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SEP 30 1982

BOARD OF PERSONNEL APPEALS

No. 81-514

IN THE SUPREME COURT OF THE STATE OF MONTANA

1982

UC-1-1977

CITY OF BILLINGS, MONTANA,

Plaintiff and Respondent,

vs.

BILLINGS FIREFIGHTERS LOCAL NO. 521, and the
BOARD OF PERSONNEL APPEALS,

Defendants and Appellants,

and

BUTTE TEAMSTERS UNION LOCAL NO. 2, and
UNITED FOOD & COMMERCIAL WORKERS INTER-
NATIONAL UNION, CONSISTING OF LOCAL UNIONS
NO. 4R, 8, 33, and 1981 (UFCWIU), AFL-CIO,

Amicus Curiae,

and

MONTANA STATE COUNCIL OF PROFESSIONAL
FIREFIGHTERS,

Amicus Curiae.

Appeal from: District Court of the Thirteenth Judicial District,
In and for the County of Yellowstone
Hon. Robert Wilson, Judge presiding.

Counsel of Record:

For Appellant:

Boschert and Boschert, Billings, Montana
Rosemary Boschert argued, Billings, Montana
James Gardner argued, Bd. Personnel appeals, Helena, Montana

For Respondent:

K. D. Peterson argued, Billings, Montana

For Amicus Curiae:

Donald C. Robinson, Butte, Montana
Poore, Roth & Robinson, Butte, Montana
D. Patrick McKittrick, Great Falls, Montana
Barry J. Hjort, Helena, Montana
David V. Gliko, Great Falls, Montana
Mae Nan Ellingson, Missoula, Montana

Submitted: June 28, 1982

Decided: September 28, 1982

Filed: SEP 28 1982

Thomas J. Kearney
Clerk

Mr. Justice Frank B. Morrison, Jr., delivered the Opinion of the Court.

The Thirteenth Judicial District Court of Montana issued a judgment on August 11, 1981, affirming in part and reversing in part a March 26, 1979, order of the Board of Personnel Appeals (BPA) establishing the membership of the Billings Fire Department's bargaining unit. The BPA and the Billings Firefighters, Local #521 appeal the judgment of the District Court. We reverse the District Court in part and reinstate the March 26, 1979, order of the BPA.

The Montana Public Employees Collective Bargaining Act was enacted in 1973. Pursuant to national labor policy, as set forth in the National Labor Relations Act, 29 U.S.C. section 151 et seq. (1976), the Montana Act specifically excludes supervisory and management employees from the definition of "public employee." Only public employees are allowed to bargain collectively, section 39-31-201, MCA. Thus, supervisory and management employees were effectively denied membership in collective bargaining units.

From 1968 until the commencement of this action in 1977, the City of Billings continuously recognized Billings Firefighters Local #521 as the collective bargaining unit for all Billings firefighters except the Fire Chief and the Assistant Fire Chief. During labor negotiations in 1977, the City of Billings attempted to exclude the line battalion chiefs, specialty officers and fire captains from the bargaining unit. The City contended that those employees were either supervisory or management, as defined in the Public Employee Collective Bargaining Act, and thus ineligible for membership in a collective bargaining unit.

In response, the Union contended that the Act's grandfather clause, section 39-31-109, MCA, by recognizing all established

collective bargaining agreements, also recognized all existing bargaining units. That section provides:

"39-31-109. Existing collective bargaining agreements not affected. Nothing in this chapter shall be construed to remove recognition of established collective bargaining agreements already recognized or in existence prior to the effective date of this act."

Union argues that the "existing agreement" recognizes Local #521 as the bargaining unit and that therefore, the unit's composition is not controlled by section 39-31-201, MCA.

At the request of the City and the Union, the BPA conducted an administrative hearing December 15 and 16, 1977, to clarify the membership of the bargaining unit. On February 28, 1978, the hearings officer issued a recommended order concluding that "the appropriate bargaining unit in the Billings Fire Department is that unit which has been recognized by the City of Billings since 1968, i.e., all employees of the Billings Fire Department except the Chief and the Assistant Chief." She reached this conclusion by interpreting the grandfather clause to recognize existing bargaining units as well as existing bargaining agreements, as advocated by the Union.

The City appealed the recommended order to the Board of Personnel Appeals. On July 28, 1978, the BPA issued an order remanding the case to the hearings officer with instructions to apply the facts to the following two-prong test:

- (1) Is the position in question that of a supervisor or management official?
- (2) If it is, does the inclusion of that position in the bargaining unit create an actual substantial conflict which results in the compromising of the interests of any party to its detriment?

This test is the result of a considered effort by the BPA to reconcile the grandfather clause, which it interprets

as recognizing both bargaining units and agreements already in existence, with section 39-31-201, MCA, forbidding non-public employees from belonging to collective bargaining units. The BPA found that where the two sections come into conflict, the conflict must be settled in view of the policy of the Act. Section 39-31-101, MCA, states the policy:

"39-31-101. Policy. In order to promote public business by removing certain recognized sources of strife and unrest, it is the policy of the state of Montana to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees."

The test adopted by the BPA allows for grandfathering and also prevents conflicts intended to be avoided by the exclusion of supervisors and management officials from the unit. If the presence of a supervisory or a management position within the unit becomes the source of "strife and unrest," the position will be removed from the unit. If there is no strife or unrest, evidenced by actual substantial conflict, the grandfathered unit will be allowed to remain "as is."

The hearings officer issued a thirty-page decision on January 19, 1979, again concluding that the bargaining unit should remain as it has been since 1968.

To determine whether or not the positions were those of supervisors or management officials, the hearings officer applied a multi-question test to each contested position. She considered the duties attendant to each position as well as the definitions of supervisor and management official found in section 39-31-103, MCA. She concluded that the line battalion chiefs, the communications officer and the fire marshal in the Billings Fire Department are supervisory employees. She further concluded that the captains, maintenance

officer and training officer are not supervisory employees. None of the positions were found to be that of a management official.

Next, the hearings officer applied the second part of the test to those positions found to be supervisory. She determined that the presence of the positions in the unit created no actual substantial conflicts resulting in the compromising of the interests of any party to its detriment. Therefore, she allowed the supervisory positions to remain in the unit.

In reaching that conclusion, the hearings officer considered the following:

- (1) Local #521 has never gone on strike. *Cont.*
- (2) Testimony of the fire chief that in his twenty-six years on the Department, very few formal grievances had been filed.
- (3) Testimony of an engineer that only one grievance had gone to arbitration since 1968.
- (4) Testimony of the fire marshal that his membership in the unit had never caused problems at staff meetings with the fire chief.
- (5) Testimony of the fire chief, battalion chiefs and captains that the current structure of the unit had never interfered with the efficient operation of the Department.
- (6) Testimony of a captain that his membership in the unit had never interfered with the exercise of his authority.
- (7) Testimony of the union's chief negotiator for the 1977 contract that the make-up of the unit had caused no disharmony and that there were no special interest groups within the unit.
- (8) Testimony of engineers and firemen that no internal

conflict or disharmony existed due to the bargaining unit structure.

(9) A petition signed by 80% of the specialty officers and 83% of the lieutenants, engineers and firefighters stating: "We the undersigned members of I.A.F.F. Local 521 are in opposition to any change in our bargaining unit."

On March 26, 1979, the Board of Personnel Appeals adopted the recommended order of the hearings officer as its final order. The City of Billings appealed to the District Court. Following a hearing, the District Court issued an order July 28, 1981, concluding the following:

". . .

"2. Supervisors and management personnel are excluded from Firefighters Local #521 Bargaining Unit and former Section 59-1615, R.C.M. [the grandfather clause], does not change the statutory exclusions.

"3. The Line Battalion Chiefs are supervisors and are excluded from Firefighters Local #521 Bargaining Unit.

"4. The Specialty Officers, Communications Officer, Maintenance Officer, Fire Marshal and Training Officer are supervisory and excluded from Firefighters Local #521 Bargaining Unit.

"5. The Fire Captains shall remain with Firefighters Local #521 Bargaining Unit.

"6. The test applied by the Board of Personnel Appeals is not logical and is arbitrary and capricious. . ."

In so holding, the District Court found requiring an actual conflict to occur before removing a supervisory or management position from the unit to be illogical as their presence in the unit is inherently conflicting. In addition, it found all officers except fire captains to be supervisory personnel and excluded them from the unit.

In their appeal of the order and judgment of the District Court, the BPA and the Union present several issues for our consideration:

(1) Whether the state legislature authorized the BPA as the agency to establish the appropriate bargaining units for public employees?

(2) Whether the BPA's interpretation of section 39-31-109, MCA, the grandfather clause, was a rational statutory construction, or whether it was illogical, arbitrary and capricious?

(3) Whether the BPA's two-prong test reconciling the inconsistencies between two sections within the Montana Public Employees Collective Bargaining Act was arbitrary and capricious?

(4) Whether the BPA's determination that certain employees were supervisory or management officials was clearly erroneous?

(5) Whether the BPA's test, if rational, was correctly applied by the BPA to the facts of this case?

On cross-appeal, the City presents us with one other issue: Whether the District Court erred when it failed to find the BPA's finding that captains were not supervisory or management officials to be clearly erroneous?

ISSUE ONE

The Montana legislature clearly authorized the BPA as the agency to establish appropriate bargaining units for public employees when it enacted section 39-31-202, MCA:

"39-31-202. Board to determine appropriate bargaining unit-factors to be considered. In order to assure employees the fullest freedom in exercising the rights guaranteed by this chapter, the board or an agent of the board shall decide the unit appropriate for the purpose of collective bargaining. . ."

Like all BPA orders, an order determining the membership of a bargaining unit is subject to review by the district court, section 39-31-409, MCA. Pursuant to section 39-31-105, MCA, judicial review of contested agency orders is

governed by the Montana Administrative Procedure Act (MAPA). Section 2-4-704, MCA, sets forth the MAPA standards of review to be followed by a district court when reviewing an agency decision. The relevant portions of section 2-4-704, MCA, state:

"(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

". . .

"(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

"(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;

". . ."

Pursuant to that statute, findings of fact by an agency have been subject to a "clearly erroneous" standard of review by the courts. *Wheatland County v. Bleeker* (1978), 175 Mont. 478, 575 P.2d 48. Conclusions of law are subject to an "abuse of discretion" review. These standards differ due to the agency's expertise regarding the facts involved and the court's expertise in interpreting and applying the law. Davis' 4 Administrative Law Treatise, §29.01 (1958).

Both statutory and case law have employed the terms "clearly erroneous," "abuse of discretion" and "substantial credible evidence" in form not entirely clear nor consistent. We view this as an appropriate opportunity for clarification.

Specifically, the factual findings of the BPA will be upheld if supported by substantial evidence. Section 39-31-409(4), MCA. MAPA allows factual findings to be overturned

when they are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Section 2-4-704(2)(e), MCA. We find these tests can be harmonized. If there is substantial credible evidence in the record, the findings are not "clearly erroneous." Under either statute the scope of judicial review is the same. If the record contains support for the factual determinations made by the agency, the courts may not weigh the evidence. They are bound by the findings of the agency.

In reviewing legal questions, the scope of review is broader. Where the intent of statutes is unclear, deference will be given to the agency's interpretation. *Ford Motor Credit Co. v. Milhollin* (1980), 444 U.S. 555, 100 S.Ct. 790, 63 L.Ed.2d 22; *FCC v. WNCN Listeners Guild, et al.* (1981), 450 U.S. 582, 101 S.Ct. 1266, 67 L.Ed.2d 521. Where it appears that the legislative intent is clearly contrary to agency interpretation, the courts will not hesitate to reverse on the basis of "abuse of discretion."

The determination of a bargaining unit involves mixed questions of law and fact as is hereafter discussed. In reviewing the BPA's findings of fact and conclusions of law, we will be bound by the foregoing scope of review.

ISSUE TWO

The BPA's interpretation of section 39-31-109, MCA, the grandfather clause, is primarily a question of law. Therefore, the reviewing court should determine whether that interpretation involves "abuse of discretion." The clause recognizes all bargaining agreements in existence at the time of the passage of the Montana Public Employee Collective Bargaining Act. The BPA asserts that existing bargaining units should also be recognized.

The City of Billings has recognized Local #521 since 1968. The bargaining agreement reflects that in its "recognition clause." Therefore, by recognizing the agreement, the City recognizes the Unit. The Unit does not cease to exist when the agreement ends. The Unit continues to exist until a new Unit is formed and recognized. The BPA's interpretation of the grandfather clause is rational, does not involve an abuse of discretion and we reinstate it.

ISSUE THREE

The BPA's interpretation of the grandfather clause previously discussed, recognizes existing bargaining units containing supervisory personnel in violation of section 39-31-201, MCA. The Board recognized that public policy supports elimination of conflict of interest within a bargaining unit and therefore, notwithstanding its interpretation of the grandfather clause, sought to foster the spirit of the Act by adopting a legal test to eliminate actual substantial conflict. The validity of such a test is a question of law.

The District Court found the presence of supervisory or management officials in the bargaining unit to be inherently conflicting. It therefore held the test to be irrational for allowing continued membership until actual substantial conflict occurs. We do not agree.

Testimony that Local #521, a bargaining unit consisting of firefighters as well as supervisors, has had a relatively peaceful existence since 1968 indicates a lack of any inherent conflict. This does not mean that actual substantial conflict could not occur.

The test developed by the BPA is a rational, considered effort by the BPA to assure an effective bargaining unit. The test considers the policy of the act, i.e., to remove

suggests that sources of strife (i.e., supervisors) should be removed when the unit is removed

again w/ i reasons to be implied

strife and unrest from bargaining units, as well as some of the factors set forth in section 39-31-202, MCA, for determining unit composition--the "history of collective bargaining" and the "desires of the employees." The result accomplished preserves the public policy underlying the act. We find the Board's approach to be a rational one for determining bargaining unit memberships.

ISSUE FOUR

In applying the BPA's test, the hearings officer made many findings of fact regarding the supervisory or management nature of various department positions. She applied a multi-question test to each position and considered the definitions of supervisory and management official in making her determination.

The District Court, to reverse these findings of fact, had to find the record bare of "substantial credible evidence." We find such evidence to exist.

The District Court supplied no reason for finding the position determinations to be unsupported. Rather, it chose to substitute its findings for those of the BPA. The governing statute provides: "The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Section 2-4-704(2), MCA. There is substantial, and as we have herein noted, abundant evidence to support those determinations. Therefore, we reinstate the findings of the BPA that only the line battalion chiefs, the fire marshal and the communications officer are supervisors.

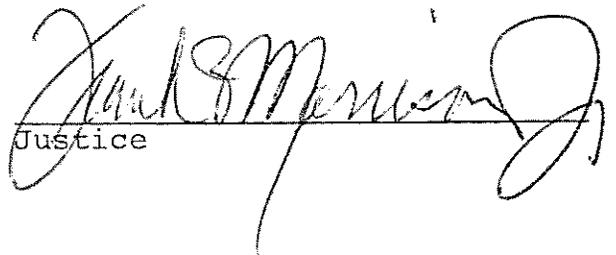
On cross-appeal, the City asks us to determine whether or not the District Court erred when it failed to find the BPA's determination that fire captains are neither supervisory nor management officials to be clearly erroneous. The District

Court did not err. The hearings officer considered the duties of the captains and compared them to the duties of the supervisors and management officials set forth in section 39-31-103(3) and (4), MCA. There was substantial evidence to support the BPA's determination.

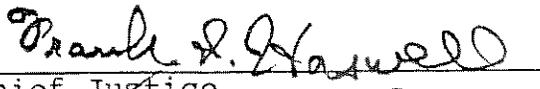
ISSUE FIVE

Finally, the District Court held that because the presence of supervisors in a bargaining unit creates inherent conflict, the second prong of the BPA's test was not correctly applied to the instant facts. We have already stated that no inherent conflict exists within Local #521. In addition, there was a substantial amount of testimony presented to the hearings officer indicating that no actual substantial conflict exists. The hearings officer correctly applied the test to Local #521.

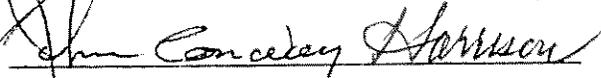
The order of the District Court is vacated and the March 26, 1979, order of the Board of Personnel Appeals is reinstated.

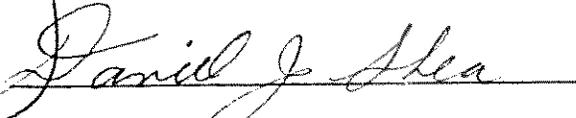

Justice

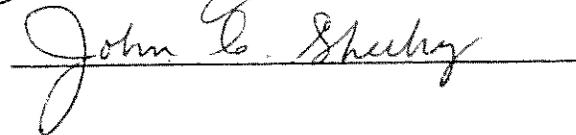
We Concur:


Chief Justice


Justice


Justice


Justice


Justice

Justices

Mr. Justice Fred J. Weber, dissenting:

The majority opinion constitutes a careful and thoughtful analysis of the statutes, case law, and the underlying problems of collective bargaining in the public employee sector. I do not disagree with the analysis of the majority opinion and I am therefore led to sign the opinion.

However, I dissent because the opinion does not address a different interpretation of the statutes which I believe should be considered. I dissent with the aim of calling this matter to the attention of the legislature so that it may determine if additional legislation is required.

As pointed out in the majority opinion, the Montana Public Employees Collective Bargaining Act (herein called "Act") is in agreement with the national labor policy as set forth in the National Labor Relations Act with regard to the definition of "public employees." Both the Montana and the federal definition of "public employees" excludes both supervisory and management employees. The result of the majority opinion is to neutralize the statutory exclusion as to both supervisory and management employees where they are a part of a bargaining unit in existence prior to the 1973 effective date of the Act. Such neutralizing of the statutory exclusion will continue without limit of years so long as the collective bargaining unit remains in existence. I suggest that a different interpretation can be given to the statute which will not have the effect of repealing the definition of public employees for bargaining units in existence prior to 1973.

The Act emphasizes that "public employees" shall be protected in the exercise of their right of self-organization, collective bargaining and other related rights. The next

step is to determine what employees are to be protected under this public employees collective bargaining act. The Act itself specifically defines "public employees" in section 39-31-103, MCA, as follows:

"(2) (a) 'Public employee' means:

"(i) except as provided in subsection (2) (b) of this section, a person employed by a public employer in any capacity; and

". . .

"(b) 'Public employee' does not mean:

"(i) an elected official;

"(ii) a person directly appointed by the governor;

"(iii) a supervisory employee, as defined in subsection (3) of this section;

"(iv) a management official, as defined in subsection (4) of this section;

"(v) a confidential employee, as defined in subsection (12) of this section;

"(vi) a member of any state board or commission who serves the state intermittently;

"(vii) a school district clerk;

"(viii) a school administrator;

"(ix) a registered professional nurse performing service for a health care facility;

"(x) a professional engineer; or

"(xi) an engineer-in-training." (Underscoring added.)

The definition is clear. It totally excludes a number of persons, starting with elected officials, including supervisory employees and management officials, and ending with engineers-in-training. It is critical to note that the statute does not base exclusion upon a theory of potential "substantial conflict" if such employees are included in a bargaining unit. Instead, the legislature by definition states that these described persons do not constitute "public employees"

who are granted the right of collective bargaining. The result of the majority opinion is to disregard the very specific exclusion, and to add a new idea--the exclusions shall be applied only if there is "substantial conflict." Such an interpretation adds a test not included in the statute.

If a collective bargaining unit were organized after the 1973 effective date of the Act, such a unit cannot include people other than public employees as defined in the Act; so that in such a situation, supervisory employees and management officials could not under any circumstance be included as a part of the unit, even though proof might be submitted that their presence would not create a substantial conflict. The result is a direct conflict between the persons who are "public employees" in different bargaining units.

The majority opinion bases its conclusions on the grandfather clause, which is set forth in section 39-31-109, MCA, as follows:

"Existing collective bargaining agreements not affected. Nothing in this chapter shall be construed to remove recognition of established collective bargaining agreements already recognized or in existence prior to the effective date of this act."

I have no problem in agreeing that the grandfather clause requires recognition of the established collective bargaining agreement with Local #521. I also find no problem in recognition of Local #521 as the bargaining unit. I do question the conclusion that all persons who were in the bargaining unit must continue to be allowed to remain in the bargaining unit in future years.

Without question the collective bargaining agreements and the bargaining units in existence prior to the 1973 date

of the Act must be recognized. However, in contract negotiations taking place after the effective date of the Act in 1973, the statutes appear to require that the statutory definition of "public employees" must be recognized, with the result that in such subsequent negotiations, supervisory employees and management officials as defined in the Act must be excluded from the bargaining unit. The result would be that the bargaining unit would continue negotiations as it did prior to 1973, but that a unit could no longer retain as a part of the members of the unit any of the persons excluded from the statutory definition of "public employees." The result would be that the legislative determination as to the persons who are entitled to bargain collectively under the Act would be recognized. The further result would be that all bargaining units under the public employees process would retain the same categories of employees.

A number of parties representing different unions have appeared in this action. Apparently all of them would oppose a construction of the statutory exclusion as above suggested. It seems to me that this is an expression of disagreement by the unions with the clear definition stated by the legislature as to the persons who can and cannot be classed as public employees for collective bargaining purposes. If the legislature agrees with the interpretation of the majority, no legislation is required. On the other hand, if the legislature determines that the definition of "public employees" set forth in the statute should be carried through, then additional legislation is required.


Justice

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BOARD OF PERSONNEL APPEALS

1 IN THE DISTRICT COURT OF THE THIRTEENTH
2 JUDICIAL DISTRICT OF THE STATE OF MONTANA,
3 IN AND FOR THE COUNTY OF YELLOWSTONE

4
5 CITY OF BILLINGS,)
6)
7 Plaintiff,)
8)
9 vs.)
10)
11 BILLINGS FIREFIGHTERS, LOCAL #521,)
12 and THE BOARD OF PERSONNEL APPEALS,)
13)
14 Respondents.)

No. DV 79-706

J U D G M E N T

11 This matter came on regularly for hearing before this Court and the
12 Court having considered the transcript made in this matter by the Hearing
13 Examiner and the Board of Personnel Appeals, the Court having considered
14 legal memoranda, argument of counsel and having made and entered Findings of
15 Fact and Conclusions of Law and the court being fully advised, it is

16 ORDERED, ADJUDGED AND DECREED, that supervisors and management
17 personnel of the City of Billings within Firefighters, Local #521 Bargaining
18 Unit are, by statute of the State of Montana, excluded from the bargaining unit,
19 notwithstanding former RCM 1947 §59-1615, and it is

20 FURTHER ORDERED, ADJUDGED AND DECREED, that the Line Battalion Chiefs
21 of the Billings Fire Department are supervisors and are excluded from Fire-
22 fighters, Local #521 Bargaining Unit, and it is

23 FURTHER ORDERED, ADJUDGED AND DECREED, that the Specialty Officers,
24 Communications Officer, Maintenance Officer, Fire Marshal and Training Officer
25 are supervisory and management employees of the City of Billings Fire Department
26 and are excluded from Firefighters, Local #521 Bargaining Unit, and it is

27 FURTHER ORDERED, ADJUDGED AND DECREED, that the Fire Captains shall
28 remain as members of the Firefighters, Local #521 Bargaining Unit, and it is

29 FURTHER ORDERED, ADJUDGED AND DECREED that the test applied by the
30 Board of Personnel Appeals in this matter is not logical and is arbitrary and
31 capricious in that actual and substantial conflict is inherent because of the
32 nature of the duties of the supervisory employees and the City of Billings is

1 not required to prove present or past actual conflict, and it is

2 FURTHER ORDERED, ADJUDGED AND DECREED, that the Order of the Board
3 of Personnel Appeals is reversed in part and affirmed in part consistent with
4 this Judgment.

5 JUDGMENT DATED 16 August 1981.

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ROBERT M. WILSON

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Judge

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1 IN THE DISTRICT COURT OF THE THIRTEENTH
2 JUDICIAL DISTRICT OF THE STATE OF MONTANA,
3 IN AND FOR THE COUNTY OF YELLOWSTONE

BOARD OF PERSONNEL APPEALS

5 CITY OF BILLINGS,)
6 Plaintiff,)
7 -vs-)
8 BILLINGS FIREFIGHTERS, LOCAL)
9 #521, and THE BOARD OF PERSONNEL)
10 APPEALS,)
11 Respondents.)
_____)

No. DV 79-706

* O R D E R *

12
13 This matter having come on regularly for
14 consideration by the above-entitled Court and the parties
15 having submitted memoranda and having argued the case to the
16 Court and the Court being fully advised makes and enters
17 its:

18 FINDINGS OF FACT

19 I.

20 This is a review of the Final Order of the
21 Board of Personnel Appeals brought by Petition by the City
22 of Billings pursuant to the Montana Administrative Procedure
23 Act. Judicial review is authorized by Section 2-4-702, M.C.A.

24 II.

25 In 1968, the City of Billings recognized
26 Local #521, International Association of Firefighters as the
27 bargaining unit for the employees of the Billings Fire
28 Department.

29 At the time of the hearing in this matter,
30 Local #521 was composed of one Fire Marshal, one Communications
31 Officer, one Training Officer, one Maintenance Officer, four
32 (Line) Battalion Chiefs, twenty-six Captains, six Lieutenants,

1 twenty-five Engineers, and thirty-nine Firefighters.

2 The Billings Fire Department is organized accord-
3 ing to a chain of command which extends from the Fire Chief
4 through the Assistant Chief, Battalion Chiefs, Captains, Lieu-
5 tenants, Engineers, and Firefighters; or from the Fire Chief
6 to each Specialty Officer to any staff a Specialty Officer might
7 have. This chain of command is the vehicle through which
8 supervision is exercised, policy is carried out, and input is
9 received.

10 III.

11 The Board of Personnel Appeals adopted the
12 Hearing Examiner's extensive findings as to the Line Battalion
13 Chiefs. Those findings detail the supervisory functions of the
14 Line Battalion Chiefs. They are in fact, supervisors.

15 IV.

16 The Specialty Officers within the Billings
17 Fire Department are the Communications Officer, Maintenance
18 Officer, Fire Marshal and Training Officer. The Board of
19 Personnel Appeals adopted the Hearing Examiner's extensive
20 findings as to the Specialty Officers. Those findings detail
21 the supervisory and management functions of those Specialty
22 Officers. The Communications Officer and Fire Marshal are, in
23 fact, supervisory. In addition, each Specialty Officer repre-
24 sents management policy and direction in each area of res-
25 ponsibility. The areas of responsibility are all areas of manage-
26 ment concern and policy. The Communications Officer supervises
27 and oversees the total communications link of the City. The
28 Fire Marshal implements management policy with respect to fire
29 investigations and fire prevention policy. The Training Officer
30 is responsible to see that management policy of having a well-
31 trained and efficient fire fighting force is carried out. The
32 Maintenance Officer is responsible to see that management polic-

1 ies with respect to equipment are carried out. Each area over
2 which these Specialty Officers have jurisdiction are areas of
3 management concern. In the areas of responsibility the Specialty
4 Officers make operative decisions for the city administration.

5 V.

6 The Board of Personnel Appeals has adopted the
7 Hearing Examiner's extensive findings. Those findings detail
8 the functions of the Fire Department Captains. Although there
9 appear to be substantial elements of supervision, the Captains
10 are not supervisors, in fact.

11 VI.

12 The Board of Personnel Appeals has adopted a
13 test for determining whether to include or exclude supervisory
14 employees in a grandfathered bargaining unit. This is two
15 pronged: (1) Determine whether the unit currently contains
16 employees who might be classified as supervisory or management.
17 (2) If there are supervisory or management employees in the
18 bargaining unit does their presence result in actual, substan-
19 tial conflict?

20 VII.

21 Application of the above test to the Billings
22 Firefighters unit, an administrative hearing examiner and the
23 Board of Personnel Appeals, in a separate review, determined
24 that while the bargaining unit contains some supervisory employees,
25 there was no evidence of actual, substantial conflict.

26 VIII.

27 The BPA has issued a Final Order allowing the
28 current composition of the Billings Firefighters bargaining unit
29 to continue as it has existed since its inception in 1968.

30 XI.

31 The Battalion Chiefs and Specialty Officers
32 are supervisory employees and if allowed to remain in the

1 bargaining unit a conflict will exist.

2 X.

3 The two prong test adopted by the Board of
4 Personnel Appeals is not logical. It is capricious. The City
5 should not be required to wait and see if a conflict develops.
6 It is inherent in the nature of their supervisory duties that
7 actual and substantial conflicts will develop so far as the
8 Battalion Chiefs and Specialty Officers are concerned.

9 CONCLUSIONS OF LAW

10 1. This Court has jurisdiction of the parties
11 and the subject matter.

12 2. Supervisors and management personnel are
13 excluded from Firefighters Local #521 Bargaining Unit and former
14 Section 59-1615, R.C.M., does not change the statutory exclusions

15 3. The Line Battalion Chiefs are supervisors
16 and are excluded from Firefighters Local #521 Bargaining Unit.

17 4. The Specialty Officers, Communications
18 Officer, Maintenance Officer, Fire Marshal and Training Officer
19 are supervisory and excluded from Firefighters Local #521
20 Bargaining Unit.

21 5. The Fire Captains shall remain with Fire-
22 fighters Local #521 Bargaining Unit.

23 6. The test applied by the Board of Personnel
24 Appeals is not logical and is arbitrary and capricious in that
25 actual and substantial conflict is inherent because of the
26 nature of the duties of the named supervisory employees and the
27 City should not be required to prove present or past actual
28 conflict.

29 7. The Order of the Board of Personnel Appeals
30 shall be accordingly reversed in part and affirmed in part.

31 LET JUDGMENT BE ENTERED ACCORDINGLY.

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DATFD this 28 day of July, 1981.

[Handwritten Signature]

DISTRICT JUDGE

cc: Rosemary C. Boschert
Jerry L. Painter
Kenneth D. Peterson

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail upon the parties or their attorneys of record at their last known address this 29 day of July, 1980.

By: *[Handwritten Signature]*
Secretary to Hon. Robert H. Wilson

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION #1-77:)
BILLINGS FIREFIGHTERS LOCAL #521,) FINAL ORDER
CITY OF BILLINGS.)

* * * * *

Findings of Fact, Conclusions of Law, and Recommended Order were issued by Kathryn Walker, Hearing Examiner on January 19, 1979, in the above captioned matter.

K. D. Peterson, Attorney for the City of Billings, filed Exceptions to Findings of Fact, Conclusions of Law, and Recommended Order on February 9, 1979. A Memorandum in Opposition to Exceptions to Findings of Fact, Conclusion of Law, and Recommended Order was filed on March 8, 1979, by Rosemary C. Boschert, Attorney for Billings Firefighters Local #521.

Oral argument was presented to the Board on March 20, 1979. After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions to Findings of Fact, Conclusions of Law and Recommended Order filed on behalf of the City of Billings are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law, and Recommended Order of Hearing Examiner, Kathryn Walker, as the Final Order of this Board.

DATED this 26th day of March, 1979.

BOARD OF PERSONNEL APPEALS

By: Brent Cromley
Brent Cromley, Chairman

* * * * *

CERTIFICATE OF MAILING

I, Jennifer Jacobson, hereby certify and state that I did



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on the 27th day of March, 1979, mail a true and correct copy
of the above FINAL ORDER to the following persons:

K. D. Peterson
Attorney for City of Billings
Peterson and Hunt
Transwestern Building
404 North 31st Street
Billings, MT 59101

Rosemary Boschert
Boschert & Boschert
Hedden-Empire Building
Billings, MT 59101



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BEFORE THE BOARD OF PERSONNEL APPEALS

* * * * *

IN THE MATTER OF UNIT CLARIFICATION #1-77:)
BILLINGS FIREFIGHTERS LOCAL #521;) ORDER
CITY OF BILLINGS)

* * * * *

Pursuant to a stipulation entered into by both parties, Kathryn Walker, a hearing examiner for this Board, conducted a unit clarification hearing in the above matter. On February 28, 1978, the hearing examiner issued a Recommended Order which held that section 59-1615, R.C.M. 1947, protected the unit that was recognized by the City of Billings since 1968, i.e., all employees of the Billings Fire Department except the Chief and the Assistant Chief. Exceptions to that Recommended Order were filed by the City of Billings. Briefs and Oral Arguments were presented before the Board on May 2, 1978.

The hearing examiner based her decision on a prior Board decision, IN THE MATTER OF THE RETAIL CLERKS INTERNATIONAL LOCALS 4, 57, 684, 991, 1573 v. MONTANA STATE DEPARTMENT OF REVENUE. In that decision this Board stated concerning the grandfather clause:

"The Board finds that this grandfather clause [59-1615] applies to the recognition of the bargaining agent as well as the ratification of existing bargaining agreements."

The City of Billings argues that the above decision is not applicable to the fact situation now before the Board in that the Revenue decision concerns an unfair labor practice charge, but the fact situation now before the Board concerns a stipulated agreement between the parties that there shall be a clarification of the bargaining unit. This Board,

1 however, can find nothing in the stipulation or position
2 paper of the Firefighters which would warrant the con-
3 clusion that the Firefighters have waived any rights or
4 protection afforded their unit under the grandfather clause.
5 In fact, the amended position paper of the Firefighters
6 specifically refers to the grandfather clause.

7
8 After review of the fact situation of this case, this
9 Board finds that it is time again to review section 59-1615,
10 R.C.M. 1947, and this Board's Revenue decision. Section 59-
11 1615, R.C.M. 1947, provides:

12 "EXISTING COLLECTIVE BARGAINING AGREEMENTS NOT AFFECTED.
13 Nothing in this act shall be construed to remove
14 recognition of established collective bargaining
15 agreements already recognized or in existence prior to
16 the effective date of this act."

15 The ambiguity in the above statute stems from the phrase
16 "bargaining agreements already recognized or in existence."
17 The phrase itself appears to grandfather in only agreements,
18 yet the use of the term "recognized" renders the obvious
19 interpretation into a state of confusion. If indeed it was
20 the intent of the legislature to limit the grandfather
21 clause to bargaining agreements, then the term "recognized"
22 becomes a confusing redundancy. "Recognition" in labor
23 vernacular refers to the acknowledgment by the employer that
24 a union has majority support of the employees in the bargaining
25 unit. The bargaining representative is recognized, not the
26 bargaining agreement. The term is properly used in section
27 59-1606 (1)(a)(ii).

28
29 The Legislature, in consideration of the public employee
30 collective bargaining legislation, determined that protection
31 ought to be given to bargaining units existing at the time
32 of the passage of the legislation. Precisely how much
protection isn't clear on the basis of the grandfather

1 statute in view of its ambiguous language. The legislature
2 also determined that supervisory employees and management
3 officials should be excluded from any unit for collective
4 bargaining purposes. (SEE: 59-1602 (3) & (4)) The two
5 sections can and do come into conflict with each other. An
6 analysis of the rationale for passage of the two sections
7 will help resolve the conflict.

8
9 The obvious reason for excluding supervisory employees
10 and management officials is that no man "can serve two
11 masters." A supervisory employee cannot be loyal to manage-
12 ment and to his/her union.

13
14 Another reason is the potential of intra-union conflict.
15 The view was studied by the Advisory Commission on Inter-
16 governmental Relations (ACIR), a commission established by
17 Congress. The ACIR studied largely the question whether
18 supervisors should be allowed to join a rank-and-file
19 employees' organization. It said, among other things:

20 "From the viewpoint of a union or associations certain
21 objections also can be raised concerning participation
22 by supervisors and other middle-managers in their
23 activities. Supervisory personnel cannot remove
24 themselves entirely from an identification with certain
25 management responsibilities, and this can generate
26 intraunion strife. Their involvement in union or
27 associational affairs in effect places management on
28 both sides of the discussion table. State legislation
29 dealing with public labor-management relations, then,
30 should clearly define the types of supervisory and
31 managerial personnel which should not be accorded
32 employee rights." Labor Management Policies for State
and Local Government, pages 95-96.

Thus the reason for the Legislature excluding supervisory
and managerial employees from the bargaining unit is logical
both from management's and labor's position.

The intent of the Legislature in not allowing the new
legislation to affect existing bargaining units and historical

1 bargaining patterns is to maintain the status quo which the
2 parties to the agreement have found workable in the past.
3 This, of course, would prevent any disruption of the rela-
4 tionship that existed between the parties up to the passage
5 of the legislation.

6
7 Both sections were enacted by the Legislature in order
8 to further the policy of the act as stated in section 59-
9 1601:

10 "Policy. In order to promote public business by
11 removing certain recognized sources of strife and
12 unrest, it is the policy of the state of Montana to
13 encourage the practice and procedure of collective
14 bargaining to arrive at friendly adjustment of all
15 disputes between public employers and their employees."

16 Where the two sections in question, section 59-1615
17 which grandfathers in existing units, and section 59-1602
18 (3) & (4) which excludes supervisory employees and manage-
19 ment officials, come into conflict, the conflict must be
20 settled in view of the policy of the act.

21 New Jersey has a similar grandfather clause as our own.
22 It too had to resolve the conflict that existed between its
23 grandfather clause and its exclusion of supervisory
24 employees from certain bargaining units. New Jersey's
25 grandfather clause provided as follows:

26 "Section 34:13A-8.1 EFFECT OF ACT UPON PRIOR AGREE-
27 MENTS. Nothing in this act shall be construed to annul
28 or modify, or to preclude the continuation of any
29 agreement during its current term heretofore entered
30 into between any public employer and any employee
31 organizations, nor shall any provision hereof annul or
32 modify any pension statute or statutes of this State."

31 The New Jersey public employee collective bargaining
32 legislation is different from our own in that it allows

1 supervisory employees to collectively bargain, but not in a
2 unit which would mix supervisory and nonsupervisory em-
3 ployees.

4
5 The Public Employee Relations Board (PERB) in inter-
6 preting its grandfather clause held that "established
7 practice" and "prior agreements" were statutory exceptions
8 to the requirements that supervisory and nonsupervisory
9 employees could not be included in the same unit. It went
10 on, however, to state that the mere existence of one or both
11 of these statutory exceptions does not automatically require
12 the continuance of a unit composed of supervisors and non-
13 supervisors. Rather a second question must be answered:
14 the conflict on interest which occurs by having the super-
15 visory employee or management official in the bargaining
16 unit. PERB determined that the test should be that where a
17 unit has been in existence, the exclusion of employees on a
18 conflict of interest basis would require a showing of
19 instances of actual substantial conflicts that resulted in
20 compromising the interests of any party to its detriment.
21 (IN RE WEST PATERSON BOARD OF EDUCATION Case No. 77; Modi-
22 fied, Case No. 79).

23
24 This Board adopts that same principle. The test to be
25 applied when considering the question of the inclusion or
26 exclusion of supervisory employees or management officials
27 in grandfathered units shall be two pronged: (1) first a
28 determination must be made whether or not the position in
29 question is supervisory or management official; (2) if the
30 position is determined to be supervisory or management
31 official then the second question to be answered is whether
32 the inclusion of that position in the unit creates actual

1 substantial conflicts which results in compromising the
2 interests of any party to its detriment. If the inclusion
3 does result in a substantial conflict which results in
4 compromising the interest of any party to its detriment,
5 then the position must be excluded from the unit.

6
7 The Board adopts the above test because it feels that
8 the test allows for the special consideration that must be
9 given grandfathered units as shown by section 59-1615, but
10 also prevents conflicts that are intended to be avoided
11 by the exclusion of supervisory employees and management
12 officials in section 59-1602 (3) & (4). Such interpretation
13 would best effectuate the policy of the act as set out in
14 59-1601 by removing recognized sources of strife and unrest.
15 Furthermore, section 59-1606 provides that this Board shall
16 determine what is an appropriate unit. Subsection (2) of
17 that statute sets out that this Board is to decide whether a
18 community of interest exists among the positions of the
19 proposed unit. The fact that a position is included in a
20 unit that compromises a party's interest to its detriment is
21 sufficient to establish that a community of interest does not
22 exist.

23
24 IT IS THEREFORE ORDERED, that this matter is remanded
25 back to the hearings officer for her to apply the above test
26 to the fact situation in this matter. If either party
27 desires to reopen this matter to present additional evidence
28 they shall contact the hearing examiner as soon as they
29 receive this order.

30
31 DATED this 10th day of July, 1978.

32 BOARD OF PERSONNEL APPEALS

By Brent Cromley
Brent Cromley, Chairman

CERTIFICATE OF MAILING

I, Trena Scoffield, hereby certify and state that I did on the 10th day of July, 1978, mail a true and correct copy of the ORDER in the matter of UC#1-77 to the following persons:

Ms. Rosemary Boschert
Attorney at Law
219 Hedden-Empire Bldg
Billings, Mt 59101

K.D. Peterson
Attorney
302 Transwestern Bldg
404 N. 31st St
Billings, Mt 59101


Trena Scoffield

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BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION #1-77:) FINDINGS OF FACT,
BILLINGS FIREFIGHTERS LOCAL #521;) CONCLUSION OF LAW,
CITY OF BILLINGS) RECOMMENDED ORDER

* * * * *

On November 14, 1977, the Billings Firefighters Local #521 and the City of Billings filed a stipulation in the matter of Unit Clarification #1-77 with the Board of Personnel Appeals. Therein the parties agreed to waive certain specified procedures of the Board of Personnel Appeals, to file position papers by November 21, 1977, and to have the matter heard before the Board of Personnel Appeals within twenty (20) days of filing the position papers.

On November 21, 1977, the parties filed position papers which indicated that the major issue to be heard was whether or not the positions of Battalion Chiefs, Training Officer, Communication Officer, Maintenance Officer, Fire Marshall, and Fire Captians were properly included in the bargaining unit. Billings Firefighters Local #521 contended that these positions are properly included within the bargaining unit. The City of Billings contended that these positions should be excluded from the bargaining unit because they are management and/or supervisory positions as defined by Section 59-1602(2), (3), and (4), R.C.M. 1947.

The hearing in this matter was held December 15 and 16, 1977, under the authority of Section 59-1606, R.C.M. 1947, and in accordance with the Administrative Procedure Act.

Having carefully reviewed the record in this matter, including sworn testimony and evidence presented, these are the findings of fact:

FINDINGS OF FACT

1. On September 12, 1977, the City of Billings, Montana, and Local #521 International Association of Fire Fighters

1 entered into a collective bargaining agreement to be effective
2 from July 1, 1977, to June 30, 1978. Therein the City of
3 Billings recognized Local #521 International Association of
4 Fire Fighters as the exclusive bargaining representative
5 for all the employees of the Fire Department except the
6 Chief and the Assistant Chief.

7 2. Uncontroverted testimony and evidence established that
8 the City of Billings so recognized Local #521, International
9 Association of Fire Fighters as the exclusive bargaining
10 agent of the above-described unit in 1968 (prior to July 1, 1973,
11 the effective date of the Public Employees Collective Bargaining
12 Act) and at all other times material herein.

13 14 DISCUSSION

15 It is the decision of this hearing examiner that Section
16 59-1615, R.C.M. 1947, the "grandfather clause," is dispositive
17 of the other issues raised at the hearing in this matter.
18 Section 59-1615 provides:

19 Existing collective bargaining agreements not affected.
20 Nothing in this act shall be construed to remove
21 recognition of established collective bargaining
22 agreements already recognized or in existence prior to
23 the effective date of this act.

24 The Board of Personnel Appeals addressed the scope and
25 effect of Section 59-1615 in its decision in the matter of
26 the Retail Clerks International Locals 4, 57, 684, 991,
27 1573, Complainant, versus Montana State Department of Revenue,
28 Respondent (signed February 5, 1974, by Patrick F. Hooks,
29 Chairman of the Board of Personnel Appeals). Therein the
30 Board stated that Section 59-1615:

31 . . . anticipated this problem [whether or not an
32 employer can legally enter into a contract covering
33 what it feels are management and supervisory personnel]
34 and gave continuing protection to those employees,
35 whether supervisory or not, who were recognized prior
36 to the effective date of the Act. . .

The Board finds that this grandfather clause

1 applies to the recognition of the bargaining agent
2 as well as the ratification of existing bargaining
agreements. [emphasis added]

3 The City of Billings entered into an agreement with
4 Local #521 International Association of Fire Fighters
5 and recognized a unit composed of all employees of the Fire
6 Department except the Chief and the Assistant Chief before
7 the effective date of the Public Employees Collective
8 Bargaining Act (July 1, 1973). To argue that the allegedly
9 supervisory and managerial employees should be removed from
10 that unit under the provisions of Section 59-1602(3) and
11 (4), R.C.M. 1947, would be to disregard the protective
12 aspects of Section 59-1615 of the same act.

13
14 CONCLUSION OF LAW

15 In accordance with the provision of Section 59-1615,
16 R.C.M. 1947, the appropriate bargaining unit in the Billings
17 Fire Department is that unit which has been recognized by
18 the City of Billings since 1968, i.e., all employees of the
19 Billings Fire Department except the Chief and the Assistant
20 Chief.

21
22 RECOMMENDED ORDER

23 The bargaining unit in the Billings Fire Department
24 shall be composed of all employees of the Fire Department
25 except the Chief and the Assistant Chief.

26 Dated this 28th day of February, 1978.

27
28 BOARD OF PERSONNEL APPEALS

29
30 BY Kathryn Walker
31 Kathryn Walker
Hearings Examiner
32

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CERTIFICATE OF MAILING

I, Elaine Schillinger, hereby certify and state that I did on the _____ day of February, 1978, mail a true and correct copy of the above FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDED ORDER to the following:

Ms. Rosemary Boschert
Attorney
Hedden-Empire Building
Billings, MT 59101

Mr. Lee Brady
1140 Sandstone Tr.
Billings, MT 59101

Mr. Denver Christensen
17083 Independent Lane
Billings, MT 59101

Mr. K.D. Peterson
Peterson and Hunt, Attorneys
302 Transwestern Building
404 North 31st Street
Billings, MT 59101

Mr. Richard Larson
City Administrator
P.O. Box 1178
Billings, MT 59101

Elaine Schillinger
Elaine Schillinger