

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

In the matter of Unfair Labor Practice No. 1-87:

MONTANA PUBLIC EMPLOYEES)
ASSOCIATION, MPEA; and)
MIKE MAHAN,)

Complainant,)

-vs-

FINAL ORDER

PINE HILLS SCHOOL, ALLAN)
DAVIS, SUPERINTENDENT, MILES)
CITY, MONTANA,)

Defendant/Employer.)

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Arlyn L. Plowman on August 20, 1987.

Exceptions to the Findings of Fact, Conclusions and Law and Recommended Order were filed by the Personnel Division, Department of Administration on September 9, 1987.

Oral argument was scheduled before the Board of Personnel Appeals on November 30, 1987.

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

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

2. IT IS ORDERED that this Board therefore adopt the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Arlyn Plowman as the Final Order of this Board.

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The hearings examiner's proposed decision is nevertheless adopted with one qualification. The hearings examiner made certain findings that the employer had failed to institute a program of progressive discipline or warnings. The Board does not find these findings particularly persuasive or supportive of the conclusions of law in this matter, and does not intend to give these findings any precedential value.

DATED this 24th day of February, 1988.

BOARD OF PERSONNEL APPEALS

By Alan Joscelyn
Alan Joscelyn
Chairman

CERTIFICATE OF MAILING

I, Janette Jacobson, do certify that a true and correct copy of the above document was mailed to the following on the 24th day of February, 1988:

Kathleen Holden
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MONTANA PUBLIC EMPLOYEES)	
ASSOCIATION, MPEA; and MIKE)	
MAHAN)	
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Complainant,)	
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vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW; AND
)	RECOMMENDED ORDER
PINE HILLS SCHOOL, ALLAN)	
DAVIS, SUPERINTENDENT, MILES)	
CITY, MONTANA,)	
)	
Defendant/Employer.)	

* * * * *

I. INTRODUCTION

A hearing on the above-captioned matter was held on July 16, 1987, in the courtroom of the Custer County Courthouse, Miles City, Montana. At the hearing David Stiteler, attorney, represented the Montana Public Employees Association and Carole Colbo, Labor Relations Specialist, State Personnel Division, Department of Administration, State of Montana represented the Pine Hills School. Arlyn L. Plowman was the Hearing Examiner. The parties had the opportunity to present documentary evidence and testimony of witnesses in the support of their case. Upon the conclusion of rebuttal testimony, the parties waived closing arguments in favor of post-hearing briefs. The briefs were to be submitted postmarked no later than August 7, 1987. Timely briefs were filed and the matter was deemed submitted on August 10, 1987.

II. BACKGROUND

This hearing arose out of an unfair labor practice charge complaint filed on or about January 5, 1987, by the Montana Public Employees Association (MPEA) against the Pine Hills School. That charge alleged that the Pine Hills

1 School violated the Montana Collective Bargaining Law for
2 Public Employees (Section 39-31-101, et seq., MCA) by
3 discharging Mike Mahan for his involvement in certain
4 protected activities.

5 The employer/defendant, Pine Hills School, responded
6 timely to the complaint and denied that Mike Mahan's pro-
7 tected activity was a factor in his discharge. The employer
8 further asserted that the employee was discharged for
9 unsatisfactory performance.

10 On January 30, 1987, the Board of Personnel Appeals
11 appointed Michael T. Furlong to investigate the allegations
12 contained within the complaint. On March 26, 1987 an inves-
13 tigator's report was issued finding that the allegations
14 contained probable merit.

15 Subsequently, the Board of Personnel Appeals appointed
16 Arlyn L. Plowman as Hearing Examiner and a Notice of Hearing
17 was issued May 20, 1987. A pre-hearing conference was held
18 on July 1, 1987 by telephone.

19 III. FINDINGS OF FACT

20 1. Mike Mahan was hired by the Pine Hills School as a
21 Cottage Life Attendant on May 12, 1986. He was hired under
22 the provisions of an On the Job Training (OJT) program. The
23 OJT program subsidized his employment for a specified
24 training period. He completed the OJT program and continued
25 his employment with the Pine Hills School. He was a proba-
26 tionary employee. He would have completed his probationary
27 period November 12, 1986.

28 Mike Mahan had previously been employed by the Pine
29 Hills School in the school's dairy.

30 2. Mike Mahan's employment with the Pine Hills School
31 as a Cottage Life Attendant was not without difficulty.
32 Mike Mahan was involved in at least five instances wherein

1 he received verbal reprimands.

- 2 a. May 23, 1986 - Mike Mahan violated post
3 orders and left a co-worker in a lodge by
4 himself with twenty-five students. He was
5 counseled by a program manager. He was not
6 advised or warned that his job was in jeopardy.
7
8 b. May 31, 1986 - Mike Mahan was called a name
9 by the residents. He reacted to this name
10 calling using punitive measures. Once again
11 he was counseled by a program manager and
12 also by Larry Williams, Section Chief for
13 Residential Services. Mike Mahan was reprimanded
14 for his punitive measures and his
15 failure to implement progressive discipline.
16 He was not advised or warned that his job was
17 in jeopardy.
18
19 c. August 20, 1986 - Mike Mahan had a problem
20 with a student. He became angry with the
21 student and also angry with a co-worker in
22 view of the students. Once again he was
23 counseled by a program manager and Larry
24 Williams. He was advised to learn to control
25 his anger. Mike Mahan was not advised or
26 warned that his job was in jeopardy.
27
28 d. October 15, 1986 - Mike Mahan contacted the
29 program manger at Russell Lodge to discuss
30 another employee's performance. Mike Mahan
31 was angry with the co-worker and alleged that
32 the co-worker would not back him up. A
meeting was scheduled the next day to discuss
the situation. However, at the time set for
the meeting Mike Mahan was reticent to
discuss what had prompted his complaint.
Once again he was counseled by the program
manager about controlling his anger and
over-reacting to situations. Mike Mahan was
not advised or warned his employment was in
jeopardy.
e. November 1, 1986 - One of the residents was
being transferred to Custer Lodge from the
maximum security unit. There occurred an
incident of name-calling between Mike Mahan
and the student. The student had to be
removed from the lodge by a security guard.
Once again Mike Mahan was counseled by Larry
Williams about his anger and how anger would
not diffuse conflict with the students but
would escalate the situation. Mike Mahan was
not advised or warned that his employment was
in jeopardy.

30 In all of the above instances any reprimands given were
31 verbal; no written reprimands were issued. In none of the
32 above instances did the employer institute a program of
progressive discipline or remedial training.

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3. During October of 1986, in concert with other Pine Hills School employees, Mike Mahan compiled a list of complaints concerning events and policies affecting their employment. These complaints were reduced to writing and the employees requested the help of local union officers in presenting the complaints to management.

The local union officers presented this list of complaints to Larry Williams. Larry Williams was less than pleased when presented with the complaints. In the response to his questions, the local union officers told Larry Williams that Mike Mahan was directly involved with the preparation and compilation of the complaints.

4. On November 5, 1986, Mike Mahan was given a termination letter signed by Larry Williams in which Mike Mahan was advised that his employment had been terminated due to performance deficiencies. The termination letter was written after recommendation for termination was received from at least one program manager, and after he consulted with and obtained the concurrence of Mr. Sealy, Director of Care and Custody and Mr. Davis, Superintendent of the Pine Hills School.

5. The timing and sequence of events must be considered. At most, only a few weeks passed between the time that the list of complaints was presented to the employer and the time of Mike Mahan's discharge.

6. On November 2, 1986 Larry Williams counseled Mike Mahan regarding an incident concerning name-calling between Mike Mahan and a student. This was the fourth time Mike Mahan had been counseled concerning angry reactions with students or other staff members. As in other instances, Mike Mahan was not warned that his job was in jeopardy.

7. Several days later, on November 5, 1986, Larry

1 Williams discharged Mike Mahan, allegedly because the manner
2 in which Mike Mahan related to and interacted with students
3 was not conducive to their rehabilitation or treatment.

4 8. Mike Mahan had previously worked for this employ-
5 er. He completed an On the Job Training (OJT) program. At
6 the time of his termination, he was within ten days of
7 completing his six month probationary period. He was no
8 stranger to the management of Pine Hills School. Long
9 before the time of termination management must have known of
10 his deficiencies and strengths, work habits and practices.
11 There is nothing in the record showing that the employer
12 considered extending his probationary period to correct
13 deficiencies.

14 9. He may have been less than an exemplary employee.
15 He had been counseled repeatedly; but he was never warned
16 that his job was in jeopardy nor was there any mention of
17 progressive discipline. (There is a certain irony here in
18 that the employer repeatedly complained that Mahan did not
19 implement progressive discipline when dealing with resi-
20 dents.)

21 10. As a probationary employee Mahan could have been
22 terminated at will without recourse. Mike Mahan received
23 counseling for incidents on May 23 and May 31, 1987 prior to
24 the completion of the OJT program. He also received coun-
25 seling for incidents on August 20, October 15 and November
26 1, 1986. The major change in Mike Mahan's standing over
27 this time was his involvement with the preparation of a list
28 of complaints. The timing of his discharge, shortly after
29 Larry Williams became aware of his involvement with the list
30 of complaints, is more than coincidental.

31 11. There is substantial evidence that Mike Mahan's
32 participation in the drafting of the list of complaints was

1 a motivating factor in the decision to terminate him.

2 12. The employer did not show that Mike Mahan was
3 discharged pursuant to any disciplinary/evaluation policy or
4 system. It was not shown that Mike Mahan's performance just
5 prior to termination was substantially more deficient than
6 it had been previously. Nor was it shown that he was subjec-
7 ted to a policy, system or practice of progressive disci-
8 pline or remedial training to correct alleged deficiencies.
9 Nor was it shown that he had ever been advised that his
10 performance was so deficient as to jeopardize his continued
11 employment.

12 IV. CONCLUSIONS OF LAW

13 1. The Board of Personnel Appeals has jurisdiction in
14 this matter under Section 39-31-101 et seq., MCA.

15 2. Pursuant to Section 2-18-102, MCA the Department
16 of Administration has promulgated Rules, Administrative
17 Rules of Montana 2.21.3808 through 2.21.3812, dealing with
18 probationary employees. Accordingly, an employee may be
19 discharged at any time during this six month probationary
20 period. The probationary period may be extended. Mike
21 Mahan was such a probationary employee.

22 3. The Montana Collective Bargaining Law for Public
23 Employees at Section 39-31-101 et seq., MCA, specifically
24 Section 39-31-401, MCA makes it an unfair labor practice for
25 a public employer to interfere with, restrain, or coerce
26 employees in the exercise of their right to engage in
27 self-organization, to form, join or assist any labor organ-
28 ization and to engage in other concerted activities for the
29 purpose of mutual aid or protection.

30 The language in the Montana Collective Bargaining for
31 Public Employees Act setting forth employee rights (Section
32 39-31-201, MCA) and defining of unfair labor practices on

1 the part of employers (Section 39-31-401, MCA) is nearly
2 identical to similar provisions in Section 7 and 8 of the
3 National Labor Relations Act, 29 USC 150 et seq. Therefore,
4 practice and precedent pursuant to the National Labor
5 Relations Act must be given great weight. City of Great
6 Falls v. Young, 686 P.2d 185, 119 LRRM 2682.

7 Section 39-31-201, MCA in language very similar to
8 Section 7 of the National Labor Relations Act, states that
9 public employees shall have and shall be protected in the
10 exercise of certain rights or activities. These protected
11 activities include assisting any labor organization and
12 engaging in concerted activities for the purpose of mutual
13 aid or protection.

14 Concerted activities have been defined as those activi-
15 ties which are for the purpose of inducing or preparing for
16 group action to correct a grievance or complaint. Indiana
17 Gear Works v NLRB, 371 F.2d 273, 64 LRRM 2253; Prill v.
18 NLRB, 751 F.2d 941, 118 LRRM 2649; Ontario Knife Company v
19 NLRB, 637 F.2d 840, 106 LRRM 2053.

20 The mutual aid or protection clause protects activities
21 beyond grievance settlement, collective bargaining and
22 self-organization. NLRB v Coca Cola Bottling Company of
23 Buffalo, Inc., 811 F.2d 82, 124 LRRM 2585; Eastex, Inc. v
24 NLRB, 556 F.2d 1280, 98 LRRM 2717.

25 Mike Mahan's participation in the formulation and
26 drafting of the list of complaints was protected activity
27 under Section 39-31-201, MCA.

28 4. Section 39-31-401(1), MCA is similar to Section 8(a)(1)
29 of the National Labor Relations Act and must be distinguish-
30 ed from Section 39-31-401(3), MCA which is similar to
31 Section 8(a)(3) of the National Labor Relations Act. Section
32 39-31-401(1), MCA makes it an unfair labor practice for a

1 public employer to interfere with, restrain or coerce
2 employees in the exercise of rights guaranteed in Section
3 39-31-201, MCA.

4 The protection afforded employees under Section
5 39-31-401(1), MCA is not exclusive to union activity but
6 extends to any group activity for mutual aid or protection.
7 Therefore, Pine Hills School has committed an unfair labor
8 practice if Mike Mahan's discharge interfered with, re-
9 strained, or coerced his right to engage in concerted
10 activity.

11 It is not necessary to show that the discharge had the
12 effect of discouraging union membership. It is necessary
13 only to show that the discharge interfered with Mike Mahan's
14 right to engage in concerted activity for mutual aid or
15 protection to show a violation of Section 39-31-401(1), MCA.
16 NLRB v McCatron, 216 F.2d 212, 35 LRRM 2012; NLRB v. Burnup
17 and Sims, Inc., 379 US 21, 57 LRRM 2385; Modern Motors v
18 NLRB, 198 F.2d 925, 30 LRRM 2628.

19 5. It is not necessary to show that Mike Mahan's
20 concerted and therefore protected activities were the sole
21 reason for his discharge. It is only necessary to show that
22 his protected activity was a motivating factor in his
23 discharge. NLRB v. Transportation Management Corporation,
24 462 US 393, 113 LRRM 2857; Board of Trustees v State of
25 Montana, 604 P.2d 770, 103 LRRM 3090.

26 There is substantial evidence that Mike Mahan's concer-
27 ted, and therefore protected, activity was a motivating
28 factor in Larry Williams' decision to discharge Mike Mahan.
29 The implementation of the decision to discharge interfered
30 with, restrained or coerced Mike Mahan's rights under
31 Section 39-31-201, MCA and is therefore an unfair labor
32 practice pursuant to Section 39-31-401(1), MCA.

1 6. Both the United States Supreme Court and the
2 Montana Supreme Court have determined that if the charging
3 party has shown substantial evidence that an employee was
4 illegally discharged for protected activity, the burden is
5 on management to show, by a preponderance of the evidence
6 that the reason for discharge was not related to protected
7 activity. NLRB v. Transportation Management Corporation,
8 supra, Board of Trustees v State of Montana, supra.

9 The employer, therefore, had a burden to show by a
10 preponderance of the evidence that Mike Mahan would have
11 been discharged absent his protected activity. The employer
12 has clearly failed to do so.

13 Pine Hills School, a public employer subject to the
14 Montana Collective Act for Public Employes committed an
15 unfair labor practice when Mike Mahan was discharged. Mike
16 Mahan's protected activity was a motivating factor in his
17 discharge. He would not have been discharged on November 5,
18 1986 but for his concerted and protected activity.

19 V. RECOMMENDED ORDER

20 It is hereby ordered that after this order becomes
21 final, Pine Hills School, its officers, agents, and repre-
22 sentatives shall:

- 23 1. cease and desist its violation of Section
24 39-31-401, MCA;
- 25 2. take affirmative action by reinstating Mike
26 Mahan as a Cottage Life Attendant at the Pine
27 Hills School;
- 28 3. make Mike Mahan whole by repaying him for all
29 lost wages, including interest and all
30 benefits which he would have received had he
31 not been terminated on November 5, 1986;
- 32 4. meet with union representatives of Mike Mahan
 and attempt to determine the amount due him
 under number 3 above, if a mutual determina-
 tion cannot be made within ten (10) days,
 notify this Board so that a hearing may be
 held and a detailed remedial order issued;

- 1
- 2 5. post in a conspicuous place in the Pine Hills
- 3 School copies of the attached notice marked
- 4 "Appendix";
- 5 6. notify this Board in writing within twenty
- 6 (20) days what steps have been taken to
- 7 comply with this order.

8 VI. NOTICE

9 Exceptions to these Findings of Fact, Conclusions of

10 Law, and Recommended Order may be filed within twenty (20)

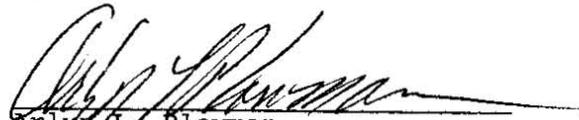
11 days of service thereof. If no exceptions are filed, the

12 Recommended Order shall become the Final Order of the Board

13 of Personnel Appeals. Address exceptions to the Board of

14 Personnel Appeals, P.O. Box 1728, Helena, Montana 59624.

15 Dated this 20th day of August, 1987.

16 
17 Arlyn L. Plowman
18 Hearing Examiner

19 CERTIFICATE OF SERVICE

20 The undersigned does certify that a true and correct

21 copy of this document was served upon the following on the

22 20th day of August, 1987, postage paid and addressed as

23 follows:

24 Carole Colbo
25 Labor Relations Specialist
26 Labor Relations and Employee Benefits Bureau
27 Department of Administration
28 State of Montana
29 Mitchell Bldg., Room 130
30 Helena, MT 59620

31 David W. Stiteler
32 Staff Attorney
Montana Public Employees Association
P.O. Box 5600
Helena, MT 59604



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APPENDIX

In accordance with the order of the Board of Personnel Appeals and to effectuate the policies of Title 39, Chapter 31, MCA, Pine Hills School acting through its officers, agents, and representatives, does hereby notify employees of the Pine Hills School that:

It will cease and desist its violation of Section 39-31-401(1) and (3), MCA and will reinstate Mike Mahan with appropriate back pay and benefits.

PINE HILLS SCHOOL

By: Allen Davis
Superintendent

Dated this _____ day of _____, 1987.

This notice shall remain posted for a period of sixty (60) consecutive days from the date of posting and shall not be altered, defaced or covered.

Questions about this notice or compliance therewith may be directed to the Board of Personnel Appeals, P.O. Box 1728, Helena, Montana 59620 or telephone 444-3022.