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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 29-82:

UNIFIED LOGAN TEACHER ASSOCIATION)
UNIT OF GALLATIN COUNTY RURAL MEA/)
NEA,)
Complainant,)
- vs -)
GALLATIN COUNTY SCHOOL DISTRICT)
NO. 1, LOGAN SCHOOL DISTRICT,)
Defendant.)

FINAL ORDER

No exceptions having been filed, pursuant to ARM 24.26.215,
to the Findings of Fact, Conclusions of Law and Recommended
Order issued on May 27, 1983, by Hearing Examiner Jack H.
Calhoun;

THEREFORE, this Board adopts that Recommended Order in
this matter as its FINAL ORDER.

DATED this 23rd day of September, 1983.

BOARD OF PERSONNEL APPEALS

BY Alan L. Joscelyn
Alan L. Joscelyn, Chairman
Board of Personnel Appeals

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct
copy of this document was mailed to the following on the
23rd day of September, 1983:

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Charles Erdmann, Attorney
Montana School Boards Association
501 North Sanders
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Jennifer Jacobson

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 29-82:

UNIFIED LOGAN TEACHER ASSOCIATION)	
UNIT OF GALLATIN COUNTY RURAL MEA/)	
NEA,)	
	FINDINGS OF FACT,
Complainant,)	CONCLUSIONS OF LAW,
	AND
vs.)	RECOMMENDED ORDER
GALLATIN COUNTY SCHOOL DISTRICT)	
NO. 1, LOGAN SCHOOL DISTRICT,)	
Defendant.)	

* * * * *

The Unified Logan Teacher Association filed this unfair labor practice charge on September 3, 1982, alleging that Gallatin County School District No. 1 violated Section 39-31-401(1) and (3) MCA when it removed head teaching duties from Susan Howe's position. The District answered on September 22, 1982 and denied any violation occurred. A hearing was held on January 12, 1983 in Bozeman under authority of Section 39-31-406 MCA. The Association was represented by Emilie Loring, the District was represented by Charles Erdmann.

ISSUE

The issue raised by this charge is whether the School District's action in removing certain head teacher duties from Ms. Howe's position constitutes an unfair labor practice under Section 39-31-401 MCA.

FINDINGS OF FACT

Based on the evidence on the record, including the sworn testimony of witnesses, I make the following findings.

1 1. Logan School employs three teachers, one of whom
2 is designated head teacher by the Board of Trustees. There
3 is no principal. The School employs a Clerk who serves as
4 liaison between the Board and teachers. The Board communi-
5 cates with the head teacher and the other teachers through
6 the Clerk and at monthly meetings. There are approximately
7 28 students in the school.

8 2. The Board of Trustees is comprised of the chairman
9 and two other members. It is responsible for the operation
10 of the School.

11 3. The Unified Logan Teachers Association, a unit of
12 the Montana Education Association is a labor organization as
13 defined in Section 39-31-103(5) MCA.

14 4. Gallatin County School District No. 1 is a public
15 employer as defined in Section 39-31-103(1) MCA.

16 5. The head teacher is paid an extra duty allowance
17 of \$300.00 for the school year. Specific duties as enumer-
18 ated in the job description for the position are to:

- 19 . Order books and supplies (gets Board permission,
20 if over \$50.00) and relay paperwork to the Clerk.
- 21 . Oversee disciplinary problems in cooperation with
22 the staff.
- 23 . Serve as boss under the Board.
- 24 . Inform the Board when conflicts arise between
25 parents, students and the staff.
- 26 . Notify parents when a student is injured.
- 27 . Supervise the playground.
- 28 . Establish a duty roster in cooperation with other
29 teachers.
- 30 . Report truant or incorrigible pupils to the Board.
- 31 . Suspend students for good cause subject to the
32 review of the Board.
- . Attend monthly Board meetings.
- . Comply with appropriate laws.
- . Inform the Board regarding directions from the
 County Superintendent of Schools.
- . Know Sections 75-6108 and 75-6110 RCM.
- . Protect students from abuse.
- . Conduct registration day, if so instructed.
- . Work with and assist other teachers, but not
 interfere with them.

1 6. Susan Howe has been employed by Gallatin County
2 School District No. 1, Logan School since 1977 and has been
3 a tenured teacher since her 1980-81 contract with the Board.
4 She became head teacher beginning with the 1978-79 school
5 year and held that position through the 1981-82 school year.

6 7. During her employment with the District, Mrs. Howe
7 has received five evaluation reports on her performance as a
8 teacher. They cover endeavors such as classroom management,
9 teaching performance, attitude, relationship with students
10 and parents, cooperation with staff, preparation and quality
11 of instruction. All comments, made by several different
12 evaluators hired by the Gallatin County Superintendent's
13 office, are to the effect that she performed excellent work
14 in all areas.

15 8. During November of 1981, Ms. Howe and the other
16 two teachers informed the School Board they wished to nego-
17 tiate. The Board, at that time, was receptive to the propo-
18 sition.

19 9. At its February 17, 1982 meeting, the Board recog-
20 nized the Unified Logan Teachers Association as the bargain-
21 ing agent for the teachers.

22 10. During March of 1982 the teachers submitted a con-
23 tract proposal to the Board. A meeting was set for the
24 23rd, but the Board members did not attend.

25 11. The teachers sent several letters requesting that
26 the Board negotiate with them, however, no bargaining took
27 place. At one time the Chairman of the School Board called
28 one of the teachers and said he would tell her when he
29 wanted to negotiate.

30 12. On March 31, 1982, the Clerk delivered individual
31 contracts for the 1982-83 year for the teachers to sign.

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1 13. On April 17, 1982, Ms. Howe signed her individual
2 contract, which provided for her retention as head teacher,
3 but she noted "acceptance of tenure only" under her signa-
4 ture because she wanted to make sure the Board understood
5 she was not giving up the right to negotiate salary and
6 benefits.

7 14. On April 22, 1982, the Teachers Association filed
8 an unfair labor practice charge against the School District
9 for refusal to meet and bargain with the teachers and for
10 issuing individual contracts in violation of the Act.

11 15. At the April 27, 1982 School Board meeting, a
12 motion was passed which declared that the Board did not
13 recognize the Unified Logan Teachers Association as "nego-
14 tiators for Logan teachers."

15 16. On June 18, 1982, the parties were supposed to
16 attend a pre-hearing conference on the unfair labor practice
17 charge; however, no one from the Board appeared. The chair-
18 man was out of the state.

19 17. On July 14, 1982, the teachers engaged in a bar-
20 gaining session with the Gallatin County Attorney who went
21 through their proposals.

22 18. On July 28, 1982, the teachers met with the School
23 Board and were told the Board would not negotiate and that
24 it would close the school.

25 19. On July 31, 1982, the chairman called Ms. Howe to
26 say that further negotiations were postponed and that the
27 Board had hired someone to negotiate.

28 20. On August 19, 1982, Ms. Howe received a letter
29 from the School Board informing her that her duties for the
30 1982-83 school year would not include those of head teacher.
31 Her salary was not reduced.

32

1 21. Bargaining between the parties has gone smoothly
2 since the Board hired a negotiator.

3 22. Prior to the spring of 1982 no member of the
4 School Board ever indicated to Ms. Howe that they were less
5 than satisfied with her performance as head teacher.

6 23. Two members of the School Board testified that
7 Ms. Howe had had problems with the Clerk and the speech
8 therapist.

9 24. The problem with the Clerk was caused by Ms. Howe's
10 inability to spend more time socializing with her. The speech
11 therapist matter was caused by a lack of physical space for
12 him to work. Neither situation was caused nor compounded by
13 Ms. Howe.

14 24. Although the chairman of the School Board testified
15 that they did not negotiate because they did not know their
16 legal obligations, he had previously served on the Three
17 Forks School Board's bargaining committee and had bargained
18 with the Three Forks teachers. He had also been a member of
19 the Teamsters Union from 1969 to 1977.

20 25. The two other teachers who were involved with Ms.
21 Howe in attempting to negotiate with the School Board did
22 not return for the 1982-83 school year. The Board hired two
23 replacement teachers and designated one as head teacher.

24 26. Since she was first employed by the School District,
25 Ms. Howe has received periodic pay raises of from five to
26 ten percent each year.

27 27. Two members of the School Board testified that
28 they had discussed removing Ms. Howe's head teaching duties
29 prior to the time she became involved in union activities.
30 They believed the discussions were during the 1980-81 school
31 year; however, there is nothing in the School Board minutes
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1 showing such consideration and during that same school year
2 Ms. Howe received a ten percent pay increase.

3 28. The chairman of the Board knew that Ms. Howe was
4 the only one of the teachers who paid MEA dues by check-off.

5 29. The School Board has not questioned Ms. Howe's
6 status as an employee under the provisions of the Act during
7 the negotiations with the teachers.

8 All proposed findings of fact which were contrary to
9 the above findings were rejected on the grounds that they
10 were not supported by the evidence on the record as a whole
11 or on the basis of the credibility given to the testimony of
12 the witnesses.

13 14 ANALYSIS

15 The Board of Personnel Appeals is asked to find an
16 unfair labor practice against Gallatin County School District
17 No. 1 because it removed Ms. Howe's head teacher duties in
18 retaliation for union activities which are protected under
19 Section 39-31-401 MCA.

20 Section 39-31-401(1) MCA prohibits conduct on the part
21 of public employers which interferes with, restrains or
22 coerces public employees who exercise their rights under
23 Section 39-31-201 MCA. Section 39-31-401(3) MCA prohibits
24 discrimination by a public employer with regard to hiring,
25 tenure or condition of employment to encourage or discourage
26 union membership. The National Labor Relations Act contains
27 comparable protections and prohibitions in Section 8(a)(1)
28 and (3). Because of the similarity of the two statutes the
29 Montana Supreme Court has held that decision of the National
30 Labor Relations Board and the federal courts are relevant in
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1 interpreting the Montana Act. (State Department of High-
2 ways v. Public Employees Craft Council, 165 Mont. 349, 529
3 P.2d 785 (1974), 87 LRRM 2101; AFSCME Local 2390 v. City of
4 Billings, 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753 (1976).

5 In 1979 in Board of Trustees of Billings School District
6 No. 2 v. State of Montana ex rel Board of Personnel Appeals
7 and Billings Education Association, 36 St. Rep. 2289, 604
8 P.2d 770, the Montana Supreme Court adopted the "but for"
9 test, which had been used by the U.S. Supreme Court in
10 Mt. Healthy School District v. Doyle, 429 U.S. 274, 97 S.
11 Ct. 568 (1977), for the so-called dual motivation cases
12 arising under Montana's Collective Bargaining Act. The NLRB
13 adopted the Mt. Healthy test of causation in Wright Line,
14 251 NLRB 1083, 105 LRRM 1169 (1980), enforced NLRB v. Wright
15 Line, 662 F.2d 899, 108 LRRM 2513, (1CA 1981).

16 Under the dual motive doctrine the employee is said to
17 have given the employer cause for disciplinary action and
18 the employer is said to have had a discriminatory reason for
19 imposing the discipline. If the facts of the case show both
20 permissible and impermissible reasons for the employer's
21 action, the task then becomes one of determining motivation.
22 Board of Trustees, supra. However, when the evidence reveals
23 that the reason purported by the employer is a sham, the
24 justification can be called merely pretextual, i.e., there
25 is no legitimate business justification to be found, and
26 discrimination may be found without further testing under
27 the dual motive doctrine. Wright Line, supra.

28 Although the School Board contends it had legitimate
29 business reasons for removing Ms. Howe's head teaching
30 duties, the facts of this case support the conclusion that
31 the reasons advanced were pretextual. No indication was
32 ever given to Ms. Howe that she was not doing a good job as

1 head teacher. On the contrary, she received excellent evalu-
2 ations and she was periodically given salary increases. As
3 late as early August of 1982, she believed she was to be the
4 head teacher again the following school year because she had
5 signed an individual contract offered by the Board, which
6 included head teacher duties and a stipend for extra pay for
7 those duties, and because she had no indication from any
8 source that she would not be head teacher. Ms. Howe was a
9 credible witness and I have given considerable weight to
10 her testimony. Any comparable credit one might be inclined
11 to give to the testimony of the two School Board members is
12 simply countervailed by their reprehensible conduct regarding
13 the teachers' efforts toward unionization. It appears that
14 removing Ms. Howe's head teacher duties was a part of that
15 conduct. The reasons offered by them at the hearing for
16 removing her duties seemed to be afterthoughts prompted by
17 their newborn realization that they did indeed have obliga-
18 tions under the Act and that their employees were afforded
19 certain protections by it.

20 Even though it is unnecessary to go beyond the pretext
21 aspect of the analysis of the employer's assertion, an
22 application of the "but for" test set forth in Mt. Healthy,
23 supra, renders the same conclusion: the School Board removed
24 Ms. Howe's head teacher duties because of her union activi-
25 ties. The Complainant showed that Ms. Howe had been engaged
26 in protected activities and showed that the School Board
27 knew of those activities and possessed an antiunion animus.
28 The record is replete with evidence of the adverse reaction
29 to those activities by the Board and its individual members.
30 In light of the Board's total conduct and in the absence of
31 evidence other than the self-serving testimony of two of its
32 members; the conclusion is inescapable that they would not

1 have removed Ms. Howe's head teacher duties in the absence
2 of her protected activity. Not only was her union activity
3 the substantiating or motivating factor in the Board's
4 decision, it was the only factor. The NLRB in Wright Line,
5 supra, noted that in modern day labor relations.:

6 . . . an employer will rarely, if ever, baldly assert
7 that it has disciplined an employee because it detests
8 unions or will not tolerate employees engaging in union
9 or other protected activities. Instead, it will gen-
10 erally advance what it asserts to be a legitimate busi-
11 ness reason for its action. Examination of the evidence
12 may reveal, however, that the asserted justification is
13 a sham in that the purported rule or circumstances adv-
14 anced by the employer did not exist, or was not, in
15 fact, relied upon. When this occurs, the reason advanc-
16 ed by the employer may be termed pretextual. Since no
17 legitimate business justification for the discipline
18 exists, there is, by strict definition, no dual motive.

19 Specific evidence of the employer's intent to discourage
20 union membership is not necessary in discrimination cases.
21 It is sufficient to presume that the natural consequence of
22 the discriminatory action will chill union activity and mem-
23 bership in the union. Radio Officers Union v. NLRB, 347
24 U.S. 17, 33 LRRM 2417 (1954).

25 This case involves a demotion not a discharge, but the
26 same test for a violation of Section 39-31-401(3) MCA (an
27 8(a)(3) violation under the NLRA) is proper. The removal of
28 Ms. Howe's head teacher duties was in effect a demotion even
29 though her salary was not reduced. The position of head
30 teacher was in itself valuable. It carried an amount of
31 prestige just as any lead worker or otherwise superior posi-
32 tion would carry. Its status was superior to that of a
regular teacher because of the designation itself, not
because it held any authority to act for the School Board in
its relations with the other two teachers. Further, there
could be a monetary benefit to having served as head teacher
should Ms. Howe apply to other schools. The demotion of an
employee for engaging in protected activity has been declared

1 a violation of Section 8(a)(3) by the NLRB and the federal
2 courts. NLRB v. Berger Transfer & Storage Co., 110 LRRM
3 2865 (CA7 1982).

4 One of the issues raised by the Defendant in its post-
5 hearing brief was that Ms. Howe forfeited the head teacher
6 assignment when she returned the 1982-83 individual contract
7 with a note written on it that she accepted tenure only.
8 Ms. Howe testified that she wanted the Board to know that
9 she and the other teachers wanted to bargain and that signing
10 the contract did not indicate her willingness to surrender
11 her right to negotiate proper subjects. Even if her notation
12 could be said to amount to a conditional acceptance of the
13 Board's offer, the point is that she was, in fact, offered
14 the head teacher position and it was not until much later that
15 she was told she would not have them. At the time the School
16 Board offered her the individual contract and until August
17 there was no indication that she was not to resume her same
18 duties when school began. There was nothing about her nota-
19 tion on the contract which could be interpreted as relieving
20 the Board of its obligation to refrain from retaliatory con-
21 duct because she insisted on bargaining.

22 One further issue raised by the Defendant in its brief
23 must be specifically addressed. It contends that Ms. Howe
24 as head teacher was a supervisor and that she, therefore,
25 was not protected by the Act because supervisors are excluded
26 by Section 39-31-103 MCA. The Defendant also contends she
27 was a management official which the Act excludes from its
28 coverage. The NLRB and federal courts have consistently
29 held that only under limited and narrowly defined circum-
30 stances will discipline and discharges of supervisors be
31 upset because the action violated the NLRA. See Parker-
32 Robb Chevrolet, 110 LRRM 1289 and cases cited therein.
None of those circumstances were present here.

1 However, and assuming arguendo that Ms. Howe was a
2 supervisor or management official as those terms are defined
3 in the Act, this unfair labor practice proceeding is not the
4 forum in which to raise the question. Had the School Board
5 believed that Ms. Howe was a supervisor or management offi-
6 cial, it could have petitioned for a determination by the
7 Board of Personnel Appeals or it could have forced the union
8 to file a petition for a unit determination and an election.
9 That it did neither -- even after it realized its obligation
10 to bargain -- is significant. In my opinion it would not
11 promote the purpose of the Act to allow an employer to raise
12 such a defense to an unfair labor practice charge where a
13 certified or recognized bargaining unit exists and where the
14 employer has sat on its right to either petition this Board
15 for a new unit determination or for a unit clarification.

16 Section 39-31-103 MCA defines "supervisory employee"
17 and "management official" as follows:

18 (3)...any individual having authority in the interest
19 of the employer to hire, transfer, suspend, lay off,
20 recall, promote, discharge, assign, reward, discipline
21 other employees, having responsibility to direct them,
22 to adjust their grievances, or effectively to recommend
23 such action, if in connection with the foregoing the
24 exercise of such authority is not of a merely routine
25 or clerical nature but requires the use of independent
26 judgment.

27 (4)...a representative of management having authority
28 to act for the agency on matters relating to the imple-
29 mentation of agency policy.

30 Although the NLRA does not exclude management officials
31 from its coverage, it has developed a body of case law which
32 does provide for their exclusion. In 1974, the U.S. Supreme
Court held that all managerial employees are excluded from
coverage of the NLRA. NLRB v. Bell Aerospace, 416 U.S. 267,
85 LRRM 2945. It defined managerial employees as those who
formulate and effectuate management policies by expressing
and making operative the employer's decisions and those who

1 have discretion in the performance of their jobs independent
2 of their employer's established policy. The Court made it
3 clear that those who perform routine work are not excluded.

4 A cursory review of the duties enumerated in the job
5 description for head teacher reveals Ms. Howe did not: (1)
6 formulate policy, (2) effectuate policy, or (3) have discre-
7 tion independent of established policy. Most of the head
8 teacher functions listed are either regular teacher duties
9 or they are clerical duties. The phrase "serve as boss
10 under the board" is contradicted by everything listed in the
11 description. The import of the whole job description is
12 that the head teacher is to act only with the School Board's
13 permission and in cooperation so as not to interfere with
14 other teachers. The absence of discretionary authority
15 coupled with the fact that she did not formulate policy
16 serve to preclude the exclusion of her old position based on
17 the management official definition. General Dynamics Corp.,
18 213 NLRB 124 (1974), 87 LRRM 1705.

19 The cases decided both by this Board and by the NLRB
20 and federal courts interpreting "supervisory employee" also
21 indicate that the head teacher cannot be excluded from
22 coverage on that basis. The head teacher is nothing more
23 than a lead worker. NLRB v. Harmon Industries, 565 F.2d
24 1047, 96 LRRM 3198 (1977); City of Billings v. Billings
25 Firefighters Local No. 521, 39 St. Rep. 1844. All of the
26 duties listed in the job description and Ms. Howe's testimony
27 show that the head teacher was to "report to the Board,"
28 "inform the Board," work with other teachers, "cooperate"
29 with other teachers. Nothing, except of course the phrase
30 "Serve as boss..." in the description shows she had author-
31 ity to perform any of the functions listed in the definition
32 of "supervisory employee," nor does it indicate she could

1 effectively recommend them. The word "boss" as used in the
2 description begs the question: what did "boss" mean? All
3 the evidence on the record compels the conclusion it meant
4 "straw boss" or lead worker. Further, there is nothing in
5 the record to show that Ms. Howe used independent judgment
6 in carrying out "supervisory" responsibilities even if one
7 assumed, for the sake of argument, she had the necessary
8 authority or that she effectively recommended any of the
9 actions. Unimedia Corp. 98 LRRM 1176 (1978); Poultry Enter-
10 prises, Inc. v.NLRBI, 216 F.2d 798, 35 LRRM 2151.

11 The School Board violated Ms. Howe's collective bar-
12 gaining rights under Section 39-31-401(3) MCA by removing
13 her head teacher duties. Such violation also interfered
14 with her Section 39-31-201 MCA rights and violated Section
15 39-31-401(1) MCA.

16 CONCLUSION OF LAW

17 Gallatin County School District No 1, Logan School
18 District violated Sections 39-31-401(1) and (3) MCA when it
19 removed Susan Howe's head teacher duties.

20 RECOMMENDED ORDER

21 IT IS ORDERED that Gallatin County School District No.
22 1, Logan School District, its officers, agents, representa-
23 tives and School Board members shall:

- 24 1. Cease and desist its violation of Section 39-31-401
25 MCA.
- 26 2. Take the following affirmative action to make
27 Susan Howe whole:
28 Offer her the position of head teacher
29 and reinstate her to that position if
30 she accepts.
- 31 3. Sign and post in a conspicuous place in the Logan
32 School building during the months of September and

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October 1983 a copy of the attached notice marked "Appendix."

- 4. Notify this Board in writing within twenty days of this ORDER becoming final ~~and~~ what steps have been taken to comply therewith.

NOTICE

Exceptions to these findings, conclusion and recommendation may be filed within twenty days. If no exceptions are filed this recommended order will become the final order of the Board of Personnel Appeals.

Dated this 27th day of May, 1983.

BOARD OF PERSONNEL APPEALS

By: 
Jack H. Calhoun
Hearing Examiner

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 27th day of May, 1983:

Charles Erdman, Attorney
Montana School Board Association
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BPA4/bdG