

BEFORE THE BOARD OF PERSONNEL APPEALS

1
2 LOWER FLATHEAD EDUCATION ASSOCIATION,)
3 Complainant,)
4 -vs-)
5 SCHOOL DISTRICT NO. 7-J, LAKE COUNTY,)
6 CHARLO, MONTANA)
7 Defendant.)

FINAL ORDER

ULP#39-76

8 * * * * *

9 A proposed Findings of Fact, Conclusions of Law and
10 Recommended Order was issued by Hearing Examiner, Ms. Kathryn
11 Walker, on July 25, 1977.

12 Exceptions to that Proposed Order were filed by Defendant
13 School District on August 16, 1977, and oral argument was heard
14 before the Board of Personnel Appeals on September 23, 1977.

15 After reviewing the record and considering the briefs and
16 oral arguments, the Board makes the following Order:

17 1. IT IS ORDERED, that the Exceptions to the Hearing Exam-
18 iner's Proposed Findings of Fact, Conclusions of Law and Proposed
19 Order are denied.

20 2. IT IS ORDERED, that this Board therefore adopts the
21 Findings of Fact, Conclusions of Law and Order issued by the
22 Hearings Examiner.

23 Dated this 1st day of November, 1977.

24 BOARD OF PERSONNEL APPEALS

25 By Brent Cromley
26 Brent Cromley
27 Chairman

CERTIFICATE OF MAILING

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I, Trena Scoffield, hereby certify and state that I did
on the 4th day of November, 1977, mail a true and correct copy
of the FINAL ORDER in ULP#39 to the following persons:

Hilley & Loring
Attorneys at Law
1713 Tenth Ave. So.
Great Falls, Mt 59401

Richard P. Heinz
Attorney at Law
P. O. Box 88
Lake County Attorney
Polson, Mt 59860


Trena Scoffield

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BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE #39-76:

LOWER FLATHEAD EDUCATION ASSOCIATION,)
)
 Complainant,)
)
 -VS-)
)
 SCHOOL DISTRICT NO. 7-J, LAKE COUNTY,)
 CHARLO, MONTANA,)
)
 Defendant.)

FINDINGS OF FACT,
CONCLUSION OF LAW,
AND RECOMMENDED
ORDER.

On December 6, 1976, the Lower Flathead Education Association, affiliated with the Montana Education Association, filed an unfair labor practice charge with the Board of Personnel Appeals against Lake County School District No. 7, Charlo, Montana. An amended unfair labor practice charge was filed in this matter February 24, 1977.

The charge alleged that Section 59-1605(1) (a), R.C.M. 1947, had been violated in that the employer had interfered with, restrained, or coerced employees in the exercise of the rights guaranteed in Section 59-1603(1), R.C.M. 1947.

The Defendant denied the charge in an answer filed with the Board of Personnel Appeals March 11, 1977.

Therefore a hearing on the matter was held April 28, 1977, in the Fireside Room, Allentown, Charlo, Montana. The Complainant was represented by Ms. Emilie Loring of the law firm of Hilley and Loring, Great Falls, Montana. Mr. Richard Heinz, Lake County Attorney, Polson, Montana, represented the Defendant.

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 Procedure Act (Sections 82-4201 to 84-4225, R.C.M. 1947).

FINDINGS OF FACT

After a thorough review of the entire record of this case, including sworn testimony, evidence, and briefs, I make the following findings of fact:

1. Ms. Roberta Sharp is a tenured teacher in School District No. 7-J, Lake County, Charlo, Montana. From January, 1971, through the 1975-76 school term Ms. Sharp taught second grade in that district. She was employed as a remedial reading teacher in that district during the 1976-77 school term.

2. Ms. Sharp's activities in the Lower Flathead Education Association have included: a) Association president, 1973-74 and 1974-75 school terms; b) negotiator on the Association's negotiating team, 1973-74 school term; c) secretary for the Association's negotiating team, 1975-76 school term.

3. Mr. Michael Lowe is the Superintendent of Schools, School District No. 7-J, Lake County, Charlo, Montana. He has been so employed since July, 1974.

4. While Ms. Sharp had very little contact with Mr. Lowe at the beginning of the 1974-75 school term, a cordial relationship existed between them. At the time, this relationship was not adversely affected by the incident described below:

...I [Ms. Sharp] was the president of the MEA unit and after school had begun some of the agreements in our master contract were not being followed. I went to Mr. Lowe to discuss them and these were essentially that he had changed the hours that we were to come and go from school...He said that since they were in the contract that would have to be the rule of the day, but he would see to it that it was different for next year. (Sharp, tape 036)

5. During negotiations in the spring of 1975 "Mr. Lowe essentially made up the contract, the master contract, that [the teachers] were supposed to use as the MEA contract... it was a rewritten master contract for the MEA". (Sharp, tape 041) Ms. Sharp, who "disagreed wholeheartedly" (Sharp,

1 tape 041) with Mr. Lowe's proposal, attempted to call a meeting
2 of Association members to discuss the proposal. However,
3 even though Ms. Sharp followed normal procedure for calling
4 the Association meeting (i.e., she asked someone in the
5 school office to announce the meeting), an all staff meeting,
6 rather than an Association meeting, was announced. At the
7 all staff meeting the contract proposed by Mr. Lowe was
8 ratified.

9 6. Mr. Robert Southern, principal at Charlo during the
10 1974-75 school term, testified that during the spring of 1975
11 Mr. Dick Kerr, a School Board member, told him, in effect,
12 "to get Mrs. Sharp." Mr. Southern interpreted this as a
13 directive to give Ms. Sharp a poor performance evaluation or
14 to find some means of firing her. Because the comment
15 was made in passing and because it did not reflect any School
16 Board action, Mr. Southern disregarded the comment when he
17 evaluated Ms. Sharp.

18 Further testimony of Mr. Southern indicated that
19 "it wasn't the only time it [the statement "to get Ms. Sharp"]
20 was made." (Southern, tape 244)

21 7. In March, 1976, Ms. Sharp's teaching performance was
22 evaluated by Mr. Young, principal of the elementary school
23 at Charlo. In this evaluation Mr. Young recommended that
24 Ms. Sharp be reassigned to grade two. (Complainant's Exhibit
25 1)

26 8. At the June 14, 1976, school board meeting teaching
27 assignments for the 1976-77 school term were made. It was
28 announced that during the 1976-77 school term Ms. Sharp would
29 function as a remedial reading teacher.

30 a. Mr. Lowe testified that he played a role
31 in recommending teaching assignments to the School
32 Board and that he favored Ms. Sharp's assignment
to the remedial reading program because he felt

1 she would work better in its one-to-one teaching
2 situation. He alluded to apparently unfavorable
3 comments about Ms. Sharp's ability to function with
4 large groups of children in a self contained class-
5 room. While he stated that there were no documented
6 comments to this effect, he contended that the March,
7 1976, evaluation of Ms. Sharp (Complainant's Exhibit
8 1) indicated that Ms. Sharp "might do a better job
9 working with smaller amounts [sic] of students".
10 (Lowe, tape 296)

11 b. Mr. Young was supportive of Mr. Lowe's
12 recommendation to assign Ms. Sharp to the remedial
13 reading program, stating that he believed Ms. Sharp
14 would work better with a smaller group of students.
15 He referred to "extenuating circumstances that had
16 come out in one of the board meetings and from
17 parents", but declined to expand on this statement
18 "because of confidentiality". (Young, tape 507)

19 c. Mr. Lowe and Mr. Young maintained that
20 their support of Ms. Sharp's assignment to the
21 remedial reading program was based on the above-
22 mentioned considerations, and denied that Ms.
23 Sharp's Association activities had affected their
24 recommendation.

25 d. The record established that Ms. Sharp
26 first became aware of her assignment to the
27 remedial reading program at the June 14, 1976,
28 School Board meeting. Neither Mr. Lowe nor Mr.
29 Young discussed the possibility of the assignment
30 with her, nor did they inform her of their deci-
31 sion to make such a recommendation to the School
32 Board. Ms. Sharp had never asked to be transferred
from grade two.

1 9. During the 1976-77 school term the remedial reading
2 program consisted of a Title I Supervisor (a certified teacher),
3 a Remedial Reading Teacher (a certified teacher: Ms. Sharp),
4 and three aides. As the Remedial Reading Teacher, Ms. Sharp
5 was paid at the level on the salary schedule appropriate for
6 her experience and education. The aides were paid considerably
7 less.

8 10. The charge in this matter alleged that "Roberta
9 Sharp...a tenure teacher, [was] demoted to the position of an
10 aide for the 1976-77 school year...all professional status and
11 perquisites [were] denied to her...." The following points
12 were specifically discussed relative to this charge:

13 a. While the Title I Supervisor had what
14 could be called a classroom, neither Ms. Sharp nor
15 the aides were assigned a classroom or any parti-
16 cular place to work.

17 Mr. Lowe testified that the situation was
18 caused by a lack of available space, that other
19 classes were also suffering for lack of facilities,
20 and that the situation would be corrected when a
21 new building was completed in August, 1977.

22 b. At the first PTA meeting of the 1976-77
23 school term the teachers, but not the aides, were
24 introduced to the parents. Ms. Sharp was intro-
25 duced only after the person making the introduc-
26 tions for her group, apparently Mr. Young, was
27 reminded to do so.

28 Mr. Lowe testified that he believed this
29 to have merely been an oversight, that he was cer-
30 tain there was no intentional slighting of Ms.
31 Sharp.

32

1 c. Ms. Sharp was not given keys as were the
2 other teachers. She testified that she was not
3 given any keys at the beginning of the 1976-77
4 school term, that she was given a desk key only
5 "after she'd been there awhile" (Sharp, tape 087),
6 and that even though she requested a key to the
7 outside door she was not given one until she was
8 locked out of the building in January, 1977.

9 Mr. Lowe contended that there were a
10 number of teachers who hadn't received keys to the
11 elementary school's outside door because the lock
12 had been changed and enough keys hadn't been made.
13 Ms. Sharp testified that if it was true that this
14 lock had been changed "it was not changed suffici-
15 ently to keep the keys that were kept over the
16 summer from working in it". (Sharp, tape 593)

17 Mr. Lowe and Mr. Young assumed administra-
18 tive responsibility for having failed to provide
19 Ms. Sharp with a key when one had become available.
20 They denied that there was any intentional depri-
21 vation, however.

22 d. At the beginning of the school term, Ms.
23 Sharp and the aides in Title I were called to a
24 meeting by Mr. Young. According to Ms. Sharp's
25 testimony, she and the aides were informed that,
26 due to a confidentiality clause, they weren't to
27 discuss students' problems with parents or with
28 other teachers; that if they had a problem they
29 were to go to the Title I Supervisor who would
30 contact the parents or teachers.

31 Mr. Lowe and Mr. Young emphasized the
32 special confidentiality precautions necessary for

1 Title I, but denied that Ms. Sharp had been/
2 would be denied access to parents, or that
3 parents had been/would be denied access to Ms.
4 Sharp. Mr. Young denied that he had ever issued
5 a directive to Ms. Sharp depriving her of parent
6 contact, but testified that he had met with the
7 Title I Supervisor, Ms. Sharp, and the aides at
8 the beginning of the school term and had said
9 that comments to parents were to go through
10 the Title I Supervisor. He testified that these
11 procedures applied only to Ms. Sharp's Title I
12 work; that her work under district funds was not
13 subject to the same rules. However, he said he
14 had not delineated this distinction at the meeting
15 because only Title I was being discussed. Apparently
16 Mr. Young never indicated this distinction to Ms.
17 Sharp.

18 e. In January, 1977, Ms. Sharp had occasion
19 to be absent from school. She notified the principal
20 of this, per procedure used by teachers. When she
21 returned to school, however, she was reprimanded
22 for failing to notify the Title I Supervisor of
23 the absence, which was the procedure used by the
24 aides. She was subsequently instructed to notify
25 both the principal and the Title I Supervisor should
26 she have occasion to be absent thereafter.

27 Mr. Young testified that in the instance
28 precipitating Ms. Sharp's reprimand in this matter
29 he assumed responsibility for failing to transmit
30 the notice of absence to the Title I Supervisor.
31 He further testified that he then suggested that
32 Ms. Sharp notify both him and the Title I Super-
visor to avoid a recurrence of this incident.

1 f. Ms. Sharp testified that she was treated
2 as an aide regarding noon and recess duty, in that
3 assignments were made so that there were two
4 teachers and an aide on duty except on the days
5 when she was assigned - then there were two teachers
6 and Ms. Sharp on duty.

7 Mr. Lowe testified he was sure Mr. Young,
8 who was responsible for the assignments, had not
9 deliberately assigned Ms. Sharp's duties along
10 with the aides.

11 g. Ms. Sharp testified that she has been
12 treated as an aide by the Title I Supervisor - for
13 example, the Title I Supervisor explained what Ms.
14 Sharp's duties would be at a meeting attended by
15 Ms. Sharp and the aides during which she and the
16 aides "were all treated the same". (Sharp, tape
17 214) Ms. Sharp further testified that she has been
18 called an aide by the Title I Supervisor:

19 "When we met with the mothers, she [the
20 Title I Supervisor] was discussing our
21 program. She said that she had prepared
22 the program and set it up as to how it
should run and the aides were carrying
it out. Therefore that included me..."
(Sharp, tape 114)

23 11. Mr. Lowe testified that in Charlo's relatively small
24 Title I program many of Ms. Sharp's teaching duties were similar
25 to the aides' duties, but that these basic distinctions existed:

26 "Although they all have direct one on one
27 contact, the teachers are the ones who
28 set up individual programs for their kids,
who direct the learning process. The aides
are simply following instructions." (Lowe,
29 tape 329)

30 "The difference is simply that we feel the
31 teachers are the ones that have the skills
to evaluate and to understand the needs of
32 the children." (Lowe, tape 335)

1 Ms. Sharp testified that her work and the
2 aides' work is essentially the same regarding plan-
3 ning, use of materials, and student assignments.

4 12. Mr. Lowe stated that the aides are subordinate to Ms.
5 Sharp, but testified that he has never issued instructions or
6 explanations to the aides to this effect. Ms. Sharp testified
7 that she has never been told she has any authority over the
8 aides and that in practice she exercises no supervision over
9 the aides.

10 13. The following testimony established that, while it may
11 be acceptable, desirable, and even advisable that Charlo's
12 remedial reading program employ two certified teachers, this
13 is not required by Title I:

14 LORING: Are there Title I requirements that
15 there be two certified teachers in a program
of your size?

16 LOWE: ...No...

17 (Loring/Lowe, tape 443)

18 14. While the direct School Board assignment had not been
19 made at the time of the hearing in this matter, Mr. Lowe and
20 Mr. Young were recommending that Ms. Sharp be reassigned to
21 the position of remedial reading teacher for the 1977-78 school
22 term "if funding were available". (Lowe, Tape 400)

23 15. When asked if Ms. Sharp's assignment as remedial reading
24 teacher was permanent, Mr. Lowe responded that he:

25 "would certainly hope so. However, each year
26 funding seems to become more and more of a
27 problem and it may not be possible that we
28 maintain the remedial program to as great
29 an extent as it is right now. I would hope
30 so. And it seems that we will be able to
31 next year... I feel that the program has
done an excellent job and I would hate to
see us limit it by decreasing staff members.
If there's necessity in decreasing, of
course the first to go will be the aides."
32 (Lowe, tape 401)

DISCUSSION

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Section 59-1603(2)(b), R.C.M. 1947, clearly states that it is the prerogative of the public employer to hire, promote, transfer, assign, and retain employees.

Section 59-1605(1)(a), R.C.M. 1947, states that it is an unfair labor practice for a public employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 59-1603, R.C.M. 1947. Namely, these rights include the right of self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits and other conditions of employment and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion.

Basically, the public employer may exercise his right to hire, promote, transfer, assign, and retain employees so long as he does not infringe upon the employees' rights cited above. The issue is not so much whether there is a legitimate basis for hiring, promoting, transferring, assigning, or retaining an employee, but whether that basis is the sole reason for the action. Because improper motive distinguishes illegal action from legal action, the motivating cause behind an alleged illegal hire, promotion, transfer, assignment, or retention must be carefully determined.

In NLRB v. Okla-Inn, 84LRRM 2585 (10th Cir. 1973), the quality of evidence required to establish improper motive was set forth. The court said at pages 2591 and 2592 that it must be established

by acceptable substantial evidence on the whole record, that the discharge came from the forbidden motives of interference in employee statutory rights. . . .The law requires evidence that extends beyond mere suspicion, that amounts to more than a mere scintilla. . . .

1 However, it is not . . . always necessary for the Board
2 to explicitly show beyond a reasonable doubt that the
3 employer had absolute knowledge and was completely
4 aware of the discharged employees (sic) close connec-
5 tion to the Union. . . . Where there is substantial
6 evidence, direct or circumstantial, to indicate that
7 an employee was discharged for Union activities, a
8 very definite burden is imposed on the employer to
9 prove existence of a reason, not within the Act's
10 provisions, sufficient to warrant the discharge.

11 Applying these comments to the matter at hand, namely
12 whether or not the transfer of Roberta Sharp from a second
13 grade teaching position to a remedial reading teaching position
14 was a legal activity of the School Board, the following factors
15 were considered:

16 1. Ms. Sharp's status as a teacher was adversely affected
17 by the transfer. The findings of fact indicated that her func-
18 tion as a "remedial reading teacher" was indeed more comparable
19 to that of a teacher's aide than to that of a certified tenured
20 teacher. The fact that her position was not required within
21 the program and the tenuous nature of that position's funding
22 was also considered.

23 2. The reasons given for Ms. Sharp's transfer appeared
24 to be pretextual, primarily because of the subjective and
25 arbitrary nature by which the decision was made, the lack of
26 supportive documentation for the decision, and the lack of any
27 special qualifications for the position on Ms. Sharp's part.

28 3. The school administration was aware of Ms. Sharp's
29 Association activities. Prior to the time of the transfer,
30 there had been disagreements between Ms. Sharp and the school
31 administration concerning Association activities.

32 4. Prior to the time of the transfer, the desire to under-
mine Ms. Sharp's position or to take punitive action against
her was exhibited.

5. The manner in which the transfer was handled indicated,
at best, a lack of cooperation and professionalism on the
part of the school administration.

1 The evidence indicating beyond mere suspicion that Ms.
2 Sharp was transferred because of her Association activities,
3 and the employer having failed to prove the existence of a
4 reason sufficient to warrant her transfer, it is determined
5 that the employer has interfered with, restrained, and coerced
6 Ms. Sharp in the exercise of her right guaranteed in Section
7 59-1603, R.C.M. 1947.

8
9 CONCLUSION OF LAW

10 The allegation that Lake County School District No. 7,
11 Charlo, Montana, has engaged in an unfair labor practice within
12 the meaning of Section 59 1605(1)(a), R.C.M. 1947, has been
13 sustained by the Lower Flathead Education Association in that
14 Lake County School District No. 7, Charlo, Montana has
15 interfered with, restrained, or coerced Roberta Sharp in the
16 exercise of the rights guaranteed her in Section 59-1603(1)(a),
17 R.C.M. 1947.

18 RECOMMENDED ORDER

19 It is hereby ordered that Lake County School District No. 7,
20 Charlo, Montana:

21 1. Cease and desist from interfering with, restraining,
22 or coercing Roberta Sharp in the exercise of the rights guaran-
23 teed her in Section 59-1603(1)(a), R.C.M. 1947.

24 2. Take the following affirmative action:

25 a.) Offer to Roberta Sharp a regular classroom teach-
26 ing position for the 1977-78 school term and re-establish as
27 many perquisites accorded other teachers as possible.

28 b.) Notify the Administrator of the Board of Personnel
29 Appeals, in writing, within twenty days of receipt of this
30 decision, what steps have been taken to comply herewith.

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1 NOTICE

2 Exceptions may be filed to these Findings of Fact, Con-
3 clusion of Law, and Recommended Order within twenty days of
4 service thereof. If no exceptions are filed with the Board
5 of Personnel Appeals within that period of time, the Proposed
6 Order shall become the Final Order of the Board of Personnel
7 Appeals.

8 DATED this 25th day of July, 1977.

9
10 BOARD OF PERSONNEL APPEALS

11
12 BY Kathryn Walker
13 Kathryn Walker 834
14 Hearing Examiner

15 * * * * *

16 CERTIFICATE OF MAILING

17 I, Janice M. Fishburn, hereby certify and state that I
18 mailed on the 25th day of July, 1977, a true and correct copy
19 of the FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDED
20 ORDER to the following:

21 Mr. Michael Lowe, Superintendent
22 School District No. 7-J, Lake County
Charlo, MT 59824

23 Ms. Emilje Loring, Attorney
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31 Janice M. Fishburn
32 Janice M. Fishburn