

BEFORE THE BOARD OF PERSONNEL APPEALS

ULP-5-1975

AMERICAN FEDERATION OF STATE,
COUNTY, AND MUNICIPAL EMPLOYEES,
LOCAL NO. 2390,

Complainant,

-vs-

LOUIS J. BERTAGNA, CITY OF
BILLINGS,

Defendant.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER AS RECOMMENDED
TO THE BOARD OF
PERSONNEL APPEALS

I Introduction

On June 16, 1975, Charles F. Montee filed an unfair labor practice charge with the Board of Personnel Appeals.¹ Montee charged Louis J. Bertagna with violation of section 59-1605(1)(c)&(d), R.C.M. 1947. Pursuant to Montee's charge, I conducted a hearing on July 28, 1975 as an agent of the Board of Personnel Appeals. At the hearing, Rosemary C. Boschert, attorney-at-law, Billings, Montana appeared on behalf of Montee while Frank C. Richter, attorney-at-law, office of the Billings city attorney, appeared on behalf of Bertagna. Briefs were submitted by both parties after the hearing.

II Preliminary Motion and Evidentiary Objections

Prior to the hearing, the city of Billings moved that the unfair labor practice charge be dismissed on the grounds that the charge had already been the subject of arbitration proceedings provided for by a collective bargaining agreement between the American Federation of State, County, and

¹The caption in this case is incorrect. The unfair labor practice charge clearly shows that the complainant is Charles F. Montee and not the American Federation of State, County, and Municipal Employees, Local No. 2390. However, I have used the same caption used by the Board of Personnel Appeals and the parties in order to avoid confusion.

1 Municipal Employees, Local No. 2390 and the city of Billings.
2 This motion was renewed during the hearing and was taken under
3 advisement by me.

4 Under the Public Employees Collective Bargaining Act
5 (Title 59, Chapter 16, R.C.M. 1947) there is a substantial
6 question as to whether the Board of Personnel Appeals (a mem-
7 ber thereof, or a designated agent) may defer to an arbitration
8 process in the case of an unfair labor practice. Section seven,
9 part one of that Act directs that "whenever" an unfair labor
10 practice charge is filed, the Board of Personnel Appeals "shall"
11 issue a notice of hearing and conduct an administrative hearing.
12 (Emphasis supplied.) These directives seem to be mandatory.
13 Section seven does not seem to grant the Board the discretion
14 necessary to defer to arbitration. Even if I could defer to
15 arbitration as the designated agent of the Board, there has
16 been no showing that the arbitrator's award would effectuate
17 the policies of the Public Employees Collective Bargaining Act--
18 a cardinal requirement of any remedy that I might recommend
19 here. Section 59-1607, R.C.M. 1947. The copy of the arbitrator's
20 decision which was attached as an exhibit to the city's answer,
21 does not detail the arbitrator's award, if any. Therefore,
22 the city's motion is denied.

23 During the hearing the complainant objected to the ad-
24 mission of the defendant's proposed exhibits two, four, and
25 five. These exhibits are correspondence addressed to Louis
26 Bertagna which were purportedly written by supervisors or
27 acting supervisors of the transit department. The corres-
28 pondence addresses Montee's conduct and behavior as an employee
29 of the transit department.

30 The complainant objected to defendant's proposed exhibit
31 number two because, among other reasons, no proper foundation
32 had been laid for its admission. This objection is sustained.

1 There is no evidence on the record to show that it is gen-
2 uine or that it was executed by its purported author.²

3 The complainant objected to defendant's proposed ex-
4 hibits numbers four and five on the basis that they were not
5 available in the complainant's personnel file. According
6 to counsel for the complainant, she obtained the personnel
7 file of the complainant before the hearing. However, she
8 was unaware of the existence of defendant's proposed exhibits
9 numbers four and five because they were filed in an inter-
10 office communications file rather than in complainant's per-
11 sonnel file. Complainant's objection is one which does not
12 reflect on the admissibility or inadmissibility of the evi-
13 dence in question and is therefore overruled. It appears from
14 the record that defendant's proposed exhibits numbers four and
15 five are relevant, material and competent and that a proper
16 foundation has been laid for their admission into evidence.
17 They shall, therefore, be admitted into evidence as defendant's
18 exhibits numbers four and five.

19 III Findings of Fact

20 Upon the entire record in this case and upon substantial,
21 reliable evidence, I make the following findings of fact:

22 There was no evidence presented by either party with re-
23 gard to the defendant's alleged violation of section 59-1605(1)(d),
24 R.C.M. 1947.

25 Charles F. Montee was employed by the city of Billings
26 transit department as a relief driver from December 31, 1973
27 to February, 1974 and as a permanent bus driver from June 1,
28 1974 to August 10, 1974 and from early October, 1974 to De-
29 cember 31, 1974. Montee claims that he was illegally discharged

31 ²The purported author of this correspondence did not
32 testify at the hearing. Louis Bertagna testified that he
was deceased.

1 by Louis Bertagna on August 10, 1974 because he had joined a
2 labor organization and on December 31, 1974 because he had
3 filed grievances as a union steward.

4 Louis Bertagna is the director of the transit depart-
5 ment and was during all periods of Montee's employment with
6 the transit department. He claims Montee was laid off on
7 August 10, 1974 because of a budgetary cutback ordered by
8 the city council and on December 31, 1974 because of what
9 he characterized as a "bad" and "disrespectful" attitude.

10 Montee joined the American Federation of State, County,
11 and Municipal Employees, Local No. 2390 on August 9, 1974.
12 Although Bertagna terminated Montee's employment relationship
13 with the transit department the next day, it does not appear
14 that Montee was discharged because of his union membership.
15 First, and most importantly, there is no evidence on the
16 record presented by the complainant or the defendant which
17 shows that Bertagna knew of Montee's union membership. Ber-
18 tagna testified, in fact, that he was unaware of Montee's
19 union membership on August 10th. If Bertagna did not possess
20 this knowledge, it can hardly be concluded that he terminated
21 Montee because of his union membership. Second, evidence
22 presented by Bertagna shows that the city council ordered
23 a budget cut which had to be implemented by August 12, 1974.
24 Bertagna testified that he complied with this order, in part,
25 by terminating Montee. Montee said that four relief drivers
26 with less seniority than him were retained in violation of
27 the collective bargaining agreement between the union and
28 the city. However, Bertagna testified that the city had
29 concluded that the seniority provisions did not apply to the
30 relief drivers because they were not part of the bargaining
31 unit, as were the permanent bus drivers. Bertagna said that
32 cuts were made in both categories of drivers and that Montee

1 was laid off because he had the least amount of seniority
2 among the permanent bus drivers. Thirdly, Montee was rehired
3 by the transit department as soon as a vacancy occurred among
4 the permanent bus drivers after his termination in August.
5 This conduct is not consistent with the act of discharging
6 an employee because of his union membership.

7 Montee was appointed union steward on the day he was
8 rehired in October. According to his fellow employees,
9 Montee aggressively and conscientiously performed his duties
10 as steward and actively engaged in other union activities.
11 Montee testified that he received numerous employee complaints
12 as steward and that he filed five separate employee grievances
13 against management in the month of November. One of these
14 grievances was in favor of a fellow employee and could have
15 adversely affected his own position. One employee character-
16 ized Montee as a "leader" of the union employees and said
17 that he attempted to solve "long standing problems" which
18 existed in the transit department. Another city employee
19 said that Montee was concerned with the transit department
20 employee's rights and tried to protect those rights as the
21 union steward. Employees attributed many improvements in
22 the transit department to Montee's stewardship activities.

23 According to Montee, Bertagna told him that he wasn't
24 going to allow any union to run his department and that he
25 didn't want any of his employees joining a union. Bertagna
26 disclaimed making these statements and said that he didn't
27 "believe" that he had told his employees what he thought of
28 unions. However, Walter Smith, a very credible and forthright
29 ex-employee of the transit department, testified that when
30 he was hired Bertagna told him that he didn't particularly
31 like the union, that he didn't like the union running his
32 organization, and therefore that he didn't like his employees

1 becoming members of the union. The employees evidently sensed
2 Bertagna's union animus even though a few employees testified
3 that they had never heard Bertagna make uncomplimentary com-
4 ments about the union or make threatening statements to em-
5 ployees because of the union. The union steward position
6 had been vacant months before Montee was appointed and the
7 position has remained vacant since Montee's discharge. Lee
8 McCormack, a city employee and an active member of the union,
9 characterized Montee as one of the only employees in the
10 transit department with the "intestinal fortitude" to ac-
11 cept the position. McCormack said that the employees of the
12 transit department had been reluctant to get actively in-
13 volved with union activities because they feared losing
14 their jobs. Elsie Kemper, a transit department employee,
15 said that the union had approached her about becoming stew-
16 ard but that she declined because she was afraid she might
17 be discharged as Montee was.

18 That Bertagna was aware of Montee's stewardship activities
19 is beyond question. Bertagna testified that he received a
20 memorandum from the union dated October 4, 1974 which informed
21 him of Montee's appointment as union steward. Furthermore,
22 Montee testified that as a union steward he had occasion to
23 "confront" Bertagna with employee complaints.

24 Montee was an excellent employee who had a good working
25 relationship with his fellow employees. There is a litany
26 of praise on the record extolling Montee's performance as
27 a bus driver. Montee received three commendations from pa-
28 trons of the transit department. One of these patrons de-
29 scribed Montee as very businesslike in the performance of
30 his duties and as always very courteous to the patrons,
31 more so than other bus drivers she was familiar with. Walter
32 Smith, a past employee of the transit department, testified

1 that Montee's ability as a bus driver "was quite satisfactory"
2 and that Montee performed his job in a workmanlike manner.
3 Elsie Kemper, another employee of the transit department, said
4 that Montee "was a very good bus driver. He kept good time
5 schedules." Alicia Pope, also an employee of the transit
6 department, said:
7 "Well, when Montee was on duty, he was always
8 very serious about his work and conscientious
9 and he was one of the few that would always
10 stand by the bus. And there really wasn't any
11 hanky panky with Montee. He always conducted
12 himself in a business manner, businesslike man-
13 ner."
14 Ms. Pope also said that Montee "was always on his toes."
15 Ms. Pope, incidentally, was passed over in a promotion which
16 was awarded to Montee. Evelyn Haley, another employee of the
17 department, said that Montee's ability as a bus driver was
18 beyond question. She characterized him as "very well groomed,"
19 "very well mannered" and "a good driver." She agreed that
20 Montee performed his duties in a workmanlike manner. Even
21 the defendant's witnesses testified as to Montee's excellent
22 performance as a bus driver. Louis Bertagna said that Montee's
23 work performance was good. He never received any complaints
24 from Montee's supervisors or fellow employees about Montee's
25 work performance. He acknowledged that Montee had received
26 three compliments from transit department patrons. Ralph
27 Healy, one of Montee's supervisors, agreed, in response to
28 questions by me, that Montee was a good driver, that his
29 conduct was exemplary, that he was a superior employee, and
30 that he did an above average job in relation to other em-
31 ployees of the department. Donald Biggs, another supervisor
32 of the department, said that Montee was never insubordinate
to him on the job. Biggs was satisfied with Montee's driving
and said "his appearance and everything was always neat. . ."
Biggs said that Montee was a good worker, that he never received

1 any complaints about his work performance, and that he was
2 a model employee. Kathy Strombeck, an employee of the de-
3 partment, said that Montee was apparently a good bus driver
4 because she never heard the other bus drivers complain about
5 him. She agreed his performance was good and his grooming
6 was excellent and that Montee sometimes worked above and
7 beyond the call of duty.

8 The record is also replete with evidence of Montee's
9 ability to get along with his fellow employees. Montee
10 characterized his ability to get along with his fellow em-
11 ployees as "very good." Ms. Kemper testified that "at the
12 time he worked, other drivers all seemed to like him." Ms.
13 Pope said that Montee was respected by his fellow employees,
14 that he was pleasant and good humored. Ms. Haley testified
15 that Montee "got along with the biggest majority of them
16 /the employees/." Mr. Healy said that "on the surface"
17 Montee got along well with his fellow employees and agreed
18 that there was nothing specific to show that he didn't get
19 along with his fellow employees.

20 A great portion of the unfair labor practice hearing
21 was devoted to determining why Montee was discharged on
22 December 31, 1974. Montee was purportedly discharged be-
23 cause of a "bad" and "disrespectful" attitude. Bertagna
24 said that Montee was disrespectful to management and super-
25 vision, was unwilling to cooperate with the department and
26 was disagreeable. Bertagna also said that he relied on
27 reports from department supervisors which recommended that
28 Montee be terminated.

29 Despite his testimony, Bertagna actually only specified
30 two occasions where Montee had been disrespectful to him.
31 The record does not indicate which period of Montee's employ-
32 ment one occasion occurred. The other occasion occurred,

1 according to Bertagna, at a department picnic held in July
2 of 1974. Thus it occurred before Montee was rehired in
3 October and evidently was not serious enough to preclude
4 Montee's reemployment by the department in October. Bertagna
5 specified no instances when Montee was unwilling to cooperate
6 with the department or was disagreeable. Nor did he specify
7 any incidents when Montee was disrespectful towards his super-
8 visors.

9 Despite Bertagna's admission that Montee was a good
10 employee, Bertagna said that he only warned Montee once
11 about his attitude. This warning occurred, according to
12 Bertagna, in a very general conversation between Bertagna
13 and Montee at an unspecified time prior to his discharge.
14 He did not deem it necessary to provide Montee with a formal
15 written warning nor did he tell Montee if his attitude didn't
16 improve, he would be discharged. Other employees who made
17 mistakes but were not infected with a "bad attitude" were
18 cautioned and allowed to rectify their mistakes according
19 to Bertagna.

20 Ralph Healy and Don Biggs both recommended by letter
21 to Bertagna that Montee be terminated. In their letters
22 they charged that Montee was the cause of dissension, unrest
23 and low morale among the employees of the department, and
24 that he was uncooperative and disagreeable. But during the
25 hearing the specified few incidents to substantiate these
26 charges. They did testify as to incidents in which they
27 contended that Montee had been disrespectful towards Ber-
28 tagna or to them. One of these incidents occurred during
29 the department picnic in July of 1973 and has been dis-
30 cussed above. In the other incident, as reported by Biggs,
31 Montee was supposedly disrespectful to Healy. However,
32 Healy evidently did not perceive the incident as a sign

1 of disrespect because he testified at the hearing that Montee
2 had never been disrespectful towards him. Healy also testified
3 that after Montee returned to work, department employees began
4 turning in numerous complaints. He also said that Montee was
5 always trying to get the opinion of his fellow employees as
6 to what they thought was wrong with the department. Despite
7 Montee's excellent work performance, neither Healy nor Biggs
8 cautioned Montee to improve his attitude.

9 Two co-employees of Montee, Kathy Strombeck and Evelyn
10 Haley, testified that they had heard Montee make derogatory
11 comments about Bertagna. However, each witness could only
12 recall one specific comment. Strombeck testified that Montee
13 attempted to "cause trouble" by taking "little things" and
14 "blowing them out of proportion." Strombeck agreed that
15 these "little things" sometimes related to working conditions
16 of the employees; she could not specify an instance when they
17 did not. Montee said that he had conflicts with Strombeck
18 because of her "intentional violation of the union contract
19 by asking for special favors from management."³ Apparently
20 Strombeck was wary of Montee also because she testified that
21 she felt that "when Montee first started with us he was out
22 for more than to be a driver. . . . That he was trying to
23 get higher than just a dumb old bus driver." Montee's re-
24 lationship with the other employee, Evelyn Haley, had been
25 difficult on one occasion also. Haley testified that Montee
26 was wrongfully promoted over her to the position of perm-
27 anent bus driver--even though he had less seniority than her.
28 She complained to Bertagna about this and at the same time

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30 ³ Montee, by way of illustration, testified that Strombeck
31 had requested a shift change with less than twelve hours of
32 rest between the shifts. He contended that such a shift change
violated the law and the collective bargaining contract.

1 complained about Montee's attitude.⁴

2 IV Discussion

3 The ultimate issue in this case is whether or not Charles
4 F. Montee was discharged on December 31, 1974 because of his
5 union activities.⁵ Louis Bertagna, the director of the transit
6 department, contends that Montee was discharged because of a
7 "bad" and "disrespectful" attitude. He characterized Montee
8 as uncooperative and disagreeable. I do not agree with Ber-
9 tagna's contentions. It is my belief that Montee was discharged
10 because of his union activities. I have reached this con-
11 clusion particularly in light of the following considerations:

12 1. Bertagna's union animus. Louis Bertagna did not like
13 labor organizations because, according to him, they interfered
14 with his management of the transit department. Moreover, he
15 did not want department employees to join unions. He expressed
16 these sentiments to two employees, one of which was Montee.

17 2. Bertagna's knowledge of Montee's union activities.
18 Bertagna knew that Montee was actively involved in union
19 activities. He was apprised of Montee's appointment as union
20 steward in early October. He had dealt with Montee in Mon-
21 tee's capacity as union steward on a number of occasions.

22 3. Montee's role in union activities. The record clearly
23 details that Montee was a leader of union employees and that he
24 performed his union stewardship responsibilities in a very
25 aggressive and conscientious manner.

26 4. The timing of Montee's discharge. Montee was dis-
27 charged the month after he had filed five employee grievances.

28
29 ⁴Ironically, Montee, as the union steward, filed a grievance
30 on behalf of Haley and against himself in this matter.

31 ⁵I believe my findings of fact have sufficiently disposed
32 of Montee's termination in August of 1974 and the city's alleged
violation of section 59-1605(1)(d), R.C.M. 1947 as issues and
therefore they will not be addressed here.

1 The stewardship position had been vacant months prior to
2 Montee's appointment as union steward. Thus, the filing of
3 employee grievances by Montee disrupted the dormancy of the
4 stewardship position.

5 5. The defendant's inadequate explanation of the reasons
6 for Montee's discharge. The defendant's explanation of the
7 reasons for Montee's discharge are unconvincing and seem pre-
8 textual. Although the record is replete with general char-
9 acterizations about Montee's attitude and his effect on his
10 co-employees during his employment with the transit depart-
11 ment, there were few specific illustrations to corroborate
12 the characterizations. Indeed, one of the few specific in-
13 cidents used by the defendant to illustrate Montee's attitude
14 occurred before he was rehired in October. Its significance
15 as a cause for discharging Montee is, therefore, quite ques-
16 tionable. Furthermore, the characterizations that Montee was
17 disagreeable and uncooperative belie the testimony presented
18 at the hearing: Virtually every witness testified that Montee
19 had a good relationship with his fellow employees; Bertagna
20 and Montee's supervisors testified that Montee was never in-
21 subordinate or disrespectful on the job.

22 6. Absence of an indication of dissatisfaction by the
23 defendant. There was an almost complete absence of prior
24 warning or other indication of dissatisfaction by Bertagna
25 or Montee's supervisors with regard to the attitude of Montee.
26 This seems strange in light of two factors: Montee, by every
27 witnesses account, was an excellent employee; Other employees
28 who made mistakes were warned and allowed to rectify their
29 mistakes.

30 V Conclusions of Law

31 The defendants, Louis J. Bertagna and the city of Billings,
32 violated provisions of section 59-1605(1)(a)&(c), R.C.M. 1947

1 and are guilty of an unfair labor practice as specified in
2 section 59-1605(1)(a)&(c) by discharging Charles F. Montee.

3 The discharge of Montee was motivated by his involvement
4 in union activities, which are rights of public employees pro-
5 tected by section 59-1603, R.C.M. 1947.

6 VI Recommended Order

7 It is hereby ordered that the city of Billings:

8 1. Cease and desist from discouraging membership in
9 or lawful activity on behalf of the American Federation of
10 State, County, and Municipal Employees, Local No. 2390,
11 by discharging any employee because he joined or assisted
12 a labor organization or engaged in any concerted activity
13 protected by section 59-1603.

14 2. Take the following affirmative action:

15 (a) Offer to Charles F. Montee immediate and full re-
16 instatement to his former or substantially equivalent po-
17 sition and make him whole for any loss of pay suffered in
18 consequence of his discharge because of his engagement in
19 union activity.

20 (b) Preserve and upon request make available to the
21 Board of Personnel Appeals or its agents, for examination
22 and copying, all payroll records, social security payment
23 records, timecards, personnel records and reports, and all
24 other records necessary to analyze the amount of backpay
25 due under the terms of this order.

26 (c) Post at its plant for the transit department in
27 Billings, Montana copies of the attached notice marked
28 "Appendix." Copies of this notice, after signed by the
29 city's representative, shall be posed by the city immediately
30 upon receipt thereof, and be maintained by it for sixty con-
31 secutive days thereafter, in conspicuous places, including
32 all places where notices to employees are customarily posted.

1 Reasonable steps shall be taken to insure that the notices
2 are not altered, defaced, or covered by any other material.

3 (d) Notify the executive secretary of the Board of
4 Personnel Appeals in writing within twenty days from re-
5 ceipt of this order, what steps have been taken to comply
6 herewith.

7 Dated this 15th day of December, 1975.

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Peter O. Maltese

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Peter O. Maltese, Esq.
Hearing Examiner

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CERTIFICATE OF MAILING

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I hereby certify that I mailed a true copy of the above
Findings of Fact, Conclusions of Law, and Order as Recommended
to the Board of Personnel Appeals to the following parties
on the fifteenth day of December, 1975:

Rosemary C. Boschert
Attorney for Charles F. Montee
219 Hedden-Empire
Billings, Montana 59101

Frank C. Richter
Office of the City Attorney
720 North 30th Street
Billings, Montana 59101

By Peter O. Maltese