STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 23-2005:

FEDERATION OF RIVERSIDE YOUTH CORRECTION FACILITY EMPLOYEES, MEA-MFT, NEA, AFT, AFL-CIO,	)	Case No. 1045-2005
Complainant,	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER**
vs.	)	
STATE OF MONTANA, DEPARTMENT OF CORRECTIONS,	)	
Defendant.	)	

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I. INTRODUCTION

On November 18, 2004, the Federation of Riverside Youth Correctional Facility Employees, MEA-MFT, NEA, AFT, AFL-CIO, filed an unfair labor charge asserting that the State of Montana, Department of Corrections (DOC) violated Mont. Code Ann. § 39-31-401(1), (2) and (4) by interfering in employee rights guaranteed by Mont. Code Ann. § 39-31-201. DOC denied any unfair labor practice. On April 21, 2005, the Board completed its investigation and found probable merit, referring the case to the Hearings Bureau for a hearing.

Hearing Officer Terry Spear convened a contested case hearing in this matter on July 15, 2005. Richard Larson, Harlen, Chronister, Parish & Larson, P.C., represented the federation. Ruth Ann Hansen, Labor Relations Specialist, Montana Department of Administration, participated as an advocate for DOC. Melissa Case, Don Scott, Ronald D. Fuller, Daniel Gene Kissner and Cindy Rea McKenzie testified under oath. The hearing officer admitted exhibits A, B and E by stipulation of the parties, and admitted the first 2 pages of exhibit D over foundation and hearsay objections, refusing the 3rd page of exhibit D on a hearsay objection. The parties submitted the case with simultaneous post hearing filings on September 6, 2005.

II. ISSUE

Did DOC discharge Don Scott because of his union activities and thereby commit an unfair labor practice, in violation of Mont. Code Ann. § 39-31-401?

III. FINDINGS OF FACT

1. Riverside Youth Correctional Facility is a facility staffed and operated by the Montana Department of Corrections (DOC) and located near Boulder, Montana. On March 29, 2004, DOC hired Don Scott to teach social studies, a "tech prep" class (essentially wood shop) and a health class at Riverside. DOC is a public employer as that term is defined in Mont. Code Ann. § 39-31-103(10). Riverside is a correctional facility for the incarceration of juvenile, female offenders.

2. At all times pertinent to this case, Riverside teachers were members of a bargaining unit represented for collective bargaining purposes by the Federation of Riverside Youth Correctional Facility Employees, MEA-MFT (the federation). The union was certified as the unit's exclusive representative on November 25, 2003, following an election held under the aegis of the Board of Personnel Appeals on November 17, 2003.

3. All new state employees can serve a probationary period, during which time the state can discharge them without demonstrating just cause. In 2004, DOC had a 6-month probationary period for its new employees at Riverside. The probationary period started with the first day of work.

4. In 2004, Ron Fuller was Riverside's principal, generally in charge of the educational program. He was Scott's immediate supervisor. Cindy McKenzie was Riverside's superintendent. She supervised Fuller and, indirectly, Scott.

5. Fuller, Scott's immediate supervisor, saw deficiencies in Scott's performance during his probationary period. Fuller pointed out the deficiencies to Scott and counseled him about them. He attempted to get Scott to choose more appropriate individualized teaching materials (texts) and to do a more detailed and accurate job of adequately tracking and recording the progress of the individual students. He told Scott that he (Scott) needed to do more to assure that he was reaching the students and addressing their concerns. He tried to discourage Scott from appealing to the students' antisocial feelings in anecdotal classroom discussions. Scott did not consider the counseling significant and exerted minimal efforts to improve the deficiencies noted.

6. Almost halfway through Scott's probationary period, two of his tech prep students decided to utilize a knife (used for wood work) as a weapon, to force a staff member to provide them with the keys to a vehicle they could use as a getaway car.

They removed the knife from the shadow board on the door of a tool cabinet that was locked between classes, hiding it on the bottom shelf of that same cabinet, to ascertain if anyone would note the knife's absence. No one did, for several days. The students then removed the knife from the tech prep room at the end of class, still with no one noticing. A roommate of one of the two, frightened by the plan, informed the staff. A search of the sleeping quarters produced the knife and the two students confessed after being confronted. Scott, responsible for the tech prep room and its contents, never noticed the knife's prolonged absence. In his testimony, he was uncertain the knife had ever been in the tech prep room at all.

7. Over the course of Scott's probationary period, Fuller reported his ongoing concerns about Scott's performance to McKenzie. In June 2004, Fuller drafted a report at McKenzie's request, detailing Scott's continuing performance deficiencies. Fuller recommended Scott's employment be terminated because Fuller did not believe Scott was adequately performing the teaching functions of the job. McKenzie made an independent decision that Fuller's recommendation was valid and made the decision to terminate Scott's employment. She had no knowledge or information about any union activity or interest on Scott's part.

8. DOC fired Scott during his probationary period on September 24, 2004, for performance deficiencies. There was no collective bargaining agreement in place when Scott was hired in March 2004 nor when he was fired in September 2004.

9. Scott at no time during his employment was a member or otherwise a participant in collective bargaining on behalf of the employees through the federation. Scott at no time during his employment demonstrated to DOC that he was or intended to be active in union affairs and activities through the federation.

IV. DISCUSSION

It is an unfair labor practice for an employer to interfere with, restrain or coerce employees in their exercise of the rights to self-organize, to form, join or assist a labor organization and to engage in other concerted activities to interfere in the administration of a labor organization or in order to discourage membership in a labor organization. Mont. Code Ann. § 39-31-401 (1), (2) and (3).

A public employer illegally discriminates in hire or tenure of employment by discharging an employee because of union activity. Mont. Code Ann. § 39-31-401; *Board of Trustees of Billings School District No. 2 v. Board of Personnel Appeals* (1979) 185 Mont. 89, 604 P.2d 770. A decision to discharge an employee because of anti-union considerations is an unfair labor practice. The gravamen of the ULP is the actual motivation of the decision maker–the discriminatory motive must be a

motivating factor or "moving cause" for the adverse employment action taken. *NLRB v. Consol. Freightways* (6th Cir. 1981), 651 F.2d 436; *NLRB v. Pfizer, Inc.* (7th Cir. 1980), 629 F.2d 1272; *Polynesian Cult. Cent., Inc. v. NLRB* (9th Cir. 1978), 582 F.2d 467.

Fuller recommended that Scott be discharged. According to the federation, Fuller acted out of anti-union animus, demonstrated by conversational comments allegedly made by Fuller. The evidence of those conversational comments was both disputed and weak. The connection between those alleged conversational comments and purported anti-union bias against Scott, whose connections with the federation were, at best, tenuous, was unproved.

On its face, this lack of proof was sufficient to defeat the claim of an unfair labor practice. Since Scott was still a probationary employee, DOC had no duty to establish just cause for his discharge. In any event, the reasons DOC produced for the discharge more than rebutted the very limited evidence of anti-union animus.

There is no question that Scott's failure to maintain the security of tools which could serve as weapons created a dangerous situation at the facility. There is no real question that Fuller's motivation for recommending discharge was partially the result of this failure, but primarily the result of Fuller's conclusion that Scott was not adequately reaching and teaching the students in his social science classes. McKenzie testified credibly that, for her as superintendent, the "last straw" in deciding to discharge Scott was confirmation that he had joked in health class about smuggling cigarettes over the Canadian border and reselling them and that he saw no harm in it, but thought "it was rather funny." In short, DOC had multiple valid reasons to terminate Scott's employment, all unrelated to any alleged anti-union animus on the part of Fuller.

Even if Fuller's reported anti-union comments took place, which is doubtful, and those comments manifested a genuine hostility toward the union, which is even more doubtful, there was virtually no evidence that Scott engaged in any meaningful union activity. Thus, giving the most generous benefit of the doubt to the federation, there was very little evidence of substance to establish that Fuller's alleged anti-union bias motivated his recommendation to discharge Scott, and no evidence that McKenzie, who made the termination decision, had any anti-union animus.

The federation failed to prove its case, and is not entitled to any "practically automatic inference" of hostility toward the union as a result of the comments allegedly made by Fuller. ***Cf.***, *Board of Trustees, Billings School District No. 2,* ***op. cit.***, ***citing*** *NLRB v. Whitin Machine Works* (1st Cir. 1953), 204 F2d 883.

V. CONCLUSIONS OF LAW

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

2. Any actual anti-union animus (if there was any) played no part in the decision of DOC to discharge Don Scott and that decision therefore was not an unfair labor practice. Mont. Code Ann. § 39-31-401.

VI. RECOMMENDED ORDER

The complaint of the Federation of Riverside Youth Correctional Facility Employees is **DISMISSED.**

DATED this 14th day of October, 2005.

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR
Terry Spear, 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