STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 29-82:

UNIFIED LOGAN TEACHER ASSOCIATION UNIT OF GALLATIN COUNTY RURAL MEA/ NEA,	)	
Complainant,	)	FINAL ORDER
- vs -	)	
GALLATIN COUNTY SCHOOL DISTRICT NO. 1, LOGAN SCHOOL DISTRICT,	)	
Defendant.	)	

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No exceptions having been filed, pursuant to ARM 24.26.215, to the Findings of Fact, Conclusions of Law and Recommended Order issued on May 27, 1983, by Hearing Examiner Jack H. Calhoun;

THEREFORE, this Board adopts that Recommended Order in this matter as its FINAL ORDER.

DATED this 23rd day of September, 1983.

BOARD OF PERSONNEL APPEALS

BY Alan L. Joscelyn
Alan L. Joscelyn, Chairman
Board of Personnel Appeals

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CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 23rd day of September, 1983:

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 29-82:

UNIFIED LOGAN TEACHER ASSOCIATION UNIT OF GALLATIN COUNTY RURAL MEA/ NEA, Complainant, vs. GALLATIN COUNTY SCHOOL DISTRICT NO. 1, LOGAN SCHOOL DISTRICT, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

* * * * * * * * * * * * * * * * * * *

The Unified Logan Teacher Association filed this unfair labor practice charge on September 3, 1982, alleging that Gallatin County School District No. 1 violated Section 39-31-401(1) and (3) MCA when it removed head teaching duties from Susan Howe's position. The District answered on September 22, 1982 and denied any violation occurred. A hearing was held on January 12, 1983 in Bozeman under authority of Section 39-31-406 MCA. The Association was represented by Emilie Loring, the District was represented by Charles Erdmann.

ISSUE

The issue raised by this charge is whether the School District's action in removing certain head teacher duties from Ms. Howe's position constitutes an unfair labor practice under Section 39-31-401 MCA.

FINDINGS OF FACT

Based on the evidence on the record, including the sworn testimony of witnesses, I make the following findings.

1. Logan School employs three teachers, one of whom is designated head teacher by the Board of Trustees. There is no principal. The School employs a Clerk who serves as liaison between the Board and teachers. The Board communicates with the head teacher and the other teachers through the Clerk and at monthly meetings. There are approximately 28 students in the school.

2. The Board of Trustees is comprised of the chairman and two other members. It is responsible for the operation of the School.

3. The Unified Logan Teachers Association, a unit of the Montana Education Association is a labor organization as defined in Section 39-31-103(5) MCA.

4. Gallatin County School District No. 1 is a public employer as defined in Secton 39-31-103(1) MCA.

5. The head teacher is paid an extra duty allowance of $300.00 for the school year. Specific duties as enumerated in the job description for the position are to:

- Order books and supplies (gets Board permission, if over $50.00) and relay paperwork to the Clerk.
- Oversee disciplinary problems in cooperation with the staff.
- Serve as boss under the Board.
- Inform the Board when conflicts arise between parents, students and the staff.
- Notify parents when a student is injured.
- Supervise the playground.
- Establish a duty roster in cooperation with other teachers.
- Report truant or incorrigible pupils to the Board.
- Suspend students for good cause subject to the review of the Board.
- Attend monthly Board meetings.
- Comply with appropriate laws.
- Inform the Board regarding directions from the County Superintendent of Schools.
- Know Sections 75-6108 and 75-6110 RCM.
- Protect students from abuse.
- Conduct registration day, if so instructed.
- Work with and assist other teachers, but not interfere with them.

6. Susan Howe has been employed by Gallatin County School District No. 1, Logan School since 1977 and has been a tenured teacher since her 1980-81 contract with the Board. She became head teacher beginning with the 1978-79 school year and held that position through the 1981-82 school year.

7. During her employment with the District, Mrs. Howe has received five evaluation reports on her performance as a teacher. They cover endeavors such as classroom management, teaching performance, attitude, relationship with students and parents, cooperation with staff, preparation and quality of instruction. All comments, made by several different evaluators hired by the Gallatin County Superintendent's office, are to the effect that she performed excellent work in all areas.

8. During November of 1981, Ms. Howe and the other two teachers informed the School Board they wished to negotiate. The Board, at that time, was receptive to the proposition.

9. At its February 17, 1982 meeting, the Board recognized the Unified Logan Teachers Association as the bargaining agent for the teachers.

10. During March of 1982 the teachers submitted a contract proposal to the Board. A meeting was set for the 23rd, but the Board members did not attend.

11. The teachers sent several letters requesting that the Board negotiate with them, however, no bargaining took place. At one time the Chairman of the School Board called one of the teachers and said he would tell her when he wanted to negotiate.

12. On March 31, 1982, the Clerk delivered individual contracts for the 1982-83 year for the teachers to sign.

13. On April 17, 1982, Ms. Howe signed her individual contract, which provided for her retention as head teacher, but she noted "acceptance of tenure only" under her signature because she wanted to make sure the Board understood she was not giving up the right to negotiate salary and benefits.

14. On April 22, 1982, the Teachers Association filed an unfair labor practice charge against the School District for refusal to meet and bargain with the teachers and for issuing individual contracts in violation of the Act.

15. At the April 27, 1982 School Board meeting, a motion was passed which declared that the Board did not recognize the Unified Logan Teachers Association as "negotiators for Logan teachers."

16. On June 18, 1982, the parties were supposed to attend a pre-hearing conference on the unfair labor practice charge; however, no one from the Board appeared. The chairman was out of the state.

17. On July 14, 1982, the teachers engaged in a bargaining session with the Gallatin County Attorney who went through their proposals.

18. On July 28, 1982, the teachers met with the School Board and were told the Board would not negotiate and that it would close the school.

19. On July 31, 1982, the chairman called Ms. Howe to say that further negotiations were postponed and that the Board had hired someone to negotiate.

20. On August 19, 1982, Ms. Howe received a letter from the School Board informing her that her duties for the 1982-83 school year would not include those of head teacher. Her salary was not reduced.

21. Bargaining between the parties has gone smoothly since the Board hired a negotiator.

22. Prior to the spring of 1982 no member of the School Board ever indicated to Ms. Howe that they were less than satisfied with her performance as head teacher.

23. Two members of the School Board testified that Ms. Howe had had problems with the Clerk and the speech therapist.

24. The problem with the Clerk was caused by Ms. Howe's inability to spend more time socializing with her. The speech therapist matter was caused by a lack of physical space for him to work. Neither situation was caused nor compounded by Ms. Howe.

24. Although the chairman of the School Board testified that they did not negotiate because they did not know their legal obligations, he had previously served on the Three Forks School Board's bargaining committee and had bargained with the Three Forks teachers. He had also been a member of the Teamsters Union from 1969 to 1977.

25. The two other teachers who were involved with Ms. Howe in attempting to negotiate with the School Board did not return for the 1982-83 school year. The Board hired two replacement teachers and designated one as head teacher.

26. Since she was first employed by the School District, Ms. Howe has received periodic pay raises of from five to ten percent each year.

27. Two members of the School Board testified that they had discussed removing Ms. Howe's head teaching duties prior to the time she became involved in union activities. They believed the discussions were during the 1980-81 school year; however, there is nothing in the School Board minutes

showing such consideration and during that same school year Ms. Howe received a ten percent pay increase.

28. The chairman of the Board knew that Ms. Howe was the only one of the teachers who paid MEA dues by check-off.

29. The School Board has not questioned Ms. Howe's status as an employee under the provisions of the Act during the negotiations with the teachers.

All proposed findings of fact which were contrary to the above findings were rejected on the grounds that they were not supported by the evidence on the record as a whole or on the basis of the credibility given to the testimony of the witnesses.

ANALYSIS

The Board of Personnel Appeals is asked to find an unfair labor practice against Gallatin County School District No. 1 because it removed Ms. Howe's head teacher duties in retaliation for union activities which are protected under Section 39-31-401 MCA.

Secton 39-31-401(1) MCA prohibits conduct on the part of public employers which interferes with, restrains or coerces public employees who exercise their rights under Section 39-31-201 MCA. Section 39-31-401(3) MCA prohibits discrimination by a public employer with regard to hiring, tenure or condition of employment to encourage or discourage union membership. The National Labor Relations Act contains comparable protections and prohibitions in Section 8(a)(1) and (3). Because of the similarity of the two statutes the Montana Supreme Court has held that decision of the National Labor Relations Board and the federal courts are relevant in

interpreting the Montana Act. (State Department of Highways v. Public Employees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974), 87 LRRM 2101; AFSCME Local 2390 v. City of Billings, 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753 (1976).

In 1979 in Board of Trustees of Billings School District No. 2 v. State of Montana ex rel Board of Personnel Appeals and Billings Education Association, 36 St. Rep. 2289, 604 P.2d 770, the Montana Supreme Court adopted the "but for" test, which had been used by the U.S. Supreme Court in Mt. Healthy School District v. Doyle, 429 U.S. 274, 97 S. Ct. 568 (1977), for the so-called dual motivation cases arising under Montana's Collective Bargaining Act. The NLRB adopted the Mt. Healthy test of causation in Wright Line, 251 NLRB 1083, 105 LRRM 1169 (1980), enforced NLRB v. Wright Line, 662 F.2d 899, 108 LRRM 2513, (1CA 1981).

Under the dual motive doctrine the employee is said to have given the employer cause for disciplinary action and the employer is said to have had a discriminatory reason for imposing the discipline. If the facts of the case show both permissible and impermissible reasons for the employer's action, the task then becomes one of determining motivation. Board of Trustees, supra. However, when the evidence reveals that the reason purported by the employer is a sham, the justification can be called merely pretextual, i.e., there is no legitimate business justification to be found, and discrimination may be found without further testing under the dual motive doctrine. Wright Line, supra.

Although the School Board contends it had legitimate business reasons for removing Ms. Howe's head teaching duties, the facts of this case support the conclusion that the reasons advanced were pretextual. No indication was ever given to Ms. Howe that she was not doing a good job as

head teacher. On the contrary, she received excellent evaluations and she was periodically given salary increases. As late as early August of 1982, she believed she was to be the head teacher again the following school year because she had signed an individual contract offered by the Board, which included head teacher duties and a stipend for extra pay for those duties, and because she had no indication from any source that she would not be head teacher. Ms. Howe was a credible witness and I have given considerable weight to her testimony. Any comparable credit one might be inclined to give to the testimony of the two School Board members is simply countervailed by their reprehensible conduct regarding the teachers' efforts toward unionization. It appears that removing Ms. Howe's head teacher duties was a part of that conduct. The reasons offered by them at the hearing for removing her duties seemed to be afterthoughts prompted by their newborn realization that they did indeed have obligations under the Act and that their employees were afforded certain protections by it.

Even though it is unnecessary to go beyond the pretext aspect of the analysis of the employer's assertion, an application of the "but for" test set forth in Mt. Healthy, supra, renders the same conclusion: the School Board removed Ms. Howe's head teacher duties because of her union activities. The Complainant showed that Ms. Howe had been engaged in protected activities and showed that the School Board knew of those activities and possessed an antiunion animus. The record is replete with evidence of the adverse reaction to those activities by the Board and its individual members. In light of the Board's total conduct and in the absence of evidence other than the self-serving testimony of two of its members, the conclusion is inescapable that they would not

have removed Ms. Howe's head teacher duties in the absence of her protected activity. Not only was her union activity the substantiating or motivating factor in the Board's decision, it was the only factor. The NLRB in Wright Line, supra, noted that in modern day labor relations.:

> . . . an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstances advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive.

Specific evidence of the employer's intent to discourage union membership is not necessary in discrimination cases. It is sufficient to presume that the natural consequence of the discriminatory action will chill union activity and membership in the union. Radio Officers Union v. NLRB, 347 U.S. 17, 33 LRRM 2417 (1954).

This case involves a demotion not a discharge, but the same test for a violation of Section 39-31-401(3) MCA (an 8(a)(3) violation under the NLRA) is proper. The removal of Ms. Howe's head teacher duties was in effect a demotion even though her salary was not reduced. The position of head teacher was in itself valuable. It carried an amount of prestige just as any lead worker or otherwise superior position would carry. Its status was superior to that of a regular teacher because of the designation itself, not because it held any authority to act for the School Board in its relations with the other two teachers. Further, there could be a monetary benefit to having served as head teacher should Ms. Howe apply to other schools. The demotion of an employee for engaging in protected activity has been declared

a violation of Section 8(a)(3) by the NLRB and the federal courts. NLRB v. Berger Transfer & Storage Co., 110 LRRM 2865 (CA7 1982).

One of the issues raised by the Defendant in its post-hearing brief was that Ms. Howe forfeited the head teacher assignment when she returned the 1982-83 individual contract with a note written on it that she accepted tenure only. Ms. Howe testified that she wanted the Board to know that she and the other teachers wanted to bargain and that signing the contract did not indicate her willingness to surrender her right to negotiate proper subjects. Even if her notation could be said to amount to a conditional acceptance of the Board's offer, the point is that she was, in fact, offered the head teacher position and it was not until much later that she was told she would not have them. At the time the School Board offered her the individual contract and until August there was no indication that she was not to resume her same duties when school began. There was nothing about her notation on the contract which could be interpreted as relieving the Board of its obligation to refrain from retaliatory conduct because she insisted on bargaining.

One further issue raised by the Defendant in its brief must be specifically addressed. It contends that Ms. Howe as head teacher was a supervisor and that she, therefore, was not protected by the Act because supervisors are excluded by Section 39-31-103 MCA. The Defendant also contends she was a management official which the Act excludes from its coverage. The NLRB and federal courts have consistently held that only under limited and narrowly defined circumstances will discipline and discharges of supervisors be upset because the action violated the NLRA. See Parker-Robb Chevrolet, 110 LRRM 1289 and cases cited therein. None of those circumstances were present here.

However, and assuming arguendo that Ms. Howe was a supervisor or management official as those terms are defined in the Act, this unfair labor practice proceeding is not the forum in which to raise the question. Had the School Board believed that Ms. Howe was a supervisor or management official, it could have petitioned for a determination by the Board of Personnel Appeals or it could have forced the union to file a petition for a unit determination and an election. That it did neither -- even after it realized its obligation to bargain -- is significant. In my opinion it would not promote the purpose of the Act to allow an employer to raise such a defense to an unfair labor practice charge where a certified or recognized bargaining unit exists and where the employer has sat on its right to either petition this Board for a new unit determination or for a unit clarification.

Section 39-31-103 MCA defines "supervisory employee" and "management official" as follows:

> (3)...any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline other employees, having responsibility to direct them, to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.
>
> (4)...a representative of management having authority to act for the agency on matters relating to the implementation of agency policy.

Although the NLRA does not exclude management officials from its coverage, it has developed a body of case law which does provide for their exclusion. In 1974, the U.S. Supreme Court held that all managerial employees are excluded from coverage of the NLRA. NLRB v. Bell Aerospace, 416 U.S. 267, 85 LRRM 2945. It defined managerial employees as those who formulate and effectuate management policies by expressing and making operative the employer's decisions and those who

have discretion in the performance of their jobs independent of their employer's established policy. The Court made it clear that those who perform routine work are not excluded.

A cursory review of the duties enumerated in the job description for head teacher reveals Ms. Howe did not: (1) formulate policy, (2) effectuate policy, or (3) have discretion independent of established policy. Most of the head teacher functions listed are either regular teacher duties or they are clerical duties. The phrase "serve as boss under the board" is contradicted by everything listed in the description. The import of the whole job description is that the head teacher is to act only with the School Board's permission and in cooperation so as not to interfere with other teachers. The absence of discretionary authority coupled with the fact that she did not formulate policy serve to preclude the exclusion of her old position based on the management official definition. General Dynamics Corp., 213 NLRB 124 (1974), 87 LRRM 1705.

The cases decided both by this Board and by the NLRB and federal courts interpreting "supervisory employee" also indicate that the head teacher cannot be excluded from coverage on that basis. The head teacher is nothing more than a lead worker. NLRB v. Harmon Industries, 565 F.2d 1047, 96 LRRM 3198 (1977); City of Billings v. Billings Firefighters Local No. 521, 39 St. Rep. 1844. All of the duties listed in the job description and Ms. Howe's testimony show that the head teacher was to "report to the Board," "inform the Board," work with other teachers, "cooperate" with other teachers. Nothing, except of course the phrase "Serve as boss...," in the description shows she had authority to perform any of the functions listed in the definition of "supervisory employee," nor does it indicate she could

effectively recommend them. The word "boss" as used in the description begs the question: what did "boss" mean? All the evidence on the record compels the conclusion it meant "straw boss" or lead worker. Further, there is nothing in the record to show that Ms. Howe used independent judgment in carrying out "supervisory" responsibilities even if one assumed, for the sake of argument, she had the necessary authority or that she effectivey recommended any of the actions. Unimedia Corp. 98 LRRM 1176 (1978); Poultry Enterprises, Inc. v.NLRBI, 216 F.2d 798, 35 LRRM 2151.

The School Board violated Ms. Howe's collective bargaining rights under Section 39-31-401(3) MCA by removing her head teacher duties. Such violation also interfered with her Section 39-31-201 MCA rights and violated Section 39-31-401(1) MCA.

CONCLUSION OF LAW

Gallatin County School District No 1, Logan School District violated Sections 39-31-401(1) and (3) MCA when it removed Susan Howe's head teacher duties.

RECOMMENDED ORDER

IT IS ORDERED that Gallatin County School District No. 1, Logan School District, its officers, agents, representatives and School Board members shall:

1. Cease and desist its violation of Section 39-31-401 MCA.
2. Take the following affirmative action to make Susan Howe whole:

   Offer her the position of head teacher and reinstate her to that position if she accepts.
3. Sign and post in a conspicuous place in the Logan School building during the months of September and

October 1983 a copy of the attached notice marked "Appendix."

4. Notify this Board in writing within twenty days of this ORDER becoming final ~~and~~ what steps have been taken to comply therewith.

NOTICE

Exceptions to these findings, conclusion and recommendation may be filed within twenty days. If no exceptions are filed this recommended order will become the final order of the Board of Personnel Appeals.

Dated this 27th day of May, 1983.

BOARD OF PERSONNEL APPEALS

By: Jack H. Calhoun
Hearing Examiner

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 27th day of May, 1983:

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