BEFORE THE BOARD OF PERSONNEL APPEALS

OF THE STATE OF MONTANA

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IN THE MATTER OF LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 1334, Complainant, -vs- MONTANA PUBLIC EMPLOYEE'S ASSOCIATION, Respondent.	ULP-10-1974 OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AS RECOMMENDED TO THE BOARD OF PERSONNEL APPEALS

The above-entitled matter came on for hearing before me as hearings examiner for the Board of Personnel Appeals on August 14, 1974, upon the complaint of the complainant and the answer of the respondent. The complainant was represented by its attorney, Joseph W. Duffy, and the respondent was represented by its Executive Director, Thomas E. Schneider. Both parties called and examined witnesses and submitted documentary evidence at the hearing. Subsequent thereto, each party submitted a brief and proposed findings of fact and conclusions of law.

OPINION

The basic charges contained in the complaint are:

(1) That the respondent restrained or coerced employees in the exercise of their rights guaranteed by Section 59-1605(2)(a) and,

(2) That the respondent violated Section 59-1605 by encouraging employer domination.

The first charge is based on the distribution of certain printed materials by respondent. Copies of these materials are attached to the complaint and designated Exhibits "A" through "H". The second charge is also based on the distribution of

a printed document which is also attached to the complaint and designated Exhibit "A".

Section 59-1605(2)(a) provides as follows:

> "It is an unfair labor practice for a labor organization or its agents to: (a) restrain or coerce employees in the exercise of the right guaranteed in subsection (1) of section 3 (59-1603) of this act, or a public employer in the selection of his representative for the purpose of collective bargaining or the adjustment of grievances; ..."

Section 59-1603(1) provides as follows:

> "(1) Public employees shall have, and shall be protected in the exercise of, the right of self-organization to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment and to engage in other mutual aid or protection, free from interference, restraint or coercion. ..."

Section 59-1605(1)(b) reads as follows:

> "(1) It is an unfair labor practice for a public employer to: ... (b) dominate, interfere, or assist in the formation or administration of any labor organization; however, subject to rules adopted by the board under section 12(3), an employer is not prohibited from permitting employees to confer with him during working hours without loss of time or pay; ..."

Because of the relative newness of Title 59, Chapter 16, (which provides for collective bargaining between public employers and their employees) there are no Montana Supreme Court decisions setting forth what facts constitute restraint or coercion of employees' rights guaranteed by Section 59-1603 or employer domination as defined by Section 59-1605. Because of the similarities between Title 59, Chapter 16 and the Federal Labor Management Relations Act, and because of the many years of experience the National Labor Relations Board has had in interpreting the federal act, the decisions of the NLRB will be considered here.

By way of background, the respondent filed a petition for decertification seeking to decertify the complainant as the collective bargaining agent for the custodians of the physical plant at Montana State University in Bozeman, Montana. An

election was scheduled for June 27, 1974. The documents referred to above (Exhibits "A" through "H") concerned this election and are the documents upon which the unfair labor practice charges are based. The complainant obtained a court order enjoining the holding of the election on June 27, 1974.

The first issue involves the charge of restraint or coercion by the respondent organization of rights guaranteed to employees free from interference by Section 59-1603. Specifically it is charged that the dissemination of Exhibits "A" through "H", copies of which are attached to the complaint, unlawfully restrained or coerced employees. In determining this issue, complainant has urged that the standard set forth in Celanese Corp. v. NLRB, 291 F 2d 224, be utilized. It is as follows:

> "(1) there has been a material misrepresentation of fact, (2) this misrepresentation comes from a party who had special knowledge or was in an authoritative position to know the true facts and (3) no other party had sufficient opportunity to correct the misrepresentation before the election. US Gypsum Co., 130 NLRB No. 99; The Cleveland Trencher Co., 130 NLRB No. 59; Kawneer Co., 119 NLRB No. 1460; The Calydine Co., 117 NLRB No. 1026. Where these elements are present, the Board has found that the legitimate limits of campaign propaganda have been exceeded and has set aside the election on the ground that it does not reflect the free desires of the employees without further requiring that prejudice to the fairness of the election be shown."

In Hollywood Ceramics Co., 140 NLRB 221, the Board preserved the criteria set forth in Celanese Corp. v. NLRB, supra, and restated the rule as follows:

> "a misrepresentation or other similar campaign trickery which involves a substantial departure from the truth at a time which prevents the other parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election."

The standard set forth in Celanese Corp. v. NLRB, supra, will be utilized here for determining whether an unfair labor

practice has been proved even though the standard as set forth in Celanese was for the purpose of determining whether the "laboratory conditions" for an election had been interferred with, and such standard is more restrictive than the usual test for determining the existence of an unfair labor practice.

Applying the standard in Celanese to the instant case and assuming that the first two elements of said standard have been proved, it appears the complaint must fail for lack of proof of the third element. There is no proof in the record attempting to show that complainant did not have an opportunity to correct any misrepresentations contained in Exhibits "A" through "H" before the election. (The election had not been held as of the date of hearing on this matter.) In addition, respondent's Exhibit "H" appears to be a response by complainant to certain allegations made by respondent in Exhibits "A" through "H".

Further, the NLRB in interpreting the federal act has been reluctant to undertake the censorship of election propaganda. The board has stated that "exaggeration, inaccuracies, half-truths, and name calling, though not condoned, will not be grounds for setting aside an election". It appears to be the NLRB's view that absolute precision of statement and complete honesty are not always obtainable in an election campaign, nor are they expected by employees. (Cleveland Trencher Co., 130 NLRB 600; Merck and Co., 104 NLRB 891; Gummed Prod. Co., 112 NLRB 1092; and Hollywood Ceramics Co., supra).

Since in my opinion Exhibits "A" through "H" contain some inaccuracies, I have also considered the question of coercion without reference to any court decision. The complainant's brief states that it established said coercion through the testimony of Forsberg and Davis. (Complainant's brief, page 6)

I have read and reread the testimony of both witnesses and fail to find proof of coercion. The testimony of Mr. Forsberg in this regard is as follows:

"Q Mr. Forsberg, showing you what are, for the record, Complainant Exhibits A-H, I would like to ask you if you have ever seen any of those materials?

A Yes I have.

Q And on what occasion did you see them?

A They were mailed to me.

Q You received those in the mail?

A Yes.

Q To your knowledge, did anyone else that is a custodian at the college receive that correspondence?

A Yes.

Q It was sent to you through the United States Mail?

A Yes.

MR. DUFFY: I have no further questions."

The witness Forsberg states only that he received Exhibits "A" through "H". He does not in any manner claim restraint or coercion.

Mr. Davis testified regarding said exhibits as follows:

"Q Showing you what are identified for the record as Complaint Exhibits A-H, have you ever seen those before?

A Yes.

Q You have seen those?

A Yes.

Q On what occasion did you see them?

A They sent them to me in the mail.

...

Q During these meetings, in light of the correspondence that you received, did you have any apprehension about your job security or what might happen?

A Yes, I did.

Q How would you describe it?

A Well, I figured that if MPEA come here, you know what I mean, we'd have, you know what I mean, and another thing I didn't like is that I belong to this union a long time and the MPEA claims they've done all the things like this college that this union has done down there and I don't and that's why I didn't go for it. If that answers your question.

Q Was there any thought in your mind about loss of representation.

A Yes, there was.

Q What fear did you have about losing your representation?

A Well, I just figured that we would be classified or something like that, you know what I mean, and we wouldn't all get the same wages and, you know, different, have a different setup altogether.

Q Was there any fear that the jobs here might be sub-contracted out to another outfit?

A That's right, I did."

Mr. Davis does state that he had some apprehension about job security, loss of representation, and sub-contracting. He does not state what, if anything, contained in Exhibits "A" through "H" caused this apprehension and when asked by his attorney to describe his apprehension regarding job security he stated as follows:

"Well, I figured that if MPEA came here, you know what I mean, we'd have, you know what I mean, ..."

There is nothing in Mr. Davis's testimony to indicate any tie-in between the fears he expresses and Exhibits "A" through "H". Rather it would appear Mr. Davis's only fear was that changes might occur if the employees chose a new collective bargaining agent. His fears do not indicate any restraint or coercion in choosing that collective bargaining agent.

The second issue involves the charge that the respondent violated Section 59-1605 by encouraging employer domination. Section 59-1605 (1)(b) states that it is an unfair labor practice for a public employer to dominate any labor organization. This

charge is based on a statement in Exhibit "B", attached to the complaint, which reads as follows:

> "P.S. You have the right to ask either Mr. C. C. Dye or Mr. Johnston about anything. If you are still unsure about how you stand if you vote MPEA, ask them!!!"

It would appear that in order to have an unfair labor practice under Section 59-1605(1)(b), as charged, that an employer must actually dominate or assist the employee organization. If such an act took place, then we would have an unfair labor practice by the employer. There is no charge against the employer in this case. It would appear from a strict reading of the statutes in question that encouraging employer domination is not an unfair labor practice. It would appear such domination must actually exist. In other words, the statutes (so far as this issue is concerned) are for the protection of employees and, if no domination occurs, the employees' rights have not been affected. However, for purposes of this decision I will assume that encouraging employer domination constitutes an unfair labor practice.

The statement from Exhibit "B" quoted above appears merely to advise employees that they have a right to confer with representatives of the employer regarding MPEA. The statute (59-1605) appears to permit employees to confer with the employer. There is nothing in the record to show that respondent in advising the employees that they may confer with their employer requested or encouraged the employer to favor the respondent's position in such conferences.

The overriding consideration to me in deciding this matter has been the protection of the employees' rights in choosing a bargaining representative. It would appear from the record that such rights have not suffered from either coercion by the respondent or domination by the employer. Further, the record does

not establish encouragement of domination by the employer from the respondent.

Accordingly, I find as follows:

FINDINGS OF FACT

1. That the respondent has not restrained or coerced employees.

2. That respondent has not encouraged employer domination of the employee organization.

Based on the above findings of fact, I conclude as follows:

CONCLUSIONS OF LAW

That the allegations of the complaint that respondent has engaged in unfair labor practices have not been sustained by evidence. Accordingly, I recommend the following order:

ORDER

IT IS ORDERED, upon the basis of the foregoing findings of fact, conclusions of law and the entire record in this case, that the allegations of the complaint have not been sustained by evidence and that the complaint be dismissed on its merits.

DATED this 22 day of May, 1975.

Jerome T. Loendorf
Hearings Examiner

CERTIFICATE OF MAILING

I, Jerome T. Loendorf, hereby state and certify that I did on the 22 day of May, 1975, mail a true copy of the above Opinion, Findings of Fact, Conclusions of Law, and Recommended Order to:

Mr. Joseph W. Duffy
McKittrick & Duffy
Attorneys at Law
315 Davidson Building
Great Falls, Montana 59401

Mr. Thomas E. Schneider
Executive Director
Montana Public Employees Assoc.
P. O. Box 1184
Helena, Montana 59601

SUBSCRIBED AND SWORN to before me this 22d day of May, 1975.

NOTARY PUBLIC for the State of Montana
Residing at Helena, Montana
My commission expires: June 15, 1978