

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 4-2006:

MILES COMMUNITY COLLEGE)	Case No. 207-2006
FACULTY ASSOCIATION,)	
)	
Complainant,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND RECOMMENDED ORDER
)	
MILES COMMUNITY COLLEGE,)	
)	
Defendant.)	

* * * * *

I. INTRODUCTION

The Miles Community College Faculty Association (MCCFA) filed an unfair labor charge against Respondent Miles Community College alleging that the decision to not renew the teaching contract of Earl Kiddie was in retaliation for his activity in forming a teacher's union at Miles Community College. Miles Community College contends that the decision to not renew was based on Kiddie's poor work performance.

Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on February 2 and February 3, 2006. Richard Larson, Attorney at Law, represented the union. Lawrence Martin, Attorney at Law, represented the community college. The parties' Joint Exhibits 1 through 14 were admitted into evidence. Union's Exhibit A, portions of B (as denoted in the record), and C were also admitted into evidence. In addition, Respondent's Exhibits 3, 5-8, 12, and 13 through 18 were also admitted into evidence. Earl Kiddie, George Dickie, Robert Bishop, James Joyce, Dwight Gunnare, Sasha Perkins¹, Michelle Sue Weight, Tom Clarke and Darrel Hammon all testified under oath.

¹ By stipulation of the parties, Perkins testified by telephone.

Extended post-hearing briefing was permitted to allow the parties the benefit of reviewing a transcript of the proceeding prior to filing closing briefs. The final briefs in this matter were timely mailed and were received in the Hearings Bureau on July 12, 2006. Based on the arguments and evidence adduced at the hearing as well as the arguments presented in the parties' closing briefs, the following findings of fact, conclusions of law, and recommended order are made.

II. ISSUE

Did Miles Community College commit an unfair labor practice by not renewing Kiddie's teaching contract?

III. FINDINGS OF FACT

1. Miles Community College is a State of Montana institution of higher learning located in Miles City, Montana.

2. In addition to traditional classroom teaching, Miles Community College provides "distance learning" programs to students located at remote areas throughout Montana. The long distance learning program permits a far broader range of students in Montana to have access to Miles Community College courses than would otherwise be the case without the distance learning. Because of this, Miles Community College considers the long distance teaching program to be an essential part of its educational mission.

3. The long distance teaching program is accomplished by video conferencing. Instructors who teach courses that are part of the distance learning program teach a class on the Miles Community College campus and while doing so their lecture is video conferenced to students at a remote site. The video conferencing setup permits students at the remote site to engage in an interactive learning experience with the instructor. Students at the remote site can, for example, ask questions of the instructor. The video conferencing program also allows instructors to administer tests at the remote site with the help of local proctors.

4. Miles Community College instructors are not required to teach long distance learning courses. Teaching that type of course is strictly voluntary. Miles Community College requires instructors wishing to teach long distance learning to attend training for long distance teaching. Miles Community College offers such training at the beginning of the fall and spring semesters.

5. The long distance learning program at Miles Community College is an accredited program. In order to maintain the program's accreditation, certain standards regarding the method of teaching and the quality of the video conferencing must be maintained. Without proper technique during the teaching, the long distance teaching is useless. Two important teaching criteria for teaching long distance learning are for the instructor to (1) stay in the front of the classroom so that students at the remote site can see the instructor and (2) not walk past the microphones while teaching.

6. A video technician in the classroom controls the video equipment while the instructor is teaching. In both the campus classroom and at the remote site, two monitors are set up. One of the monitors shows what is happening in the campus classroom and the other shows what is happening at the remote site. On occasion, the camera or the microphones will go down and this can disrupt teaching.

7. Miles Community College employed Kiddie as a full-time instructor beginning in the fall of 2002. He was employed annually on a one-year contract basis. Kiddie was employed to teach general psychology, ethics and certain other sociology courses. Kiddie's contract was renewed each year until the end of the spring semester, 2005. At that time, the college president, Darrel Hammon, recommended to the board that Kiddie's teaching contract not be renewed for the 2005-2006 teaching year. The board adopted that recommendation and Kiddie's contract was not renewed.

8. Kiddie began teaching long distance learning courses at Miles Community College during the spring semester, 2003. The strictures limiting the instructor's classroom movement in the long distance learning did not suit Kiddie's teaching style. Instead of remaining in the front of the classroom, Kiddie liked to move around the classroom while lecturing. He also liked to leave up his Power Point presentations. This resulted in the video technician being unable to fulfill the important function of focusing the camera on the instructor because Kiddie would require that the tech continue to show the Power Point screen to the students at the remote site while he continued to lecture.

9. Kiddie was unwilling to modify his teaching style in order to accommodate the long distance learning. The problems with his teaching of the long distance learning courses continued semester over semester through the 2003-2004 and 2004-2005 teaching years. Nonetheless, he continued to volunteer for teaching the courses. In fact, almost 35% of his total teaching schedule involved teaching through long distance learning.

10. Kiddie also had problems with controlling the noise level in his classroom. On several occasions, the volume of the video being shown in Kiddie's class was so loud that the students in Instructor James Joyce's nearby business classes became distracted.

11. One time, the disruption to Joyce's class was so pervasive that Joyce was prompted to complain in writing to President Hammon. On that occasion, the volume of the video in Kiddie's room was so loud that Joyce could not be heard by his students (Exhibit R-8, Joyce's letter to College President Darrel Hammon). As a result of the noise, Joyce went into Kiddie's room to ask Kiddie to turn the volume down. To Joyce's surprise, Kiddie was not in the classroom. When Joyce asked the students where Kiddie was, one of them responded that Kiddie had other classes to prepare for so he was not there. This understandably upset Joyce and he continued to look for Kiddie. Approximately one-half hour later, Joyce found Kiddie walking in the hallways of the college.

12. Joyce later learned that it was common practice for Kiddie to be absent from his classroom while presenting videos. Indeed, Joyce noted that it was common for students to get up and leave during Kiddie's video presentations. *Id.* To Joyce, who served as the Dean of the Professional and Technical Division of the college, Kiddie's behavior was unacceptable for an instructor at the college.

13. Kiddie's continuing refusal to conform his teaching habits to the long distance learning requirements while teaching long distance classes reached a crescendo during a long distance course he was teaching on January 25, 2005. On that evening, Sasha Perkins was working as the video technician. Students at the remote site were having trouble understanding and following Kiddie's lecture as he repeatedly strayed out of the view of the camera and out of the earshot of the microphones. When one of the remote students complained, Kiddie stated "we all need to get together on this." When another student at the remote site then complained, Kiddie stated "If the class doesn't fit your needs, I suggest you drop it and take it at another time."

14. Kiddie also had problems with ensuring timely delivery of exams to the remote sites. Instead of managing his time to ensure that the exams arrived ahead of schedule, Kiddie would not infrequently fail to prepare his exams so that the exams could be timely delivered to the remote site by regular mail. Instead, he would attempt to send the tests by facsimile to the remote sites after the video conferencing had begun. This would result in complaints from administrators at the remote sites (which were not owned by Miles Community College) as it would tie up fax

machines for extended periods of time and would result in the use of copious amounts of paper resources that did not belong to Miles Community College.

15. Michelle Weight, director of distance learning at Miles Community College, had the responsibility for ensuring that instructors conducted their distance learning appropriately. She also had the responsibility of taking corrective action against instructors who did not properly teach the distance learning program. In this capacity, Weight repeatedly worked with Kiddie to overcome the problems that he had with teaching the long distance courses. Despite repeated assistance and admonitions, Kiddie simply would not change his teaching method to comport with the inherent restrictions of the long distance learning courses.

16. Weight also admonished Kiddie about the problem with his belated faxing of examinations to the remote sites. Nonetheless, Kiddie decided that it was more effective for him to wait until after the video conferencing had started and then send the examinations by facsimile. Thus, despite Weight's admonition that he should not engage in this conduct, Kiddie continued to do so.

17. In the fall semester, 2004, Kiddie and other instructors at the college began discussing the formation of a teacher's union. Kiddie contacted MEA/MFT to learn of the process for unionizing the instructors and also made arrangement for meetings between interested instructors and MEA/MFT personnel.

18. On November 18, 2004, the Montana Board of Personnel Appeals (BOPA) advised President Hammon that it was conducting a unit determination and asked Hammon to provide the Board with a list of all employees in the proposed unit to BOPA no later than December 1, 2004 (Joint Exhibit 10). A unit election was held in December, 2004. On December 20, 2004, Hammon reported to the Miles Community College trustees that the instructors were holding an election to decide whether to unionize and that the results would be available in January, 2005.

19. The results of the vote showed that the instructors had voted to unionize. On January 19, 2005, BOPA advised President Hammon by letter that MEA/MFT had been certified as the union representative for all collective bargaining purposes (Joint Exhibit 12). Dickie was elected as president and Kiddie was elected treasurer of the Miles Community College local. Dickie also informed President Hammon of the formation of the union and also sent a letter to the Board of Trustees for the college advising them of the formation of the union.

20. Throughout the 2004-2005 school year, Hammon had been concerned about Kiddie's conduct in the classroom, especially with respect to Kiddie's difficulties with video conferencing. Hammon had received the letter from Joyce in the fall of 2004 about Kiddie's conduct. Michelle Weight had complained repeatedly to Hammon about Kiddie's video conferencing problems. Kiddie's January 25, 2005 conduct was the proverbial "straw that broke the camel's back" for Weight. Immediately upon learning of the incident, she contacted Hammon by phone while he was in Helena, Montana, attending to legislative business for the school. She advised Hammon of Kiddie's conduct during the January 25, 2005 video conference.

21. Hammon decided, based on the totality of Kiddie's conduct, that he would recommend to the trustees that Kiddie's contract not be renewed for the following academic year. On February 21, 2005, the trustees considered the renewal of various instructors including Kiddie. Hammon recommended to the trustees that Kiddie's contract not be renewed. In doing so, he cited to the concerns regarding Kiddie's performance.

22. Traditionally, the trustees have essentially "rubber stamped" the recommendations of the college president, permitting the person in that position to make the personnel decisions about the college. Kiddie's case was no different. Thus, the trustees, taking Hammon at his word, voted to not renew Kiddie's contract. At no time during the meeting did Hammon make any remarks about Kiddie's union activity.

23. In order to preserve what the trustees felt to be Kiddie's privacy rights, the trustees undertook the decision to not renew Kiddie's contract in a closed session. Kiddie had asked that the action be undertaken in an open meeting. Kiddie grieved the decision to hold the meeting in closed session over his objection and prevailed, thus voiding the trustees' February 21, 2005 action.

24. At a Board of Trustees meeting held on May 10, 2005, the trustees again considered the question of renewing Kiddie's teaching contract. Again the board voted unanimously to not renew the contract. The minutes of that meeting reflect that Hammon was specifically asked whether Kiddie's involvement in the unionization effort played a part in Hammon's recommendation to not renew Kiddie's contract. Hammon indicated that it did not.

25. During the union formation process, Hammon and the trustees displayed some concern about the formation of the union. Specifically, the management was concerned about what type of flexibility for program

implementation (adding, deleting new courses) that formation of the union might present. This concern, however, did not rise to the level that it could be considered to be anti-union animus. More importantly, it did not affect Hammon's decision to not renew Kiddie's contract. That decision was based strictly on Hammon's concerns about Kiddie's teaching habits and particularly Kiddie's unwillingness to properly teach his long distance courses.

IV. DISCUSSION²

Public employers may not (1) interfere, coerce or restrain employees in exercising their rights to organize nor may they interfere in the administration of a labor organization. Mont. Code Ann. § 39-31-401(1) and (2). In addition, public employers cannot discriminate against an employee in a term of employment in order to encourage or discourage membership in a labor organization nor may an employer discriminate or take any action against an employee because that employee has testified in an unfair labor charge case. Mont. Code Ann. § 39-31-401(3) and (4).

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals of using federal court and National Labor Relations Board (NLRB) precedents as guidance in interpreting the Montana collective bargaining laws. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

The Montana Supreme Court applies the following analysis in cases such as the one at bar where the parties argue that differing motivations prompted the nonrenewal of the employment contract:

“When a charge is made that by firing an employee the employer has exceeded the lawful limits of his right to manage and to discipline, substantial evidence must be adduced to support at least three points. First, it must be shown that the employer knew that the employee was engaging in some activity protected by the Act. Second, it must be shown that the employee was discharged because he engaged in a protected activity. Third, it must be shown that the discharge had the effect of encouraging or discouraging membership in a labor organization. The first and second points constitute discrimination and the

²Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

practically automatic inferences as to the third point results in a violation of [the Act].

Billings School District v. Board of Personnel Appeals (1979), 185 Mont. 89, 101, 604 P.2d 770, 777, quoting *NLRB v. Whittin Machine Works*, 204 F.2d 883, 884 (1st Cir. 1953). If an employee can make the showing described above, the burden will then shift to the respondent to show by a preponderance of the evidence that it would have made the same decision not to renew even in the absence of the protected conduct. *Billings School District, supra*, 185 Mont. at 101, 604 P.2d at 777, citing *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977).³

The facts of this case show that the first prong of the *Billings School District* case has been met. Hammon was aware that Kiddie was engaged in protected union activity at the time Hammon decided to recommend that Kiddie's contract not be renewed. The resolution of this case turns on the second prong of the *Billings School District* analysis, i.e., the college's basis for not renewing Kiddie's teaching contract. If there is substantial evidence that the basis was President Hammon's desire to retaliate for the formation of the union or to otherwise hamper union activity, then an unfair labor practice has been proved and the college must then show by a preponderance of the evidence that the anti-union animus played no part in the decision to not renew Kiddie's contract. If, on the other hand, the substantial evidence fails to show that there was an anti-union animus motivating the nonrenewal, then the unfair labor practice fails. Here, the evidence fails to establish that Hammon's action was motivated by anti-union animus.

Kiddie's conduct of repeatedly failing to properly teach the long distance learning course was problematic. Weight had repeated discussions with Kiddie about his methodology of teaching the courses. Kiddie quite obviously did not like the constraints placed upon his teaching by the long distance learning setup. As Weight succinctly stated, properly putting on the long distance learning course was like producing a television show. Kiddie did not like direction and repeatedly refused to follow instruction for properly broadcasting the course. These problems continued for some time despite repeated admonitions. Kiddie refused to follow reasonable direction regarding the delivery of examinations to remote sites and this also created problems. These issues, compounded by Kiddie's conduct as reported by Joyce and Kiddie's conduct while teaching on January 25, 2005, quite reasonably led Hammon to the conclusion that Kiddie simply did not want to properly teach the long distance learning courses. When weighed against the long distance learning program's obvious

³ This test is more commonly known as the "but for" test.

importance to the college, Hammon quite reasonably and legitimately concluded that Kiddie should not be teaching at the college and that his teaching contract should not be renewed.

Kiddie's contention that his student reviews were positive and that this undermines the legitimacy of the basis for the nonrenewal of his contract is not compelling. Regardless of the student evaluations, Kiddie quite obviously did not like the long distance learning and, more importantly, was unwilling to follow the strictures of the long distance learning. This was directly contrary to one of the most important functions of Miles Community College: providing long distance learning. Moreover, long distance learning was a large part of the curriculum taught by Kiddie. In this case, the evidence points toward Hammon's legitimate basis for nonrenewal as the true basis for the decision to not renew Kiddie's contract and not any anti-union animus that he might have harbored. The union, therefore, has failed to carry its burden and its claim of an unfair labor practice must be dismissed.

Even if, however, the union had carried its burden, the hearing officer would still find that the preponderance of the evidence demonstrates that Hammon's motivation was not related to anti-union animus. As earlier stated, in light of the importance of the long distance learning program to Miles Community College, Kiddie's obvious unwillingness to conform his teaching habits to the strictures of the program, and his conduct in teaching as observed by Joyce, Weight and Perkins, Hammon's decision to not renew was certainly based solely on Kiddie's performance and not his union activity.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this case. Mont. Code Ann. § 39-31-207.

2. The union has failed to show by a preponderance of the evidence that Miles Community College violated Mont. Code Ann. § 39-31-401(1), (2), (3) or (4). The decision to not renew Kiddie's teaching contract was not motivated by anti-union animus.

3. Because the union has failed to prove any violation in this matter, the charge should be dismissed.

VI. RECOMMENDED ORDER

Based on the foregoing, the hearing officer recommends that the unfair labor practice alleged by MCCFA be dismissed as the union has failed to show that the nonrenewal of Kiddie's contract was based on anti-union animus.

DATED this 8th day of September, 2006.

BOARD OF PERSONNEL APPEALS

By: *Gregory L. Hanchett*
GREGORY L. HANCHETT
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to Admin. R. Mont. 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. Mont. Code Ann. § 39-31-406(6). Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

* * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

Richard Larson
Attorney at Law
P.O. Box 1152
Helena, MT 59624-1152

Laurence R. Martin
Attorney at Law
P.O. Box 2558
Billings, MT 59103-2558

DATED this 8th day of September, 2006.

Sandy Durcan