

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 43-2005:

EKALAKA TEACHERS' ASSOCIATION,) Case No. 2626-2005
affiliated with the MEA-MFT, NEA,)
AFT, AFL-CIO,)

Complainant,)

vs.)

EKALAKA UNIFIED BOARD OF)
TRUSTEES AND WADE NORTHROP,)
SUPERINTENDENT OF SCHOOLS,)

Defendant.)

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

* * * * *

I. INTRODUCTION

On July 8, 2005, Complainant Ekalaka Teachers' Association, MEA-MFT (ETA) filed this charge alleging that the Ekalaka School District Board of Trustees (Ekalaka) and the district's superintendent, Wade Northrop, committed an unfair labor practice in unfairly disciplining and then refusing to rehire non-tenured teacher Sherry Roberts for the 2005-2006 school year. ETA alleges that the unfair discipline and failure to rehire was in retaliation for Roberts' participation as a critical witness in an earlier unfair labor practice charge which ETA successfully prosecuted against Ekalaka. ETA alleges that the failure to rehire Roberts violated Mont. Code Ann. §§ 39-31-201 and 39-31-401(1), (2) and (4).

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this proceeding on January 19, 2006 in Ekalaka, Montana. Rick Larson, attorney at law, represented ETA. Tony Koenig, attorney at law, represented Ekalaka and Northrop. The parties stipulated to the admission of Complainant's Exhibits 1 through 5 and Defendant's Exhibits A through H. MEA-MFT Field Representative Maggie Copeland, Ekalaka Teachers Association President Valerie O'Connell, and Sherry Roberts testified under oath on behalf of ETA. Northrop and school board trustees

David Wolfe, Norella Thomas, Ronda Knapp, and Robin Markuson testified on behalf of Ekalaka and Northrop. The parties were permitted to file post-hearing briefs and the matter was deemed submitted for decision on February 1, 2006. Based on the evidence submitted at the hearing and the parties' arguments in their post-hearing briefing, the hearing officer makes the following findings of fact, conclusions of law, and recommended order.

II. ISSUE

The issue in this case is whether Ekalaka and Northrop committed an unfair labor practice in violation of Mont. Code Ann. §§ 39-31-201 and 39-31-401(1), (2) and (4) as alleged in MEA-MFT's charge.

III. FINDINGS OF FACT

1. Ekalaka hires teachers on annual contracts to fill teaching positions in the Ekalaka School District. Some of these teachers are non-tenured. A non-tenured teacher has no assurance of being hired the following year. The rehiring of a non-tenured teacher rests in the discretion of Ekalaka.

2. Ekalaka hired Roberts to teach agriculture and vocational classes at the Carter County High School during the 2003-2004 school year and again during the 2004-2005 school year. Roberts was a non-tenured teacher at all times during her employment with Ekalaka.

3. During the 2003-2004 school year, Northrop prepared two written in-classroom evaluations of Roberts (Complainant's Exhibit 4). The first stemmed from Northrop's in-classroom observations on November 6 and 19, 2003 and December 17, 2003. Northrop discussed the written portion of this evaluation with Roberts on December 19, 2003. The second emanated from Northrop's in-classroom observations on February 17 and March 8, 2004. Northrop discussed the written portion of this evaluation with Roberts on March 15, 2004.

4. In general, each of these evaluations found that Roberts' work with the students was very good or excellent. The first evaluation, however, admonished Roberts that she must follow policy when ordering materials.

5. During the 2004-2005 school year, Roberts also received two written in-classroom evaluations from Northrop (Exhibit 4). The first stemmed from Northrop's in-classroom observations on November 1 and 18, 2004 and

December 14, 2004. Northrop discussed the written portion of this evaluation with Roberts on December 16, 2004. This evaluation was good. Northrop suggested, however, that Roberts keep a cleaner and more organized shop and that she follow purchasing process. Northrop did note parenthetically that Roberts had been better about the purchasing.

6. The second evaluation was the culmination of Northrop's in-classroom observation of Roberts on January 31, 2005, March 1 and March 10, 2005. Northrop discussed the evaluation with Roberts on March 14, 2005. This evaluation, like the others, was good. Northrop suggested to Roberts that she clearly communicate lesson objectives and learning tasks, that she maintain high expectations of the students, and that she follow purchasing procedures.

7. On January 5, 2004, MEA-MFT filed an unfair labor practice charge with the Montana Board of Personnel Appeals (BOPA) alleging that Northrop and Ekalaka had committed an unfair labor practice by paying moving expenses to a newly hired teacher who was a member of the bargaining unit without bargaining the payment with ETA. The hearing officer assigned to that case conducted a contested case hearing on August 12, 2004. On the basis of the testimony and evidence presented at that hearing, the hearing officer determined that Ekalaka had committed an unfair labor practice in paying the bargaining unit member's moving expenses without bargaining the payment with ETA (Exhibit 5, Recommended Order in ULP Case No. 23-2004). That decision was subsequently upheld by both the Montana Board of Personnel Appeals and the Montana Judicial District Court.

8. Roberts provided damaging testimony against Northrop and Ekalaka in ULP 23-2004. The hearing officer determined that Northrop's testimony was not credible in part on the basis of Roberts' testimony (Exhibit 5, page 6).

9. The hearing officer issued her recommended decision in ULP Case No. 23-2004 on January 4, 2005. Ekalaka first learned of the decision when Northrop reported it to the trustees at the trustee meeting on January 10, 2005.

10. The first incidents that began to highlight the friction between Roberts and Northrop are memorialized in Northrop's January 31, 2005 memorandum to Roberts discussing Roberts' conduct (Exhibit 1, January 31, 2005 memorandum from Northrop to Roberts). Northrop's memorandum requested a meeting with Roberts to discuss an accusation she allegedly made during an FFA (Future Farmers of America) advisory board meeting to the effect that Northrop had mishandled United States Department of Agriculture (USDA) grant money and had mishandled other grants.

The memorandum also discusses Roberts' comments at the advisory meeting regarding her authority. For some reason, Northrop perceived that Roberts declared in the meeting that she had some type of authority which she did not have and this upset Northrop. The memorandum went on to indicate that there was an issue of shop purchases, but did not describe what the problem was with the shop purchases. Finally, the memorandum indicated that Northrop and Roberts would discuss Roberts' allegation, made to a school board member, that Northrop had threatened to hit her at one point.

11. As a result of the meeting, Northrop instituted a corrective action plan for Roberts in his February 4, 2005 memorandum to Roberts (Exhibit 1). The memorandum required Roberts to stop making false accusations about Northrop with respect to his handling of grant funds. It also directed Roberts to make no more false accusations about threats. Finally, the memorandum directed Roberts to leave all paperwork related to the USDA grant with the district business manager. Northrop's rationale for doing this was that the administration was responsible for administering the grant.

12. On February 7, 2005, Roberts responded to Northrop's February 4, 2005 memorandum (Exhibit 1, Roberts' February 7, 2005 memorandum to Northrop). Roberts questioned Northrop's accusation that she had ever accused him of mishandling grant monies. Roberts also questioned how she had ever failed to follow the "chain of command," noting that she had "done nothing that our union contract and the laws of this State and fine country does not permit." Finally, Roberts refused to turn over to Northrop paperwork from the USDA grant project because, in her opinion, these documents were private documents containing information she had obtained through her own efforts.

13. The incident which Roberts perceived as a threat from Northrop occurred on December 16, 2004 during Northrop's meeting with Roberts about the classroom evaluations discussed above in Paragraph 5. Roberts inexplicably believed that Northrop had threatened to hit her. In fact, he had not. Nonetheless, Roberts then proceeded to tell a school board member that Northrop had threatened to hit her.

14. In the fall of 2003, Roberts and her welding class received 196 boxes of welding rods from an out of state welding company that had been working in the Ekalaka area. In January, 2005, Roberts exchanged the welding rods and received in return 12 pairs of welding gloves and 12 welding helmets which the shop needed. The gloves and helmets were then utilized by the students in the high school shop.

15. Prior to exchanging the rods, Roberts informed Northrop that the shop had received the welding rods. She told him that she would approach the metal fabrication shop to see about trading the rods for materials that the high school shop needed (Exhibit 1, February 11, 2005 memo from Northrop to Roberts regarding a corrective action plan). Northrop had agreed to permit Roberts to approach the fabrication shop to see what kind of trade could be made. Northrop had not, however, permitted Roberts to enter into a deal with the fabrication shop. Northrop also asked Roberts to have the rods valued so that the district would know the value of the rods before entering into any type of trade for the rods.

16. Northrop learned that the welding rods had been traded to the metal fabrication company without his knowledge or approval. He wrote a memo to Roberts on February 11, 2005, advising her that in trading the rods for materials without his knowledge, she was “in direct violation of policy and [had] chosen to ignore my orders” (Exhibit 1, February 11, 2005 Memorandum from Northrop to Roberts).

17. In response to this letter, Roberts sent a memo to Northrop contesting his assertion that Roberts had violated any school policy (Exhibit 1, Roberts February 13, 2005 memorandum to Northrop). In that memorandum, Roberts also challenged Northrop’s assertion that he had given Roberts any written directives regarding the disposition of the welding rods. Finally, Roberts advised Northrop that his concerns were, in any event, “moot.” In reaching this conclusion, Roberts informed Northrop that “the laws of this great State of Montana supercede local policy.” She then went on to cite a Montana statute which she believed gave her the authority, under the direction of the letter from the company that donated the welding rods, to dispose of as she saw fit. In other words, Roberts’ letter was basically telling Northrop that even though the welding rods had been donated to the high school vocational class, she would decide what to do with them, not Northrop. Not unreasonably, this response added to Northrop’s growing concern that Roberts was becoming increasingly insubordinate.

18. Northrop’s February 11, 2005 corrective action plan also prompted Copeland to write a letter to Northrop demanding that the February 11, 2005 corrective action plan be removed from Roberts’ personnel file. The letter also warned Northrop that his letters had become “increasingly hostile” and that continued harassment of Roberts would result in a ULP being filed (Exhibit 1, February 14, 2005 letter to Northrop from Copeland).

19. From February 14, 2005 until February 28, 2005, Roberts took leave from her position in order to recuperate from a personal illness. On February 22, 2005, Northrop provided a letter to Roberts indicating that her leave would be considered as leave under the Family Medical Leave Act (FMLA). The letter asked Roberts to provide medical certification from her health care provider only if she would not be able to return to work by February 28, 2005. The letter also indicated that district policy required Roberts to provide certification from her health care provider indicating that she was cleared to return to work. Northrop further explained that he had already in essence received that clearance by virtue of the medical provider's written statement releasing Roberts to work on February 28, 2005. The letter further provided that if Roberts was cleared to return to work prior to February 28, 2005, she would need to provide at least two days notice of her earlier return at least two days before returning to work. Finally, the letter requested that Roberts turn in her keys during her absence so that the substitute teacher would have keys to the shop area and greenhouse.

20. The district's FMLA leave policy permitted the superintendent to require medical certification from an employee for leave to determine FMLA leave eligibility "as well as fitness for duty" (Exhibit 1, copy of Ekalaka School District FMLA leave policy). The policy also required that an employee fill out a sick leave request whenever the employee was to be absent from work for more than 3 days.

21. Northrop's letter to Roberts did not sit well with the union, which perceived it as yet another in a string of retaliatory actions by Northrop against Roberts. Upon learning of the letter, Copeland asked to review a copy of the board's FMLA policy and a copy of the collective bargaining agreement. Copeland also asked to see a list of all employees who were absent due to illness for three or more days (Exhibit 1, Copeland letter to Northrop dated February 25, 2005). In response, Northrop sent Copeland a copy of the collective bargaining agreement. Northrop indicated that Ekalaka did not maintain a list of employees who had been absent for more than 3 days.

22. Copeland responded to Northrop in a letter dated March 11, 2005. Copeland argued that the district had no authority to require Roberts to supply a medical certification before returning to work nor did it have the right to request that Roberts notify the district at least two days before returning to work if her absence was to be less than the anticipated two weeks. In fact, the district did have such authority as demonstrated by both the policy and in Northrop's March 18, 2005 letter to Copeland (Exhibit 1). Moreover, the district's rationale for requesting

forewarning of Roberts' return - in order to properly schedule and notify the substitute teacher filling Roberts' position in her absence - was reasonable.

23. Roberts was willing to comply with Northrop's request to return the keys—but only upon Northrop's willingness to sign a receipt that he had received the keys. This did not sit well with Northrop. He viewed this as yet another act of insubordination.

24. On May 3, 2005, Northrop advised Roberts that he intended to recommend that her contract be nonrenewed without cause for the 2005-2006 school year. On May 9, 2005, Northrop in fact made that recommendation to the trustees and the trustees voted to nonrenew Roberts' contract.

25. Chairman Robin Markuson voted for nonrenewal of Roberts' contract because of concerns she had for the cleanliness and safety of the shop area. Markuson had visited the shop during the spring of 2004 and found the shop to be "a mess." She toured the shop again right before the beginning of the fall semester in 2004 and found that instead of having been cleaned up, the shop was worse than when she had last seen it. When Markuson visited the shop again in April, 2005, the cleanliness and safety issues still remained.

26. In reaching his decision not to renew Roberts' contract, Trustee David Wolfe decided that there were too many problems with the way Roberts was teaching the class. Wolfe learned that students in the class had been "cussed at." Wolfe's youngest son had taken shop from Roberts and Wolfe felt that Roberts did not properly teach the class.

27. Trustee Norella Thomas also felt that the shop class was not being properly run and therefore decided to vote for nonrenewal of Roberts' contract. Thomas had visited the class and found "terrible disorganization" in the shop. Trustee Ronda Knapp voted to nonrenew Roberts because Knapp was dissatisfied with the way Roberts was teaching.

28. Markuson, Wolfe, and Knapp were aware at the time they voted for nonrenewal that Roberts had testified against the district in ULP 23-2004. That knowledge, however, did not impact their decision to vote for nonrenewal. Thomas had no knowledge that Roberts had testified against the district in that ULP.

IV. DISCUSSION¹

The parties agree (as demonstrated by their post-hearing briefs) that if Northrop's decision to nonrenew was motivated by a desire to retaliate against Roberts or the union, then a ULP will have occurred notwithstanding the fact that Roberts' contract permitted Ekalaka to nonrenew her contract without cause. The parties also agree that as a non-tenured teacher, Ekalaka could nonrenew Roberts' contract for no reason at all. Thus, in order to prevail in this matter, the union must demonstrate that Northrop's conduct was motivated at least in part by some type of anti-union animus. Here, the union has failed to carry that burden. Northrop perceived Roberts' conduct during the 2004-2005 school year as insubordination and for this reason he decided to nonrenew her contract. He was not motivated by any anti-union animus.

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

¹Statements 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.

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 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).²

The fight in this case is not centered on the first and third prongs of the test. Ekalaka was aware that Roberts had engaged in protected activity at the time that Northrop and Roberts' working relationship began to sour and the parties do not dispute that. Likewise, the parties do not seriously dispute that if the decision to nonrenew was based upon a desire to retaliate against Roberts for her testimony in the earlier ULP, then the discouraging impact upon the collective bargaining process would be self-evident. Rather, this case hinges on the evaluation of the second prong. It is this prong that the union must prove preponderantly and this the union has failed to do.

Viewed objectively, Northrop's concerns over Roberts' increasingly insubordinate attitude was not unwarranted. Prior to Northrop and the trustees learning of the decision in ULP 23-2004, Roberts essentially fabricated Northrop's alleged physical threat toward her and then proceeded to tell a board member and to spread that rumor. Northrop not unreasonably told her to stop.

Roberts also began to openly challenge (to other persons in other committees such as the FFA advisory board) Northrop's competence in handling grants. Northrop, believing that the administration was responsible for ensuring that the USDA grant was completed, and also believing that Roberts was not timely completing the grant, required Roberts to turn the paperwork over to the office so that the office could complete the grant. Roberts defied this directive also, as demonstrated in her February 7, 2005 memorandum.

² This test is more commonly known as the "but for" test.

With respect to the welding rods, Northrop advised Roberts that she had improperly traded that merchandise without getting his permission. Once learning of this, Northrop directed Roberts to supply him all information about the transaction and provide him with a valuation of the rods because Northrop believed that the district had a fiduciary duty to account for gifts to the district and the disbursement of those gifts. Once again, Roberts defied the request, pointing out that she believed that Montana law gave her the right to dispose of the rods provided that the proceeds of the disposal were utilized for the school shop. This only added to Northrop's correct perception that Roberts was growing increasingly defiant.

Northrop acted appropriately and within his rights in having Roberts comport with various requirements of FMLA when she took her two week leave of absence to recuperate. Far from being discriminatory, Northrop reasonably and properly required that Roberts retain a release from her doctor to ensure she was completely healthy before returning to work. Furthermore, Northrop was being prudent in requesting that Roberts notify the district two days in advance if she was going to return early from her leave. The district obviously had to make arrangements for Roberts' substitute in order to provide continuity in teaching for the students. Nothing that Northrop did with respect to the FMLA leave shows a hostile attitude toward Roberts.

By the time the contract renewal came around, Northrop correctly assessed that Roberts was growing increasingly insubordinate and on the basis of this insubordination recommended that her contract be nonrenewed. Neither Northrop nor the board was motivated by anti-union animus in making that decision.

The testimony of the trustees also shows that their decision to nonrenew was not based on any anti-union animus. They all had problems with the way Roberts was teaching the shop class. It was these concerns and not a desire to retaliate that lead to their decision to vote for nonrenewal.

The union argues that one episode-Roberts' request that Northrop sign a receipt for the keys-stands out in showing that Northrop was hellbent in getting rid of Roberts due to her testimony in the previous ULP (Union brief, Page 3). To the contrary, Northrop's refusal to sign a receipt for the keys reinforces for the hearing officer that Northrop's belief that Roberts was growing increasingly insubordinate was sincere even if not objectively warranted. His reaction was wholly consistent with the significant importance that he attached to "chain of command" and employees following orders. His conduct with regard to the return of the keys only serves to reinforce the finding that it was Northrop's belief in Roberts' increasing

insubordination - and not a desire to retaliate against Roberts for her testimony - that lead to his decision to recommend nonrenewal for Roberts. Thus, even if Northrop objectively overreacted to Roberts' conduct, the union has nevertheless failed to establish by a preponderance of the evidence that Ekalaka's decision to nonrenew was motivated by anti-union animus.

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 Ekalaka violated Mont. Code Ann. § 39-31-401(1), (2), (3) or (4). The decision to nonrenew Roberts' 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

The hearing officer recommends that the Ekalaka Teacher's Association/MEA-MFT's unfair labor practice charge against the Ekalaka Unified Board of Trustees and Wade Northrop, Superintendent, be dismissed.

DATED this 25th day of April, 2006.

BOARD OF PERSONNEL APPEALS

By: /s/ 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