

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 8-2001:

ROCKY MOUNTAIN	)	Case No. 1693-2001
DEVELOPMENT COUNCIL,	)	
HEAD START PROGRAM,	)	
	)	
Complainant,	)	
	)	FINDINGS OF FACT;
vs.	)	CONCLUSIONS OF LAW;
	)	AND RECOMMENDED ORDER
MICHELLE PERCIVAL, PRESIDENT,	)	
TRI-COUNTY FEDERATION OF HEAD START	)	
EMPLOYEES, MEA-MFT, AFT, AFL-CIO,	)	
Defendant.	)	

\* \* \* \* \*

**I. INTRODUCTION**

The Complainant filed an unfair labor practice charge with the Department of Labor and Industry, Board of Personnel Appeals (Board), on February 27, 2001. The Board issued a Summons on March 5, 2001, and the summons and charges were served on the Defendant. The Defendant filed its response to the charges and an investigation was conducted by the Board. The Board's investigator filed his report and determination on March 28, 2001, and found probable merit for the charges.

Hearing Officer Gordon Bruce conducted a hearing in this matter on October 18, 2001, in Helena, Montana. The Complainant, Rocky Mountain Development Council, Head Start Program, was represented by Jerome T. Loendorf, Attorney at Law. The Defendant, Michelle Percival, President, Tri-County Federation of Head Start Employees, MEA-MFT, AFT, AFL-CIO, was represented by Richard Larson, Attorney at Law. Michelle Percival, Patty Dahl, Head Start Director, Gene Leuwer, RMDC Director, and Marcia Barfkneck, Head Start Teacher, gave sworn testimony. The Hearing Officer admitted Exhibits DE-1 through 10, A, B and C, and 1 and 4 into the record. Parties filed post-hearing briefs and the record closed on November 8, 2001.

**II. ISSUE**

The issue is whether the Defendant failed to bargain in good faith with the Complainant as required by § 39-31-402(1) and (2), MCA, and engaged in an unfair labor practice by restraining

the Complainant, a public employer, in the selection of its representative for the purpose of collective bargaining.

### **III. BACKGROUND**

Rocky Mountain Development Council (RMDC), through Gene Leuwer, its executive director, filed a charge in February 2001 against Michelle Percival, a Head Start teacher and family advocate, who at that time was the president of Tri-County Federation of Head Start Employees, MEA-MFT, AFL-CIO. RMDC and the Federation were parties to a collective bargaining agreement. The charge alleged that Percival, at a January 23, 2001 Head Start Policy Council (Policy Council) meeting, "[tried] to persuade the council to disapprove a budget item which was for the purpose of extending the contract of the public employer's labor relations specialist for another year." Percival's conduct was alleged to constitute an unfair labor practice under § 39-31-402(1), MCA. RMDC sought two substantive remedies: 1) the posting of a "finding of guilt" in the workplace, and 2) a cease and desist order.

In response to the charge, the Federation argued that the Policy Council was not Percival's employer and comments made before the Policy Council, therefore, could not violate § 39-31-402(1), MCA, because the Council was not a "public employer." The Federation also denied that Percival's comments were meant to or in fact did restrain RMDC - which did employ Percival - from hiring its preferred "labor relations specialist." RMDC kept its "specialist" in place. Finally, the Federation contended that Percival's comments were protected speech.

### **IV. FINDINGS OF FACT**

1. Rocky Mountain Development Council is a "public employer" within the meaning of § 39-31-103(10), MCA.
2. Tri-County Federation of Head Start Employees, MEA-MFT, AFT, AFL-CIO is a "labor organization" within the meaning of § 39-31-103(6), MCA.
3. RMDC - not the Policy Council - is the employer, and the underlying collective bargaining agreement is between the Federation and RMDC. The agreement is not subject to prior review or approval by the Policy Council and the Policy Council does not participate in bargaining or contract administration. Federal guidelines outline Policy Council responsibilities. One of the responsibilities of the Policy Council is to give approval to the grant application that is submitted to the federal funding agency each year. The "grant year" runs from May 1 to April 30 and the grant application includes proposed budget information in various categories. Head Start administrators develop the budget based on their priorities. The Head Start director presents the application to the Policy Council. The Policy Council and the RMDC's board of directors must both approve budget items.
4. Under Policy Council Bylaws, they are to "assist in the development of and give their approval to the grant application before it is submitted." The Policy Council requires information to perform this function, and as over half of their membership turns over each year, they need to be as fully informed as possible.
5. On December 16, 1999, during a RMDC meeting in which the board was being briefed on the status of union negotiations, one of the board members asked if any teachers present had comments to offer to the board. Michelle Percival was present and commented as noted in the board minutes:

Union Negotiations: Dave Fuller briefly updated the Board on the last negotiation session at which the issues were resolved with the exception of the leave policy for bargaining unit members. We will support a joint request for mediation. We hope to resolve the remaining issue.

Glenna asked if they had any comments: Michelle asked the Board to help support the mediation process and to remember that the "hired gun" (RMDC's Negotiator, Duane Johnson) should support the negotiations. They (the representatives) would like the Board's support in the negotiations.

Mike Colbert wanted to know the perception of leave from the Union's side. Dave stated that it would not be appropriate to discuss specific issues outside of the negotiating process. Gene clarified the process. Mary Ellen inquired about the content of the "hired gun" statement. Michelle responded that \$5,000 of Head Start money was given to hire someone [to] help negotiate from Rocky's side.

6. The Head Start Policy Council held a meeting on January 16, 2001. A quorum was present at this meeting. Patty Dahl, the Head Start director, Percival, and other guests were present at the meeting. A grant application was discussed at this meeting. The grant application included a request for \$5,000 for RMDC to contract again for the services of a labor relations specialist. The grant application was approved in principle at that time.

7. The Policy Council held another meeting on January 23, 2001. A quorum was present. The grant application, including the \$5,000 allocated to contract for the services of a labor relations specialist, was again discussed. Dahl again reviewed the grant application for the Policy Council. A Policy Council member questioned the \$5,000 allocated for contracting with a labor relations specialist. Michelle Percival and other union members were present at the meeting. When asked by the Policy Council for comments, Percival spoke. She stated that a union meeting was held the night before and they were upset with money being spent on a labor relations specialist when the kids do not have markers in the classroom and there was no money for supplies.

8. Percival believed that there was a shortage of funds for supplies and thought that Head Start funds would be utilized to pay for a contract negotiator. She did not mention any specific names in referencing contracted services. Specifically, she never stated that Duane Johnson, contract negotiator, should not be hired. Her concern was that Head Start funds would be used for contract services, and she believed those funds should be utilized to purchase needed supplies.

9. During the discussions, Gene Leuwer, RMDC's executive director, obtained a general ledger and advised everyone there was still over \$5,900 available for supplies in the classrooms. Leuwer and Dahl explained the need for a labor relations specialist, as RMDC did not have anyone available with the skills to deal with the collective bargaining process. When a vote was taken, only four members of the Policy Council voted against spending the \$5,000 for a labor relations specialist. However, because 80% of the Policy Council members are required to vote in favor of the matter for it to pass, the \$5,000 proposed to hire a labor relations specialist did not receive approval of the Policy Council. The Policy Council, apparently satisfied that the money was not needed for markers or supplies, then voted to utilize the money for child mental health and child

services.

10. Although the Policy Council did not approve the allocation for Head Start funds for RMDC to hire a labor relations specialist, RMDC ultimately hired their specialist, apparently utilizing Community Development Block Grant funds.

## **V. DISCUSSION**

Montana law requires a public employer to bargain collectively in good faith with labor organizations representing their employees on issues of wages, hours, fringe benefits, and other conditions of employment. § 39-31-301(5), MCA. The failure to bargain collectively in good faith is a violation of § 39-31-401(5), MCA.

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using federal court and National Labor Relations Board (NLRB) precedent as guidance in interpreting the Montana Collective Bargaining for Public Employees Act. *State ex rel. Board of Personnel Appeals v. District Court*, 183 Mont. 223, 598 P.2d 1117 (1979); *Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals*, 195 Mont. 272, 635 P.2d 1310 (1981); *City of Great Falls v. Young (Young III)*, 211 Mont. 13, 686 P.2d 185 (1984).

RMDC's charges in this matter focus on Percival's comments at a meeting of the Policy Council, not the RMDC board. The Policy Council is not the employer, and to establish direct coercion, as alleged by RMDC, the employer must show that the conduct was applied to force a change in or selection of a particular representative. *Florida Power Co. v. Electrical Workers IBEW Local 641*, 417 U.S. 790, 805, 86 LRRM 2689 (1974).

Further, for union conduct to be objectionable as indirect restraint or coercion, the employer's representative must be coerced for performing covered functions; otherwise there is no presumption that the conduct will adversely affect the representative's future performance of protected activities. *American Broadcasting Companies v. Writers Guild*, 437 U.S. 411, 430, 98 LRRM 2705 (1978).

RMDC did not show that Percival or anyone else took action against any RMDC representative. Neither Duane Johnson or any other existing or prospective representative was restrained or coerced in any manner. Further, it is clear that the Policy Council has no role in negotiating or administering the collective bargaining agreement. The Policy Council is not RMDC's labor representative. RMDC failed to show how addressing the Policy Council amounted to indirect coercion.

Based on the overall record, Percival's comments were not intended to restrain or coerce the RMDC board or Johnson in any way. The Policy Council asked Percival for comments, and she addressed her concerns about any potential shortage in supplies, believing that it was better to allocate the \$5,000 to benefit the children in the program. RMDC failed to show that Percival's comments culminated in an unfair labor practice act.

The Federation also argues that Percival has a constitutional right to free speech and that her comments were protected speech pursuant to *Madison School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976). However, the Hearing Officer does not have to reach that issue because the Federation has prevailed.

## **VI. CONCLUSIONS OF LAW**

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to § 39-31-405, MCA.
2. Rocky Mountain Development Council, Head Start Program, has failed to show that Michelle Percival, President, Tri-County Federation of Head Start Employees, MEA-MFT, AFT, AFL-

CIO engaged in an unfair labor practice in the selection of its representative for the purpose of collective bargaining.

**VII. RECOMMENDED ORDER**

It is hereby Ordered that this matter is Dismissed With Prejudice.

DATED this 17th day of December, 2001.

BOARD OF PERSONNEL APPEALS

By: /s/ GORDON D. BRUCE  
GORDON D. BRUCE  
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to ARM 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. § 39?31?406(6), MCA. 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