

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 28-94:

ROY EDUCATION ASSOCIATION,)
MEA/NEA,)

Complainant,)

vs.)

ROY ELEMENTARY & HIGH SCHOOL)
DISTRICT NO. 74,)

Defendant.)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

On November 10, 1993 the Roy Education Association filed this unfair labor practice charge against Roy Elementary and High School District No. 74 alleging a violation of Section 39-31-401(1) and (3), MCA. This section of the statute provides it is an unfair labor practice for a public employer to: "(1)interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201;" or "discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in any labor organization; . . ."

The complaint alleges that the district selectively implemented a reduction in force and/or nonrenewal of officers of the Roy Education Association. In addition, the district is accused of assigning Alice Green multiple classes in one period and other selective actions against Association officers without legitimate and substantial business reasons.

1 On January 26, 1994, the Association filed an amended
2 complaint in which it further alleged that the district violated
3 the statute by refusing to speak with union officers directly to
4 schedule negotiations and by assigning classes and subjects to
5 other teachers rather than to union officers more qualified to
6 teach and oversee the classes and subjects.

7 The administrative hearing was conducted in this matter on
8 July 13, 1994 in Lewistown, Montana. The Complainant was
9 represented by its counsel, J. Dennis Moreen. Michael Dahlem,
10 Staff Attorney for the Montana School Boards Association,
11 represented the Defendant. The hearing was recessed and continued
12 on July 14 and July 27, 1994 in Helena, Montana, for the purpose of
13 obtaining additional witness testimony. At the conclusion of the
14 hearing, the parties agreed to submit proposed findings of fact,
15 conclusions of law and a recommended order on September 16, 1994.
16 Response briefs were scheduled, and final brief was filed on
17 October 14, 1994.

18 II. ISSUES

19 Did Roy Elementary and High School District No. 74 violate
20 Section 39-31-401(1) and (3), MCA by deciding, without any
21 legitimate and substantial business reason, to (1) selectively
22 implement a reduction in force and/or nonrenewal of officers of the
23 Roy Education Association; (2) assign Alice Green multiple classes
24 in one period; (3) refuse to speak with union officers directly to
25 schedule negotiations; and (4) assign classes and subjects to other
26 teachers rather than to union officers more qualified to teach and
27 oversee the classes and subjects? Were any of these actions, if
28

1 established, inherently destructive of the employees' rights of
2 self-organization?

3 **III. FINDINGS OF FACT¹**

4 1. Roy High School is one of the smallest high school
5 districts in the state of Montana. During the 1992-93 school year,
6 there were only 12 high school students enrolled at Roy and six
7 teachers employed to teach 18 junior high and high school students
8 during the 1992-93 school year. (Knodel testimony, tape 7.)

9 2. In the spring of 1993, district superintendent Harry
10 Knodel projected an enrollment of 6-10 students in the high school
11 for the 1993-94 school year. (Knodel testimony)

12 3. Alice Green is employed as a tenured teacher with Roy
13 School District No. 74 and is endorsed in business education and
14 mathematics. (Green testimony, tape 3; Exhibit C-8.)

15 4. Green has served as president of the Roy Education
16 Association (REA) since the 1992-93 school year. (Green testimony,
17 tape 3.)

18 5. During the 1992-93 school year, Green taught advanced
19 math, pre-algebra, 7th and 8th grade math, algebra I and II, typing
20 and consumer math. (Green testimony, tape 5; Exhibit D-3, page 2.)
21 (Knodel testimony, tape 7; Exhibit D-3, page 2).
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23

24 ¹All proposed findings, conclusions and supporting arguments
25 of the parties have been considered. To the extent that the
26 proposed findings and conclusions submitted by the parties, and the
27 arguments made by them, are in accordance with the findings,
28 conclusions and views stated herein, they have been accepted, and
to the extent they are inconsistent therewith, they have been
rejected. Certain proposed findings and conclusions may have been
omitted as not relevant or as not necessary to a proper determina-
tion of the material issues presented. To the extent that the
testimony of various witnesses is not in accord with the findings
herein, it is not credited.

1 6. Because of on-going problems with low and declining
2 enrollment, discussion of possible staff reductions in the high
3 school began in October, 1992. (Kyle Grimsrud [Chairman Roy School
4 Board] testimony, tape 2; Exhibit D-2).

5 7. By letter dated December 9, 1992, James Lubke and Mrs.
6 Green, the designated negotiating team for the REA, requested
7 negotiations with the Board. Their request set out a list of items
8 the union wanted to negotiate, and requested that a date be set for
9 negotiations. (Exhibit C-19, Testimony Green, Lubke and Grimsrud)

10 8. A meeting was indeed held between the Board and the team
11 of Green and Lubke wherein they "went over" the items which were
12 listed on the December 9th agenda. The Board advised them they
13 would meet at a later date. (Exhibit C-1 and Testimony Green and
14 Lubke)

15 9. The school board subsequently discussed possible staff
16 reductions at its January 13, 1993 and February 9, 1993 meetings.
17 The possible reductions included many positions, including that of
18 the superintendent. (Knodel testimony, tape 7, Exhibit C-6;
19 Exhibit D-5.)

20 10. Being concerned about the potential for reduction in
21 force (RIF) being initiated by the Board, and being referred to
22 grievance procedures and RIF policy, Green requested opportunity to
23 copy the Board's policy book, and Keller made the policy book
24 available to Green to be copied. (Grimsrud testimony, tape 1;
25 Green testimony, tape 3; Keller testimony, tape 5 and Exhibit C-1)

26 11. Subsequently, Keller needed the policy book returned to
27 make appropriate changes for a final edition, and after one week he
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1 requested it be returned, but made it available to Green in the
2 secretary's office. (Keller testimony, tapes 5 and 6.)8.

3 12. Knodel's recommendations to the Board in January 1993,
4 were made based on projections of low and declining enrollment and
5 the need for fiscal responsibility. His credible testimony
6 revealed that union status of any employee was not a factor in his
7 recommendations. (Knodel testimony, tape 7 and Exhibit D-5)

8 13. On February 24, 1993 the board of trustees voted to
9 reduce or terminate teaching positions and to cut classified
10 employee hours by 25% across the board in response to the
11 recommendations made by the superintendent. The Board voted to
12 reduce the kindergarten/reading position to one half time or
13 combine with the first grade. This position was held by Ms.
14 Kolstad. The Mathematics/Business position was reduced to three
15 seventh time. This position was held by Mrs. Green. The
16 English/Librarian position was reduced to three seventh time. Mrs.
17 Walker was employed in that position. The Physical
18 Education/Industrial Arts position was eliminated. Mr. Lubke was
19 employed in that position. (Grimsrud, Green and Lubke testimony,
20 Exhibit C-6).

21 14. While some of the classified reductions were temporary,
22 Board chairman Gary Keller testified that one part-time janitor's
23 position was permanently eliminated. (Keller testimony, tape 5.)

24 15. Keller explained that former teacher Rene Kolstad was
25 offered a teaching contract after being informed of her layoff
26 because the school board rescinded an earlier decision to combine
27 positions and by board policy she was entitled to be offered the
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1 position. Kolstad declined the offer of employment. (Keller
2 testimony, tape 5.)

3 16. Former REA vice-president James Lubke stated that he
4 never appealed the school board's decision to eliminate his
5 teaching position because of declining enrollment even though state
6 law permits a non-tenured teacher to file an appeal if the teacher
7 believes that the reason stated is untrue. (Lubke testimony, tape
8 3; Section 20-4-206, MCA).

9 17. Board member, and former chairman, Kyle Grimsrud stated
10 that, with the exception of Alice Green, he did not know who the
11 REA officers were **at the time** staff reductions were made, and the
12 Board never discussed the union membership of any employee of the
13 district. (Grimsrud testimony, tape 1 and 2.)

14 18. Alice Green admitted that she did not communicate the
15 names of the union officers to the Board, nor inform the Board that
16 she was the exclusive representative of the REA. Furthermore, no
17 documentary evidence on record identifies any union officer by
18 title with the exception of Alice Green. (See Green testimony,
19 tape 4 and 5)

20 19. Although Lubke stated that he informed Grimsrud and board
21 member Rex Murnion of the names of the union officers, Grimsrud did
22 not recall any such conversation taking place. In all events,
23 Grimsrud was aware of Green's position with the REA. (Lubke
24 testimony, tape 3; Grimsrud testimony, tape 5.)

25 20. The record does reflect that Grimsrud failed to return
26 business phone messages from Green left at his home, but both
27 Green's and Grimsrud's memories of the phone calls had dimmed over
28 time. Nevertheless, Green was never **denied** opportunity to speak to

1 the Board, albeit Board chairman Grimsrud's actions reflected his
2 preference to discuss certain pertinent matters with REA
3 representative Lubke. Lubke maintained contact with Grimsrud and
4 had informed Grimsrud the Board could contact him about scheduling
5 negotiation sessions. (Testimony Green, Grimsrud and Lubke)

6 21. Although Grimsrud did not speak with Lubke on the
7 telephone, he met with him informally at school or in town where
8 they would discuss the scheduling of bargaining sessions.
9 Moreover, Lubke had informed Grimsrud to contact either Green or
10 himself concerning REA matters. Grimsrud was never asked to deal
11 exclusively with Green. (Testimony Grimsrud and Lubke- tapes 1, 2,
12 3 and 5.)

13 22. Although Lubke and Green claim that the school board
14 "ignored" Green at a meeting on March 10, 1993, Lubke stated that
15 he never asked the board to direct its questions to Green. Nor
16 does the record reflect that Green made any concerted effort to
17 obtain the attention of the Board at the meeting. (Lubke
18 testimony, tapes 2 and 3.)

19 23. Other than the March 10, 1993 board meeting, Green did
20 not identify any other occasions on which she felt she was ignored
21 by the board of trustees. She typically just sat at board meetings
22 and didn't ask any questions. (Green testimony, tape 4.)

23 24. Although Green asserts throughout that Grimsrud
24 essentially ignored her calls, requests, etc., he did sign a
25 "grant" request that was prepared by Alice Green for his approval.
26 (Grimsrud testimony, tape 5.)

27 25. During an informal conversation with Superintendent
28 Knodel on March 11, 1993, Green was advised her new schedule would

1 | be set up to be more accommodating to her and would be set for the
2 | first, third and last period of the school day. Knodel's credible
3 | testimony indicated he never intended any threat from that
4 | conversation, but merely giving his overview of the coming RIF
5 | actions being undertaken by the Board. (Testimony Knodel)

6 | 26. Although Green stated that she somehow felt threatened by
7 | comments made by superintendent Knodel on March 11, 1993, her fears
8 | were certainly never realized, as no adverse action was ever
9 | proposed by either Knodel or the Board. Green did not have her
10 | assigned courses spread throughout the day and, in fact, had her
11 | hours increased in September, 1993. (Green testimony, tape 3;
12 | Exhibit C-6.)24.

13 | 27. The REA and the school board held only two bargaining
14 | sessions before the REA asked MEA Uni-Serve Director Jane Fields to
15 | attend a session on March 16, 1993. Prior to that meeting, the
16 | union had never even submitted a written proposal to the school
17 | board, and Lubke admitted that the Board never refused to bargain
18 | with the REA. He and Green merely complained that little progress
19 | was made during the first two bargaining sessions. (Lubke
20 | testimony, tapes 2 and 3; Green testimony, tapes 3 and 4; Fields
21 | testimony, tape 8.)

22 | 28. The Roy School Board and the Roy Education Association
23 | reached a tentative agreement on a new collective bargaining
24 | agreement on July 16, 1993. The contract was ratified by the
25 | school board on August 9, 1993. During the course of negotiations,
26 | the Roy Education Association never requested mediation, nor did it
27 | file an unfair labor practice charge alleging a refusal by the
28 |

1 board to bargain in good faith. (Lubke testimony, tapes 2 and 3;
2 Green testimony, tape 4; Fields testimony, tape 8.)

3 29. Most teachers at Roy have been assigned multiple subject
4 classes and former superintendent Bewick described the schedule of
5 Kathryn Kennedy as an example of multiple subjects being taught in
6 a single class period. During the 7th period last school year,
7 Kennedy taught Band 7/8, Band 9/12 and Elementary Band 5/6. Each
8 of these assignments represents a different subject for which
9 specific preparation is required. (Bewick testimony, tape 6 and
10 Exhibit C-7)

11 30. Bewick also stated that English 9/10 represents two
12 separate subjects in which students work on different assignments.
13 He stated that, in terms of preparation, there is no significant
14 difference in teaching English 9/10 and Math 7/8. (Bewick
15 testimony, tape 6.)

16 31. In one of the periods in which Alice Green taught three
17 separate subjects during the 1993-94 school year, one of the
18 subjects was pre-algebra taught to an advanced 8th grade student.
19 Green was not required to teach this subject, but accepted it
20 voluntarily. (Green testimony, tape 4; Bewick testimony, tape 6.)

21 32. Green acknowledged that she had been routinely assigned
22 two subjects in one class period in the past. During the 1992-93
23 school year, she had been assigned three subjects in one period.
24 Prior to September, 1993, however, she had never made any complaint
25 to the school board about her teaching assignment. (Grimsrud
26 testimony, tape 2; Green testimony, tape 5; Fields testimony, tape
27 8.)

1 33. Although Green taught eight subjects in 1992-93, she had
2 only 15 students in those classes. In 1993-94 she taught 17
3 students in seven subjects. She explained that multiple subject
4 assignments are more common in her field of mathematics because it
5 is harder to teach those courses every other year. She felt it
6 might be feasible to teach Government one year and American History
7 the next, however, because all students need Algebra I, II and
8 Geometry in order to take Advanced Math, it is necessary to offer
9 more math subjects each year. (Green testimony, tape 5.)

10 34. Green claims that she was qualified to oversee an Edunet
11 course assigned to Gaskell during his 2nd period, when he was also
12 assigned Independent Study and Biology. The record reflects,
13 however that Green last taught computer science during the 1986-87
14 school year and last took a computer science course in 1991 or
15 1992. (Bewick testimony, tape 6; Green testimony, tape 5 and
16 Exhibit C-7.)

17 35. Although no computer science course was offered during
18 the 1993-94 school year, Bewick stated that he would have assigned
19 the course to William Gaskill rather than to Green because of
20 Gaskill's superior qualifications, experience and credentials.
21 Gaskill had been instrumental in placing computers into the Roy
22 schools. (Bewick testimony)

23 36. Bewick assigned Survival Skills to Gaskell rather than
24 to Green because of Gaskell's counseling experience. He deemed the
25 counseling needs of the students very important in teaching the
26 course, and Gaskell's background experience in counseling would
27 compliment the overall needs of the students. (Bewick testimony,
28 tapes 6 and 7.)

1 37. Bewick also recommended that Alice Green's hours be
2 **increased** because a higher than expected enrollment prevented her
3 from giving sufficient attention to the students in her classes.
4 Thereafter, on September 23, 1994, superintendent Bewick presented
5 the board with several options regarding Alice Green's schedule for
6 the 1993-94 school year. He made no specific recommendations and
7 it was the Board who chose to increase Green's hours from 3/7 to
8 5/7 time. (Grimsrud testimony, tape 2; Bewick testimony, tape 6.)

9 38. The Board may have appeared "upset" with Bewick's
10 recommendation, but their concern was the additional cost had not
11 been included in the budget. (Bewick testimony, tape 6.)

12 39. Alice Green was given the option of spreading seven
13 subjects over five periods with no preparation period or over four
14 periods with a preparation period. Nothing in the record indicates
15 granting such option to Green was other than an act of good will by
16 the Board in allowing her some flexibility with her schedule. By
17 her own choice then, Green selected the four period option.
18 (Bewick testimony, tape 6.)

19 40. Bewick convincingly testified that Green's status as REA
20 president was not a factor in any decision or recommendation he
21 made while employed as superintendent. And, neither Bewick nor
22 Knodel ever observed any board member refusing to meet, confer or
23 discuss matters with Alice Green. (Bewick testimony; Knodel
24 testimony, tape 7.)

25 41. Jane Fields, Uniserve Director, was uncontroverted in her
26 testimony revealing she felt the school board may have been
27 inexperienced in dealing with the union, but that they were chiefly
28 concerned with keeping its costs down when it made the decision to

1 reduce staff. And, she admitted she never informed the Board that
2 she believed the RIFs had been motivated by any anti-union animus.
3 (Fields testimony, tape 8.)

4 42. Consistent with the board's concern for fiscal
5 responsibility, teachers received no pay increase in the contract
6 ratified on August 9, 1993. (Green testimony, tape 4.)

7 IV. CONCLUSIONS OF LAW

8 1. The Montana Supreme Court has approved the use of federal
9 court and National Labor Relations Board decisions as precedent
10 when interpreting the Montana Collective Bargaining for Public
11 Employees Act. City of Great Falls v. Young, 211 Mont. 13, 686 P.2d
12 185, 119 LRRM 2682 (1984). Pursuant to Section 39-31-406, MCA, the
13 Court has also held that a Complainant's case must be established
14 by a preponderance of the evidence. Board of Trustees v. State of
15 Montana, 185 Mont. 89, 604 P.2d 770, 103 LRRM 3090 (1979).

16 2. In Missoula County High School v. Board of Personnel
17 Appeals, 224 Mont. 50, 727 P.2d 1327 (1986), the Montana Supreme
18 Court articulated the criteria to be employed when reviewing an
19 unfair labor practice charge alleging a violation of Section 39-31-
20 401(1) and (3), MCA. In that case, the Court held: "Under the
21 equivalent federal statutes (29 U.S.C. Section 158(a)(1) and (3)),
22 any violation of subsection (3) necessarily implies a derivative
23 violation of subsection (1). [Citation omitted]. Subsection (1)
24 'was intended as a general definition of employer unfair labor
25 practices. Violations of it may be either derivative, independent,
26 or both.' [Citation omitted.]" Id. at 55.

27 3. Citing a United States Supreme Court decision, the Court
28 went on to point out: "[T]he intention was to forbid only those

1 acts that are motivated by anti-union animus...But an employer may
2 take actions in the course of a labor dispute that present a
3 complex of motives...and it is often difficult to identify the true
4 motive.

5 "In these situations the Court has divided an employer's
6 conduct into two classes...Some conduct is so 'inherently
7 destructive of employee interests' that it carries with it a strong
8 inference of impermissible motive...In such a situation, even if an
9 employer comes forward with a nondiscriminatory explanation for its
10 actions, the Board 'may nevertheless draw an inference of improper
11 motive from the conduct itself and exercise its duty to strike the
12 proper balance between the asserted business justifications and the
13 invasion of employee rights in light of the Act and its
14 policy.'...On the other hand, if the adverse effect of the
15 discriminatory conduct on employee rights is 'comparatively
16 slight,' an antiunion motivation must be proved to sustain the
17 charge if the employer has come forward with evidence of legitimate
18 and substantial business justifications for the conduct. [Citation
19 omitted.]" Id. at 55-56.

20 4. With respect to the question of what acts are inherently
21 destructive of employee interests, our Court has taken a
22 conservative approach. In Missoula County High School, it cited a
23 9th Circuit Court of Appeals case in support of the following
24 definition: "'[C]ases involving conduct with far reaching effects
25 which would hinder future bargaining, or conduct which
26 discriminates solely upon the basis of participation in strikes or
27 union activity. Examples of inherently destructive activity are
28 permanent discharge for participation in union activities, granting

1 superseniority to strike breakers, and other actions creating
2 visible and continuing obstacles to the future exercise of employee
3 rights. (Citation omitted.)' Portland Willamette Co. v. N.L.R.B.
4 (9th Cir. 1976), 534 F.2d 1331, 1334. It is notable that The
5 Portland Willamette Co. court declined to find inherently
6 destructive conduct in an employer's proposal, during a strike, to
7 grant a retroactive pay increase to workers who had returned to,
8 and remained at, work by a certain date." Id. at 58-59.

9 5. With regard to an employer's stated business
10 justifications, the Court held: "We caution the Board that it is
11 neither our function nor the Board's to second-guess business
12 decisions.

13 "The Act was not intended to guarantee that business decisions
14 be sound, only that they not be the product of antiunion
15 motivation...[Citations omitted.] To find a violation of Section
16 39-31-401(3), MCA, where the discriminatory conduct has
17 comparatively slight effect, '[A]n antiunion motivation must be
18 proved to sustain the charge if (as here) the employer has come
19 forward with evidence of legitimate and substantial business
20 justifications for the conduct.'" [Citation omitted.] Id. at 57-
21 60.

22 The Court addressed the issue of whether the Complainant had
23 established an independent, as opposed to a derivative, violation
24 as found under Section 39-31-401(1), MCA. To establish an
25 independent violation, a Complainant must show:

26 (1) that employees are engaged in protected activities,
27 (citation omitted);

1 (2) that the employer's conduct tend to 'interfere with,
2 restrain, or coerce employees in those activities, (citation
3 omitted); and

4 (3) that the employer's conduct is not justified by a
5 legitimate and substantial business reason, (citation omitted).'
6 Fun Striders, Inc., 686 F.2d at 661-662. Id. at 60.

7 6. Complainant cites Missoula County High School V. Board of
8 Personnel Appeals, 224 Mont. 50, 55-56, 727 P.2d 1327 (1986) as
9 controlling in this matter. However, in that case the Court cited
10 Portland Willamette Co., supra, wherein the Court further held:
11 "The Act was not intended to guarantee that business decisions be
12 sound, only that they not be the product of antiunion
13 motivation...[Citations omitted.] To find a violation of Section
14 39-31-401(3), MCA, where the discriminatory conduct has
15 comparatively slight effect, '[A]n antiunion motivation must be
16 proved to sustain the charge if the employer has come forward with
17 evidence of legitimate and substantial business justifications for
18 the conduct.'" [Citation omitted] Id. at 57-60. And here, the
19 overall record supports the conclusion that Defendant acted out of
20 legitimate and substantial business reasons.

21 7. As argued by Defendant, the record simply does not
22 support Complainant's contentions that Alice Green was singled out
23 for multiple subject assignments. In the small Roy School
24 District, such assignments had by past practice not been an unusual
25 happening. Further, Alice Green and other teachers carried out
26 such assignments in the past without complaint, and given the low
27 enrollment at Roy High School, there appears to be a legitimate and
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1 substantial business justification for multiple subject
2 assignments.

3 8. As to board members or administrators intentionally
4 ignoring or refusing to "deal" with Alice Green because of any
5 anti-union animus, the evidence in the record does not lead to such
6 conclusion in this matter. The Board may have been inexperienced
7 in dealing with the Union and its representatives; and may have
8 been more comfortable discussing matters with Lubke than with
9 Green, but then, Lubke was vice-president of the Union and
10 apparently had authorization to "meet and greet" and carry on
11 discussions with board members. Furthermore, REA vice-president
12 Lubke never asked Grimsrud to deal exclusively with Green and
13 continued to carry on discussions with Grimsrud both in and out of
14 board meetings with the apparent knowledge of Green.

15 9. Likewise, there is insufficient evidence to substantiate
16 the charge that former superintendent Knodel ever threatened Green.
17 Knodel's credible testimony revealed no threats were at all
18 intended during his discussions with Green. There is simply no
19 evidence indicating any such alleged threats were ever carried out,
20 but it is evident neither Green nor the REA ever brought the matter
21 to the attention of the school board prior to the filing of this
22 charge. It can only be concluded that Green misapprehended the
23 essence of her conversation with Knodel.

24 10. With regard to the charge that classes for which Alice
25 Green was more qualified to teach were assigned to other teachers,
26 here again, Defendant presented substantial evidence on the record
27 which clearly shows that the district had a legitimate and
28 substantial business justification for assigning Survival Skills to

1 William Gaskell. The determinate reason was Gaskell's background
2 in counseling which the Board thought very beneficial in teaching
3 the survival skill class. Similar justification for assigning
4 computer science to Gaskell had the course been offered was his
5 experience with the computer system within Roy Schools. While it
6 is true that Green may have been equally qualified to oversee
7 Edunet, it is noted that this duty was assigned to Gaskell in
8 addition to his other teaching responsibilities for the 2nd period.
9 As pointed out by Defendant, there is nothing in the record showing
10 that this assignment merited a separate class period, and given
11 Green's complaints about her schedule, it is reasonable that the
12 Board did not saddle her with the burden of another assignment. In
13 all events, there is no evidence in the record to support the claim
14 that any of the assignments were motivated by anti-union animus.

15 11. The Complainant also alleges that the employer's actions
16 are inherently destructive of the right of self-organization and
17 cites Sidney Education Association v. Richland County High School
18 district No. 1 and Elementary District No.5 ULP 29-84 and American
19 Freightways Co., 124 NLRB 146, 44 LRRM 1302 (1959). These cases
20 are not dispositive of this matter. The Defendant has shown that
21 the Board's actions did not hinder future bargaining, have far
22 reaching effects, or discriminate solely upon the basis of
23 participation by Green, Lubke, or other union representatives or
24 members in union activity. To do so would ignore the fact that
25 during the course of these alleged violations, the parties were
26 able to successfully negotiate a new collective bargaining
27 agreement without recourse to a strike, an unfair labor practice
28 charge or even a request for mediation.

1 12. Further, as to Complainant's assertions with regard to
2 class assignments, meeting protocol and unreturned telephone calls,
3 such actions in this matter were not shown to be inherently
4 destructive of the right of self-organization. Here, there is no
5 credible evidence in the record to support the claim that any
6 employee was discharged or reduced in hours because of their
7 membership in the Roy Education Association.

8 13. As argued by Defendant, with respect to the Section 39-
9 31-401(1), MCA charge, it is not clear whether the Complainant is
10 alleging an independent, or a derivative violation. In all events,
11 however, the Complainant has failed to satisfy the three-pronged
12 test articulated above in Missoula County High School.
13 Furthermore, where an unlawful purpose is not present or cannot be
14 implied as a matter of law, (as in this case) the Court has held
15 that "discrimination" does not violate the Act, even if the
16 employer's conduct is deemed unjustified or unfair. Laidlaw Corp.,
17 171 NLRB 1366, 68 LRRM 1252 (1968). Further, pursuant to Radio
18 Officers v. NLRB, 347 US 17, 33 LRRM 2417 (1954), the Supreme Court
19 explained:

20 The language of Section 8(a)(3) is not ambiguous. The unfair
21 labor practice is for an employer to encourage or discourage
22 membership by means of discrimination. Thus this section does
23 not outlaw all encouragement or discouragement of membership
24 in labor organizations; only such as is accomplished by
25 discrimination is prohibited. Nor does this section outlaw
26 discrimination in employment as such; only such discrimination
27 as encourages or discourages membership in a labor
28 organization is proscribed.

(Radio Officers, supra)

26 14. Finally, the Defendant contends that even if the hearing
27 examiner finds merit in any of these charges, Alice Green is not
28 entitled to any relief from the school board's April 14, 1993

1 decision to reduce her contract to 3/7 time because this charge was
2 not filed within 6 months from the date of that decision as
3 required by Section 39-31-404, MCA. In support thereof, they cite
4 U.S. Postal Service, 271 NLRB 61, 116 LRRM 1417 (1984) and IATSE
5 Local 659, 276 NLRB 91, 120 LRRM 1135 (1985), wherein the NLRB held
6 that the six month limitation period commences on the date when the
7 final adverse employment decision is made and communicated, not on
8 the date its consequences become effective. See also, U.S. Postal
9 Service, 285 NLRB 98, 126 LRRM 1138 (1987).

10 The matter of filing time deadlines was not included in the
11 issues to be addressed by this forum, and specifically delineated
12 herein (See number II. Issues). Notwithstanding, as argued by
13 Complainant, the reduction of Mrs. Green is a matter properly
14 before the Board of Personnel Appeals. As contended by
15 Complainant, the District failed to present evidence of when or if
16 notice was given to Mrs. Green of its action at its April 14, 1993
17 meeting. Further, it is reasonable to conclude, as pointed out
18 by Complainant, that the final adverse employment decision by the
19 District which caused the Roy Education Association to file formal
20 ULP charges was the offer to rehire Renee Kolstad who had been
21 discharged with other union officers. Kolstad, however, was
22 offered a job on May 26, 1993, but as no such offer was extended to
23 union officers, the Complainant felt such action then constituted
24 an unfair labor practice. That date falls within the 6 month
25 filing time frame.

26 15. With respect to the Section 39-31-401(3), MCA
27 discrimination charge, the Defendant has shown that it never acted
28 with anti-union motive when the decision was made to reduce the

1 number of employees in Fergus County Elementary and High School
2 District No. 74. As argued by Defendant, with the exception of
3 Alice Green, the record does not support the claim that board
4 members even knew that James Lubke or Mary Jane Walker were union
5 officers **at the time** the reduction in force decision was made. It
6 could be argued (but wasn't proffered herein) that under the so
7 called "small plant doctrine", [See Coral Gables Convalescent Home,
8 234 NLRB 1198, 97 LRRM 1435 (1978)] it could be inferred, and a
9 conclusion reached that because of the small size of the Roy
10 Schools, Defendant was aware of the affected employees union
11 allegiance. Here, however, as the facts indicate, except for
12 Green, there existed no such awareness at the time the reduction in
13 force decision was made by the Board.

14 16. Moreover, the overall record indicates that Defendant
15 would have taken the same personnel action regardless of Green's or
16 other REA member's protected activity. The record clearly
17 demonstrates that the Board had a legitimate and substantial
18 business reason for reducing teaching and non-teaching staff due to
19 low and declining enrollment, and the need for fiscal
20 responsibility. These were their sole motivating factors in
21 implementing the actions ultimately affecting the before mentioned
22 employees.

23 **V. SUMMARY**

24 Beginning in October, 1992 the school board began a series of
25 discussions over measures to reduce costs, culminating in a
26 February 24, 1993, decision to reduce or eliminate a number of
27 teaching and non-teaching positions. The decision to eliminate or
28 to reduce the hours assigned to these positions, including the

1 position held by Alice Green, was based strictly on low and
2 declining enrollment and the need for fiscal responsibility.

3 There is nothing in the record supporting the conclusion that
4 anti-union animus played any role in the decision to reduce
5 positions or to assign Alice Green multiple subjects in a single
6 period. Indeed, such assignments have been the norm in Roy for
7 many years. There is no objective evidence that the Roy School
8 Board ever refused to deal with the president of the Roy Education
9 Association or that it assigned to other teachers courses for which
10 she was more qualified to teach.

11 Nor does the reliable, probative and substantial evidence on
12 the record support the charge that any board member or
13 administrator of Roy Elementary and High School District No. 74
14 ever interfered with, restrained or coerced any employees in the
15 exercise of their rights under Section 39-31-201, MCA or that any
16 board member or administrator ever discriminated against employees
17 in regard to their hire or tenure of employment in order to
18 discourage membership in the Roy Education Association.

19 VI. RECOMMENDED ORDER

20 Based on the findings made above, this matter is **Dismissed** and
21 the relief requested is **Denied**.

22 SPECIAL NOTICE

23 Exceptions to these Findings of Fact, Conclusions of Law and
24 Recommended Order may be filed pursuant to A.R.M. 24.26.215 within
25 twenty (20) days after the day the decision of the hearing officer
26 is mailed, January 8, 1995. If no exceptions are filed, this
27 Recommended Order shall become the Final Order of the Board of
28 Personnel Appeals. Notice of Appeal shall be mailed to:

1 Board of Personnel Appeals,
2 Department of Labor and Industry
3 P.O. Box 1728,
4 Helena, MT 59624-1728.

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8 DATED this 19th day of December, 1994.

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12 BOARD OF PERSONNEL APPEALS

13
14 By: Gordon D. Bruce
15 GORDON D. BRUCE
16 Hearing Officer

17 * * * * *

18 CERTIFICATE OF MAILING

19 The undersigned hereby certifies that true and correct copies
20 of the foregoing documents were, this day served upon the following
21 parties or such parties' attorneys of record by depositing the same
22 in the U.S. Mail, postage prepaid, and addressed as follows:

23 J. Dennis Moreen, Esq.
24 CHRONISTER, DRISCOLL & MOREEN
25 P.O. Box 1152
26 Helena, MT 59624

27 Michael Dahlem, Esq.
28 Montana School Boards Association
1 South Montana Avenue
Helena, MT 59601

DATED this 19th day of December, 1994.

Doris Stenson