

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

1 IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGES NOS. 20-89  
2 AND 22-89:

3 LIVINGSTON SCHOOL DISTRICT )  
4 NO. 1 AND NO. 4 AND BOARD OF )  
5 TRUSTEES DISTRICT NO. 1 AND NO. 4, )

6 Complainant, )

7 - vs - )

8 LIVINGSTON EDUCATION )  
9 ASSOCIATION, AND MS. BETTY )  
10 CONRAD, PRESIDENT, )

11 Defendant. )

12 and )

13 LIVINGSTON EDUCATION )  
14 ASSOCIATION, BETTY CONRAD, )  
15 PRESIDENT, )

16 Complainant, )

17 - vs - )

18 LIVINGSTON SCHOOL DISTRICT NO. 1 )  
19 AND NO. 4 AND BOARD OF TRUSTEES )  
20 DISTRICT NO. 1 AND NO. 4, )

21 Defendant. )

22 FINAL ORDER

23 \* \* \* \* \*

24 On January 24, 1990, the Board of Personnel Appeals reversed  
25 Conclusion of Law No. 1 of the Hearing Examiner in this matter  
and determined that certain actions of the Livingston Education  
Association were in violation of Section 39-31-402(1) MCA.

RATIONALE

Section 39-31-402(1) MCA provides:

It is an unfair labor practice for a  
labor organization or its agents to:  
(1) restrain or coerce employees in the  
exercise of the right guaranteed in 39-31-201

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or a public employer in the selection of his representative for the purpose of collective bargaining or the adjustment of grievances.

The Board agrees with the statement of the Hearing Examiner that the prohibitions found in Section 39-31-402(1) MCA go to restraint or coercion of the employer's choice of its bargaining representative.

The Board, however, disagrees with the Hearing Examiner's notion that Mr. Robert Gersack was the same as the employer. The public employer here was the Livingston School District and not Gersack nor any of the other trustees. The teachers are under contract with the district, Section 20-4-301 MCA. The district is a "body corporate and, as such body corporate, may sue and be sued, contract and be contracted with, and acquire, hold, use, and dispose of real or personal property for school purposes, within the limitations prescribed by law." Section 20-6-101(3), MCA.

Likewise, Gersack had no more of a proprietary interest in the business of the school district than any of the other taxpayers, he shared the responsibility for collective bargaining, even if he was not a member of the direct negotiating team, Section 39-31-301, MCA.

The picketing of the neutral third party, First National Park Bank, Gersack's place of business, by members of the Livingston Education Association was intended to influence the district's bargaining representatives' positions on the negotiations with the teachers. The picketing was also likely to influence the public's choice of Gersack as a school district

trustee and, therefore, as a representative of the district's collective bargaining team.

There can be little doubt, that if permitted, such tactics would also have the very chilling effect of limiting the number of citizens willing to jeopardize their own employment/business for the opportunity to serve on the Livingston School Board.

As such picketing of a neutral third party has the potential for influencing the public's choice of trustees and for limiting the field of available trustee candidates, it is an unlawful effort to "restrain or coerce a public employer in the selection of his representative for the purpose of collective bargaining."

DATED this 8 day of March, 1990.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn  
ALAN L. JOSCELYN  
CHAIRMAN

\* \* \* \* \*

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do certify that a true and correct copy of this document was mailed to the following on the 9th day of March, 1990:

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NO. 1 AND NO.4 and BOARD OF )  
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Defendant. )

*file copy, placed  
in ULP 22-89 folder*

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
AND  
RECOMMENDED ORDER

\* \* \* \* \*

BACKGROUND

On April 10, 1989 Livingston School District No. 1 and No. 4 and the Board of Trustees of District No. 1 and No. 4 (the Board) filed an unfair labor practice charge against the Livingston Education Association and Betty Conrad its president (the Association) alleging that certain picketing engaged in by members of the Association constituted a violation of Section 39-31-402(1) MCA.

On April 21, 1989 the Association filed an unfair labor practice charge against the Board stating that a restraining order obtained by the Board to enjoin the Association's picketing activity violated Sections 39-31-201 MCA. It is noted that Section 39-31-401(1) MCA prohibits employer conduct that violates Section 39-31-201 MCA.

Both charges were consolidated for purposes of conducting the administrative hearing that was held in Livingston on August 18, 1989. The Board was represented by Donald C. Robinson. The Association was represented by Allen B. Chronister. A briefing schedule was set and the matter was deemed submitted on October 2, 1989.

#### ISSUES

There are two issues raised here. The first is whether the picketing by certain members of the Association at the bank where the chairman of the board of trustees worked as president and chairman of the board of directors is a violation of Section 39-31-402(1) MCA. The second issue is whether the board of trustees violated Section 39-31-401(1) MCA when it obtained a restraining order against the Association enjoining its members from picketing the bank.

#### FINDINGS OF FACT

Based on the evidence on the record including the sworn testimony of witness, I find as follow.

1. Livingston School District No. 4 and No. 1 ("District"), is a school district organized and existing under

Montana law and conducts its school district activities in Park County, Montana.

2. As the board of trustees ("Board"), is an elected school board organized and existing under Montana law which operates the district and Robert Gersack was at the time its pertinent chairman.

3. Livingston Education Association ("LEA"), is a labor organization ("union") which represents a majority of the teachers who teach in the district, and is the exclusive bargaining representative of the teaching employees of the district.

4. On January 24, 1986 the Board and the LEA signed a professional agreement with its term ending on June 30, 1987, but which by its terms continues in force and affect. A copy of the professional agreement is attached hereto. Despite protracted negotiations, the parties have been unable to agree to the terms of a new contact.

5. The board of trustees regularly meet at the library of Park County High School in Livingston, Montana. In January and February of 1989 the LEA picketed the Park County High on several occasions during the times that regular or special meetings of school trustees were to occur at the high school. On at least one such occasion of picketing the picketers requested, and were allowed, to address the school board regarding the matter of the labor contact negotiations.

6. In February, 1989, the LEA also picketed the school administration offices beginning at approximately 3:30 p.m. each day, until the end of the business hours at those offices. This picketing lasted about one week during the month of February, 1989.

7. On March 30, 1989, approximately twenty (20) members of the LEA established and maintained a picket line on the sidewalk adjacent to the First National Park Bank, located at 2nd and Callender Streets, in Livingston, Montana. Some of the picketers carried signs which carried the following messages:

"Bargain The Issues" (two (2) signs)

"This Is Secondary Picketing Towards Bob Gersack"

"Gersack Help Education, Resign"

"Bob Gersack Is The Frank Lorezo Of Livingston"

"Miles City Teachers Are Lowest Paid In Class One Districts." "Mr. Gersack Was A Board Member There Also."

"Binding Arbitration Now"

"Come On School Board, Stand Up And Be Counted For Education" Reverse of same sign: "Gersack, For The Good Of Education Negotiate"

"Ask Bob About His Union Busting Plan"

"Two Years--Too Long. We Won't Throw It In"

"Arbitration Now"

"Arbitration Will Settle The Contract"

"Why Are Teachers Such A Low Priority? Have A Heart,

Negotiate Contract Please"

"Quit Stalling Negotiations Now" Reverse of same sign:

"I Want To Teach Not Picket, Settle Now"

"We Teach Our Nation's #1 Most Valuable Resource. We Expect Fair Compensation" Reverse of same sign: "I Would Love A Contract"

The picketing occurred again the following day, March 31, 1989.

8. The picketing was peaceful and lasted approximately forty (40) minutes each day.

9. No banking business of the district is conducted at the First National Park Bank.

10 The First National Park Bank is a banking corporation organized and existing under the laws of the State of Montana. Mr. Gersack is its president. It is privately owned by several individuals, including Bob Gersack who is a minority owner.

The above Findings of Fact, numbers one (1) through ten (10), are made verbatim from facts stipulated and agreed to by the parties in writing and submitted at the hearing in this matter.

11. Mr. Gersack was not on the Board's negotiating team during the time the bank was picketed. The Board's team was composed of three (3) other Board members and Rick D'Hooge, of the Montana School Board Association.

12. On two occasions during July of 1987 when the parties were negotiating, they met in the community room of the First National Park Bank.

13. The Board obtained an injunction against the picketing at the bank and a restraining order was served on picketing Association members at approximately the time picketing ended on March 31, 1989.

#### DISCUSSION

Section 39-31-402(1) MCA provides that it is an unfair labor practice for labor organization to "restrain or coerce a public employer in the selection of his representative for the purpose of collective bargaining or the adjustment of grievances." The provision is identical to the wording in the National Labor Relations Act that prohibits similar conduct.

The Montana Supreme Court in State Department of Highways vs. Public Employees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974), held that it is appropriate to rely on National Labor Relations Board and federal court precedence in interpreting Montana's Collective Bargaining for Public Employees Act, 39, Chapter 31, MCA. The National Labor Relations Board and The federal courts interpret the prohibition against restraining or coercing employers' representatives in exercising their collective bargaining and grievance responsibilities as a protection to employers to prevent unions from exerting pressure on the employer to force it into a multi-employer bargaining unit or to dictate its choice of representative for the settlement of

grievances. NLRB vs. Electrical Workers Local 340, 107 S.Ct. 2002, 125 LRRM 2305 (1987).

The prohibition is against union restraint or coercion of the employer's selection of its representative. The U.S. Supreme Court stated in, Florida Power and Light Company vs. IBEW, 417 US 790, 86 LRRM 2689 (1974):

No where in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the selection of its representatives for the purpose of collective bargaining and grievance adjustment. The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of Section 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer. (emphasis in original)

There is no restraint or coercion against the employer in the selection of his representative where the employer himself is acting as the representative. Painters, Local 1621 (Glass Management Assn.), 211 NLRB No.91, 90 LRRM 1637 (1975). Union picketing of an employer to pressure it into entering a collective bargaining agreement does not violate Section 8(b)(1)(B) of the National Labor Relations Act. Morand Bros. Beverages Co., 190 F.2d 576, 28 LRRM 2364 (CA 7,1951).

There is a substantial difference between finding a possible adverse effect from a union's sanctions against a supervisor-member while he performs supervisory functions and finding such a

possible effect from a union's sanctions against a substantial owner of an employer. It is unlikely that an individual with substantial ownership interest in a firm would take action in the performance of the relevant functions which would be detrimental to his own business or that of others similarly situated in his bargaining organization. Painters, supra.

In Carpenters Local 1098 (Womack, Inc.), 280 NLRB No. 102, 123 LRRM 1002, (1986), the National Labor Relations Board found that the union did not violate Section 8(b)(1)(B) of the National Labor Relations Act when it daily picketed the home of the employer's chief negotiator, since the picketing was for a lawful economical objective rather than restraining or coercing the employer in its selection of its representative. The picketing had begun after the parties reached impasse, the picket signs indicated the union was seeking a new contract and the picketing was peaceful and restrained in nature.

The union did not violate the National Labor Relations Act when it disciplined the employer's service manager and superintendent where the evidence did not establish that they possessed grievance-adjustment or collective-bargaining responsibilities. Sheetmetal Worker Local 6 (Jacob's Heating), 286 NLRB No. 25, 130 LRRM 1020 (1987).

The Montana Collective Bargaining for Public Employees Act, Title 39, Chapter 31, MCA, unlike 8(b)(7) of the National Labor Relations Act, is silent on the subject of picketing. There is no direct prohibition against picketing by public employees.

In IBEW Local 532 (Brink Construction Co.), 291 NLRB No. 69, 130 LRRM 1274, 1988, the National Labor Relations Board held that the union did not violate the Labor Management Relations Act when it filed suit to compel the employer to comply with the collective bargaining agreement where the union had a lawful objective in seeking a resolution of the disputed issue and its contention was reasonable.

Mr. Gersack was not a person selected by the employer to represent the employer. He was one and the same as the employer. As a Board member he was the equivalent of a member of a board of directors or a partner in a partnership in the private sector. At the time of the picketing he was not on the negotiating team and did not represent the Board in negotiations with the Association and even if he had been, the Association picketing could not be a violation of 39-31-402(1) MCA because there would have been no restraint or coercion against the employer in the selection of its representative. The National Labor Relations Board held in Painters Local 1621, Supra, "This dichotomy in treatment of union sanctions imposed on an employer's supervisor as opposed to those leveled directly against the employer himself may also be explained by the fact that it is difficult to envision circumstances where the employer would be greatly influenced in the performance of his grievance-adjustment or collective-bargaining functions where any decision he makes in those respects directly works to his benefit or detriment depending on how he decides it." The Association's

picketing of Mr. Gersack's bank would not adversely affect his loyalty towards the school board, if anything it would strengthen it.

Public employers in Montana do not face the same problem that is encountered by private sector employers who sometimes allow their foreman and first-line supervisory personnel to be members of a union that represents the employer's workers. Most of the National Labor Relations Board case law addresses problems caused by that arrangement, problems of loyalty and allegiance. The Montana Act excludes supervisors from the coverage of the act. Section 39-31-103(3) MCA.

To the Board's contention that picketing Board members' places of business would tend to cause them to resign and discourage prospective Board members from seeking office, suffice it to say that Title 39, Chapter 31, MCA does not prohibit such picketing, per se. Unless the picketing can be interpreted to violate Section 39-31-402 MCA, the effect it has on individual elected officials or those who contemplate seeking public is irrelevant. The picketing in the instance case does not amount to such a violation. The duty of Board of Personnel Appeals hearing examiners is to apply the law to the facts. It is not their place to attempt to make public policy by interjecting their opinions on what the law should be. The School Board's concern with the effect picketing of members' places of business on those members' role as public officials is understandable,

however, such picketing is not illegal. The Board's remedy would seem to lie with the legislature.

The Association contends that its picketing was protected concerted activity under Section 39-31-201 MCA and that the Board interfered with that activity by obtaining a temporary restraining order prohibiting the picketing. The Association requested that the hearing examiner take judicial notice of the pleadings in the District Court case where the Board obtained the temporary restraining order. That request has been granted and the pleading have been noted. The U.S. Supreme Court in, Bill Johnson's Restaurants vs. NLRB, 461 U.S. 731, 113 LRRM 2647 (1983), held that although a lawsuit filed by an employer against employees engaged in concerted activity proved to be without merit, that does not mean that the suit was, by that fact itself, an unfair labor practice. Rather, the suit must have been instituted for an unlawful objective with the intent of retaliating against an employee for the exercise of protected rights before a violation of the National Labor Relations Act can be found. In the instance case there was no proof that the Board's purpose in obtaining the injunction was to retaliate against the Association's picketing members or the Association itself. Furthermore, there was no showing that injunctive relief sought by the Board was founded upon an unlawful objective. IBEW Local 532 (Brink Construction Co.), (1988), 291 NLRB No. 69, 130 LRRM 1274.

CONCLUSIONS OF LAW

1. The Association did not violate Section 39-31-402(1) MCA when certain of its members picketed the bank where the chairman of Livingston School District No. 1 and No. 4 and Board of Trustees worked.

2. The Board of Trustees did not violate Section 39-31-401(1) MCA when it obtained a restraining order against the Association and enjoined its members from picketing the bank.

RECOMMENDED ORDER

The unfair labor practice charge filed by Livingston School District No. 1 and 4 and Board of Trustees against Livingston Education Association and Ms. Betty Conrad, President is dismissed.

The unfair labor practice charge filed by the Livingston Education Association, Betty Conrad, President against the Livingston School District No. 1 and 4 and Board of Trustees is dismissed.

Dated this 22nd day of November, 1989.

BOARD OF PERSONNEL APPEALS

By:   
JACK H. CALHOUN  
Hearing Examiner

NOTICE:

Exceptions to these Findings of Fact, and Conclusions of Law and Recommended Order maybe filed with in twenty (20) days of service. If exceptions are not filed the Recommended Order will become the Final Order of the Board of Personnel Appeals.

CERTIFICATE OF MAILING

I Lami Vondahl do certify that a true and correct copy of this document was mailed to the following on the 22nd day of November, 1989:

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