

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT DETERMINATION NO. 20-2000:

INTERNATIONAL UNION OF)	
OPERATING ENGINEERS)	
LOCAL NO. 400,)	
)	
Complainant,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND RECOMMENDED ORDER.
)	
FERGUS COUNTY BOARD OF)	
COMMISSIONERS,)	
)	
Defendant.)	

* * * * *

1. INTRODUCTION

On February 9, 2000, the International Union of Operating Engineers Local No. 400 (Union) filed an unfair labor practice (ULP) charge with the Board of Personnel Appeals (BOPA), alleging that the Fergus County Board of Commissioners (County) violated §39-31-401, MCA. On February 22, 2000, the County responded, denying any violation of the above law. BOPA investigated, and issued an investigative report and determination on March 16, 2000 finding that if the facts alleged by the Complainant were proven, an unfair labor practice charge was supported, and that the facts stated by one party did not agree with those offered by the other.

Hearing Officer Bernadine E. Warren conducted a hearing in this matter on July 13, 2000, in Lewistown, Montana. Richard Larsen represented the County. Kathie Bailey, Board chairman, appeared as a witness for the County. Joe Spika and Kathy Fleharty, Board members, observed. Dave Luckey, Assistant Business Manager, represented the Union. Sandi Curriero, Organizer, appeared as a witness

for the Union. Union exhibits A through S were admitted into the record over the County's objection that they were not timely submitted. The Hearing Officer admitted the exhibits because the County failed to show it was unduly harmed or prejudiced by the late filing. County exhibits A through K, M and N were admitted into the record without objection. County proposed exhibit L was admitted over the Union's objection that it was not timely submitted. However, the County offered the exhibit in rebuttal to Union testimony, and it was admitted on that basis.

II. ISSUE

Whether the County's failure to provide information, if proven, violated any part of § 39-51-401, MCA.

III. FINDINGS OF FACT

1. On September 20, 1999, Sandi Curriero, organizer for the International Union of Operating Engineers, Local 400, mailed the County a letter advising that a majority of Road and Bridge Crew County employees had declared the desire to be represented by the Union.

2. On September 20, 1999, Curriero hand delivered a Petition for New Unit Determination and Election form to the Department of Labor and Industry. She incorrectly noted that those to be included in the determination were full-time and part-time ambulance crew employed by the County.

3. After delivering the form, Curriero discovered her error. Later the same day, Curriero hand delivered an amended form showing that those to be included in the determination were full-time and part-time Road and Bridge Crew employed by the County.

4. On September 29, 2000, Jennifer Jacobson, Election Judge, mailed a letter to the Fergus County Commission Chair, Kathie Bailey, advising that the BOPA had received a petition from the Union proposing a bargaining unit composed of full-time and part-time ambulance crew. Bailey received the letter a few days later.

She immediately faxed a response to Jacobson, advising that the County did not employ any ambulance crew.

5. On October 8, 1999, Jacobson mailed a letter to the County advising that the BOPA had received an amended petition that proposed a bargaining unit composed of full-time and part-time Road and Bridge Crew employees. Jacobson asked for a listing of the names and addresses of all employees in the proposed unit, called an "excelsior list".

6. Bailey did not receive the letter.

7. On November 5, 1999, Jacobson mailed the County a letter advising that she had not received the excelsior list.

8. On November 8, 1999, Bailey spoke with Paul Melvin, a Department employee, regarding the November 5 letter. After learning of the October 8 letter, Bailey said that she had not received it. Melvin faxed a copy of the letter to Bailey at 4:29 p.m. from the Department fax machine. At 4:47 p.m., Bailey faxed Melvin a listing of 17 Road and Bridge Crew employees.

9. On November 9, 1999, Jacobson mailed the County a Second Service letter advising that the BOPA had received an amended petition for unit determination and election proposing a bargaining unit composed of Road and Bridge Crew employees. Jacobson requested that the County send a listing of the names and addresses of all employees in the proposed unit by November 15, 1999. Bailey did not respond since she had faxed the listing to Melvin on November 8, 1999.

10. Between October and December 1999, Curriero spoke with Jacobson at least three times asking for a copy of the excelsior list. Each time Jacobson said that the County had not provided the list.

11. On December 1, 1999, Jacobson mailed the County a letter advising that an election by secret ballot would be conducted by the BOPA to determine the exclusive representative for collective bargaining purposes for certain employees of the

Fergus County Road and Bridge Crew. She enclosed a list of 14 eligible voters who would receive a mail ballot.

12. On December 2, 1999, Bailey faxed Jacobson a note stating that the list contained address errors, and had failed to include three affected workers. Bailey received no response to her fax.

13. On December 7, 1999, the County sent Road and Bridge employees a memo advising that the County budget was tightly controlled, providing information about the upcoming union election, and stating that it did not believe workers needed to pay dues to a Union to represent them. The memo ended encouraging workers to vote at election time, commenting that a failure to vote would result in giving a vote to the union.

14. On December 23, 1999, Paul Melvin called the Union and advised that the Road and Bridge Crew had voted the Union in as its representative.

15. On January 4, 2000, Jacobson mailed a letter addressed to Kathie Bailey with the County, with a copy being mailed to Curriero. The letter advised that the BOPA had certified the Union for bargaining purposes for the Road and Bridge crew. Curriero received the letter within a day or two. Bailey did not receive the letter at that time.

16. On January 11, 2000, Curriero mailed a letter to the County requesting that it provide budget, payroll, policy, training, holiday, benefit, and other employee information by January 21, 2000.

17. Bailey did not respond to the request for information because she had not received notification from the State of the election results.

18. On January 23, 2000, Curriero mailed a letter to the County renewing its request for information contained in the January 11 letter, asking that it receive the information no later than January 31, 2000.

19. On January 24, 2000, Bailey received the January 4 election result letter from Jacobson. The envelope was postmarked January 20, 2000.

20. On January 27, 2000, Dave Luckey, Assistant Business Manager for the Union, and Curriero met with 12 Road and Bridge crew employees to discuss proposals for bargaining.

21. On January 28, 2000, since he was already in town, Luckey asked Vern Peterson, Board Member, if the County had yet provided the requested information. Peterson stated that he understood that Bailey had already mailed the information to the Union. Bailey, who was out of the office for a few days, had not yet mailed the information.

22. On February 1, 2000, Luckey still had not received the requested information. He wrote a letter to the County asking that the information be received by February 5, 2000, or the Union would file charges with the BOPA.

23. On February 3, 2000, when Bailey returned to the office, Peterson informed her that he had told the Union that the County had already mailed the requested information. Bailey, who had not yet mailed the information, went to her office, gathered all the information, and mailed it that day to the Union.

24. On February 4, 2000, Luckey and Curriero met again with Road and Bridge crew employees to discuss bargaining proposals. Only eight employees attended the meeting. Luckey and Curriero believed fewer attended this meeting because the Union was unable to address employee concerns without the information it had requested from the County.

25. On February 5, 2000, Luckey met with Road and Bridge crew employees. He had not yet received the information requested from the County.

26. Shortly afterward, Luckey received the information mailed by Bailey on February 3. Following the receipt of that information, Luckey requested additional information. The County has provided all information requested by the Union.

27. On February 9, 2000, the Union filed a ULP with the Department, alleging that the County interfered with the rights of the Fergus County Road and

Bridge crew by failing to promptly provide public information requested by the Union.

IV. 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, MCA. It is an unfair labor practice for an employer to "interfere, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201." § 39-31-401, MCA.

The Union alleges the County violated § 39-31-401, MCA by purposefully failing to respond to requests for the excelsior list and, once employees voted the Union as their exclusive representative, requests for budgetary, payroll and benefit information. It contends the refusal to promptly provide the requested information interfered with, restrained and coerced Road and Bridge Crew.

The County denies the allegations, contending that delays in the process were caused by errors committed by the State, and that it was not required to provide budgetary, payroll and benefit information until it had been notified by the BOPA of certification.

The United States Supreme Court's well settled rule is that it is an unfair labor practice for an employer to refuse to furnish a bargaining union that information which is necessary to the proper discharge of the duties of the bargaining agent. *NLRB v. Whittin Machine Works*, 349 US 905, 35 LRRM 2730 (1955). *See also NLRB v. Truitt Mfg. Co.*, 351 US 149, 38 LRRM 2042 (1956). However, the question remains whether an employer has committed an unfair labor practice when it has not been notified of certification.

The majority of the frustration and delay in this case occurred through errors. The Union's initial petition incorrectly defined the affected workers, causing a delay in filing a proper petition for election. Following that error, the BOPA made several errors in failing to notify the County of the correct petition, failing to promptly

forward the excelsior list to the Union, and failing to notify the County of election results and certification.

In *Sunstead Heat Transfer, Inc. v. NLRB*, 538 F.2d 1257(1976), the Seventh Circuit held that there is no general duty to bargain with the union during the period after an election where the union *appears* to have won but is not yet certified, and where the employer did bargain after certification. The Court held that under those circumstances, there was no unfair labor practice in failing to bargain before certification. In the present case, the union was, indeed, certified when it requested information from the County. However, Fergus County had not been notified of the certification. It provided the requested information once it received notice of the certification. The facts show that it bargained in good faith once it received notice of certification. No unfair labor practice occurred.

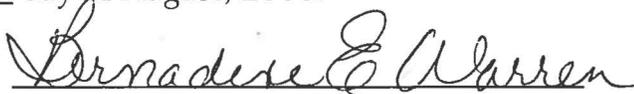
V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this matter pursuant to §39-31-406, MCA.
2. Fergus County Board of Commissioners did not violate § 39-31-401, MCA.

VI. RECOMMENDED ORDER

It is hereby ordered that Unfair Labor Practice Charge 20-2000 be dismissed.

DATED this 21 day of August, 2000.


Bernadine E. Warren, Hearing Officer
Board of Personnel Appeals
Department of Labor and Industry

NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than September 13, 2000. This time period includes the 20 days provided for in ARM 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Dave Luckey
Operating Engineers Local 400
PO Box 5929
Helena MT 59604-5929

Kathie Bailey
Fergus County Commissioner
712 West Main
Lewistown MT 59457

Richard L Larsen
Richard Larsen & Associates
1733 Parkhill Drive
Billings MT 59102

DATED this 21 day of August, 2000.

Carol A. Larkin