BEFORE THE BOARD OF PERSONNEL APPEALS

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IN THE MATTER OF:

FRAZER EDUCATION ASSOCIATION,

Complainant,

vs

VALLEY COUNTY SCHOOL DISTRICT #2 & 2H

Defendant.

ULP-15-1976

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER.

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STATEMENT OF CASE

On 15 June 1976, the Frazer Education Association, affiliated with the Montana Education Association (hereafter referred to as the Association or the F.E.A.) filed an unfair labor practice charge with the Montana Board of Personnel Appeals against the Valley County School District #2 & 2H (hereafter referred to as the School Board).

The charges allege that Section 59-1605(1)(a), R.C.M., 1947, has been violated in that the School Board had interfered with, restrained, or coerced employees in the exercise of their rights guaranteed in section three of the Montana Public Employees Collective Bargaining Act. The Association also alleges the Board violated Section 59-1605(1)(e), R.C.M., 1947, by failing to bargain collectively in good faith with the exclusive representative - the Association.

The Association's third unfair labor practice charge alleges that the Board violated Section 59-1605(1)(c) by discriminating in regards to tenure of employment to discourage membership in the Association. The four non-renewals alleged because of the violation of 59-1605(1)(c) involved Mr. Thomas Gigstad, Mr. Burdett Newman, Ms. Kathy Newman, and Ms. Diane Dehne. The Association's specific charge relating to Ms. Newman and Ms. Dehne is as follows:

"2. The contract of Kathy Newman was not renewed although her rating was above average. The stated reason, to hire a "better teacher" is inadequate under the statute as it does not explain why Ms. Newman was not renewed. She had been a party to two grievances and had been active in preparing and investigating other grievances. She was a member of the negotiating team (serving as its secretary) and was secretary-treasurer of the Frazer Education Association."

"3. The contract of Diane Dehne was not renewed, although her rating was above average. Again, the stated reason did not refer to Ms. Dehne. She was the subject of a bitter grievance struggle and her evaluation was reduced in the area of "administration relations" because of her participation in the association grievance over salaries. She was also a party to three additional grievances."

The School Board denied the charges in an answer filed with the Board of Personnel Appeals (hereafter referred to as the Board) on 13 July 1976. In part, the School Board stated that, "Hiring and firing of teachers is the prerogative of the School Board."

A hearing on the above-captioned matter was held on 29 July 1976 and 17 August 1976, at the Frazer Public School, Frazer, Montana. The Association was represented by Ms. Emilie Loring of the law firm of Hilley and Loring, Great Falls, Montana. Mr. Peter O. Maltese, Attorney at Law, Glasgow, Montana represented the School Board.

As the duly appointed hearing examiner of the Board, I conducted the hearing in accordance with the provisions of the Montana Administrative Procedures Act (Sections 82-4201 to 82-4225, R.C.M., 1947).

MOTION

At the 17 August 1976 hearing the Hearing Examiner granted a motion by the parties to bifurcate the various allegations in the Association's charge and to only address, at this time, the allegations contained in the third charge (59-1605(1)(c)) which pertains to the alleged discrimination of non-renewal of Ms. Kathy Newman and Ms. Diane Dehne.[1]

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1. During the period between the two hearing dates, the School Board offered a contract to Mr. Gigstad. Also, Mr. Newman has accepted a contract with another school district. Therefore, the question of their non-renewal because of alleged discrimination is moot.

OBJECTIONS TO TESTIMONY

During the hearing I took several objections to testimony under advisement. My ruling on those objections is as follows:

1. Counsel Loring's and Counsel Maltese's objections to hearsay evidence are hereby sustained.

After a thorough review of the entire record of this case, including briefs of parties concerned, sworn testimony and evidence, I make the following findings:

1. The Association is the exclusive representative for collective bargaining purposes for all teachers employed by the School Board.

2. The School Board and the Association agreed to their first collective bargaining contract for the 1975-76 school year (Joint Exhibit A).

3. The 1975-76 contract included a grievance procedure clause (Joint Exhibit 1: Article V). Ms. Newman, as the Secretary-Treasurer of the Association, assisted in some of the grievance investigations; typed and delivered all of the grievances; and was a party to several, specifically her placement on the salary schedule, (Complainant Exhibit 1) and the evaluation procedure (Complainant Exhibits 11 and 12).

4. The minutes of a regular School Board meeting on 9 March 1976 state: (Complainant Exhibit #15)

> "The following teachers were re-elected:...[2] One teacher resigned: Margaret Steidle. Four teachers were not re-elected because the Board felt they could find someone better: Thomas Gigstad, Kathy Newman, Burdette Newman, and Diane Dehne."

5. Ms. Newman and Ms. Dehne were formally notified on 14 April 1976 that their contracts would not be renewed "because the trustees feel

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2. *Seventeen teachers were re-elected.*

they can find better teachers to take your place." (Complainant Exhibit 18; tp. 630.)[3]

Mr. Blount testified that the attorney for the Montana School Board Association advised the Frazer School Board that the above explanation was sufficient reason for non-renewal of a teacher's contract.

6. Ms. Newman was also a member of the Association's negotiation team, which was attempting to negotiate a contract to succeed that 1975-76 agreement.

Mr. Tom Gigstad, President of the Association, testified that negotiation for the 1976-77 school year began on February 17, 1976. By May, after six sessions (several postponements by the School Board), the only agreements involved the recognition clause and a few sections of three articles. A mediation session was held on 22 May.

GRIEVANCE

7. In reference to grievances, Ms. Newman testified under cross examination, as follows:

> Mr. Maltese: "You mentioned, Ms. Newman, that Mr. Langdon (Superintendent) at one time critized you for typing grievance letters instead of doing your school work?"
>
> Ms. Newman: "He made the statement that I wouldn't be such a problem if I would be doing school work instead of typing letters for the Association."
>
> Mr. Maltese: "In conjunction with that criticism was he critizing you about some matter which related to your teaching?"
>
> Ms. Newman: "No."
>
> Mr. Maltese: "Is that the only occasion he

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3. *tp is the place on the tape, 29 July hearing; TP refers to 17 August tape.*

critized you in an oblique way about your handling grievance matters?"

Ms. Newman: "Directly, yes." (tp. 565)

8. Ms. Dehne was a party to several grievances; specifically her placement on the salary schedule (Complainant Exhibits 1, 2, 6, 7, and 8) and the evaluation procedure (Complainant Exhibit 10).

Ms. Dehne testified that in discussing her evaluation with her principal, Mr. Laisner, she learned her evaluation was reduced from outstanding to satisfactory in one area because she had not gone to him individually, but had gone to the F.E.A. for assistance in processing the grievance. The Association filed a second grievance relating to alleged reprisal on her teacher evaluation form for filing the first grievance (Complainant Exhibit 7).

The first evaluation began on 2 December but was not signed (or completed) until February. (Complainant Exhibit 7 and 23).

9. On the first evaluation, signed February 1976, Ms. Dehne had seven outstanding, thirteen satisfactory and two unsatisfactory; on the second, signed 8 March 1976, she had eleven outstanding, thirteen satisfactory and one unsatisfactory - (punctuality) (Complainant Exhibit 23).

During both evaluations Mr. Laisner (Principal) never mentioned the possibility that her contract might not be renewed.

10. Ms. Newman was evaluated twice. On the first evaluation in the 1975-76 school year, Ms. Newman had eighteen outstanding and seven satisfactory; on the second one, twenty-four outstanding and one satisfactory. Ms. Newman was not informed at either evaluation that her contract might not be renewed.

11. Ms. Newman testified that "Mr. Laisner did mention that my lesson plan books hadn't been turned in on time every Friday evening. Which is true - they hadn't - but most of the time they (the lesson plans) were turned in the following Monday morning." (tp 506)

On the second evaluation, 11 March, Ms. Newman received an

"outstanding" rating in this category because she had improved greatly. That was a two day difference (Tuesday - Thursday) and "I hadn't even turned them in yet."

12. Ms. Newman testified that "At the end of the second evaluation he (Mr. Laisner) mentioned that I was one of the best teachers as far as discipline and rapport with the students." (tp. 514)

13. Mr. Harold Blount, Chairman of the School Board, testified that the following factors are used by the School Board to determine if a teacher is re-elected or not re-elected:

1) Meet with the administration, namely the superintendent and the principal. Listen to their evaluation of each teacher.

2) Board members may make their own evaluation by visiting the school.

3) Listen to the views of the community.

14. Mr. Blount testified that another reason (beside those stated in the 14 April letter) for Ms. Newman's non-renewal was reports in her personnel file stating she was out of her classroom.

During cross examination, Mr. Blount stated that he never saw Ms. Newman's written rebuttals regarding the absences, nor did he see her formal teacher evaluation form on the 9 March meeting.

> He testified that "Another reason was that a vocational report needed to be filed and she was instructed to do so and it was a direct order from the superintendent to complete this report..."(TP 76)

During cross examination, Mr. Blount stated he never visited Ms. Newman's nor Ms. Dehne's classroom.

15. Mr. Laisner testified that Ms. Newman could have supervised her students better; also he testified that she did not get along with her supervisor at all times, citing one instance and the vocational form as examples of "insubordination." (TP 187)

16. Ms. Newman testified that sometime in February she received a note in her school mail box requesting that she fill out a form

pertaining to vocational education. Ms. Newman returned the form with a note stating she could not complete it without having additional information. She was later accused of refusing to complete the form. Ms. Newman testified that she never refused to complete it but only needed additional information to do so."

17. Under vigorous cross examination during rebuttal, Ms. Newman responded that she was only absent from her classroom for school related functions (supplies stored in office, some students worked in the office) (TP 407). "In notes Ms. Newman was reprimanded for leaving the classroom. She wrote rebuttals to these notes."

18. Mr. Blount testified that the principle reason Ms. Dehne's contract was not renewed was because the School Board did not know if Title I funds would be available for the 1976-77 school year.[4] (TP 139)

Mr. Laisner concurred with Mr. Blount's testimony and added that Ms. Dehne frequently was not punctual. The evaluation form checked as "unsatisfactory" under "Attendance and Punctuality."

19. In reference to the specific unfair labor practice charge, Mr. Maltese asked Mr. Laisner two questions: "Would you say that her (Newman's) membership in F.E.A. was a reason for her discharge?" and "Would you say her participation in grievance procedure or anything else?" Mr. Laisner response was "I don't believe so." (TP 298

20. Chairman Blount testified as follows regarding the specific charge:

> Mr. Maltese: "During the executive board meeting (9 March) did you or the Board ever mention that these people were discharged because they belonged to the F.E.A.?"

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4. *Ms. Dehne was hired under a grant from the Elementary and Secondary Education Act Title I.*

Mr. Blount: "No."

Mr. Maltese: "Was there any mention about their participation as to grievances?"

Mr. Blount: "Not at this executive session."

Mr. Maltese: "Was there any discussion about these two people being involved in collective bargaining?"

Mr. Blount: "No, not at that particular session."

DISCUSSION

I find that the Respondent's discharge of Ms. Newman and Ms. Dehne, under the circumstances detailed, was in violation of the Collective Bargaining Act for Public Employees and that the reasons given for their non-renewal are pretextual. I have given weight to the following considerations.

The timing of the non-renewal: The non-renewal action was taken on the evening of the day of Ms. Newman's first evaluation. Ms. Newman was not given a second evaluation before the non-renewal to determine if any of the deficiencies detected in the first evaluation had been corrected. Ms. Newman and Ms. Dehne, according to the testimony, were not given any prior notice of even the possibility of non-renewal. There was an absence of formal prior censure, warning, criticism, or dissatisfaction by the Superintendent or the Principal of their teaching performances or attitudes which might have been detrimental to the smooth operation of the small school.

I do not credit Mr. Blount's testimony that Ms. Newman's contract was non-renewed based on the minor infractions of working rules. I give little credit to this when nothing concrete showing insubordination was established. On the contrary, the explanation given by Ms. Newman as to the vocational report was that she requested additional information, she didn't refuse to complete it. Also, after the initial "flare-up" of discussion with the Superintendent/

Principal there is no evidence on the record that this was a continuous problem to the administration, to other faculty members, or that it involved the students. From her demeanor on the witness stand, I think it is safe to say that Ms. Newman was "abrupt" with the administrators but there is no evidence that it caused disruptions in the school system or that it was insubordination. In fact even the first evaluation states "outstanding" under the category of cooperation with the administration. Indeed, an odd rating when by evening of the same day that rating became a basis for non-renewal.

Union activities of Employees: It is clear that Ms. Newman and Ms. Dehne did engage in Association activities and that the Respondent had knowledge of those activities.

The Respondent contends that the non-renewal of Ms. Newman and Ms. Dehne was unrelated to any union activities; that the non-renewals were prompted by employee insubordination and deficient teaching standards.

In reference to Ms. Newman's non-renewal, the Respondent substantiated her alleged "insubordination" based on (1) one "heated" discussion at the beginning of the 1975-76 school year and (2) the matter of the vocational report.

Though evaluations vary from district to district, I cannot ignore the fact that even after the School Board decided not to renew Ms. Newman's contract, the evaluation form,two days later,shows that she was rated as "outstanding" in the vast majority of the twenty-five areas evaluated by the Principal.

Ms. Dehne's evaluations are not as high as Ms. Newman's; however, she was rated as "outstanding" or "satisfactory" in every area except one - punctuality. That one "unsatisfactory" rating does not indicate a major teaching deficiency.

The Respondent's major contention for the non-renewal of Ms. Dehne's contract was the uncertainty of Title I funds. Yet, in the formal non-renewal notification, Ms. Dehne was not advised

that that was the reason for the School Board's action.

It is common knowledge that this School Board, like many others, does not know if Title I funds are available until late spring or early summer. Therefore, should all Title I teachers be non-renewed every year until a School Board has definite word about the funds available?

The Attorney General's opinion No. 77 states that a teacher can gain tenure, regardless of source of funds (federal) for the salary.

CONCLUSIONS OF LAW

1. The Respondent violated provisions of Section 59-1605, R.C.M., 1947, and is guilty of unfair labor practices as specified in Section 59-1605(1)(c), R.C.M., 1947 by non-renewing the contracts for Ms. Kathy Newman and Ms. Diane Dohne.

2. The discharge of said employees was motivated by the employees' involvement in union activities, which are rights of public employees protected by Section 59-1603, R.C.M., 1947.

RECOMMENDED ORDER

1. Having found that the Respondent has engaged in an unfair labor practice within the meaning of Section 59-1605(1)(c), of that Act, it is ordered that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

2. Take the following affirmative action:

(a) Offer to Kathy Newman and Diane Dohne immediate and full reinstatement of their former positions and make them whole for any loss of pay or loss of fringe benefits suffered in consequence of their non-renewal because of their engagement in union activities.

(b) Notify the Administrator of the Board of Personnel Appeals in writing, within twenty (20) days from receipt of this decision, what steps have been taken to comply herewith.

(c) Place copies of this order in the personnel files of Ms. Newman and Ms. Dehne. The orders shall remain in the personnel files of said employees until such time as they may in writing request their removal.

Dated this 16th day of September, 1976.

BOARD OF PERSONNEL APPEALS

BY Ray Suenan
Ray Suenan
Hearing Examiner

CERTIFICATE OF MAILING

* * * * * * * * * * *

I, Vonda Brewster, hereby certify and state that I did on the 16th day of September, 1976 did mail a copy of the above Findings of Fact, Conclusions of Law and Recommended Order.

Harold Blount
Chairman, Board of Trustees
Frazer Schools
Frazer, MT 59225

Emilie Loring
Hilley & Loring
1713 Tenth Avenue South
Great Falls, MT 59401

Peter O. Maltese
P. O. Box 388
Glasgow, MT 59230

Tom Gigstad, President
Fraser Education Association
Frazer, MT 59225

Vonda Brewster