board informally arrives
at individual teacher salaries.

31 *Mr. Mike Welling testified that he had basically agreed with the School*
Board on his salary through some sort of informal negotiations well before
the June School Board meeting.

1 agreement with the School Board on his salary prior to the June meeting. During
2 the meeting the teachers agreed formally on salary amounts (which included pay
3 increases up to 9.4%) and the contracts were signed.

4 Mrs. Newman was the exception as she was the only teacher in the school
5 district that did not receive a salary increase. She disagreed with the School
6 Board's decision and did not sign and return her contract. (Complainant's exhibit
7 D).

8 5. The School Board's decision to single out Mrs. Newman with respect to
9 withholding a salary increase for the 1975-76 school year precipitated the unfair
10 labor practice charge. Mr. Keedy argued in Mrs. Newman's behalf that the School
11 Board discriminated against Mrs. Newman by withholding a salary increase because
12 of her affiliation with the MEA. He offered circumstantial evidence which he
13 characterized as "overwhelming" to support this allegation. Specifically, he
14 pointed to the following facts:

15 a. Mrs. Newman was the only teacher in the school district and possibly the
16 Kalispell area who did not receive some increase in salary for the 1975-76 school
17 year.

18 b. Mrs. Newman has taught in the school district longer than at least two
19 of the other three teachers in the school district and it appears that this
20 instance was the first time that a teacher had been singled out for no salary
21 increase.

22 c. Mrs. Newman is the only teacher in the school district that is a member
23 of the MEA.

24 d. Mrs. Newman was also singled out from the other teachers when she was
25 told she had to follow her contract to the letter.

26 e. Mr. Wittlake made remarks which Mr. Keedy has characterized as "sarcastic"
27 and "disrespectful" towards the MEA and indicative of Mr. Wittlake's attitude
28 concerning Mrs. Newman's membership in the MEA. (See point of fact #6.)

29 Through testimony, Mr. Keedy offered the rationale that because Mrs. Newman
30 had utilized her membership in the MEA to effectively reverse the School Board's
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1 decision of non-renewal of her contract, the School Board was now punishing her
2 by withholding any salary increase for the 1975-76 school year.

3 6. As aforementioned, the unfair labor practice charge mentioned "sarcastic"
4 and "disrespectful" remarks allegedly made by Mr. Wittlake. The record shows
5 that at the April 7, 1975, School Board meeting, Mr. Wittlake told Mr. Keedy that
6 the "MEA is nothing but a teacher's union." Mr. Keedy testified that the tone
7 of this remark was objectionable.

8 Mr. Wittlake also gave his opinion on pending legislation before the state
9 legislature concerning the collective bargaining rights of teachers and expressed
10 his disapproval of this legislation because it infringed upon the managerial
11 rights of the School Board.

12 At the June 9, 1975, School Board meeting at which individual contracts were
13 issued to teachers of the district, Mr. Wittlake made the remark "I don't like
14 these outsiders coming in and trying to tell the School Board what to do."
15 Mrs. Newman took this reference to "outsiders" to mean Mr. Keedy and the MEA.

16 Mr. Wittlake testified that he was referring to Mr. James Newman (Mrs. Newman's
17 husband) because of Mr. Newman's comments to the School Board with respect to the
18 permissive levies available to the school district and representative MEA wage
19 scales. Mr. Wittlake testified further that he did not like Mr. Newman's opinions
20 and felt they were unwarranted because Mr. Newman was not a taxpayer in the
21 Batavia School District.

22 In the same conversation, Mr. Wittlake stated that "he did not like Mr. Keedy's
23 tactics." Mr. Wittlake testified that the reason he made this remark was
24 because Mr. Keedy initially represented himself on March 10, 1975, as Mrs. Newman's
25 attorney and did not indicate to Mr. Wittlake that he was an MEA representative.⁶
26 He further testified that he didn't like Mr. Keedy telling him that "you will
27 have this meeting with me or you'll be sorry."⁷

28 7. Mrs. Newman testified that she had been thwarted by the School Board in her
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30 6. This may have been the case at the time of the first conversation
31 between Mr. Wittlake and Mr. Keedy but it appears that Mr. Wittlake
32 knew that Mr. Keedy was an MEA representative by the following day.

7. The meeting referred to here is Mrs. Newman's request for a
hearing on the charges brought against her.

1 attempts to interest other teachers in the school district in joining the
2 MEA. However, there is no direct evidence on the record to support this
3 allegation.

4 8. Through the course of the hearing, Mr. Keedy objected to testimony and
5 evidence concerning Mrs. Newman's professional competency. He argued
6 that any evidence the School Board had to offer with respect to Mrs. Newman's
7 professional competency in order to justify the action of withholding her
8 salary increase was effectively made irrelevant to this case because of the
9 School Board's rescission of the decision not to renew Mrs. Newman's teaching
10 contract. He went further and argued that the effective result of the
11 hearing held April 7, 1975 was to refute charges specified in the letter
12 dated March 24, 1975 (complainant's exhibit B) and that the School Board's
13 defense for their actions in this case was without merit if it is based on
14 those charges.

15 I continually deferred from ruling on these objections until I was
16 forced to do so. Both sides were on the verge of presenting cases they had
17 presented in the April 7, 1975 School Board meeting which dealt specifically
18 with Mrs. Newman's professional competency.

19 The School Board attempted to introduce a number of letters allegedly
20 from parents who were disgruntled with Mrs. Newman's teaching performance.
21 Mr. Keedy attempted to introduce a petition, signed by a number of parents,
22 which purportedly attested to Mrs. Newman's competency. I ruled that I
23 would not permit these offers of evidence on the record and gave as a rationale
24 for this ruling that it is my responsibility to determine whether or not the
25 School Board is engaging in an unfair labor practice and not to determine
26 Mrs. Newman's professional competency.⁸

27 9. Mr. Wittlake testified that a salary increase was not given to Mrs.
28 Newman because the School Board felt she did not merit a salary increase.
29 He testified:

30 "What it all boils down to is, I believe as far as the complaint
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32 8. Of course it is essential to explore the School Board's motivation for taking
the action of withholding a salary increase, but I had to make the decision
as to how far this point should be pursued.

1 against myself and the School Board--is that we have based Mrs.
2 Newman's salary on the basis on which we think her ability has
3 been--the ability she showed us last year and not--it did not
4 have anything to do with her affiliation with the MEA."

5 10. Mr. Wallace Vintage, County Superintendent of Schools, testified
6 that although infrequent, salary increases are withheld from individual
7 teachers if a school board unilaterally determines that an individual
8 teacher does not merit an increase. He did testify however that collective
9 bargaining has in most instances eliminated this practice.

10 DISCUSSION

11 The basic determination that has to be made in this case is to decide
12 whether or not the School Board discriminated against Mrs. Newman by withholding
13 a salary increase in an effort to discourage membership in her affiliate labor
14 organization. Section 59-1605(1)(c) R.C.M. 1947 reads in part:

15 It is an unfair labor practice for a public employer
16 to discriminate in regard to hire or tenure of employment
17 or any term or condition of employment to encourage
18 or discourage membership in any labor organization . . . (emphasis added)

19 Because identical language is found in Section 8(a)(3) of the National
20 Labor Relations Act, it is useful to examine precedent established by the
21 National Labor Relations Board in this area. In the benchmark case of
22 *Radio Officers' Union versus the NLRB*⁹ the Supreme Court explained:

23 The language of 8(a)(3) is not ambiguous. The unfair labor practice
24 is for an employer to encourage or discourage membership by means of
25 discrimination. Thus this section does not outlaw all encouragement
26 or discouragement of membership in labor organizations; only such
27 is accomplished by discrimination is prohibited. Nor does this
28 section outlaw discrimination in employment as such; only such
29 discrimination as encourages or discourages membership in a labor
30 organization is proscribed.

31 Essentially it is the employer's purpose which determines if the employer
32 is engaging in an unfair labor practice when the employer discriminates among
his employees.

Often, in cases where discrimination has in fact taken place, direct evidence
such as threats, coercion, and promises is difficult to obtain. It is in such
cases that "reasonable inferences from evidence presented"¹⁰ must be drawn to

9. *Republic Aviation Corp v. NLRB*, 324 US 793, 16 LRRM 620 (1945).

10. *Ibid.*

1 determine whether or not a violation has occurred.

2 Thus in the case at hand where direct evidence of discrimination is absent,
3 Mr. Keedy's arguments based on circumstantial evidence must be carefully
4 considered. He has specifically pointed to the Board's decision to withhold
5 a salary increase; related this to Mrs. Newman's affiliation in the MEA; and called
6 attention to certain remarks made by School Board members to substantiate
7 his case.

8 However, after carefully weighing the entire record, I find that the
9 preponderance of evidence in this case does not support the allegation that it
10 was Mrs. Newman's MEA affiliation which resulted in the withholding of her salary
11 increase. As I see it, Mrs. Newman did not receive a salary increase because of
12 the poor management practices of the School Board and the School Board's basic
13 insistence that she did not merit an increase. Mr. Wittlake and the School
14 Board have maintained that Salary increases are awarded on a meritorious basis.
15 Yet it is difficult to understand how the School Board determines merit or lack of
16 merit as there was no real evaluation procedure utilized and even Salary schedules
17 are not maintained.

18 It is a fact that there was a conflict between Mrs. Newman and the School Board
19 well before the MEA actively moved to represent Mrs. Newman. Further, there is no
20 evidence that the School Board had ever interfered with Mrs. Newman's participation
21 in the MEA.

22 Mr. Keedy has in essence argued that the School Board's action in rescinding
23 its decision not to renew Mrs. Newman's contract constitutes an admission that Mrs.
24 Newman is competent and therefore should be dealt with on an equal basis with other
25 teachers in the district. He contends further that the School Board, failing to
26 justify its action of non-renewal, has taken the next alternative of withholding
27 a salary increase and that this was done because of Mrs. Newman's utilization
28 of the MEA. I believe the first part of his argument to be correct, but the second
29 part dealing with Board's motivation is in my judgement incorrect.

30 I have carefully considered the remarks noted in finding of fact number five,
31 yet the law does not suppress the right of management nor labor to freedom of
32 expression. Admittedly the remarks made by Mr. Wittlake coupled with the School

1 Board's actions are not easily dismissed. However, from the foregoing discussion,
2 and the fact that there is no direct evidence of threats or coercion against
3 Mrs. Newman with respect to her MEA affiliation, I dismiss the charge.

4 CONCLUSIONS OF LAW

5 The School Board did not discriminate against Mrs. Gwendolyn A. Newman
6 in order to discourage membership in her affiliate labor organization.
7 Therefore, Mrs. Newman was not restrained from exercising her collective
8 bargaining rights as guaranteed under Section 59-1603, R.C.M. 1947.

9 RECOMMENDED ORDER

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11 The unfair labor practice charge filed by Mrs. Gwendolyn A. Newman
12 against the Batavia School District No. 26 and the Batavia Board of Trustees
13 of July 28, 1975, is hereby dismissed.

14 DATED: 29th day of January, 1976

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16 Cordell R. Brown
17 Hearing Examiner
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CERTIFICATE OF MAILING

I, Cordell Brown, do hereby certify and state that I did, on the 29th day of January, 1976, mail a true and correct copy of the Board of Personnel Appeals Findings of Fact, Conclusions of Law, Recommended Order, by depositing a true and correct copy in the United States mail, in an envelope securely sealed, with postage prepaid, addressed to them at their last known address as follows:

Mrs. Gwendolyn A. Newman
Box 97
Whitefish, Montana 59937

Mr. Michael H. Keedy
Director, Uniserv Region I
Montana Education Association
95 4th Avenue E.N.
P. O. Box 1154
Kalispell, Montana 59901

Mr. Emery Wittlake
Vice Chairman
Batavia Board of Trustees
Route #2
Kalispell, Montana 59901



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