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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 39-81:

BUTTE TEACHERS' UNION,)
LOCAL NO. 332, AFT, (AFL-CIO),)
Complainant,)
- vs -)
BUTTE SCHOOL DISTRICT NO. 1,)
Defendant.)

FINAL ORDER

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on May 11, 1982.

Exceptions to the Findings of Fact, Conclusion of Law and Recommended Order were filed by J. Brian Tierney, Attorney for Complainant, on May 31, 1982.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Complainant to Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Jack H. Calhoun as the Final Order of this Board.

DATED this 9th day of July, 1982.

BOARD OF PERSONNEL APPEALS

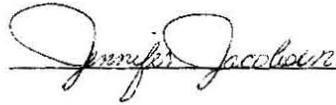
By John Kelly Addy
John Kelly Addy
Chairman

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy
of this document was mailed to the following on the 12 day
of July, 1982:

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STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 39-81:

BUTTE TEACHERS' UNION, LOCAL NO. 332, AFT (AFL-CIO))	
)	
Complainant,)	
)	
vs.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
BUTTE SCHOOL DISTRICT NO. 1)	AND RECOMMENDED ORDER
)	
Defendant.)	

* * * * *

On October 20, 1981 Complainant filed this unfair labor practice charge against the School District alleging it had violated 39-31-201 and 401 MCA when it required that teachers accompany their students outside for recess. The District denied any violation and we set the matter for hearing under authority of 39-31-406 MCA. A formal hearing was conducted in Butte on January 19, 1982. Mr. J. Brian Tierney represented the Complainant, Mr. Donald C. Robinson represented the Defendant. The case was submitted when the last brief was filed on March 10, 1982 as ordered.

ISSUE

The primary question raised here is whether the School District violated any of the rights of the Complainant teachers protected by 39-31-401 MCA. The specific issue is whether the action of the Assistant Superintendent of Schools, in requiring that elementary teachers accompany their students at recess, amounted to a retaliation against them because they had earlier filed a contract grievance and won an arbitration award.

FINDINGS OF FACT

Based on the evidence on the record including the sworn testimony of witnesses I find as follows:

1 1. The Complainant, Butte Teachers Union, is recognized
2 by the Defendant, Butte School District No. 1, as the exclusive
3 representative of teachers employed by the District. The
4 parties have a collective bargaining agreement which covers
5 the terms of wages, hours and other conditions of employment
6 of the teachers and provides a procedure for processing
7 grievances.

8 2. The contract has provided for a certain amount of
9 preparation time for intermediate grade (4th, 5th, and 6th)
10 teachers since 1973. The number of minutes has been increased
11 through negotiations over the years, however, from 1973
12 until 1979, 120 minutes per week were provided.

13 3. The School District had a policy for a number of
14 years which permitted the intermediate grade teachers to
15 rotate their recess duty. Under that policy a teacher could
16 be expected to be assigned to be outside in supervision of
17 the students about one day (for a total of about 30 minutes)
18 each week. The time a teacher actually spent at recess with
19 the students was not counted as preparation time; however,
20 the time not spent supervising students at recess was counted
21 as preparation time.

22 4. Over a number of years the subject of equality of
23 preparation time for intermediate teachers continued to be a
24 subject of discussion and debate between teachers and admini-
25 stration officials. In January of 1978 the Union filed a
26 grievance with the Superintendent over preparation time. It
27 was later resolved through negotiations.

28 5. During a pre-negotiation session for the 1979-1982
29 contract the Superintendent told members of the Union negotiat-
30 ing committee that if they pursued the recess time-preparation
31 time issue the administration's stand would be that teachers
32 would be put outside during all their students' recess

times.

1
2 6. The 1979-82 collective bargaining agreement provided
3 for 180 minutes per week of preparation time during 1979-80
4 and 225 minutes per week thereafter.

5 7. Because of the negotiated increase in preparation
6 time the District, beginning during the fall of 1979, began
7 to count the time not spent supervising students at recess
8 as preparation time. The teachers used the time when they
9 were not required to be on the playground with the students
10 in various ways. Some used it as a time to relax and take a
11 break, others used it to perform student instruction related
12 functions. At times they were assigned specific duties such
13 as shelving books.

14 8. On December 3, 1979 assistant Superintendent
15 Dennehy issued a memorandum to all principals in the District
16 on the subject of the recess program. He pointed out recent
17 accidents and lawsuits and suggested that injuries to students
18 was sufficient cause to change the policy. He referred to
19 the example of one of the principals, who had each teacher
20 take his class outside each morning and afternoon as the
21 teacher saw fit, and suggested such approach was best to
22 prevent accidents.

23 9. On December 18, 1979 Mr. Dennehy issued another
24 memorandum to principals concerning playground rules. The
25 rules were directed toward safety on the playground and
26 addressed supervision and student conduct.

27 10. Although the Assistant Superintendent believed it
28 to be in the best interest of the students' safety and the
29 employer's desire to avoid lawsuits, he did not change the
30 recess rotation policy because, given the fixed six-hour
31 teacher day, he believed the preparation time obligation had
32 to be met through utilization of non-duty recess time.

1 11. On March 20, 1980 certain intermediate grade
2 teachers filed a grievance under the terms of the collective
3 bargaining agreement. The issue raised by the grievance was
4 whether the non-duty time spent during recess under the
5 District's rotation system could be counted as preparation
6 time. The issue was eventually placed before an arbitrator
7 who ruled on April 5, 1980 that the District could not count
8 the time as preparation time. On July 10, 1981 a monetary
9 award of \$900.00 each was given to the aggrieved teachers
10 for preparation time they had lost. On appeal the District
11 Court upheld the arbitrator's decision.

12 12. On July 30, 1981 Mr. Dennehy issued a memorandum
13 changing the recess rotation policy. He directed that each
14 teacher accompany his class to the playground and supervise
15 the students during recess. He further directed that teachers
16 not cover classes for each other. During discussions with
17 principals subsequent to issuing the memorandum Mr. Dennehy
18 made it clear that the policy was flexible and that teachers'
19 personal needs could be accommodated.

20 13. The new policy resulted in increased safety during
21 recess because there were more teachers to watch the students.
22 It also made scheduling easier.

23 14. The teachers do not dispute the right of the
24 District to assign them duties during their work day. Even
25 during the recess rotation period they, on occasion, were
26 given assignments to accomplish during their non-duty recess
27 time.

28 15. If the rotation system had not been changed after
29 the arbitrator issued his award, the non-duty time previously
30 counted as preparation time would have become non-working or
31 free time, neither of which is provided for in the collective
32 bargaining agreement or by past practice.

1 16. The July 30, 1981 memorandum was not directed
2 solely at the teachers who filed the grievance, but rather at
3 all the elementary grade teachers.

4 17. The teachers believed the new policy was in retali-
5 ation of their grievance. One of them expressed that belief
6 to the Assistant Superintendent on September 9, 1981. Mr.
7 Dennehy, in response to the allegation, issued a memorandum
8 explaining that his motive was not retaliatory but primarily
9 one of safety and, secondarily, one of economics. He stated
10 that at one time the practice had been for teachers to take
11 their students to recess each day.

12 18. Two lawsuits were filed in recent years against
13 the District because of accidents on playgrounds, each
14 alleged negligence on the part of the District for failure
15 to provide supervision of the students.

16 All proposed findings of fact which are inconsistent
17 with the above findings are hereby rejected on the grounds
18 they are not supported by the evidence on the record as a
19 whole.

20 ANALYSIS

21 The pertinent parts of Title 39, Chapter 31, MCA with
22 which we are concerned here are sections 39-31-201 and
23 39-31-401(1), they provide as follows:

24 39-31-201 Public employees shall have and shall be
25 protected in the exercise of the right. . .to engage in
26 other concerted activities for the purpose of collective
bargaining or other mutual aid or protection free from
interference, restraint, or coercion.

27 39-31-401 It is an unfair labor practice for a public
employer to:

28 (1) interfere with, restrain, or coerce employees in
29 the exercise of the rights guaranteed in 39-31-201;

30 . . .

31 The same prohibition against employer interference with
32 protected employee activities is found in sections 7 and
8(a)(1) of the National Labor Relations Act. Because of the

1 similar language of the NLRA and the Montana Collective
2 Bargaining for Public Employees Act, the Board of Personnel
3 Appeals looks to National Labor Relations Board and federal
4 court precedent for guidance in this and other areas of
5 labor law. The Montana Supreme Court has held that private
6 sector precedents are relevant in interpreting the state Act
7 when its language and that of the federal Act are similar.
8 State Department of Highways v. Public Employees Craft Council,
9 165 Mont. 349, 529 P.2d 785 (1974), 87 LRRM 2101; AFSCME Local
10 2390 v. City of Billings, 171 Mont. 20, 555 P.2d 57, 93 LRRM
11 2753 (1976).

12 There is no question that the employees who filed the
13 contract grievance, which ultimately resulted in the arbitra-
14 tor's award, were engaged in protected activities. The NLRB
15 has generally held that the discharge or disciplining of
16 employees for filing or processing grievances is a violation
17 of section 8(a)(1). Ernst Steel Corp., 212 NLRB 32, 87 LRRM
18 1508 (1974); Southwestern Bell Telephone, 212 NLRB 10, 87
19 LRRM 1446 (1974). In the instant case no such disciplinary
20 action was taken by the School District. The question is
21 whether the District took any action, as a result of the
22 teachers' filing the grievance, that had an adverse effect
23 upon their rights protected by 39-31-401(1) MCA. There was
24 no allegation made and no evidence offered to support a
25 finding of a violation of 39-21-401(3) MCA. In fact, the
26 evidence on the record shows there was no discrimination by
27 the employer.

28 In Lane v. NLRB, 415 F.2d 1208 (D.C. Cir. 1969), 72
29 LRRM 2441, the circuit court made an analysis of the U.S.
30 Supreme Court's approach to section 8(a)(1) and 8(a)(3)
31 cases. After reviewing both NLRB v. Great Dane Trailers,
32 388 U.S. 26, 65 LRRM 2465 (1967) and NLRB v. Fleetwood

1 Trailer Co., 389 U.S. 375, 66 LRRM 2737 (1967), the opinion
2 stated, "In both Great Dane and Fleetwood, once the union
3 has shown some adverse effect upon the rights of the employ-
4 ees, the employer must bear the burden of establishing the
5 legitimate and substantial business justifications for his
6 conduct." There is nothing on the record in this case to
7 support a conclusion that the employer took any action which
8 adversely affected the rights of the teachers under 39-31-201
9 MCA. No disciplinary or other measures were imposed against
10 the teachers who filed the grievance. The coverage of
11 employee protected rights under Section 201 cannot reasonably
12 be broadened to include the right to duty free time. No
13 threats of reprisal, implied or expressed, were made because
14 they pursued the contract grievance procedure. The teachers
15 who filed the grievance were treated no differently than
16 those who did not so file. There were no actions against
17 their protected rights even if one concluded that the School
18 District specifically responded to the filing of the grievance
19 by changing the recess policy. The District had ample
20 reason to desire the change; the arbitrator's award gave
21 rise to the opportunity to effectuate that change.

22 Further, if the conclusion were drawn, in spite of the
23 facts on the record, that there was an adverse effect on the
24 teachers' rights, the employer sustained its burden and
25 established a legitimate and substantial business justifi-
26 cation for its action. The District's long standing concern
27 with greater safety during recess, coupled with the teachers'
28 availability serve to enforce such determination.

29 There is nothing in the record to indicate that the
30 District's conduct was "inherently destructive" of important
31 employee rights under the Great Dane principle, or that the
32 District had antiunion motives.

