

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 6-84:

MONTANA EDUCATION ASSOCIATION, MEA,)
)
 Complainant,)
)
 - vs -)
)
 LEWIS AND CLARK COUNTY SCHOOL)
 DISTRICT #45, AUGUSTA, MONTANA,)
)
 Defendant.)

FINAL ORDER

The Board of Personnel Appeals having considered Defendant's, Lewis and Clark County School District #45, exceptions to Findings of Fact, Conclusions of Law, finds and Orders as follows:

1. The evidence is inconclusive that Superintendent Price had exclusive opportunity and motive to tamper with the letters as there were other persons who had possible motive and opportunity.

2. IT IS ORDERED that Unfair Labor Practice No. 6-84 be dismissed.

DATED this 24 day of June, 1985.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn
Chairman

CERTIFICATE OF MAILING

I, Jennifer Jacobsen, do certify that a true and correct copy of this document was mailed to the following on the 25 day of June, 1985:

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STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 6-84:

MONTANA EDUCATION ASSOCIATION,)	
NEA,)	
Complainant,)	
vs.)	FINDINGS OF FACT,
LEWIS & CLARK COUNTY SCHOOL)	CONCLUSION OF LAW
DISTRICT #45, AUGUSTA,)	AND
MONTANA,)	RECOMMENDED ORDER
Defendant.)	

* * * * *

INTRODUCTION

The Montana Education Association filed this unfair labor practice charge on March 15, 1984, alleging Lewis and Clark County School District No. 45, through its Superintendent, had violated Section 39-31-401(1), MCA, by interfering with the Association's and individual teachers' statutory rights. The School District denied the charge. We conducted an investigation under authority of Section 39-31-405(1), MCA, and found probable merit to the charge. A hearing was held, under authority of Section 39-31-406, MCA, in Augusta on July 10, 1984. The Montana Education Association was represented by Emilie Loring, the School District was represented by Charles Erdmann.

ISSUES

The first issue raised by this charge is whether Lewis and Clark County School District No. 45, through its Superintendent, interfered with the delivery of certain letters sent by the Montana Education Association to teachers in the School District. The second issue is, if the letters were withheld from delivery to the teachers, did such conduct violate Section 39-31-401(1), MCA?

FINDINGS OF FACT

1
2 Based on the evidence on the record, including the
3 sworn testimony of witnesses, I make the following findings
4 of fact.

5 1. The Montana Education Association is the exclusive
6 representative of teachers employed by Lewis and Clark
7 County School District No. 45, Augusta, Montana.

8 2. A decertification election in Augusta was sched-
9 uled to be held on Thursday, March 1, 1984, by the Board of
10 Personnel Appeals. The purpose of the election was to
11 determine whether teachers in Lewis and Clark County School
12 District No. 45 wanted to continue to be represented by the
13 Augusta Education Association, MEA, NEA, or whether they
14 wanted no representation for collective bargaining purposes.

15 3. On Monday, February 27, 1984, letters bearing the
16 signatures of two Montana Education Association officials
17 were mailed from Helena. They were addressed to the indi-
18 vidual teachers in Lewis and Clark County School District
19 No. 45. The letters urged teachers to vote to retain their
20 affiliation with MEA-NEA rather than voting for no represen-
21 tation. The envelopes which contained the letters bore the
22 name and the return address of the Montana Education Assoc-
23 iation in Helena. It was customary for teachers to receive
24 personal mail at the school.

25 4. On Tuesday, February 28, 1984, David Hartman,
26 Executive Director of the Montana Education Association and
27 one of the officials who signed the letters to the teachers,
28 called Kathleen Troy, President of the Augusta Education
29 Association, told her the letters had been mailed the pre-
30 vious day and asked her to be alert to their arrival at the
31 school.
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5. Hartman's call to Troy was routine and was a part of the normal course of business in which he engaged when a decertification election was to be held involving a Montana Education Association affiliate.

6. None of the letters to the teachers was received by the teachers in their boxes at the school. One of the teachers, Kathleen Troy, received her letter at home because she had previously made arrangements with the post office to have all her mail, which was addressed to her at the school, placed directly in her own post office box. Mrs. Troy received her letter on Wednesday, February 29, 1984. The remaining letters have never been received or found.

7. On Thursday, March 1, 1984, at a meeting of teachers, immediately prior to the opening of the polls for the decertification election, Mrs. Troy announced that she would like to read aloud the confidential letter she received the day before from the Montana Education Association. Mrs. Price, a teacher in the school and wife of the Superintendent, objected to the reading. Mrs. Troy read the letter in spite of the objection.

8. Also, on Thursday, March 1, 1984, after being informed earlier in the day by Mrs. Troy that none of the other teachers had received their letters, Hartman called Richard Price, Superintendent of the School District, and asked him if he knew anything of the letters. Price said he had not seen them. Hartman then called Michael Winters, the Augusta postmaster, who told him the letters had been received at the Augusta post office on Wednesday, February 29, 1984, all of them, except Mrs. Troy's, had been placed in the school's mail bag and the school's custodian, Shorty Henry, picked up the bag.

1 9. On Friday, March 2, 1984, David Hartman again
2 called Superintendent Price and asked if he had seen the
3 letters. Mr. Price said he had not.

4 10. On Wednesday, February 29, 1984, Mr. Henry picked
5 up the mail bag at the Augusta post office at about 1:30
6 p.m. A few minutes later he delivered the bag to the office
7 of Jody Young, secretary and school clerk. Mrs. Young's
8 office is also the location of the teachers' mail boxes and
9 it contains a counter positioned in front of a glass window
10 which allows a view both to the hallway outside and from the
11 hallway inside. When the door to Young's office is open,
12 and when she is seated at her desk, she cannot see the
13 counter. Mrs. Young's office is an anteroom to the Super-
14 intendent's office.

15 11. After Henry delivered the mail bag to Young's
16 office, Superintendent Price emptied the contents of the bag
17 on the counter located by the window to the hallway and
18 began sorting the mail. The door to Mrs. Young's office was
19 open thus obscuring her view of the mail on the counter.

20 12. During the time Price was sorting mail a student
21 came in and told him Mrs. Troy's car lights were on. He
22 stopped sorting, went across the hall into the gym where
23 Troy was holding a physical education class and informed her
24 about the lights. She asked him if he would turn them off
25 for her. He did so.

26 13. When he returned to the building Mrs. Troy's class
27 was in the hallway getting a drink of water from the foun-
28 tain adjacent to the office. He returned to sorting the
29 mail. Mrs. Troy observed him sorting for several minutes
30 while her students got a drink. She testified that she
31 remembered him sorting the mail, not in front of the window,
32 but in front of the teacher mail boxes which were located

1 directly across the room from the counter. She also testi-
2 fied that when she and her class left the gym and went into
3 the hallway Mr. Price had already returned from turning off
4 her car lights and was in the process of sorting mail at
5 that time. Mrs. Troy did not see the letters from the
6 Montana Education Association.

7 14. Mr. Price testified that he did not see the let-
8 ters and that he first became aware they were missing when
9 Hartman called him on March 1, 1984. He further testified
10 he held no union animosity and that during the 1983-84
11 school year he had placed mail from the Montana Education
12 Association in the teachers' boxes. On cross examination he
13 said he did not sort any Montana Education Association mail
14 during the 1983-84 school year.

15 DISCUSSION

16 Except for a few minor details, the facts in this case
17 are not in dispute. The testimony of the witnesses at the
18 hearing is not conflicting except that related to a few
19 irrelevant matters.

20 Mr. Price testified that when he told Mrs. Troy her car
21 lights were on she asked him if he would turn them off and
22 that when he returned to the building Mrs. Troy and her
23 class were already in the hallway outside the office. Mrs.
24 Troy testified that he asked her if it was alright if he
25 turned her lights off and that she was not in the hallway
26 when he returned, but that she was still in the gym with her
27 class. She stated that Mr. Price was in the office sorting
28 mail in front of the mail boxes when she came into the
29 hallway with her students. There is little significance to
30 the difference between their recollections. Although under
31 the one view it could be said Mrs. Troy had the opportunity
32 to enter the office and take the letters and under the other

1 she did not have such opportunity, it is highly unlikely she
2 could have taken the letters unnoticed by Mrs. Young, her
3 students or anyone else. Moreover, she had no reason to
4 want the letters withheld from delivery.

5 The other area of inconsistency between Mr. Price's and
6 Mrs. Troy's testimony is his location when he was sorting
7 the mail. Price said he was in front of the window where he
8 had earlier dumped the mail on the table. Troy said he was
9 standing in front of the mail boxes when she observed him.
10 Other witnesses testified they had seen him sort the mail
11 both places. Mrs. Young said he usually dumped it on the
12 table in front of the window. Based on the testimony of all
13 the witnesses who had observed him sorting the mail, I find
14 that, depending on what stage of sorting and placing in the
15 boxes he was in, he could have been in either place; he
16 first dumped the mail on the table in front of the window,
17 segregated the teachers' mail from other mail and then put
18 their mail in their boxes. At any particular time he could
19 have been observed in either location. It is unnecessary to
20 make a credibility resolution regarding the slight differ-
21 ence between Mrs. Troy's testimony and that of Mr. Price
22 over his whereabouts at the time he sorted the mail or over
23 whether he had already returned to the office when she
24 entered the hallway with her students because even giving
25 the most favorable interpretation to Mr. Prices' version ■
26 still leaves abundant doubt that Mrs. Troy could have taken
27 the letters or that she had any reason to want them withheld
28 from delivery.

29 With regard to Mr. Price's testimony that he never saw
30 the letters, I find that testimony to be unbelievable when
31 considered along with the believable sequence of events
32 leading up to the delivery of the letters into the office by

1 Mr. Henry. Further, Mr. Price's inconsistent testimony
2 about whether he had placed MEA mail in the teacher boxes
3 during the school year lends strong support to a conclusion
4 that his testimony about not seeing the letters was untrue.

5 Essentially, the facts summarized are: (1) the letters
6 in question were mailed from the Montana Education Association
7 office to the teachers in Augusta, (2) the letters were
8 received at the Augusta post office and they were placed in
9 the school's mail bag, (3) the school custodian picked up
10 the mail and delivered it to the school office, (4) the
11 Superintendent sorted the mail, but (5) the teachers did not
12 receive the letters. It cannot seriously be contended that
13 the letters were not in the Superintendent's custody. It
14 would be incredible to conclude they may not have reached
15 him in light of the fact that the letters were mailed, they
16 were recieved in the Augusta post office, all except one
17 were placed in the school mail bag, and Mrs. Troy received
18 her letter. There was no motive shown for anyone else to
19 remove the letters from the bag or the office once they
20 arrived. There is no reasonable explanation of what hap-
21 pened to the letters if Superintendent Price did not take
22 them. It is most improbable that the letters were misdeli-
23 vered because not one ever showed up later.

24 Mrs. Troy's best interest would have been served if the
25 letters had been delivered to the teachers, moreover, she
26 read her own letter aloud just before the decertification
27 election. She had no reason to take the letters. There is
28 no evidence on the record to support a finding that anyone
29 else had access to the letters and that they had reason to
30 want them withheld from delivery. Whether Mrs. Troy ever
31 had access to them during the time Price was out of the
32 building for a few minutes is at best arguable, but to

1 ascribe a motive to her other than wanting the letters
2 delivered is not logical.

3 There is no direct evidence that Superintendent Price
4 received the letters, nor is there direct evidence that he
5 withheld the letters from delivery to the teachers; never-
6 theless, the circumstantial evidence supporting those con-
7 clusions is abundant. There simply is no reasonable expla-
8 nation of what happened to the letters if he did not with-
9 hold them. All of the circumstantial evidence in this case
10 pointing toward the culpability of Price coupled with his
11 inconsistent statements about whether he had put Association
12 mail in teacher boxes during the 1983-84 school year compels
13 the conclusion that he did in fact intentionally interfere
14 with the delivery of the letters.

15 Counsel for both parties agree that the decision in
16 this matter may be based on circumstantial evidence and they
17 both cite Exchange State Bank of Glendive v. Occident Eleva-
18 tor Co., 95 Mont. 78, 24 P.2d 126 (1933), as authority for
19 that principle and for the standard by which the quantum of
20 evidence should be measured. The Court in Exchange held:

21 The solution of any issue in a civil case may rest
22 entirely on circumstantial evidence... All that
23 is required is that the evidence shall produce
24 moral certainty in an unprejudiced mind... In
25 other words, when it furnishes support for the
26 Plaintiff's theory of the case, and thus tends to
27 exclude any other theory, it is sufficient to
28 sustain a verdict or decision.

29 The evidence on the record in this case clearly sup-
30 ports the Association's contention that Superintendent Price
31 did not distribute the letters which had been placed in the
32 school mail bag by the postal people and delivered to the
school office by the custodian. Any suggestion that the
letters may not have been placed in the mail bag at the post
office or that once the mail in the bag was dumped on the

1 counter by Price others may have taken it, is contrary to
2 reason and is not supported by the evidence. There, of
3 course, cannot exist absolute certainty that Price withheld
4 the letters because there was no direct evidence proving
5 that, nevertheless the evidence is more than adequate to
6 exclude any other reasonable hypothesis.

7 In his brief counsel for the School District conceded
8 that if the Association proved Superintendent Price stole
9 the letters, a good case could be made for interference.

10 The charge brought by the Association alleged the
11 Superintendent, as agent for the School District, interfered
12 with the Association's and individual teachers' rights under
13 the Act. Section 39-31-401(1), MCA, provides that it is an
14 unfair labor practice for an employer to interfere, restrain
15 or coerce employees in the exercise of their Section
16 39-31-201, MCA rights, which provides:

17 Public employees shall have and shall be protected
18 in the exercise of the right of self-organization,
19 to form, join, or assist any labor organization,
20 to bargain collectively through representatives of
21 their own choosing on questions of wages, hours,
22 fringe benefits, and other conditions of employ-
23 ment, and to engage in other concerted activities
24 for the purpose of collective bargaining or other
25 mutual aid or protection free from interference,
26 restraint, or coercion.

27 A long line of cases decided by the National Labor
28 Relations Board and the federal courts has stood for the
29 principle that union access to employees during the time
30 preceding an election is of threshold concern and that
31 unreasonable impediment of such access is illegal. See
32 Republic Aviation Corp. v. NLRB, 324 US 793, 16 LRRM 620
(1945); NLRB v. Monarch Tool Co., 210 F.2d 183, 33 LRRM 2488
(CA 6) cert. denied 347 US 967, 34 LRRM 2143 (1954); NLRB v.
Babcock & Wilcox, 351 US 105, 38 LRRM 2001 (1956); Eastex,
Inc. v. NLRB, 437 US 556, 98 LRRM 2717 (1978).

1 An employer was held to have violated the National
2 Labor Relations Act when the manager destroyed union leaf-
3 lets which had been given to an employee to pass out and
4 when, at another location, a manager confiscated union
5 leaflets from individual employees. Elias Bros. Big Boy v.
6 NLRB, 325 F.2d 360, 54 LRRM 2733 (CA 6, 1963).

7 Where an employer seized literature which had been
8 distributed by the union to employees by placing the mater-
9 ial on unattended desks before working hours the National
10 Labor Relations Board found a violation of Section 8(a)(1)
11 of the Act. Woolworth Co. v. NLRB, 530 F.2d 1245, 92 LRRM
12 2240 (CA 5, 1976) enfg. 216 NLRB 945, 88 LRRM 1516 (1975).

13 The NLRB found a violation of the NLRA where an employ-
14 er confiscated literature because it concerned union matters
15 and held that the taking of the literature interfered with
16 the employees' Section 7 rights to engage in and/or be
17 informed of the union's organizing campaign. Photo-Sonics,
18 Inc. v. NLRB, 678 F.2d 121, 110 LRRM 2539 (CA 9, 1982) enfg.
19 106 LRRM 1166; also see Union Carbide Corp. v. NLRB, 714
20 F.2d 657, 114 LRRM 2129 (CA 6, 1983) enfg. 109 LRRM 1062.

21 Having determined that Superintendent Price withheld
22 from delivery to the teachers union letters, I find he
23 interfered with their right to engage in concerted activi-
24 ties under Section 39-31-201, MCA.

25 CONCLUSION OF LAW

26 Lewis and Clark County School District No. 45, Augusta,
27 Montana, acting through its agent Superintendent Price,
28 violated Section 39-31-401(1), MCA, by withholding from
29 delivery certain letters from the Montana Education Assoc-
30 iation to individual teachers represented by the Associa-
31 tion.

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RECOMMENDED ORDER

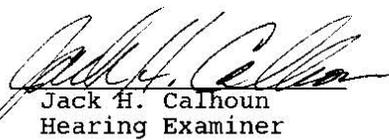
Based on the findings of fact and conclusion of law herein, IT IS ORDERED that Lewis and Clark County School District No. 45, its trustees, officers, agents and representatives cease and desist from interfering with the rights of the Montana Education Association and individual teachers as set forth in Section 39-31-401(1), MCA.

NOTICE

Exceptions to these findings of fact, conclusion of law and recommended order may be filed within twenty days of service. If exceptions are not filed, the recommended order will become the final order of the Board of Personnel Appeals.

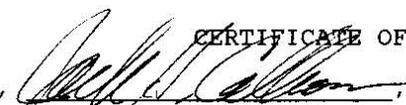
DATED this 21st day of November, 1984.

BOARD OF PERSONNEL APPEALS

BY 
Jack H. Calhoun
Hearing Examiner

* * * * *

CERTIFICATE OF MAILING

I, , do certify that a true and correct copy of this document was mailed to the following on the 21st day of November, 1984:

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