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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 3-79:

BRUCE YOUNG BY CONSTRUCTION )  
AND GENERAL LABORERS', LOCAL )  
NO. 1334, AFL-CIO, )  
Complainant, )  
- vs - )  
CITY OF GREAT FALLS, )  
Defendant. )

FINAL ORDER

\*\*\*\*\*

The Remedial Order was issued by Hearing Examiner Jack H. Calhoun on January 7, 1983.

Exceptions to the Remedial Order were filed by David V. Gliko, on behalf of the Defendant, on January 25, 1983.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant to the Remedial Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Remedial Order of Hearing Examiner Jack H. Calhoun as the Final Order of this Board.

DATED this 9th day of March, 1983.

BOARD OF PERSONNEL APPEALS

By Joan A. Uda  
Joan A. Uda  
Alternate Chairman

\*\*\*\*\*

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 9th day of March, 1983:

David V. Gliko, City Attorney  
City of Great Falls  
P.O. Box 5021  
Great Falls, MT 59403

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D. Patrick McKittrick  
MCKITTRICK LAW FIRM  
Strain Building, Suite 622  
410 Central Avenue  
P.O. Box 1184  
Great Falls, MT 59403

*Jennifer Jacobson*

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STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 3-79:

BRUCE YOUNG BY CONSTRUCTION	)	
AND GENERAL LABORERS' LOCAL	)	
NO. 1334, AFL-CIO,	)	
	)	
Complainant,	)	REMEDIAL ORDER
	)	
vs.	)	
	)	
CITY OF GREAT FALLS,	)	
	)	
Defendant.	)	

\* \* \* \* \*

On June 10, 1982 the Montana Supreme Court affirmed the Board of Personnel Appeals final order in this matter dated October 12, 1979. Pursuant to that order the parties attempted to reach a settlement on the amount due Mr. Young, however, they were not successful. A hearing was held in Great Falls on September 30, 1982 for the purpose of determining that amount. Complainant was represented by Mr. D. Patrick McKittrick, Defendant by Mr. David V. Gliko.

FINDINGS OF FACT

1. Bruce Young was terminated by the City of Great Falls on October 31, 1978 in violation of 39-31-401(1), (3) and (4) MCA. He had worked as a laborer from May 2, 1978. Prior to that period of employment he had worked for the City from March 20, 1977 until December 30, 1977.

2. At the time of his termination Mr. Young's rate of pay with the City was \$6.675 per hour pursuant to the provisions of the parties' collective bargaining agreement.

3. On July 1, 1979 the rate of pay for laborers was increased, through collective bargaining, to \$7.055 per hour.

1           4.    On July 20, 1979 the City re-employed Mr. Young as  
2 a laborer.

3           5.    From October 31, 1978 until January 5, 1979 the  
4 City utilized the services of Harold Spilde as a laborer, he  
5 was junior to Mr. Young.

6           6.    During the period from October 31, 1978 to July 20,  
7 1979 the City used Comprehensive Employment and Training Act  
8 personnel to perform labor work, however, there were no  
9 permanent hires during that time.

10          7.    Prior to Mr. Young's illegal discharge he was  
11 working 40 hours per week, since his reinstatement he has  
12 also been working 40 hours per week.

13          8.    Subsequent to his discharge Mr. Young earned  
14 \$194.70 one week of November, 1978 and \$200.00 during one  
15 week of February, 1979.

16          9.    During his period of unemployment from October 31,  
17 1978 until July 20, 1979 Young made the following efforts to  
18 gain employment:

- 19           a.    signed up on a weekly schedule at the union  
20                hall;
- 21           b.    signed up each month at the Job Service  
22                office; and
- 23           c.    contacted, on a regular basis, persons whom he  
24                knew to be prospective employers including  
25                Martin and Co. in Shelby, a beer distributor  
26                and a welding company.

27          10.   The one week of work Young gained in February of  
28 1979 was the result of his own efforts to gain employment,  
29 the week of work in November was the result of the Union's  
30 effort for him.

31          11.   During the period in question, October 31, 1978 to  
32 July 20, 1979, labor type work was difficult to find in the

Great Falls area.

1  
2 12. Bruce Young had gained seniority rights under the  
3 terms of the parties' collective bargaining agreement in  
4 existence at the time of the discharge on October 31, 1978.

5 13. At the time of his discharge Young had not signed  
6 up for City employee insurance as was required of all em-  
7 ployees who wished to be covered.

8 14. The hours which Mr. Young would have worked or  
9 would have been paid for had he been a laborer with the City  
10 from October 31, 1978, through July 19, 1979, are as follows:

11	November 1978,	22 compensable days x 8 hrs. = 176 hrs.
	December 1978,	21 compensable days x 8 hrs. = 168 hrs.
12	January 1979,	23 compensable days x 8 hrs. = 184 hrs.
	February 1979,	20 compensable days x 8 hrs. = 160 hrs.
13	March 1979,	22 compensable days x 8 hrs. = 176 hrs.
	April 1979,	21 compensable days x 8 hrs. = 168 hrs.
14	May 1979,	23 compensable days x 8 hrs. = 184 hrs.
	June 1979,	21 compensable days x 8 hrs. = 168 hrs.
15	July 1979,	14 compensable days x 8 hrs. = 112 hrs.

16 15. All holiday pay to which Young would have been  
17 entitled during the period in question has been included in  
18 the above calculations, i.e., the "compensable days" listing  
19 in finding No. 14 includes holidays for Montana public  
20 employees.

21 16. From May 2, 1978 Mr. Young would have begun earning  
22 vacation at the rate of 1.25 days per month, and would have  
23 been eligible to use his accumulated leave at the end of six  
24 months continuous employment, however, he was terminated  
25 just short of six months. Therefore, had he not been termi-  
26 nated, he would have earned vacation on 14 full months plus  
27 80% of a full month (for part of July 1979) at 1.25 per  
28 month for a total of 18.30 days for the period May 1978 to  
29 July 20, 1979. Any vacation for which he was paid or which  
30 he used must be deducted from that total.  
31  
32

1 17. He would have earned sick leave at the rate of one  
2 day per month for the same period as in finding No. 16,  
3 therefore, as of the date of his reinstatement he would have  
4 had 14.8 days accumulated. Any sick leave for which he was  
5 actually paid in full or which he used must be deducted from  
6 that total.

7 18. As a City employee, Mr. Young was covered by the  
8 Public Employee Retirement System (PERS) and Social Security.  
9 The continuity of his employment was broken resulting in a  
10 break in the contributions made by the City and him to  
11 Social Security and the PERS fund.

12 19. Interest at an appropriate rate should be added to  
13 any amount of money due and owing Mr. Young.

14 20. No claim was made that overtime would have been  
15 worked during the period in question.

16 21. Mr. Young claimed no expenses for travel or moving  
17 for the purpose of seeking and securing employment during  
18 the term of his unemployment.

19  
20 DISCUSSION

21 The primary issue raised under the remedial aspect of  
22 this proceeding is what amount of money and/or benefits, if  
23 any, are due and owing Bruce Young in order to make him  
24 whole pursuant to this Board's final order of October 12,  
25 1979.

26 Section 39-31-406(4) MCA gives the Board of Personnel  
27 Appeals authority, where it finds an unfair labor practice,  
28 to order "...such affirmative action, including reinstatement  
29 of employees with or without back pay, as will effectuate  
30 the policies of this chapter." Section 10(c) of the National  
31 Labor Relations Act is similar to 39-31-406(4) MCA and for  
32 that reason the National Labor Relations Board precedent

1 should be looked to for guidance. State Department of High-  
2 ways v. Public Employees Craft Council, 165 Mont. 349, 529  
3 P.2d 785 (1974), 87 LRRM 2101; AFSCME 2390 v. City of Billings,  
4 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753 (1976). The NLRB  
5 attempts, in cases where employees have been illegally  
6 discriminated against, to fashion a remedy which will result  
7 in a restoration of the situation, as nearly as possible, to  
8 that which would have obtained but for the prohibited conduct.  
9 Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 8 LRRM 439 (1941).  
10 Section 39-31-406(4) authorizes this Board to award back pay  
11 where it finds that the employer's unfair labor practice  
12 resulted in the employee's loss of wages. However, the  
13 employee is not relieved from an obligation to take reasonable  
14 steps to secure work during the period of discrimination and  
15 thereby mitigate the employer's back pay liability. NLRB v.  
16 Madison Courier, Inc., 82 LRRM 1667; Phelps, supra. Once  
17 the employee has established the amount of back pay due, the  
18 burden is on the employer to produce evidence to mitigate  
19 its liability. NLRB v. United Brotherhood of Carpenters &  
20 Joiners, 531 F.2d 1014, 100 LRRM 2769 (1979). The obligation  
21 of the wrongfully discharged employee is to make a reasonable  
22 effort to obtain interim employment, he is not held to the  
23 "highest standards of diligence." Airport Service Lines,  
24 231 NLRB 137, 96 LRRM 1358 (1977). In McCann Steel Co. v.  
25 NLRB, 570 F.2d 652, 97 LRRM 2921 (CA6 1978) the circuit  
26 court agreed with the NLRB's policy of "reasonable exertion."

27 The question which must first be answered is whether  
28 the efforts made by Bruce Young to obtain interim employment  
29 over an eight and one-half month period discharged the duty  
30 incumbent upon him to exercise a reasonable effort to seek  
31 comparable work. Given the uncontroverted testimony of the  
32 union official familiar with the market for laborer type

1 work in and around Great Falls during that time and Young's  
2 own testimony and job seeking efforts, I must conclude that  
3 he did indeed make such effort. He signed up with the union  
4 each week and on one occasion got one week's work from those  
5 efforts. He signed up at the local Job Service office each  
6 month, but was not successful in obtaining work. He solicited  
7 the owner of Martin & Co. from Shelby, whom he knew, and  
8 obtained one week of work in Shelby. He contacted a local  
9 beer distributor on a regular basis although he could not  
10 remember exactly when and how often. He sought employment  
11 at Superior Welding, but again, could not say precisely when  
12 or how frequently. Mr. Young, whose testimony I credit,  
13 also testified that he probably asked a lot of people about  
14 work, but that he could not recall names, places or times.  
15 His lack of recall with respect to such specificity is  
16 understandable, he was discharged approximately three years  
17 prior to the remedial hearing. Yet, his testimony was clear  
18 and without internal contradiction. Neely's Car Clinic, 107  
19 LRRM 1157 (1981). Although the labor market improved during  
20 the spring of 1979, the union official contended it was  
21 extremely difficult to get laborer work. The fact that  
22 Young twice obtained work of a one week duration speaks well  
23 for his efforts.

24 The next question raised here is whether the City had  
25 any obligation to employ Mr. Young beyond the date Mr.  
26 Spilde (refer to original findings in this matter) was ter-  
27 minated. The City contends that it would have terminated  
28 Mr. Young in any case on January 5, 1979, that January 5th  
29 should be the limit of its liability for back pay in this  
30 matter. I am not persuaded by the City's argument on this  
31 question. A review of the findings approved by this Board  
32 on October 12, 1979 and the decision of the Montana Supreme

1 Court reveals quite clearly that in addition to the laborer  
2 work being performed by Spilde, CETA employees with less  
3 seniority than Young continued to do laborer's work.

4 It is a well settled principal that the burden of proof  
5 is on the employer to show that it would not have had work  
6 available for an illegally discharged employee due to eco-  
7 nomic or other factors. NLRB v. Midwest Hanger Co., (CA8  
8 1977) 550 F.2d 1101, 94 LRRM 2878; NLRB v. Mastro Plastics  
9 Corp., 354 F.2d 170, 60 LRRM 2578 (CA2 1965). That the City  
10 had labor work available, regardless of where the funds for  
11 which to pay for it came from, in itself dispells any notion  
12 that it would not have had work for Mr. Young beyond January 5,  
13 1976. In M.S.P. Industries, Inc. v. NLRB, 568 FF.2d 166  
14 (CA10 1977), 97 LRRM 2403, the circuit court stated, in  
15 response to the employer's argument that it was suffering  
16 economic problems which should bar any remedial order,  
17 "there is proof that not only was work available for laid  
18 off and discharged employees, but also that in some instances,  
19 new employees were hired during the period of 'substantial  
20 economic difficulties' to do work formerly done by discharged  
21 employees". (Citing NLRB v. Armcor Industries, 535 F.2d  
22 239, 92 LRRM 2374.) However, an equally persuasive reason  
23 to reject the City's argument is that had he not been discri-  
24 minatorily discharged, i.e., had he been allowed to remain  
25 as a City employee, he would have been able to challenge any  
26 lay off subsequent to January 5th on the basis of a contract  
27 violation (because CETA employees with less seniority were  
28 retained) or as a violation of CETA regulations. To the  
29 City's urging that Mr. Young was a temporary employee who  
30 would have been laid off in any case, suffice it to reiterate  
31 what has just been said - that laborer work continued to be  
32 done. NLRB v. Blue Hills Cemetery, Inc., 567 F.2d 529 (CA11  
1977), 97 LRRM 2291.

1 From the foregoing I conclude that Bruce Young made a  
2 reasonable effort to obtain interim employment and that he  
3 is entitled to back pay and other benefits for the entire  
4 period in question from October 31, 1978 until July 20,  
5 1979. The task which remains is to fashion a remedy which  
6 will restore the situation, as nearly as possible, to that  
7 which would have obtained but for the illegal discrimi-  
8 nation. Phelps, supra. The Board's order to reinstate Mr.  
9 Young has been complied with. There still remain, however,  
10 the questions of: (1) how much back pay is due; (2) how  
11 much offset in interim earnings is to be applied; (3) how  
12 much interest is due; (4) how much vacation and sick leave  
13 credit should be allowed; (5) what are the City's obligations  
14 to PERS and Social Security; (6) are insurance premiums to  
15 be paid; and, (7) are there other benefits to which Mr.  
16 Young is entitled? Since the inception of the NLRA the NLRB  
17 has not allowed unemployment compensation benefits received  
18 by the discriminatee as an offset against back pay. NLRB v.  
19 Gullett Gin Co., 340 US 361, 71 S.Ct. 337, 27 LRRM 2230  
20 (1951); Higgins v. Harden, (CA 9 1981) 644 F.2d 1348, 107  
21 LRRM 2438; Winn Dixie Stores Inc., (CA 5 1969) 413 F.2d  
22 1008, 71 LRRM 3003; Cal-Pacific Furniture Mfg. Co., 221 NLRB  
23 1244, 91 LRRM 1059 (1975).

24 The U.S. Supreme Court in NLRB v. Seven-up Bottling Co.,  
25 244 US 344, 73 S. Ct. 287, 31 LRRM 2237 (1953), approved the  
26 method of computing back pay on a quarterly basis which was  
27 used by the NLRB in F.W. Woolworth Co., 26 LRRM 1185. The  
28 Woolworth formula safeguards the employee's status under the  
29 Social Security Act and it may result in an employee receiving  
30 back pay in some situations in which he would get none under  
31 the lump sum approach. The City argues that the application  
32 of the Woolworth formula is inapposite here because Mr.

1 Young would have been terminated January 5, 1979 and because  
2 he was lax in seeking employment, making the circumstances  
3 described in Woolworth inappropriate here. I have found  
4 that Mr. Young did, in fact, diligently seek employment.  
5 Further, Mr. Young's status under Social Security must be  
6 protected.

7 In 1977 the NLRB decided to adopt a new method of  
8 computing interest on back pay and other monetary remedies  
9 because its six percent rate adopted in Isis Plumbing &  
10 Heating Co., 138 NLRB 716, 51 LRRM 1122 (1962), was not in  
11 line with economic conditions of the times. The method it  
12 chose was the Internal Revenue Service's adjusted prime  
13 interest rate, which is the rate charged or paid by the IRS  
14 for federal tax purposes. It is a rate fixed by the Secretary  
15 of Treasury not more than every two years to reflect money  
16 market changes. It is defined as 90 percent of the average  
17 predominant prime rate quoted by commercial banks to large  
18 businesses, rounded to the nearest full percent. Florida  
19 Steel Corp., 231 NLRB 651, 96 LRRM 1070 (1977), North Cambria  
20 Fuel Co.v. NLRB, (CA3 1981), 107 LRRM 2140. This Board has  
21 been guided by NLRB precedent in the past because of the  
22 similarity of the two statutes and should be so guided now,  
23 particularly since the rationale is sound. With the IRS  
24 adjusted prime interest rate as a basis the following computa-  
25 tions were used to arrive at the net back pay plus interest  
26 due Mr. Young. In accordance with the Woolworth formula,  
27 what Mr. Young would have earned (gross pay), minus his  
28 interim earnings multiplied by the IRS adjusted prime rate,  
29 yields the interest due. Thus, by setting a prospective pay  
30 off date of January 1, 1983, the amount of interest due is  
31 as follows:  
32

1	QTR. ENDING	COMPENSABLE HOURS	RATE PER HOUR	GROSS PAY	INTERIM EARNINGS	NET PAY
2	12-31-78	344	\$6.675	\$2,296.20	\$194.70	\$2,101.50
3	03-31-79	520	6.675	3,471.00	200.00	3,271.00
4	06-30-79	520	6.675	3,471.00	-	3,471.00
	09-30-79	112	7.055	790.16	-	790.16
				\$10,028.36	\$394.70	\$9,633.66
5	INTEREST RATE*		INTEREST DUE 1-1-83		NET BACK PAY**	
6	50.0%		\$1,050.75		\$2,101.50	
7	48.5%		1,586.44		3,271.00	
8	47.0%		1,631.37		3,471.00	
9	45.5%		359.53		790.16	
			\$4,628.09		\$9,633.66	

10 \*The NLRB Regional Office in Seattle reported the fol-  
11 lowing adjusted prime interest rates which it used in  
12 calculating back pay award interest in the private  
13 sector: 1979 - 6%; 1980 - 12%; 1981 - 12%; 1982 - 20%.  
14 To determine simple interest due, the NLRB totals the  
15 rates for the years in which the interest was due and  
16 owing then applies that rate (6% + 12% + 12% + 20% in  
17 this case) to the amount the employee would have earned,  
18 minus interim earnings, as of the end of the first  
19 quarter he was terminated. To arrive at interest due  
20 in subsequent quarters the first rate (50% here) is  
21 reduced by one fourth of the amount of the adjusted  
22 prime rate in effect at the time (6% x ¼ = 1.5% here).

23 \*\*From these amounts the City must deduct such sums as  
24 would normally have been deducted from Mr. Young's  
25 wages for deposit with state and federal agencies on  
26 account of Social Security, PERS, and any other such  
27 deductions, and pay to such agencies to the credit of  
28 Young and the City a sum equal to the amount which,  
29 absent the discrimination, would have been deposited.

30 The above calculations reflect the amount due Mr. Young  
31 through December 31, 1982. Amounts due and owing beyond  
32 that time will have to be computed at the end of each succeeding  
quarter using the same formula, should it be necessary.

Since Mr. Young had gained seniority rights under the  
terms of the parties' collective bargaining agreement prior  
to his discharge, he must be restored to the status quo ante  
with respect to those rights. His seniority should be dated  
back to May 2, 1978. Phelps, supra, Associated Truck Lines v.  
NLRB, (CA6 1981), 106 LRRM 2242.

The evidence showed that Mr. Young had not signed up

1 for the Blue Cross insurance carried by the City for its  
2 employees. Since he chose not to be covered, no remedial  
3 order concerning insurance premiums is appropriate.

4 All holiday pay for public employees has been calcu-  
5 lated into the number of compensable hours for which Mr.  
6 Young would have been entitled to be paid, therefore, no  
7 further adjustment is necessary because there is no evidence  
8 on the record showing he would have worked any of the holidays  
9 and received overtime instead of the customary day off.  
10 There is no evidence on the record to show that he would  
11 have worked any overtime at all, whether in lieu of holiday  
12 pay or beyond the regular eight hours per day or forty hours  
13 per week. To the contrary, the evidence shows he worked  
14 forty hours per week, therefore, no adjustment in back pay  
15 for potential overtime is necessary.

16 Had he not been discharged, Mr. Young would have con-  
17 tinued to contribute to Social Security and to the Public  
18 Employees Retirement System at the applicable percent of his  
19 gross pay. The City would have contributed its share also.  
20 To make him whole the City should deduct from the wages due  
21 him that amount which he would have paid to the two agencies  
22 and forward the appropriate amount to each along with that  
23 amount which the City would have paid had he not been dis-  
24 missed. NLRB v. Rice Lake Creamery Co., 365 F.2d 888 (CA DC  
25 1966), 62 LRRM 2332, Woolworth, supra.

26 Mr. Young would have earned vacation credits from  
27 May 2, 1978 had he remained as a City employee. Further, he  
28 would have accumulated sick leave credits at the applicable  
29 rate. He should be credited, on his personnel and payroll  
30 records, with all vacation and sick leave which he would  
31 have accumulated from May 2, 1978 less any vacation or sick  
32 leave he used or for which he was paid. In the case of sick

1 leave, if he was paid for one-fourth his unused credits  
2 after his discharge, he should be credited now with the  
3 remaining three-fourths for which he did not receive payment.  
4 Richard W. Kasse Co., 64 LRRM 1181 (1967), Teamsters Union  
5 v. Lancaster Transportation Co., 38 LRRM 1254 (1956).

6  
7 CONCLUSION OF LAW

8 Bruce Young is entitled to back pay and restoration of  
9 other benefits which he would have earned but for the City's  
10 violation of his rights under title 39, chapter 31, MCA.

11 RECOMMENDED ORDER

12 IT IS ORDERED that the City of Great Falls take the  
13 following affirmative action to make Bruce Young whole:

14 1. Tender to him back pay in the amount of \$4,628.09  
15 as interest and \$9,633.66 (minus the amounts which would  
16 have been deducted for deposit with state and federal agencies  
17 for Social Security, PERS and any other regular deductions)  
18 as earnings.

19 2. Deduct from the \$9,633.66 and deposit with the  
20 appropriate agency all Social Security, PERS and any other  
21 amounts which would have been deducted for such purposes had  
22 he not been terminated.

23 3. Restore his seniority and longevity rights under  
24 the collective bargaining agreement.

25 4. In accordance with findings Nos. 16 and 17 herein,  
26 credit him with all vacation and sick leave which he would  
27 have accumulated since May 2, 1978, minus any such leave for  
28 which he was paid or which he used.

29 5. Treat him, for purposes of all other benefits, as  
30 if his employment had not been broken since May 2, 1978.  
31

NOTICE

1                    Exceptions to this ORDER may be filed within twenty  
2 (20) days of service thereof. If no exceptions are filed  
3 within that time, this ORDER shall become the FINAL ORDER of  
4 the Board of Personnel Appeals. Exceptions should be addressed  
5 to the Board at Capitol Station, Helena, Montana 59620.

6                    Dated this 27th day of December, 1982.

8                    BOARD OF PERSONNEL APPEALS

9  
10                    By Jack H. Calhoun  
                         Jack H. Calhoun  
                         Hearings Examiner

11                    CERTIFICATE OF MAILING

12                    I, Jennifer Jacobson, hereby certify and  
13 state that on the 17th day of December, 1982, a true and  
14 correct copy of the above captioned REMEDIAL ORDER was  
mailed to the following:

15                    David V. Gliko  
16                    City Attorney  
17                    City of Great Falls  
18                    P.O. Box 5021  
19                    Great Falls, MT 59403

20                    D. Patrick McKittrick  
21                    Attorney at Law  
22                    410 Central Avenue  
23                    P.O. Box 1184  
24                    Great Falls, MT 59403

Jennifer Jacobson

25                    BPA3:cwE

No. 81-563

IN THE SUPREME COURT OF THE STATE OF MONTANA

1982

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IN THE MATTER OF UNFAIR LABOR  
PRACTICE;  
BRUCE YOUNG, et al.,

Plaintiffs and Respondents,

vs.

CITY OF GREAT FALLS,

Defendant and Appellant.

---

Appeal from: District Court of the Eighth Judicial District,  
In and for the County of Cascade  
Honorable Joel G. Roth, Judge presiding.

Counsel of Record:

For Appellant:

David V. Gliko argued, City Attorney, Great Falls,  
Montana

For Respondents:

Hon. Mike Greely, Attorney General, Helena, Montana  
D. Patrick McKittrick argued, Great Falls, Montana  
Robert Jensen, Bd. Personnel Appeals, Helena, Montana

---

Submitted: May 11, 1982

Decided: June 10, 1982

Filed: JUN 10 1982

  
Clerk

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

The City of Great Falls (City) appeals from a judgment of the Cascade County District Court, Eighth Judicial District, affirming that part of a decision of the Board of Personnel Appeals (Board) that the City was guilty of violations of sections 39-31-401(1) and (3), MCA. The respondent cross-appeals from that part of the District Court's decision which reversed the hearings examiner's finding that the City had violated section 39-31-401(4), MCA.

The parties raise these issues:

1. Whether there was an unfair labor practice giving jurisdiction to the Board, or merely a possible breach of contract which should have been resolved under the contract's grievance procedure?

2. Whether the hearings examiner and the Board failed to apply the "but for" test?

CROSS-APPEAL

3. Whether the District Court erred by reversing the Board's finding of violation of section 39-31-401(4), MCA, stating that "any alleged violation of subsection (4) must have occurred before the filing of the unfair labor practice charge."

On January 10, 1979, the Construction and General Laborers' Local No. 1334, AFL-CIO (Union), on behalf of Bruce Young, filed an unfair labor practice charge with the Board of Personnel Appeals.

On October 12, 1979, the hearings examiner issued findings of fact, conclusions of law and recommended order, finding the City in violation of sections 39-31-401(1), (3), and (4). These findings were confirmed and adopted,

after review of the City's objections, by the Board's final order, issued February 21, 1980.

On March 21, 1980, the City petitioned the District Court for judicial review of the Board's final order. Pursuant to the complainant's motion, the District Court dismissed the petition for failure to name the Board as a party.

On August 20, 1981, this Court reversed the District Court's order ( \_\_\_ Mont. \_\_\_, 632 P.2d 1111, 38 St.Rep. 1317) holding that the Board need not be named as a party.

Thereafter, the cause was heard in the District Court, which issued the October 21, 1981 order from which this appeal and cross-appeal are taken.

Bruce Young was employed as a laborer in the Street Department of the City of Great Falls from March 20, 1977 to December 30, 1977, when he was laid off for lack of work. He was recalled on May 2, 1978, and worked until October 31, 1978, when he was laid off again.

During Young's tenure as a city employee, he filed, with the assistance of his union representative, four grievances under the collective bargaining agreement between the City and the Craft Council, of which Laborer's Union No. 1334 is a member.

The first, in May 1978, involved Young's transfer to the Water Department, while another employee with less seniority, Harold Spilde, remained with the Street Department. The grievance was resolved by Young's transfer back to the Street Department.

The second grievance arose in June 1978 when Young was sent home without pay for lack of work while Spilde again stayed. Young was subsequently compensated for four hours work.

The third occurred shortly thereafter when Spilde was placed in a permanent position over Young and Gerald Hagen. This one was resolved when Hagen, the most senior employee involved, was given the job.

The last grievance ultimately resulted in the filing of this unfair labor practice charge. Young challenged his October 31, 1978 lay-off because Spilde, with less Street Department seniority, was retained and doing laborer's work. Since Spilde was not a member of the Laborer's Union, the Union requested that he be terminated. At subsequent meetings between Union and City officials, pursuant to Step 1 of the Grievance Procedure in the Collective Bargaining Agreement, it was agreed that Spilde would not do work within the jurisdiction of the Laborer's Union.

Spilde was then transferred to the Traffic Division of the Street Department, where according to Bob Duty, Superintendent of the Department, he did laborer's work only during emergencies.

However, several Street Department employees testified that Spilde did perform "almost 100%" laborer's work until January 5, 1979. Also, his employment record classifies him as a laborer from May 1, 1978 to January 5, 1979, during which time he was paid laborer's wages.

In addition to Spilde, CETA employees with less seniority than Young continued to do laborer's work after Young's discharge. Furthermore, 7 or 8 new employees were hired by the Street Department in April 1979, but not Young. It was in this time period that Duty, apparently during a safety meeting, said in effect, "I don't care what happens. I won't hire Bruce Young back in the Street Department." In the same vein, during the resolution of Young's first grievance,

Duty told him that he had no hard feelings, "he just didn't like having some SOB telling him who he could or could not hire."

#### JURISDICTION

The City contends that complainants' charge does not state an unfair labor practice giving the Board jurisdiction, and that the grievance should have been resolved through the grievance procedure set out in the collective bargaining agreement.

Section 39-31-403, MCA provides that violation of section 39-31-401, MCA, the charge stated here, is an unfair labor practice remediable by the Board. At issue here is whether the Board should have deferred to the contract grievance procedure.

The District Court, in its consideration of this issue, simply stated that "[T]his Court agrees with the reasoning of the Hearings Examiner." That reasoning, with which we also agree, is reflected in the following discussion.

Because of the similarity between Montana's Collective Bargaining Act for Public Employees (Title 39, Chapter 31, MCA) and the National Labor Relations Act, it is helpful to consider federal precedent on this issue.

A "prearbitral deferral policy" was first enunciated by the NLRB in *Collyer Insulated Wire* (1971), 192 NLRB 837, 77 LRRM 1931. There, quoting from *Jos. Schlitz Brewing Co.* (1968), 175 NLRB 23, 70 LRRM 1472, 1475, the NLRB found "that the policy of promoting industrial peace and stability through collective bargaining obliges us to defer the parties to the grievance-arbitration procedures they themselves have voluntarily established." Collyer at 77 LRRM 1936.

It went on to note several circumstances in that case which "no less than those in Schlitz, weigh heavily in favor of deferral." The dispute arose within the confines of a long and productive collective bargaining relationship. No claim of enmity was made. Respondent had credibly asserted its willingness to arbitrate under a clause providing for arbitration in a broad range of disputes. The contract and its meaning lay at the center of the dispute. The contract obligated each party to submit to arbitration and bound them to the result. Collyer at 77 LRRM 1936-37.

We can distinguish Collyer on these factors alone. The Board's findings, with respect to questions of fact which are supported by substantial evidence and are therefore conclusive (section 39-31-409(4), MCA) show that the City's conduct "does not lead one to believe that a stable collective bargaining relationship exists between the parties," that "[T]here was no indication of a willingness on the part of the City to arbitrate," and that the "grievance procedure provided in the contract does not culminate in a final and binding decision. It may end in a 'binding' decision, if a majority of a six-member committee formed by the city manager and comprised of three city and three union representatives can reach agreement."

It should be noted here that the City's reliance on section 39-31-310, MCA is misplaced. It claims that the section is a legislative mandate that public employers are not bound to go to final and binding arbitration, thereby nullifying any contrary NLRB ruling. In fact, the section is permissive, not mandatory. It merely allows the parties to agree voluntarily to submit any or all issues to final and binding arbitration. No such agreement was made here,

nor does the contract require it, which as we have stated, is one basis for not deferring in this case.

Furthermore, the NLRB in General American Transp. Corp. (1977), 228 NLRB 808, 94 LRRM 1483, held ~~that~~ the Collyer doctrine is not applicable in cases involving alleged interference with protected rights or employment discrimination intended to encourage or discourage the free exercise of those rights. See sections 8(a)(1) and (3), NLRA and sections 39-31-401(1) and (3), MCA. The charge here involves such alleged violations. Deferral is inappropriate in this case.

#### UNFAIR LABOR PRACTICES

Regarding the charges themselves, the District Court concluded "that there is substantial evidence on the record considered as a whole to support the findings and conclusions of the Board with regard to the violations of Section 39-31-401(1) and (3)." Again we agree. Without wading through the wealth of available precedent propounded by the hearings examiner, we will simply restate his determinative findings.

As to section 39-31-401(1), MCA, the examiner found "that the fact that Mr. Young had a record of filing grievances affected the judgment of those city officials responsible for laying him off and keeping a person with less seniority on the payroll as a laborer." Motive is not the critical element in this violation.

As to section 39-31-401(3), the examiner found that "[T]he evidence clearly points to the conclusion that the City's discriminatory motive was a factor, and probably the <sup>N</sup>dominate (sic) factor, in its decision to lay off complainant and thereby violate the agreement. Its actions caused unrest among union members and had the effect of discouraging membership."

"BUT FOR" TEST

The City relies here on *Western Exterminator Co. v. N.L.R.B.* (9th Cir. 1977), 565 F.2d 1114, which states the rule that where a discharge is motivated by both a legitimate business consideration and protected union activity, the test is whether the business reason or the protected union activity is the moving cause behind the discharge. 565 F.2d at 1118. This Court adopted essentially the same test in *Board of Trustees of Billings, etc. v. State* (1979), \_\_\_ Mont. \_\_\_, 604 P.2d 770, 777, 36 St.Rep. 2289, 2299.

In this case, although the "but for" test was not utilized by the hearings examiner, he did find, again, "that the City's discriminatory motive was a factor, and probably the dominant<sup>N</sup> (sic) factor, in its decision to lay off complainant." The record amply demonstrates that protected union activity was the moving cause behind the discharge.

CROSS-APPEAL

Section 39-31-401(4) makes it an unfair labor practice for an employer to:

"(4) discharge or otherwise discriminate against an employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter; . . ."

The Board found there was a violation "after he (Young) filed this unfair labor practice charge because he was not called back by the city."

The District Court reversed because "any alleged violation of subsection (4) must have occurred before the filing of the unfair labor practice charge, not afterward."

Respondents do not contend that filing a grievance is equivalent to signing or filing an affidavit, petition, or complaint. Instead, they point to two statutes:

"39-31-407. Amendment of complaint. Any complaint may be amended by the complainant at any time prior to the issuance of an order based thereon, provided that the charged party is not unfairly prejudiced thereby."

"39-31-408. Modification by board of findings and order. Until the record in a proceeding has been filed in district court, the board at any time, upon reasonable notice and in such manner as it considers proper, may modify or set aside, in whole or in part, any finding or order made or issued by it."

We agree that Young was discriminated against after this charge was filed. Since he could have amended his complaint to include that discrimination had it not already been part of his original complaint, and since the City could therefore not possibly have been prejudiced thereby, we reverse the District Court on this point and grant the cross-appeal. The order of the Board is reinstated.

Affirmed in part, reversed in part.

John C. Shuck  
Justice

We Concur:

Frank D. Wadwell  
Chief Justice

John Conroy Harrison  
Frank B. Morrison  
Paul A. Fisher  
Justices

AUG 21 1981  
BOARD OF PERSONNEL APPEALS

No. 80-367

IN THE SUPREME COURT OF THE STATE OF MONTANA

1981

IN THE MATTER OF UNFAIR LABOR PRACTICE:  
BRUCE YOUNG BY CONSTRUCTION AND GENERAL  
LABORERS' LOCAL NO. 1334 AFL-CIO,

Respondent and Complainant,

vs.

CITY OF GREAT FALLS,

Plaintiff and Appellant.

Appeal from: District Court of the Eighth Judicial District,  
In and for the County of Cascade.  
Honorable Joel G. Roth, Judge presiding.

Counsel of Record:

For Appellant:

David V. Gliko, City Attorney, argued, Great Falls,  
Montana

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Montana  
James Gardner, Bd. Personnel Appeals, Helena, Montana  
D. Patrick McKittrick argued, Great Falls, Montana

Submitted: June 18, 1981

Decided: August 20, 1981

Filed: AUG 20 1981

Thomas J. Kearney  
Clerk

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

This appeal follows an order and judgment of the Eighth Judicial District, Cascade County, denying a motion to amend and dismissing appellant's petition for judicial review of a decision and order of the State Board of Personnel Appeals.

On January 10, 1979, respondent, Construction and General Laborers' Union Local No. 1334, AFL-CIO, filed an unfair labor practice charge with the Montana State Board of Personnel Appeals. This charge was filed on behalf of Bruce Young against appellant, City of Great Falls. Appellant answered and denied the charge, whereupon a hearing was held by an examiner for the Board. Following the hearing, the examiner on October 12, 1979, issued findings of fact, conclusions of law and a recommended order, confirming in part the unfair labor practice charge.

Appellant filed exceptions and objections to the decision rendered by the hearings examiner. A review hearing was then held and the Board of Personnel Appeals confirmed the recommended order. A final order was issued by the Board on February 21, 1980.

On March 21, 1980, appellant petitioned the District Court for judicial review of the final order. Service of the petition and a summons was acknowledged by Young, the attorney general of the State of Montana and the Board of Personnel Appeals. Appellant, however, did not include the Board as a named party on the petition.

Respondent, on April 21, 1980, moved to dismiss the petition for the reason that appellant failed to name the Board as a party within the 30-day limitation provided for in section 2-4-702, MCA. On April 30, 1980, appellant moved to amend its petition to add the Board as a party. A

hearing on the matter was held in the District Court on July 24, 1980. On July 29, 1980, the court issued a memorandum decision and order, denying appellant's motion to amend the petition and granting respondent's motion to dismiss. Judgment was so entered, and the City of Great Falls now appeals.

The sole issue on appeal is whether the State Board of Personnel Appeals is required to be designated as a party on a petition for judicial review. We hold that the State Board of Personnel Appeals is not required to be made a party.

Section 2-4-702, MCA, governs judicial review proceedings under the Administrative Procedure Act, including review of decisions by the Board of Personnel Appeals. That statute, in part, provides as follows:

"(2) (a) Proceedings for review shall be instituted by filing a petition in district court within 30 days after service of the final decision of the agency or, if a hearing is requested, within 30 days after the decision thereon. Except as otherwise provided by statute, the petition shall be filed in the district court for the county where the petitioner resides or has his principal place of business or where the agency maintains its principal office. Copies of the petition shall be promptly served upon the agency and all parties of record."

The only basis for dismissing this petition for judicial review is the claim by respondent that the Board is an indispensable party within the purview of Rule 19, M.R.Civ.P. In pertinent part, Rule 19 provides:

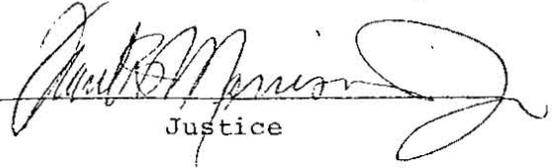
"A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest: . . ."

There is some support for the proposition that an administrative agency must be joined under Rule 19, M.R.Civ.P. See *Smith v. County of El Paso* (1979), 42 Colo.App. 316, 593 P.2d 979; *Civil Serv. Com'n of C. & C. of Denver v. District Court* (1974), 186 Colo. 308, 527 P.2d 531.

We believe that Rule 19, M.R.Civ.P., does not, by its terms, contemplate inclusion of an administrative board as an indispensable party for purposes of judicial review. Where the legislature has intended for administrative bodies to be made parties, they have specifically so provided. For example, section 39-51-2410, MCA, providing for judicial review of a decision by the Board of Labor Appeals, provides that the Employment Security Division shall be deemed to be a party in any action for judicial review. Yet when the legislature enacted 2-4-702, MCA, no provision was made for naming the "board" as a party for purposes of review.

Our court encourages a liberal interpretation of procedural rules governing judicial review of an administrative board. *F.W. Woolworth Co., Inc. v. Employment Sec. Div.* (1981), \_\_\_ Mont. \_\_\_, 627 P.2d 851, 38 St.Rep. 694. Justice is best served by avoiding an over-technical approach and allowing the parties to have their day in court.

We hold that the Board of Personnel Appeals need not be a party to proceedings for judicial review. Accordingly, the District Court order and judgment is reversed, and the case remanded for proceedings in accordance with this opinion.

  
Justice

We concur:

---

Chief Justice

*John Conway Harrison*  
*Daniel J. Shea*  
*[Signature]*

---

Justices

Mr. Justice Gene B. Daly dissenting:

We dissent.

It is true the statute does not specify whether the agency is required to be named as a party in the petition for review and does not appear to make the agency's joinder mandatory or jurisdictional in nature. A thirty-day limitation on filing a petition for judicial review, however, has been interpreted to mean that any challenge to the agency action must be perfected within the required thirty days. Perfection in this regard must include the correct joinder of all parties required to be joined under Rule 19, M.R.Civ.P. See *Smith v. County of El Paso* (1979), 42 Colo.App. 316, 593 P.2d 979; *Civil Service Commission v. District Court* (1974), 186 Colo. 308, 527 P.2d 531. (It should be pointed out that Colorado has not adopted the Administrative Procedure Act but provided for a judicial review of agency action in its rules of civil procedure, Rule 106, C.R.C.P., under which the above-cited cases were decided.)

If this interpretation is accepted by the Court, then a proper joinder of those individuals or agencies deemed to be essential or indispensable parties to the petition, under Rule 19, M.R.Civ.P., must be considered a jurisdictional requirement to be satisfied if dismissal is to be avoided.

Rule 19, M.R.Civ.P., provides in pertinent part:

"A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest . . ."

Here, appellant is attempting to challenge a decision and order of the Board of Personnel Appeals, issued in furtherance of its duty as a quasi-judicial body to administer the public policy of this State as set forth in Title 39, Chap. 31, MCA (Collective-Bargaining for Public Employees). In functioning to promote and advance this public policy, the Board has a definite interest in the petition to review and, as a practical matter, must be joined to insure a complete and just adjudication of that interest.

The majority, of course, disagrees with this conclusion and asserts that the Board is, by some liberal interpretation, excluded from their review hearing in court and that "justice is best served by avoiding an over-technical approach and allowing the parties to have their day in court." We do not understand how you give parties their day in court by excluding them. I suppose it depends on whose ox is being gored.

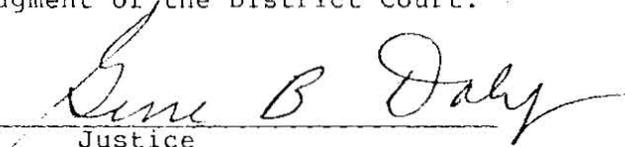
What the majority fails to realize, however, is that in this case a joinder of all essential parties within the thirty-day limitation period is a jurisdictional requirement. As a consequence of its jurisdictional nature, if a party is deemed essential or necessary to the proceeding, that party automatically becomes indispensable. This in no way depends on a liberal construction or other self-serving jingoisms relied upon by the majority.

Those essential jurisdictional requirements necessary to perfect a petition for review must be satisfied to vest authority in the reviewing or appellate tribunal. A failure to satisfy these requirements thus leaves the court with no adjudicatory or reviewing power; no jurisdiction to act; and

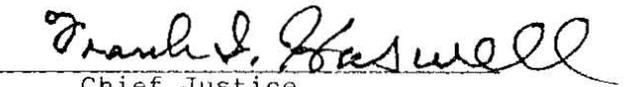
no discretion to remedy or waive the jurisdictional defects.

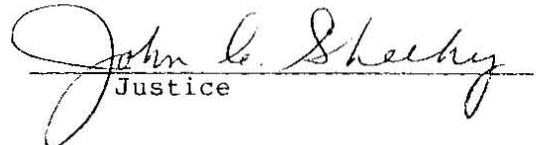
Here, appellant appears to have failed to vest the District Court with jurisdiction to consider the petition for review. If this is the case, then the court was unable to entertain appellant's motion to amend and was left with no alternative but to dismiss the action.

We would affirm the judgment of the District Court.

  
Justice

We concur in the foregoing dissent:

  
Chief Justice

  
Justice

1 IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE  
2 STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

3 -----  
4 IN THE MATTER OF UNFAIR LABOR PRACTICE: )  
5 BRUCE YOUNG BY CONSTRUCTION AND )  
6 GENERAL LABORERS' LOCAL NO. 1334, )  
7 AFL-CIO, )  
8 )  
9 Complainant, ) CAUSE NO. ADV-80-304c  
10 vs )  
11 ) MEMORANDUM DECISION  
12 CITY OF GREAT FALLS, ) AND ORDER  
13 )  
14 Defendant. )

15 -----  
16 The Defendant's Petition for Judicial Review was heard on  
17 October 21, 1981. The Defendant was represented by its attorney,  
18 Mr. David V. Gliko, and the Complainant was represented by his  
19 attorney, Mr. D. Patrick McKittrick.

20 Briefs in Support of said Petition and in opposition thereto  
21 had been filed by both counsel before the hearing.

22 Oral argument was presented by each attorney. The Court then  
23 took the matter under advisement and now enters the following  
24 Memorandum Decision and Order.

25  
26  
27  
28  
29  
30  
31  
32  
MEMORANDUM DECISION

33 This case involves Bruce Young (Young), the Construction  
34 and General Laborers' Local #1334, AFL-CIO (Union), the City of  
35 Great Falls (City), and the Board of Personnel Appeals (Board).

36 After Young was laid off by the City on October 31, 1978,  
37 Young's Union filed an Unfair Labor Practice Charge with the  
38 Board on January 10, 1979. That filing culminated in a hearing  
39 in May 1979, before a Hearings Examiner, his decision dated  
40 October 12, 1979, and a Final Order by the Board dated February  
41 21, 1980. The Board found unfair labor practices committed by

1 the City, ordered reinstatement of Young plus payment of back  
2 wages, benefits and interest.

3 On March 21, 1980, the City filed herein its Petition for  
4 Judicial Review of the Final Order of the Board. Young's attorney  
5 filed a Motion to Dismiss the Petition for the reason that the  
6 City had failed to join an indispensable party, i.e., the Board.  
7 This Court granted the Motion and an appeal to the Montana Supreme  
8 Court followed, resulting in a reversal of the Order dismissing  
9 the Petition, and remanding the case to this Court for a review  
10 of the Petition. (Montana Supreme Court Decision #80-367 decided  
11 August 20, 1981.)

12 Section 39-31-401 thru 409 MCA are the relevant statutory  
13 provisions to this proceeding. Those sections define an unfair  
14 labor practice, grant the Board jurisdiction to remedy viola-  
15 tions, set forth the procedure for hearing charges of unfair  
16 labor practices, and describe court enforcement and review of  
17 the Board's Order.

18 The unfair labor practice charges filed with the Board  
19 by the Union alleged that the City committed a violation of  
20 each of the five subsections of Section 39-31-401 MCA. The  
21 Hearings Examiner found and concluded that the alleged violations  
22 of subsections (2) and (5) were not proven. However, he found  
23 that the City had committed an unfair labor practice under sub-  
24 sections (1), (3) and (4). Hence, reinstatement of Young was  
25 ordered along with payment of his back wages, benefits, and  
26 interest since the date he was laid off on October 31, 1978.

27 The City challenges the jurisdiction of the Board at the  
28 outset, contending that Young's seniority status or lack thereof  
29 is governed by the terms of the Collective Bargaining Agreement  
30 between the Union and the City and if Young has a complaint it  
31 should involve a question of contract interpretation to be lit-  
32 igated by Young and the Union and the City in District Court.

1 The City contends that the circumstances of this case do not fit  
2 within any of the unfair labor practices detailed in Section  
3 39-31-401 MCA and therefore the Board has no jurisdiction and the  
4 Final Order of the Board must be reversed and the entire matter  
5 dismissed.

6 In reviewing the transcript of the Board's Hearing this  
7 Court notes that page 6 of the Collective Bargaining Agreement  
8 (an exhibit admitted into evidence at the Hearing) is missing.

9 The jurisdiction issue, always a crucial issue in any legal  
10 proceeding, was addressed by the Hearings Examiner in his Find-  
11 ings, Conclusions and Recommended Order beginning at page 5  
12 thereof. The Examiner concluded that the Board did have jur-  
13 isdiction and that the Board would not defer to the grievance  
14 procedure established in the Collective Bargaining Agreement  
15 because there was alleged employer discrimination or interfer-  
16 ence with an employee's protected rights and the grievance proce-  
17 dure did not terminate with binding arbitration. This Court  
18 agrees with the reasoning of the Hearings Examiner and additionally  
19 holds that because an employee may have recourse to a district  
20 court as a possible choice of forum to file his claim (possibly  
21 a declaratory judgment action) does not foreclose him from filing  
22 an unfair labor practice charge with the Board if he can assert  
23 a statutory violation under Section 39-31-401 MCA.

24 The City's attorney also challenges each finding of an  
25 unfair labor practice, i.e., subsections (1), (3), and (4) by  
26 the Hearings Examiner. This Court has reviewed the transcript,  
27 considered the Petition and the Briefs in support of and in  
28 opposition thereto, and concludes that there is substantial  
29 evidence on the record considered as a whole to support the  
30 findings and conclusions of the Board with regard to the violations  
31 of Section 39-31-401 (1) and (3).

32 However, this Court disagrees with the findings of a violation

1 of 39-31-401(4). Subsection (4) refers to a public employer  
2 discharging an employee because he has signed or filed an affidavit-  
3 vit, petition, or complaint or given any information or testimony  
4 under the statute. The Hearings Examiner admits that an employee's  
5 filing of a grievance pursuant to the provisions of a grievance  
6 procedure contained in a Collective Bargaining Agreement is not  
7 included within the definition of filing an affidavit, petition,  
8 or complaint under Subsection (4). The Hearings Examiner goes  
9 on to reason that the City has violated subsection (4) because  
10 the City refused to rehire Young after he filed his unfair labor  
11 practice charge with the Board. This Court concludes that any  
12 alleged violation of subsection (4) must have occurred before  
13 the filing of the unfair labor practice charge, not afterward.  
14 Therefore, this Court concludes that the Board's findings of a  
15 violation of 39-31-401(4) by the City must be reversed.

16 This Court agrees with the Final Order's ruling that the  
17 alleged violations under 39-31-401(2) and (5) were not proven.

18  
19 ORDER

20  
21 THEREFORE, IT IS HEREBY ORDERED that the Board's Final  
22 Order dated February 21, 1980 is affirmed except as to that part  
23 finding a violation of Section 39-31-401(4), which is reversed.

24 DATED this 26<sup>th</sup> day of October, 1981.

25  
26 Joel H. Rosta  
27 DISTRICT JUDGE

28 cc: David V. Gliko  
29 D. Patrick McKittrick  
30 Board of Personnel Appeals  
31 Mike Greely  
32

1 IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE  
2 STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

3 -----

4	IN THE MATTER OF UNFAIR LABOR PRACTICE:	)	
5	BRUCE YOUNG BY CONSTRUCTION AND	)	
6	GENERAL LABORERS' LOCAL NO. 1334,	)	
	AFL-CIO,	)	
7	Complainant.	)	No. ADV-80-304
8	vs	)	MEMORANDUM DECISION
9	CITY OF GREAT FALLS,	)	AND ORDER
10	Defendant.	)	

11 -----

12 The Complainant's Motion to Dismiss the City's Petition  
13 for Judicial Review herein was heard on July 24, 1980. The  
14 Complainant was represented by attorney, Mr. D. Patrick  
15 McKittrick and the Defendant was represented by attorney, Mr.  
16 David V. Gliko.

17 Oral argument was presented by both counsel. Briefs in  
18 Support of and in opposition to said Motion to Dismiss had  
19 been filed prior to the hearing.

20 The Court, having considered the Petition, Motion, the  
21 briefs, and the oral arguments, now enters the following  
22 Memorandum Decision and Order.

23  
24 MEMORANDUM DECISION

25  
26 The City of Great Falls filed its Petition for Judicial  
27 Review of a final decision issued on February 21, 1980, by the  
28 Board of Personnel Appeals, a board allocated to the Depart-  
29 ment of Labor and Industry of the State of Montana. Section  
30 2-15-1705 MCA.

31 Section 2-4-702 MCA governs the procedure for initiating  
32 judicial review of a final administrative agency decision.

1 Generally, a petition must be filed within 30 days after  
2 service of the final decision in the district court where the  
3 petitioner resides and copies of the petition shall be promptly  
4 served upon the agency and all parties of record. All those  
5 requirements were satisfied herein.

6 It is crucial to this decision to note that the statute  
7 2-4-702 MCA does not specify what persons or agencies should be  
8 named as parties in the Petition.

9 The Complainant's position is that the Board of Personnel  
10 Appeals is an indispensable party to the judicial review pro-  
11 ceeding and because it was not so named, the attempted judicial  
12 review was not properly perfected within the limited 30 day  
13 time period and hence the district court is without jurisdiction  
14 to review the matter and the Petition must be dismissed.

15 On the other hand, the City of Great Falls contends that  
16 the Board of Personnel Appeals is not an indispensable party,  
17 that said Board was promptly served with process, that it is  
18 clear from the allegations contained in the Petition that it  
19 is the Board's final decision dated February 21, 1980 that is  
20 being appealed, and hence the District Court has jurisdiction  
21 of the Petition and the Board.

22 The private persons who were parties in the administrative  
23 agency proceeding are also parties in the instant review pro-  
24 ceeding and there is no problem as to them. However, should  
25 the Board of Personnel Appeals of the Department of Labor and  
26 Industry be a party to the judicial review proceeding? This  
27 Court concludes that said Board is a necessary party and the  
28 failure to name the Board as a party in the Petition constitutes  
29 a fatal defect in the perfection of the review proceeding,  
30 ousts this Court of jurisdiction herein, and subjects the  
31 Petition to dismissal.

32 The conclusion of this Court is partly based upon statements

1 contained in 2 Am Jur 2nd, Administrative Law, 641, which  
2 provides in part:

3 "Where relief or review of action of an admin-  
4 istrative agency is sought in Court, the absence  
5 of a necessary party may preclude the granting  
6 of relief. Who are necessary or proper parties  
7 in a proceeding to review agency action is largely  
8 determined by statutes governing the particular  
9 agency, the nature of its powers, and the effect  
10 of the exercise of such powers . . . ."

11  
12 "The administrative agency whose action is sought  
13 to be reviewed may be, and normally is, a nec-  
14 essary, proper, and sufficient party. In par-  
15 ticular it has been held that the action of an  
16 administrator may not be challenged except in a  
17 proceeding to which he is a party . . . ."

18  
19 To further buttress this Court's decision herein,  
20 attention is directed to "Handbook of Administrative Procedure"  
21 by Roger Tippy, at page 105 thereof wherein a sample petition  
22 for judicial review is set forth. Said sample petition de-  
23 nominates the party seeking the review as the 'Petitioner',  
24 and clearly indicates the administrative agency and the success-  
25 ful party in the administrative proceeding as the 'Respondents'.

26 The failure to join the Board of Personnel Appeals as a  
27 party in the Petition for Judicial Review subjects the Petition  
28 to dismissal and the fact that said non-party Board was served  
29 with process herein does not make the Board a party when the  
30 Board was not named as a party Respondent.

31 The City's Motion to Amend the Petition to add the Board  
32 of Personnel Appeals as a party, which was filed on April 30,

1 1980, comes too late because the Petition which must name  
2 the necessary parties, must be filed within 30 days after  
3 service of the agencies' final decision, and April 30, 1980  
4 is beyond said 30 day period which expired near the end of  
5 March.

6  
7 ORDER

8  
9 THEREFORE, IT IS HEREBY ORDERED that the Respondent's  
10 (labeled Complainant herein) Motion to Dismiss the Petition  
11 for Judicial Reveiw is granted.

12 DATED this 29<sup>th</sup> day of July, 1980.

13  
14 Joel H. Roth  
15 DISTRICT JUDGE

16 cc: D. Patrick McKittrick  
17 David V. Gliko  
18 Mike Greeely  
19 Board of Personnel Appeals  
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IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 3-79:

BRUCE YOUNG by CONSTRUCTION AND )  
GENERAL LABORERS' LOCAL NO. 1334, )  
AFL-CIO, )  
Complainant, )  
- vs - )  
CITY OF GREAT FALLS, )  
Defendant. )

FINAL ORDER

\*\*\*\*\*

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun, on October 12, 1979.

Exceptions and Objections to Findings of Fact, Conclusions of Law and Recommended Order were filed by David V. Gliko, Great Falls City Attorney, on behalf of the Defendant, on October 31, 1979.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the exceptions of Defendant to the Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopt the Findings of Fact, Conclusions of Law and Recommended Order as the Final Order of this Board.

DATED this 21<sup>st</sup> day of February, 1980.

BOARD OF PERSONNEL APPEALS

By Brent Cromley  
Brent Cromley  
Chairman

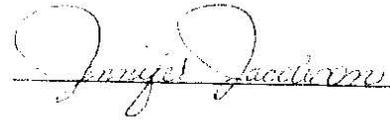
CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that I mailed a true and correct copy of the above FINAL ORDER to the following persons on the 15<sup>th</sup> day of February, 1980:

David Gliko  
City Attorney  
City of Great Falls  
P.O. Box 5021  
Great Falls, MT 59403

D. Patrick McKittrick  
Attorney at Law  
315 Davidson Building  
3 Third Street North  
P.O. Box 1184  
Great Falls, MT 59403

Gerald E. Pottratz  
Construction and General Laborers  
Local No. 1334, AFL-CIO  
1112 Seventh Street South  
Great Falls, MT 59403

  
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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR )  
PRACTICE NO. 3-79: )

BRUCE YOUNG by CONSTRUCTION AND )  
GENERAL LABORERS' LOCAL NO. 1334, )  
ALF-CIO, )

Complainant, )

vs. )

CITY OF GREAT FALLS, )

Defendant. )

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
AND RECOMMENDED ORDER

\* \* \* \* \*

On January 10, 1979, Complainant filed unfair labor practice charges against Defendant alleging that the City had violated:

(1) 39-31-401(1) MCA by laying off Bruce Young and keeping a person with less seniority on and because of Mr. Young's union activities; (2) 39-31-401(5) MCA by failing to abide by a settlement of a grievance filed by Mr. Young; (3) 39-31-401(2) MCA by interfering with the administration of the union; (4) 39-31-401(4) MCA by discouraging union membership; and (5) 39-31-401(4) MCA by discharging Mr. Young. These charges were identified at a pre-hearing conference held on March 21, 1979. A formal hearing, under authority of 39-31-405 MCA, was conducted on May 15, 1979. Mr. D. Patrick McKittrick represented complainant; Mr. David V. Gliko represented defendant.

I. ISSUES

1. Whether the Board of Personnel Appeals has jurisdiction over this matter.

2. If the Board has jurisdiction, should it defer to the grievance procedure which exists in the contract between the Union and City?

3. If the Board has jurisdiction and does not defer to the contract grievance procedure, did the City commit, by its actions which affected Mr. Young's employment, a violation of 39-31-401 MCA?



1 between Union and City officials, it was agreed that Spilde  
2 would not do laborer's work. The Union believed later that he  
3 was still performing laborer's work and set up a grievance  
4 meeting with City representatives who stated that Spilde would  
5 not do laborer's work.

6 4. Mr. Bob Duty is the superintendent of the Street  
7 Department which includes the Traffic Division. He testified  
8 that Young was laid off for lack of work, not disciplinary  
9 reasons; that Spilde worked as a laborer and engineering  
10 technician from May, 1978, to January 5, 1978; that he (Spilde)  
11 was transferred to the Traffic Division after October, 1978;  
12 that he did labor work during emergencies.

13 5. Several employees of the Street Department observed  
14 Harold Spilde performing laborer work after October, 1978,  
15 until January 5, 1979. His employment record, Complainant's  
16 Exhibit No. 2, shows him as a laborer from May 1, 1978, to  
17 January 5, 1979; prior to that, he was shown as an Engineering  
18 Tech. 1 and Junior Engineer.

19 6. Mr. Duty stated to employees of the Street Department  
20 that he would not hire Bruce Young back in the Department.

21 7. Mr. Young had gained seniority rights under terms of  
22 the collective bargaining agreement during 1977. Article XII  
23 of that agreement provides that "...Seniority means the rights  
24 secured by permanent full-time employees by length of continuous  
25 service to the city. Seniority rights shall apply to layoffs,  
26 scheduling of vacation, and transfer of employees; that is, the  
27 last employee hired shall be the first laid off. Seniority  
28 shall not be effective until a ninety (90) day probationary  
29 period has been completed, after which seniority shall date  
30 back to the date of last hiring. Seniority shall be determined  
31 by craft and division. Recall rights are not earned until  
32 after six (6) months continuous [sic] service."

1 8. The grievance procedure provided for under terms of the  
2 collective bargaining agreement between the Craft Council and the  
3 City does not require final and binding arbitration. Instead, it  
4 provides that, if both parties cannot agree to submit to binding  
5 arbitration, either party may take legal or economic action.

6 9. The City agreed that Harold Spilde would not perform  
7 laborer's work as part of the settlement of a grievance which has  
8 been filed by the Complainant and Union. The Union believed the  
9 matter was resolved.

10 10. Bruce Young had more seniority as a laborer in the  
11 Street Department as of October 31, 1978, than did Harold Spilde  
12 and he was to have been the first to be recalled if anyone was  
13 recalled in the Street Department.

14 12. Persons are employed by the City Street Department as  
15 laborers under the Comprehensive Employment and Training Act and  
16 perform some of the duties which a regular laborer would be  
17 expected to perform.

18 13. Article IV, 4.1 of the parties' collective bargaining  
19 agreement provides, in part, "Employees who are members of the  
20 union on the date of [sic] this AGREEMENT is executed shall, as  
21 condition of continuing employment, maintain their membership in  
22 the union. All future employees performing work with the juris-  
23 diction of the union involved shall, as a condition of continuing  
24 employment, become members of such union within thirty (30) days  
25 of the date of their employment and the union agrees that such  
26 employees shall have thirty-one (31) days within which to pay  
27 union's initiation fees and dues. If the employees fail to pay  
28 initiation fees or dues within thirty-one (31) days or fails to  
29 affectuate [sic] the provisions of Section 59-1603(5) of the  
30 Montana Statutes, the union may request in writing that the  
31 employee be discharged. The city agrees to discharge said  
32 employee upon written request from the union..."



1 and alleged contract violations.

2 Generally, the holding in Collyer established the following  
3 factors to determine whether deferral is appropriate: (1) the  
4 dispute must arise within the confines of a stable collective  
5 bargaining relationship, without any assertion of enmity by the  
6 respondent toward the charging party; (2) the respondent must be  
7 willing to arbitrate the issue under a clause providing for  
8 arbitration in a broad range of disputes, and (3) the contract  
9 and its meaning lie at the center of the dispute. Where the  
10 respondent's conduct has been a complete rejection of the prin-  
11 ciples of collective bargaining and the organizational rights of  
12 employees, the NLRB has not deferred, Capitol Roof & Supply Co.,  
13 217 NLRB 173, 89 LRRM 1191 (1975). Certain alleged conduct alone  
14 has been so flagrant as to prevent the NLRB from deferring to  
15 prospective arbitration regardless of the parties' previous  
16 collective bargaining relationships, e.g., the NLRB will not  
17 defer where the unfair labor practice charge alleges that the  
18 employer's conduct was in retaliation or reprisal for an  
19 employee's resort to the grievance procedure, North Shore  
20 Publishing Co., 206 NLRB 42, 84 LRRM 1165 (1973). If no final  
21 and binding grievance procedure exists, the NLRB will not defer,  
22 Wheeler Const. Co., 219 NLRB 104, 90 LRRM 1173 (1975); Tulsa  
23 Whisenhunt Funeral Homes, 195 NLRB 106, 79 LRRM 1265 (1972);  
24 Atlas Tack Corp. 226 NLRB 38, 93 LRRM 1236 (1976).

25 In 1977, the NLRB altered its prearbitral deferral policy a  
26 enunciated in Collyer. In General American Transportation Corp.  
27 228 NLRB 102, 94 LRRM 1483 (1977), the Board held that deferral  
28 was no longer appropriate in cases of alleged employer discrimi-  
29 tion or interference with protected rights.

30 In the instant case, I believe the Board of Personnel Appeal  
31 should follow NLRB precedent on deferral and not defer this  
32 charge to the contract grievance procedure. The grievance procedure

1 dure provided in the contract does not culminate in a final and  
2 binding decision. It may end in a "binding" decision, if a  
3 majority of a six-member committee formed by the city manager and  
4 comprised of three city and three union representatives can reach  
5 agreement. This charge also involves an alleged violation of  
6 complainant's basic rights under 39-31-401(1) MCA and should  
7 not, for that further reason, be deferred. The City's conduct  
8 with respect to abiding by the settlement reached on the grievance  
9 filed by Mr. Young does not lead one to conclude that a stable  
10 collective bargaining relationship exists between the parties.  
11 There was no indication of a willingness on the part of the City  
12 to arbitrate.

13 Section 39-31-401(3) MCA prohibits discrimination by a  
14 public employer "in regard to hire or tenure of employment or an  
15 term or condition of employment to encourage or discourage membe  
16 ship in any labor organization." This is the same prohibition  
17 written into Section 8(a)(3) of the National Labor Relations Act  
18 In *Radio Officers' Union v. NLRB*, 347US17, 33 LRRM 2417 (1954)  
19 the U.S. Supreme Court stated:

20 The language of Section 8(a)(3) is not ambiguous. The  
21 unfair labor practice is for an employer to encourage  
22 or discourage membership by means of discrimination.  
23 Thus, this section does not outlaw all encouragement or  
24 discouragement of membership in labor organizations;  
25 only such as is accomplished by discrimination is  
26 prohibited. Nor does this section outlaw discrimina-  
27 tion in employment as such; only such discrimination as  
28 encourages or discourages membership in a labor  
29 organization is proscribed ... But it is also clear  
that specific evidence of intent to encourage or  
discourage is not an indispensable element of proof of  
violation of 8(a)(3) ... An employer's protestation  
that he did not intend to encourage or discourage must  
be unavailing where a natural consequence of his action  
was such encouragement or discouragement. Concluding  
that encouragement or discouragement will result, it is  
presumed that he intended such consequence.

30 Discriminatory conduct motivated by union animus and having the  
31 foreseeable effect of either encouraging or discouraging union  
32 membership must be held to be violative of public employee rights  
under 39-31-401(3) MCA. I must conclude here that Mr. Young was

1 laid off and Mr. Spilde retained by the City because Young had  
2 filed a number of grievances. Had the City followed the seniori  
3 clause of the agreement and laid off Spilde first or had it  
4 placed Spilde in a true non-bargaining unit position doing non-  
5 bargaining unit work, one would be inclined to believe no union  
6 animus existed. However, Young was laid off, Spilde remained  
7 (with less seniority as a laborer) and did laborer work, the  
8 supervisor stated publicly that he would not rehire complainant,  
9 the City had CETA employees doing laborer work, and Young has not  
10 yet been recalled. The evidence clearly points to the conclusio  
11 that the City's discriminatory motive was a factor, and probably  
12 the dominate factor, in its decision to lay off complainant and  
13 thereby violate the agreement. Its actions caused unrest among  
14 union members and had the effect of discouraging membership.

15 Complainant also charged a violation of 39-31-401(4) MCA  
16 which prohibits employer discrimination against an employee for  
17 signing or filing an affidavit, petition or complaint or giving  
18 information, or testifying under the act. The same prohibition  
19 is found in Section 8(a)(4) of the NLRA. The narrow scope of  
20 this unfair labor practice should be noted. Filing a grievance  
21 under the terms of a contract grievance procedure does not equate  
22 to signing or filing an affidavit, petition, or complaint under  
23 the act. However, Mr. Young was discriminated against (for  
24 aggrieving a number of employer personnel actions) when he was  
25 laid off and a person with less seniority kept on doing laborer  
26 work. And, in my view, he was further discriminated against  
27 after he filed this unfair labor practice charge because he was  
28 not called back by the city. The evidence shows that laborer-  
29 type work was being done by CETA personnel and by Mr. Spilde.  
30 Mr. Young and his union added fuel to the already existing dis-  
31 criminatory flame by charging the City with unfair labor practice  
32 under Montana law.

1 Section 39-31-401(2) MCA makes it an unfair labor practice  
2 for a public employer to dominate, interfere, or assist in the  
3 formation or administration of any labor organization. I believe  
4 the purpose of this provision is to insure that a union which  
5 purports to represent employees in collective bargaining will not  
6 be subjected to employer control. There is no evidence on the  
7 record to indicate that the City dominated, interfered, or assisted  
8 in the administration of the Union. The type of activity set out  
9 in paragraph (4) of this section goes beyond interfering with  
10 the rights of individual employees as guaranteed by paragraph  
11 (1); it goes to those activities which are aimed at the labor  
12 organization as an entity.

13 The city was also charged with a violation of 39-31-401(5)  
14 MCA for refusing to bargain collectively in good faith with an  
15 exclusive representative. This would be an 8(a)(5) charge under  
16 the NLRA. The U.S. Supreme Court held, in *Conley v. Gibson*  
17 355US41, 46, 41 LRRM 2089 (1957), that collective bargaining is  
18 a continuing process. Clearly, it is not limited to the negoti-  
19 ation of an agreement under which the parties intend to operate.  
20 In many cases, bargaining can and must be carried on during the  
21 term of an agreement. However, the duty to bargain during the  
22 term of the agreement has generally been limited to subjects  
23 which were neither discussed nor incorporated into the contract.  
24 A waiver of bargaining rights may occur by reason of the express  
25 agreement of the parties. The contract between the city and the  
26 union contains a seniority clause which deals specifically with  
27 the rights of employees relative to lay offs, recalls, etc.  
28 Since the contract provides for such, I cannot find any obliga-  
29 tion by the city to bargain on the subject. But, bargaining is  
30 not the problem in the instant case; the parties did that prior  
31 to entering into the agreement. The problem is one of enforce-  
32 ment of contractual and statutory rights. Therefore, I must

1 conclude that there was no refusal to bargain because there was  
2 no obligation to bargain on the subject.

3 Section 39-31-401(1) MCA makes it an unfair labor practice  
4 for a public employer to interfere with, restrain, or coerce  
5 employees in the exercise of their rights guaranteed in 39-31-20  
6 MCA. That section states, "Public employees shall have and shall  
7 be protected in the exercise of the right of self-organization,  
8 to form, join, or assist any labor organization, to bargain  
9 collectively through representatives of their own choosing on  
10 questions of wages, hours, fringe benefits, and other conditions  
11 of employment and to engage in other concerted activities for the  
12 purpose of collective bargaining or other mutual aid or protection  
13 free from interference, restraint, or coercion." The NLRA sets  
14 forth the same prohibition on the national level. In Cooper  
15 Thermometer Co., 154 NLRB 502, 59 LRRM 1767 (1965) the NLRB held  
16 that motive is not the critical element in a section 8(a)(1)  
17 violation, that "interference, restraint, and coercion under  
18 Section 8(a)(1) of the act does not turn on the employer's motive  
19 or on whether the coercion succeeded or failed. The test is  
20 whether the employer engaged in conduct which, it may reasonably  
21 be said, tends to interfere with the free exercise of employee  
22 rights under the act." The NLRB has generally held that dis-  
23 charging or disciplining employees for filing or processing  
24 grievances is a violation of Section 8(a)(1), Ernst Steel Corp.,  
25 212 NLRB 32, 87 LRRM 1508 (1974); Seven-Up Bottling Co. of Detroit,  
26 223 NLRB 136, 92 LRRM 1001 (1976). I find here that the fact  
27 that Mr. Young had a record of filing grievances affected the  
28 judgment of those city officials responsible for laying him off  
29 and keeping a person with less seniority on the payroll as a  
30 laborer. The City's action in employing CETA personnel to per-  
31 form laborer work and not recall Mr. Young is a further indica-  
32 tion of its disregard for his statutory and contractual rights.

1 Whether they (City officials) intended such interference is not  
2 known; however, that is not the test which I believe should be  
3 adopted by the Board of Personnel Appeals. The BPA should adopt  
4 the same rule, with respect to 39-31-401(1) MCA violations as has  
5 been adopted by the NLRB as noted above.

6 IV. CONCLUSION OF LAW

7 The Board of Personnel Appeals has jurisdiction under  
8 39-31-403 MCA.

9 The defendant, City of Great Falls, violated 39-31-401(1)(3)  
10 and (4); it did not violate 39-31-401(2) or (5).

11 V. RECOMMENDED ORDER

12 IT IS ORDERED THAT, after this Order becomes final, the City  
13 of Great Falls, its officer, agents, and representatives shall:

14 (1) Cease and desist from its violations of 39-31-401 MCA;

15 (2) Take affirmative action by reinstating Bruce Young as a  
16 laborer with the city;

17 (3) Make Bruce Young whole by repaying him for lost wages,  
18 benefits, and interest incurred since October 31, 1978;

19 (4) Meet with representatives of the Union and attempt to  
20 determine the amount due under No. 3 above; if a mutual deter-  
21 mination cannot be made within ten days, notify the Board of  
22 Personnel Appeals' hearing examiner who will hold a hearing and  
23 issue a detailed remedial order;

24 5. Post in conspicuous places in its major place of busi-  
25 ness and appropriate work stations copies of the attached notice  
26 marked "Appendix."

27 6. Notify the Board of Personnel Appeals in writing within  
28 20 days what steps have been taken to comply with this Order.

29 The Union shall not be reimbursed for legal or other expenses  
30 incurred as a result of bringing these charges.

31 NOTICE

32 Exceptions may be filed to these Findings of Fact, Conclu-

1 sions of Law, and Recommended Order within 20 days of service  
2 thereof. If no exceptions are filed with the Board within that  
3 time, the Recommended Order shall become the Final Order of the  
4 Board. Exceptions shall be addressed to the Board of Personnel  
5 Appeals, Box 202, Capitol Station, Helena, Montana, 59601.

6 DATED this 12<sup>th</sup> day of ~~September~~<sup>October</sup>, 1979.

7 BOARD OF PERSONNEL APPEALS

8  
9  
10 By Jack H. Calhoun  
11 Jack H. Calhoun  
Hearings Examiner

12  
13 \* \* \* \* \*

14 CERTIFICATE OF MAILING

15 I, Jennifer Jacobson, hereby certify and state that on  
16 the 12 day of ~~September~~<sup>October</sup>, 1979, a true and correct copy of the  
17 above captioned FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER  
18 was mailed to the following:

19 David Gliko  
20 City Attorney  
City of Great Falls  
21 P.O. Box 5021  
Great Falls, MT 59403

22 D. Patrick McKittrick  
23 Attorney at Law  
315 Davidson Building  
24 3 Third Street North  
P.O. Box 1184  
25 Great Falls, MT 59403

26 Gerald E. Pottratz  
Construction and General Laborers  
27 Local No. 1334 AFL-CIO  
1112 Seventh Street South  
28 Great Falls, MT 59403

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31 Jennifer Jacobson  
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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 3-79:

BRUCE YOUNG BY CONSTRUCTION )  
AND GENERAL LABORERS', LOCAL )  
NO. 1334, AFL-CIO, )  
Complainant, )  
- vs - )  
CITY OF GREAT FALLS, )  
Defendant. )

FINAL ORDER

\*\*\*\*\*

The Remedial Order was issued by Hearing Examiner Jack H. Calhoun on January 7, 1983.

Exceptions to the Remedial Order were filed by David V. Gliko, on behalf of the Defendant, on January 25, 1983.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant to the Remedial Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Remedial Order of Hearing Examiner Jack H. Calhoun as the Final Order of this Board.

DATED this 9th day of March, 1983.

BOARD OF PERSONNEL APPEALS

By Joan A. Uda  
Joan A. Uda  
Alternate Chairman

\*\*\*\*\*

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 9th day of March, 1983:

David V. Gliko, City Attorney  
City of Great Falls  
P.O. Box 5021  
Great Falls, MT 59403



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D. Patrick McKittrick  
MCKITTRICK LAW FIRM  
Strain Building, Suite 622  
410 Central Avenue  
P.O. Box 1184  
Great Falls, MT 59403

*Jennifer Jacobson*

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STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 3-79:

BRUCE YOUNG BY CONSTRUCTION	)	
AND GENERAL LABORERS' LOCAL	)	
NO. 1334, AFL-CIO,	)	
	)	
Complainant,	)	REMEDIAL ORDER
	)	
vs.	)	
	)	
CITY OF GREAT FALLS,	)	
	)	
Defendant.	)	

\* \* \* \* \*

On June 10, 1982 the Montana Supreme Court affirmed the Board of Personnel Appeals final order in this matter dated October 12, 1979. Pursuant to that order the parties attempted to reach a settlement on the amount due Mr. Young, however, they were not successful. A hearing was held in Great Falls on September 30, 1982 for the purpose of determining that amount. Complainant was represented by Mr. D. Patrick McKittrick, Defendant by Mr. David V. Gliko.

FINDINGS OF FACT

1. Bruce Young was terminated by the City of Great Falls on October 31, 1978 in violation of 39-31-401(1), (3) and (4) MCA. He had worked as a laborer from May 2, 1978. Prior to that period of employment he had worked for the City from March 20, 1977 until December 30, 1977.

2. At the time of his termination Mr. Young's rate of pay with the City was \$6.675 per hour pursuant to the provisions of the parties' collective bargaining agreement.

3. On July 1, 1979 the rate of pay for laborers was increased, through collective bargaining, to \$7.055 per hour.

1           4.    On July 20, 1979 the City re-employed Mr. Young as  
2 a laborer.

3           5.    From October 31, 1978 until January 5, 1979 the  
4 City utilized the services of Harold Spilde as a laborer, he  
5 was junior to Mr. Young.

6           6.    During the period from October 31, 1978 to July 20,  
7 1979 the City used Comprehensive Employment and Training Act  
8 personnel to perform labor work, however, there were no  
9 permanent hires during that time.

10          7.    Prior to Mr. Young's illegal discharge he was  
11 working 40 hours per week, since his reinstatement he has  
12 also been working 40 hours per week.

13          8.    Subsequent to his discharge Mr. Young earned  
14 \$194.70 one week of November, 1978 and \$200.00 during one  
15 week of February, 1979.

16          9.    During his period of unemployment from October 31,  
17 1978 until July 20, 1979 Young made the following efforts to  
18 gain employment:

- 19           a.    signed up on a weekly schedule at the union  
20                hall;
- 21           b.    signed up each month at the Job Service  
22                office; and
- 23           c.    contacted, on a regular basis, persons whom he  
24                knew to be prospective employers including  
25                Martin and Co. in Shelby, a beer distributor  
26                and a welding company.

27          10.   The one week of work Young gained in February of  
28 1979 was the result of his own efforts to gain employment,  
29 the week of work in November was the result of the Union's  
30 effort for him.

31          11.   During the period in question, October 31, 1978 to  
32 July 20, 1979, labor type work was difficult to find in the

Great Falls area.

1  
2 12. Bruce Young had gained seniority rights under the  
3 terms of the parties' collective bargaining agreement in  
4 existence at the time of the discharge on October 31, 1978.

5 13. At the time of his discharge Young had not signed  
6 up for City employee insurance as was required of all em-  
7 ployees who wished to be covered.

8 14. The hours which Mr. Young would have worked or  
9 would have been paid for had he been a laborer with the City  
10 from October 31, 1978, through July 19, 1979, are as follows:

11	November 1978,	22 compensable days x 8 hrs. = 176 hrs.
	December 1978,	21 compensable days x 8 hrs. = 168 hrs.
12	January 1979,	23 compensable days x 8 hrs. = 184 hrs.
	February 1979,	20 compensable days x 8 hrs. = 160 hrs.
13	March 1979,	22 compensable days x 8 hrs. = 176 hrs.
	April 1979,	21 compensable days x 8 hrs. = 168 hrs.
14	May 1979,	23 compensable days x 8 hrs. = 184 hrs.
	June 1979,	21 compensable days x 8 hrs. = 168 hrs.
15	July 1979,	14 compensable days x 8 hrs. = 112 hrs.

16 15. All holiday pay to which Young would have been  
17 entitled during the period in question has been included in  
18 the above calculations, i.e., the "compensable days" listing  
19 in finding No. 14 includes holidays for Montana public  
20 employees.

21 16. From May 2, 1978 Mr. Young would have begun earning  
22 vacation at the rate of 1.25 days per month, and would have  
23 been eligible to use his accumulated leave at the end of six  
24 months continuous employment, however, he was terminated  
25 just short of six months. Therefore, had he not been termi-  
26 nated, he would have earned vacation on 14 full months plus  
27 80% of a full month (for part of July 1979) at 1.25 per  
28 month for a total of 18.30 days for the period May 1978 to  
29 July 20, 1979. Any vacation for which he was paid or which  
30 he used must be deducted from that total.  
31  
32

1 17. He would have earned sick leave at the rate of one  
2 day per month for the same period as in finding No. 16,  
3 therefore, as of the date of his reinstatement he would have  
4 had 14.8 days accumulated. Any sick leave for which he was  
5 actually paid in full or which he used must be deducted from  
6 that total.

7 18. As a City employee, Mr. Young was covered by the  
8 Public Employee Retirement System (PERS) and Social Security.  
9 The continuity of his employment was broken resulting in a  
10 break in the contributions made by the City and him to  
11 Social Security and the PERS fund.

12 19. Interest at an appropriate rate should be added to  
13 any amount of money due and owing Mr. Young.

14 20. No claim was made that overtime would have been  
15 worked during the period in question.

16 21. Mr. Young claimed no expenses for travel or moving  
17 for the purpose of seeking and securing employment during  
18 the term of his unemployment.

19  
20 DISCUSSION

21 The primary issue raised under the remedial aspect of  
22 this proceeding is what amount of money and/or benefits, if  
23 any, are due and owing Bruce Young in order to make him  
24 whole pursuant to this Board's final order of October 12,  
25 1979.

26 Section 39-31-406(4) MCA gives the Board of Personnel  
27 Appeals authority, where it finds an unfair labor practice,  
28 to order "...such affirmative action, including reinstatement  
29 of employees with or without back pay, as will effectuate  
30 the policies of this chapter." Section 10(c) of the National  
31 Labor Relations Act is similar to 39-31-406(4) MCA and for  
32 that reason the National Labor Relations Board precedent

1 should be looked to for guidance. State Department of High-  
2 ways v. Public Employees Craft Council, 165 Mont. 349, 529  
3 P.2d 785 (1974), 87 LRRM 2101; AFSCME 2390 v. City of Billings,  
4 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753 (1976). The NLRB  
5 attempts, in cases where employees have been illegally  
6 discriminated against, to fashion a remedy which will result  
7 in a restoration of the situation, as nearly as possible, to  
8 that which would have obtained but for the prohibited conduct.  
9 Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 8 LRRM 439 (1941).  
10 Section 39-31-406(4) authorizes this Board to award back pay  
11 where it finds that the employer's unfair labor practice  
12 resulted in the employee's loss of wages. However, the  
13 employee is not relieved from an obligation to take reasonable  
14 steps to secure work during the period of discrimination and  
15 thereby mitigate the employer's back pay liability. NLRB v.  
16 Madison Courier, Inc., 82 LRRM 1667; Phelps, supra. Once  
17 the employee has established the amount of back pay due, the  
18 burden is on the employer to produce evidence to mitigate  
19 its liability. NLRB v. United Brotherhood of Carpenters &  
20 Joiners, 531 F.2d 1014, 100 LRRM 2769 (1979). The obligation  
21 of the wrongfully discharged employee is to make a reasonable  
22 effort to obtain interim employment, he is not held to the  
23 "highest standards of diligence." Airport Service Lines,  
24 231 NLRB 137, 96 LRRM 1358 (1977). In McCann Steel Co. v.  
25 NLRB, 570 F.2d 652, 97 LRRM 2921 (CA6 1978) the circuit  
26 court agreed with the NLRB's policy of "reasonable exertion."

27 The question which must first be answered is whether  
28 the efforts made by Bruce Young to obtain interim employment  
29 over an eight and one-half month period discharged the duty  
30 incumbent upon him to exercise a reasonable effort to seek  
31 comparable work. Given the uncontroverted testimony of the  
32 union official familiar with the market for laborer type

1 work in and around Great Falls during that time and Young's  
2 own testimony and job seeking efforts, I must conclude that  
3 he did indeed make such effort. He signed up with the union  
4 each week and on one occasion got one week's work from those  
5 efforts. He signed up at the local Job Service office each  
6 month, but was not successful in obtaining work. He solicited  
7 the owner of Martin & Co. from Shelby, whom he knew, and  
8 obtained one week of work in Shelby. He contacted a local  
9 beer distributor on a regular basis although he could not  
10 remember exactly when and how often. He sought employment  
11 at Superior Welding, but again, could not say precisely when  
12 or how frequently. Mr. Young, whose testimony I credit,  
13 also testified that he probably asked a lot of people about  
14 work, but that he could not recall names, places or times.  
15 His lack of recall with respect to such specificity is  
16 understandable, he was discharged approximately three years  
17 prior to the remedial hearing. Yet, his testimony was clear  
18 and without internal contradiction. Neely's Car Clinic, 107  
19 LRRM 1157 (1981). Although the labor market improved during  
20 the spring of 1979, the union official contended it was  
21 extremely difficult to get laborer work. The fact that  
22 Young twice obtained work of a one week duration speaks well  
23 for his efforts.

24 The next question raised here is whether the City had  
25 any obligation to employ Mr. Young beyond the date Mr.  
26 Spilde (refer to original findings in this matter) was ter-  
27 minated. The City contends that it would have terminated  
28 Mr. Young in any case on January 5, 1979, that January 5th  
29 should be the limit of its liability for back pay in this  
30 matter. I am not persuaded by the City's argument on this  
31 question. A review of the findings approved by this Board  
32 on October 12, 1979 and the decision of the Montana Supreme

1 Court reveals quite clearly that in addition to the laborer  
2 work being performed by Spilde, CETA employees with less  
3 seniority than Young continued to do laborer's work.

4 It is a well settled principal that the burden of proof  
5 is on the employer to show that it would not have had work  
6 available for an illegally discharged employee due to eco-  
7 nomic or other factors. NLRB v. Midwest Hanger Co., (CA8  
8 1977) 550 F.2d 1101, 94 LRRM 2878; NLRB v. Mastro Plastics  
9 Corp., 354 F.2d 170, 60 LRRM 2578 (CA2 1965). That the City  
10 had labor work available, regardless of where the funds for  
11 which to pay for it came from, in itself dispells any notion  
12 that it would not have had work for Mr. Young beyond January 5,  
13 1976. In M.S.P. Industries, Inc. v. NLRB, 568 FF.2d 166  
14 (CA10 1977), 97 LRRM 2403, the circuit court stated, in  
15 response to the employer's argument that it was suffering  
16 economic problems which should bar any remedial order,  
17 "there is proof that not only was work available for laid  
18 off and discharged employees, but also that in some instances,  
19 new employees were hired during the period of 'substantial  
20 economic difficulties' to do work formerly done by discharged  
21 employees". (Citing NLRB v. Armcor Industries, 535 F.2d  
22 239, 92 LRRM 2374.) However, an equally persuasive reason  
23 to reject the City's argument is that had he not been discri-  
24 minatorily discharged, i.e., had he been allowed to remain  
25 as a City employee, he would have been able to challenge any  
26 lay off subsequent to January 5th on the basis of a contract  
27 violation (because CETA employees with less seniority were  
28 retained) or as a violation of CETA regulations. To the  
29 City's urging that Mr. Young was a temporary employee who  
30 would have been laid off in any case, suffice it to reiterate  
31 what has just been said - that laborer work continued to be  
32 done. NLRB v. Blue Hills Cemetery, Inc., 567 F.2d 529 (CA11  
1977), 97 LRRM 2291.

1 From the foregoing I conclude that Bruce Young made a  
2 reasonable effort to obtain interim employment and that he  
3 is entitled to back pay and other benefits for the entire  
4 period in question from October 31, 1978 until July 20,  
5 1979. The task which remains is to fashion a remedy which  
6 will restore the situation, as nearly as possible, to that  
7 which would have obtained but for the illegal discrimi-  
8 nation. Phelps, supra. The Board's order to reinstate Mr.  
9 Young has been complied with. There still remain, however,  
10 the questions of: (1) how much back pay is due; (2) how  
11 much offset in interim earnings is to be applied; (3) how  
12 much interest is due; (4) how much vacation and sick leave  
13 credit should be allowed; (5) what are the City's obligations  
14 to PERS and Social Security; (6) are insurance premiums to  
15 be paid; and, (7) are there other benefits to which Mr.  
16 Young is entitled? Since the inception of the NLRA the NLRB  
17 has not allowed unemployment compensation benefits received  
18 by the discriminatee as an offset against back pay. NLRB v.  
19 Gullett Gin Co., 340 US 361, 71 S.Ct. 337, 27 LRRM 2230  
20 (1951); Higgins v. Harden, (CA 9 1981) 644 F.2d 1348, 107  
21 LRRM 2438; Winn Dixie Stores Inc., (CA 5 1969) 413 F.2d  
22 1008, 71 LRRM 3003; Cal-Pacific Furniture Mfg. Co., 221 NLRB  
23 1244, 91 LRRM 1059 (1975).

24 The U.S. Supreme Court in NLRB v. Seven-up Bottling Co.,  
25 244 US 344, 73 S. Ct. 287, 31 LRRM 2237 (1953), approved the  
26 method of computing back pay on a quarterly basis which was  
27 used by the NLRB in F.W. Woolworth Co., 26 LRRM 1185. The  
28 Woolworth formula safeguards the employee's status under the  
29 Social Security Act and it may result in an employee receiving  
30 back pay in some situations in which he would get none under  
31 the lump sum approach. The City argues that the application  
32 of the Woolworth formula is inapposite here because Mr.

1 Young would have been terminated January 5, 1979 and because  
2 he was lax in seeking employment, making the circumstances  
3 described in Woolworth inappropriate here. I have found  
4 that Mr. Young did, in fact, diligently seek employment.  
5 Further, Mr. Young's status under Social Security must be  
6 protected.

7 In 1977 the NLRB decided to adopt a new method of  
8 computing interest on back pay and other monetary remedies  
9 because its six percent rate adopted in Isis Plumbing &  
10 Heating Co., 138 NLRB 716, 51 LRRM 1122 (1962), was not in  
11 line with economic conditions of the times. The method it  
12 chose was the Internal Revenue Service's adjusted prime  
13 interest rate, which is the rate charged or paid by the IRS  
14 for federal tax purposes. It is a rate fixed by the Secretary  
15 of Treasury not more than every two years to reflect money  
16 market changes. It is defined as 90 percent of the average  
17 predominant prime rate quoted by commercial banks to large  
18 businesses, rounded to the nearest full percent. Florida  
19 Steel Corp., 231 NLRB 651, 96 LRRM 1070 (1977), North Cambria  
20 Fuel Co.v. NLRB, (CA3 1981), 107 LRRM 2140. This Board has  
21 been guided by NLRB precedent in the past because of the  
22 similarity of the two statutes and should be so guided now,  
23 particularly since the rationale is sound. With the IRS  
24 adjusted prime interest rate as a basis the following computa-  
25 tions were used to arrive at the net back pay plus interest  
26 due Mr. Young. In accordance with the Woolworth formula,  
27 what Mr. Young would have earned (gross pay), minus his  
28 interim earnings multiplied by the IRS adjusted prime rate,  
29 yields the interest due. Thus, by setting a prospective pay  
30 off date of January 1, 1983, the amount of interest due is  
31 as follows:  
32

1	QTR. ENDING	COMPENSABLE HOURS	RATE PER HOUR	GROSS PAY	INTERIM EARNINGS	NET PAY
2	12-31-78	344	\$6.675	\$2,296.20	\$194.70	\$2,101.50
3	03-31-79	520	6.675	3,471.00	200.00	3,271.00
4	06-30-79	520	6.675	3,471.00	-	3,471.00
	09-30-79	112	7.055	790.16	-	790.16
				\$10,028.36	\$394.70	\$9,633.66

5	INTEREST RATE*	INTEREST DUE 1-1-83	NET BACK PAY**
6	50.0%	\$1,050.75	\$2,101.50
7	48.5%	1,586.44	3,271.00
8	47.0%	1,631.37	3,471.00
9	45.5%	359.53	790.16
		\$4,628.09	\$9,633.66

10 \*The NLRB Regional Office in Seattle reported the fol-  
 11 lowing adjusted prime interest rates which it used in  
 12 calculating back pay award interest in the private  
 13 sector: 1979 - 6%; 1980 - 12%; 1981 - 12%; 1982 - 20%.  
 14 To determine simple interest due, the NLRB totals the  
 15 rates for the years in which the interest was due and  
 16 owing then applies that rate (6% + 12% + 12% + 20% in  
 17 this case) to the amount the employee would have earned,  
 18 minus interim earnings, as of the end of the first  
 19 quarter he was terminated. To arrive at interest due  
 20 in subsequent quarters the first rate (50% here) is  
 21 reduced by one fourth of the amount of the adjusted  
 22 prime rate in effect at the time (6% x 1/4 = 1.5% here).

23 \*\*From these amounts the City must deduct such sums as  
 24 would normally have been deducted from Mr. Young's  
 25 wages for deposit with state and federal agencies on  
 26 account of Social Security, PERS, and any other such  
 27 deductions, and pay to such agencies to the credit of  
 28 Young and the City a sum equal to the amount which,  
 29 absent the discrimination, would have been deposited.

30 The above calculations reflect the amount due Mr. Young  
 31 through December 31, 1982. Amounts due and owing beyond  
 32 that time will have to be computed at the end of each succeeding  
 quarter using the same formula, should it be necessary.

Since Mr. Young had gained seniority rights under the  
 terms of the parties' collective bargaining agreement prior  
 to his discharge, he must be restored to the status quo ante  
 with respect to those rights. His seniority should be dated  
 back to May 2, 1978. Phelps, supra, Associated Truck Lines v.  
NLRB, (CA6 1981), 106 LRRM 2242.

The evidence showed that Mr. Young had not signed up

1 for the Blue Cross insurance carried by the City for its  
2 employees. Since he chose not to be covered, no remedial  
3 order concerning insurance premiums is appropriate.

4 All holiday pay for public employees has been calcu-  
5 lated into the number of compensable hours for which Mr.  
6 Young would have been entitled to be paid, therefore, no  
7 further adjustment is necessary because there is no evidence  
8 on the record showing he would have worked any of the holidays  
9 and received overtime instead of the customary day off.  
10 There is no evidence on the record to show that he would  
11 have worked any overtime at all, whether in lieu of holiday  
12 pay or beyond the regular eight hours per day or forty hours  
13 per week. To the contrary, the evidence shows he worked  
14 forty hours per week, therefore, no adjustment in back pay  
15 for potential overtime is necessary.

16 Had he not been discharged, Mr. Young would have con-  
17 tinued to contribute to Social Security and to the Public  
18 Employees Retirement System at the applicable percent of his  
19 gross pay. The City would have contributed its share also.  
20 To make him whole the City should deduct from the wages due  
21 him that amount which he would have paid to the two agencies  
22 and forward the appropriate amount to each along with that  
23 amount which the City would have paid had he not been dis-  
24 missed. NLRB v. Rice Lake Creamery Co., 365 F.2d 888 (CA DC  
25 1966), 62 LRRM 2332, Woolworth, supra.

26 Mr. Young would have earned vacation credits from  
27 May 2, 1978 had he remained as a City employee. Further, he  
28 would have accumulated sick leave credits at the applicable  
29 rate. He should be credited, on his personnel and payroll  
30 records, with all vacation and sick leave which he would  
31 have accumulated from May 2, 1978 less any vacation or sick  
32 leave he used or for which he was paid. In the case of sick

1 leave, if he was paid for one-fourth his unused credits  
2 after his discharge, he should be credited now with the  
3 remaining three-fourths for which he did not receive payment.  
4 Richard W. Kasse Co., 64 LRRM 1181 (1967), Teamsters Union  
5 v. Lancaster Transportation Co., 38 LRRM 1254 (1956).

6  
7 CONCLUSION OF LAW

8 Bruce Young is entitled to back pay and restoration of  
9 other benefits which he would have earned but for the City's  
10 violation of his rights under title 39, chapter 31, MCA.

11 RECOMMENDED ORDER

12 IT IS ORDERED that the City of Great Falls take the  
13 following affirmative action to make Bruce Young whole:

14 1. Tender to him back pay in the amount of \$4,628.09  
15 as interest and \$9,633.66 (minus the amounts which would  
16 have been deducted for deposit with state and federal agencies  
17 for Social Security, PERS and any other regular deductions)  
18 as earnings.

19 2. Deduct from the \$9,633.66 and deposit with the  
20 appropriate agency all Social Security, PERS and any other  
21 amounts which would have been deducted for such purposes had  
22 he not been terminated.

23 3. Restore his seniority and longevity rights under  
24 the collective bargaining agreement.

25 4. In accordance with findings Nos. 16 and 17 herein,  
26 credit him with all vacation and sick leave which he would  
27 have accumulated since May 2, 1978, minus any such leave for  
28 which he was paid or which he used.

29 5. Treat him, for purposes of all other benefits, as  
30 if his employment had not been broken since May 2, 1978.  
31

NOTICE

1                    Exceptions to this ORDER may be filed within twenty  
2 (20) days of service thereof. If no exceptions are filed  
3 within that time, this ORDER shall become the FINAL ORDER of  
4 the Board of Personnel Appeals. Exceptions should be addressed  
5 to the Board at Capitol Station, Helena, Montana 59620.

6                    Dated this 17th day of December, 1982.

8                    BOARD OF PERSONNEL APPEALS

9  
10                    By Jack H. Calhoun  
                         Jack H. Calhoun  
                         Hearings Examiner

11                    CERTIFICATE OF MAILING

12                    I, Jennifer Jacobson, hereby certify and  
13 state that on the 17th day of December, 1982, a true and  
14 correct copy of the above captioned REMEDIAL ORDER was  
mailed to the following:

15                    David V. Gliko  
16                    City Attorney  
17                    City of Great Falls  
18                    P.O. Box 5021  
19                    Great Falls, MT 59403

20                    D. Patrick McKittrick  
21                    Attorney at Law  
22                    410 Central Avenue  
23                    P.O. Box 1184  
24                    Great Falls, MT 59403

Jennifer Jacobson

25                    BPA3:cwE

No. 81-563

IN THE SUPREME COURT OF THE STATE OF MONTANA

1982

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IN THE MATTER OF UNFAIR LABOR  
PRACTICE;  
BRUCE YOUNG, et al.,

Plaintiffs and Respondents,

vs.

CITY OF GREAT FALLS,

Defendant and Appellant.

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Appeal from: District Court of the Eighth Judicial District,  
In and for the County of Cascade  
Honorable Joel G. Roth, Judge presiding.

Counsel of Record:

For Appellant:

David V. Gliko argued, City Attorney, Great Falls,  
Montana

For Respondents:

Hon. Mike Greely, Attorney General, Helena, Montana  
D. Patrick McKittrick argued, Great Falls, Montana  
Robert Jensen, Bd. Personnel Appeals, Helena, Montana

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Submitted: May 11, 1982

Decided: June 10, 1982

Filed: JUN 10 1982

  
Clerk

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

The City of Great Falls (City) appeals from a judgment of the Cascade County District Court, Eighth Judicial District, affirming that part of a decision of the Board of Personnel Appeals (Board) that the City was guilty of violations of sections 39-31-401(1) and (3), MCA. The respondent cross-appeals from that part of the District Court's decision which reversed the hearings examiner's finding that the City had violated section 39-31-401(4), MCA.

The parties raise these issues:

1. Whether there was an unfair labor practice giving jurisdiction to the Board, or merely a possible breach of contract which should have been resolved under the contract's grievance procedure?

2. Whether the hearings examiner and the Board failed to apply the "but for" test?

CROSS-APPEAL

3. Whether the District Court erred by reversing the Board's finding of violation of section 39-31-401(4), MCA, stating that "any alleged violation of subsection (4) must have occurred before the filing of the unfair labor practice charge."

On January 10, 1979, the Construction and General Laborers' Local No. 1334, AFL-CIO (Union), on behalf of Bruce Young, filed an unfair labor practice charge with the Board of Personnel Appeals.

On October 12, 1979, the hearings examiner issued findings of fact, conclusions of law and recommended order, finding the City in violation of sections 39-31-401(1), (3), and (4). These findings were confirmed and adopted,

after review of the City's objections, by the Board's final order, issued February 21, 1980.

On March 21, 1980, the City petitioned the District Court for judicial review of the Board's final order. Pursuant to the complainant's motion, the District Court dismissed the petition for failure to name the Board as a party.

On August 20, 1981, this Court reversed the District Court's order ( \_\_\_ Mont. \_\_\_, 632 P.2d 1111, 38 St.Rep. 1317) holding that the Board need not be named as a party.

Thereafter, the cause was heard in the District Court, which issued the October 21, 1981 order from which this appeal and cross-appeal are taken.

Bruce Young was employed as a laborer in the Street Department of the City of Great Falls from March 20, 1977 to December 30, 1977, when he was laid off for lack of work. He was recalled on May 2, 1978, and worked until October 31, 1978, when he was laid off again.

During Young's tenure as a city employee, he filed, with the assistance of his union representative, four grievances under the collective bargaining agreement between the City and the Craft Council, of which Laborer's Union No. 1334 is a member.

The first, in May 1978, involved Young's transfer to the Water Department, while another employee with less seniority, Harold Spilde, remained with the Street Department. The grievance was resolved by Young's transfer back to the Street Department.

The second grievance arose in June 1978 when Young was sent home without pay for lack of work while Spilde again stayed. Young was subsequently compensated for four hours work.

The third occurred shortly thereafter when Spilde was placed in a permanent position over Young and Gerald Hagen. This one was resolved when Hagen, the most senior employee involved, was given the job.

The last grievance ultimately resulted in the filing of this unfair labor practice charge. Young challenged his October 31, 1978 lay-off because Spilde, with less Street Department seniority, was retained and doing laborer's work. Since Spilde was not a member of the Laborer's Union, the Union requested that he be terminated. At subsequent meetings between Union and City officials, pursuant to Step 1 of the Grievance Procedure in the Collective Bargaining Agreement, it was agreed that Spilde would not do work within the jurisdiction of the Laborer's Union.

Spilde was then transferred to the Traffic Division of the Street Department, where according to Bob Duty, Superintendent of the Department, he did laborer's work only during emergencies.

However, several Street Department employees testified that Spilde did perform "almost 100%" laborer's work until January 5, 1979. Also, his employment record classifies him as a laborer from May 1, 1978 to January 5, 1979, during which time he was paid laborer's wages.

In addition to Spilde, CETA employees with less seniority than Young continued to do laborer's work after Young's discharge. Furthermore, 7 or 8 new employees were hired by the Street Department in April 1979, but not Young. It was in this time period that Duty, apparently during a safety meeting, said in effect, "I don't care what happens. I won't hire Bruce Young back in the Street Department." In the same vein, during the resolution of Young's first grievance,

Duty told him that he had no hard feelings, "he just didn't like having some SOB telling him who he could or could not hire."

#### JURISDICTION

The City contends that complainants' charge does not state an unfair labor practice giving the Board jurisdiction, and that the grievance should have been resolved through the grievance procedure set out in the collective bargaining agreement.

Section 39-31-403, MCA provides that violation of section 39-31-401, MCA, the charge stated here, is an unfair labor practice remediable by the Board. At issue here is whether the Board should have deferred to the contract grievance procedure.

The District Court, in its consideration of this issue, simply stated that "[T]his Court agrees with the reasoning of the Hearings Examiner." That reasoning, with which we also agree, is reflected in the following discussion.

Because of the similarity between Montana's Collective Bargaining Act for Public Employees (Title 39, Chapter 31, MCA) and the National Labor Relations Act, it is helpful to consider federal precedent on this issue.

A "prearbitral deferral policy" was first enunciated by the NLRB in *Collyer Insulated Wire* (1971), 192 NLRB 837, 77 LRRM 1931. There, quoting from *Jos. Schlitz Brewing Co.* (1968), 175 NLRB 23, 70 LRRM 1472, 1475, the NLRB found "that the policy of promoting industrial peace and stability through collective bargaining obliges us to defer the parties to the grievance-arbitration procedures they themselves have voluntarily established." Collyer at 77 LRRM 1936.

It went on to note several circumstances in that case which "no less than those in Schlitz, weigh heavily in favor of deferral." The dispute arose within the confines of a long and productive collective bargaining relationship. No claim of enmity was made. Respondent had credibly asserted its willingness to arbitrate under a clause providing for arbitration in a broad range of disputes. The contract and its meaning lay at the center of the dispute. The contract obligated each party to submit to arbitration and bound them to the result. Collyer at 77 LRRM 1936-37.

We can distinguish Collyer on these factors alone. The Board's findings, with respect to questions of fact which are supported by substantial evidence and are therefore conclusive (section 39-31-409(4), MCA) show that the City's conduct "does not lead one to believe that a stable collective bargaining relationship exists between the parties," that "[T]here was no indication of a willingness on the part of the City to arbitrate," and that the "grievance procedure provided in the contract does not culminate in a final and binding decision. It may end in a 'binding' decision, if a majority of a six-member committee formed by the city manager and comprised of three city and three union representatives can reach agreement."

It should be noted here that the City's reliance on section 39-31-310, MCA is misplaced. It claims that the section is a legislative mandate that public employers are not bound to go to final and binding arbitration, thereby nullifying any contrary NLRB ruling. In fact, the section is permissive, not mandatory. It merely allows the parties to agree voluntarily to submit any or all issues to final and binding arbitration. No such agreement was made here,

nor does the contract require it, which as we have stated, is one basis for not deferring in this case.

Furthermore, the NLRB in General American Transp. Corp. (1977), 228 NLRB 808, 94 LRRM 1483, held ~~that~~ the Collyer doctrine is not applicable in cases involving alleged interference with protected rights or employment discrimination intended to encourage or discourage the free exercise of those rights. See sections 8(a)(1) and (3), NLRA and sections 39-31-401(1) and (3), MCA. The charge here involves such alleged violations. Deferral is inappropriate in this case.

#### UNFAIR LABOR PRACTICES

Regarding the charges themselves, the District Court concluded "that there is substantial evidence on the record considered as a whole to support the findings and conclusions of the Board with regard to the violations of Section 39-31-401(1) and (3)." Again we agree. Without wading through the wealth of available precedent propounded by the hearings examiner, we will simply restate his determinative findings.

As to section 39-31-401(1), MCA, the examiner found "that the fact that Mr. Young had a record of filing grievances affected the judgment of those city officials responsible for laying him off and keeping a person with less seniority on the payroll as a laborer." Motive is not the critical element in this violation.

As to section 39-31-401(3), the examiner found that "[T]he evidence clearly points to the conclusion that the City's discriminatory motive was a factor, and probably the <sup>N</sup>dominate (sic) factor, in its decision to lay off complainant and thereby violate the agreement. Its actions caused unrest among union members and had the effect of discouraging membership."

"BUT FOR" TEST

The City relies here on *Western Exterminator Co. v. N.L.R.B.* (9th Cir. 1977), 565 F.2d 1114, which states the rule that where a discharge is motivated by both a legitimate business consideration and protected union activity, the test is whether the business reason or the protected union activity is the moving cause behind the discharge. 565 F.2d at 1118. This Court adopted essentially the same test in *Board of Trustees of Billings, etc. v. State* (1979), \_\_\_ Mont. \_\_\_, 604 P.2d 770, 777, 36 St.Rep. 2289, 2299.

In this case, although the "but for" test was not utilized by the hearings examiner, he did find, again, "that the City's discriminatory motive was a factor, and probably the dominant<sup>N</sup> (sic) factor, in its decision to lay off complainant." The record amply demonstrates that protected union activity was the moving cause behind the discharge.

CROSS-APPEAL

Section 39-31-401(4) makes it an unfair labor practice for an employer to:

"(4) discharge or otherwise discriminate against an employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter; . . ."

The Board found there was a violation "after he (Young) filed this unfair labor practice charge because he was not called back by the city."

The District Court reversed because "any alleged violation of subsection (4) must have occurred before the filing of the unfair labor practice charge, not afterward."

Respondents do not contend that filing a grievance is equivalent to signing or filing an affidavit, petition, or complaint. Instead, they point to two statutes:

"39-31-407. Amendment of complaint. Any complaint may be amended by the complainant at any time prior to the issuance of an order based thereon, provided that the charged party is not unfairly prejudiced thereby."

"39-31-408. Modification by board of findings and order. Until the record in a proceeding has been filed in district court, the board at any time, upon reasonable notice and in such manner as it considers proper, may modify or set aside, in whole or in part, any finding or order made or issued by it."

We agree that Young was discriminated against after this charge was filed. Since he could have amended his complaint to include that discrimination had it not already been part of his original complaint, and since the City could therefore not possibly have been prejudiced thereby, we reverse the District Court on this point and grant the cross-appeal. The order of the Board is reinstated.

Affirmed in part, reversed in part.

John C. Shuck  
Justice

We Concur:

Frank D. Wadwell  
Chief Justice

John Conroy Harrison  
Frank B. Morrison  
Paul A. Fisher  
Justices

AUG 21 1981  
BOARD OF PERSONNEL APPEALS

No. 80-367

IN THE SUPREME COURT OF THE STATE OF MONTANA

1981

IN THE MATTER OF UNFAIR LABOR PRACTICE:  
BRUCE YOUNG BY CONSTRUCTION AND GENERAL  
LABORERS' LOCAL NO. 1334 AFL-CIO,

Respondent and Complainant,

vs.

CITY OF GREAT FALLS,

Plaintiff and Appellant.

Appeal from: District Court of the Eighth Judicial District,  
In and for the County of Cascade.  
Honorable Joel G. Roth, Judge presiding.

Counsel of Record:

For Appellant:

David V. Gliko, City Attorney, argued, Great Falls,  
Montana

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Montana  
James Gardner, Bd. Personnel Appeals, Helena, Montana  
D. Patrick McKittrick argued, Great Falls, Montana

Submitted: June 18, 1981

Decided: August 20, 1981

Filed: AUG 20 1981

Thomas J. Kearney  
Clerk

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

This appeal follows an order and judgment of the Eighth Judicial District, Cascade County, denying a motion to amend and dismissing appellant's petition for judicial review of a decision and order of the State Board of Personnel Appeals.

On January 10, 1979, respondent, Construction and General Laborers' Union Local No. 1334, AFL-CIO, filed an unfair labor practice charge with the Montana State Board of Personnel Appeals. This charge was filed on behalf of Bruce Young against appellant, City of Great Falls. Appellant answered and denied the charge, whereupon a hearing was held by an examiner for the Board. Following the hearing, the examiner on October 12, 1979, issued findings of fact, conclusions of law and a recommended order, confirming in part the unfair labor practice charge.

Appellant filed exceptions and objections to the decision rendered by the hearings examiner. A review hearing was then held and the Board of Personnel Appeals confirmed the recommended order. A final order was issued by the Board on February 21, 1980.

On March 21, 1980, appellant petitioned the District Court for judicial review of the final order. Service of the petition and a summons was acknowledged by Young, the attorney general of the State of Montana and the Board of Personnel Appeals. Appellant, however, did not include the Board as a named party on the petition.

Respondent, on April 21, 1980, moved to dismiss the petition for the reason that appellant failed to name the Board as a party within the 30-day limitation provided for in section 2-4-702, MCA. On April 30, 1980, appellant moved to amend its petition to add the Board as a party. A

hearing on the matter was held in the District Court on July 24, 1980. On July 29, 1980, the court issued a memorandum decision and order, denying appellant's motion to amend the petition and granting respondent's motion to dismiss. Judgment was so entered, and the City of Great Falls now appeals.

The sole issue on appeal is whether the State Board of Personnel Appeals is required to be designated as a party on a petition for judicial review. We hold that the State Board of Personnel Appeals is not required to be made a party.

Section 2-4-702, MCA, governs judicial review proceedings under the Administrative Procedure Act, including review of decisions by the Board of Personnel Appeals. That statute, in part, provides as follows:

"(2)(a) Proceedings for review shall be instituted by filing a petition in district court within 30 days after service of the final decision of the agency or, if a hearing is requested, within 30 days after the decision thereon. Except as otherwise provided by statute, the petition shall be filed in the district court for the county where the petitioner resides or has his principal place of business or where the agency maintains its principal office. Copies of the petition shall be promptly served upon the agency and all parties of record."

The only basis for dismissing this petition for judicial review is the claim by respondent that the Board is an indispensable party within the purview of Rule 19, M.R.Civ.P. In pertinent part, Rule 19 provides:

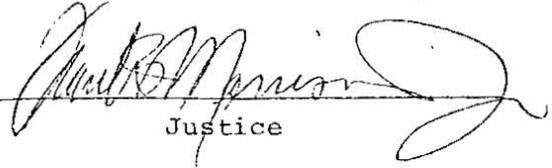
"A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest: . . ."

There is some support for the proposition that an administrative agency must be joined under Rule 19, M.R.Civ.P. See *Smith v. County of El Paso* (1979), 42 Colo.App. 316, 593 P.2d 979; *Civil Serv. Com'n of C. & C. of Denver v. District Court* (1974), 186 Colo. 308, 527 P.2d 531.

We believe that Rule 19, M.R.Civ.P., does not, by its terms, contemplate inclusion of an administrative board as an indispensable party for purposes of judicial review. Where the legislature has intended for administrative bodies to be made parties, they have specifically so provided. For example, section 39-51-2410, MCA, providing for judicial review of a decision by the Board of Labor Appeals, provides that the Employment Security Division shall be deemed to be a party in any action for judicial review. Yet when the legislature enacted 2-4-702, MCA, no provision was made for naming the "board" as a party for purposes of review.

Our court encourages a liberal interpretation of procedural rules governing judicial review of an administrative board. *F.W. Woolworth Co., Inc. v. Employment Sec. Div.* (1981), \_\_\_ Mont. \_\_\_, 627 P.2d 851, 38 St.Rep. 694. Justice is best served by avoiding an over-technical approach and allowing the parties to have their day in court.

We hold that the Board of Personnel Appeals need not be a party to proceedings for judicial review. Accordingly, the District Court order and judgment is reversed, and the case remanded for proceedings in accordance with this opinion.

  
Justice

We concur:

---

Chief Justice

*John Conway Harrison*  
*Daniel J. Shea*  
*W. J. [unclear]*

---

Justices

Mr. Justice Gene B. Daly dissenting:

We dissent.

It is true the statute does not specify whether the agency is required to be named as a party in the petition for review and does not appear to make the agency's joinder mandatory or jurisdictional in nature. A thirty-day limitation on filing a petition for judicial review, however, has been interpreted to mean that any challenge to the agency action must be perfected within the required thirty days. Perfection in this regard must include the correct joinder of all parties required to be joined under Rule 19, M.R.Civ.P. See *Smith v. County of El Paso* (1979), 42 Colo.App. 316, 593 P.2d 979; *Civil Service Commission v. District Court* (1974), 186 Colo. 308, 527 P.2d 531. (It should be pointed out that Colorado has not adopted the Administrative Procedure Act but provided for a judicial review of agency action in its rules of civil procedure, Rule 106, C.R.C.P., under which the above-cited cases were decided.)

If this interpretation is accepted by the Court, then a proper joinder of those individuals or agencies deemed to be essential or indispensable parties to the petition, under Rule 19, M.R.Civ.P., must be considered a jurisdictional requirement to be satisfied if dismissal is to be avoided.

Rule 19, M.R.Civ.P., provides in pertinent part:

"A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest . . ."

Here, appellant is attempting to challenge a decision and order of the Board of Personnel Appeals, issued in furtherance of its duty as a quasi-judicial body to administer the public policy of this State as set forth in Title 39, Chap. 31, MCA (Collective-Bargaining for Public Employees). In functioning to promote and advance this public policy, the Board has a definite interest in the petition to review and, as a practical matter, must be joined to insure a complete and just adjudication of that interest.

The majority, of course, disagrees with this conclusion and asserts that the Board is, by some liberal interpretation, excluded from their review hearing in court and that "justice is best served by avoiding an over-technical approach and allowing the parties to have their day in court." We do not understand how you give parties their day in court by excluding them. I suppose it depends on whose ox is being gored.

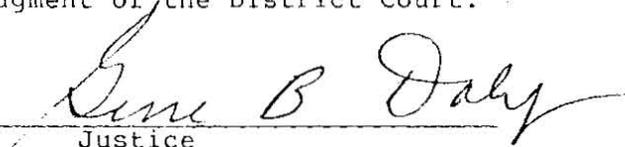
What the majority fails to realize, however, is that in this case a joinder of all essential parties within the thirty-day limitation period is a jurisdictional requirement. As a consequence of its jurisdictional nature, if a party is deemed essential or necessary to the proceeding, that party automatically becomes indispensable. This in no way depends on a liberal construction or other self-serving jingoisms relied upon by the majority.

Those essential jurisdictional requirements necessary to perfect a petition for review must be satisfied to vest authority in the reviewing or appellate tribunal. A failure to satisfy these requirements thus leaves the court with no adjudicatory or reviewing power; no jurisdiction to act; and

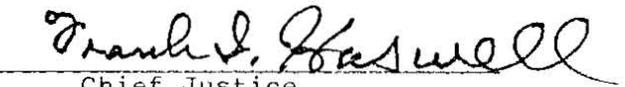
no discretion to remedy or waive the jurisdictional defects.

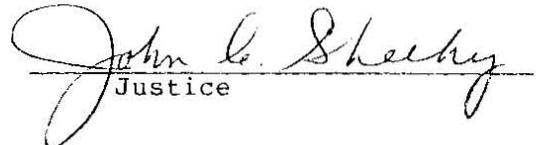
Here, appellant appears to have failed to vest the District Court with jurisdiction to consider the petition for review. If this is the case, then the court was unable to entertain appellant's motion to amend and was left with no alternative but to dismiss the action.

We would affirm the judgment of the District Court.

  
Justice

We concur in the foregoing dissent:

  
Chief Justice

  
Justice

1 IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE  
2 STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

3 -----  
4 IN THE MATTER OF UNFAIR LABOR PRACTICE: )  
5 BRUCE YOUNG BY CONSTRUCTION AND )  
6 GENERAL LABORERS' LOCAL NO. 1334, )  
7 AFL-CIO, )  
8 )  
9 Complainant, ) CAUSE NO. ADV-80-304c  
10 vs )  
11 ) MEMORANDUM DECISION  
12 CITY OF GREAT FALLS, ) AND ORDER  
13 )  
14 Defendant. )

15 -----  
16 The Defendant's Petition for Judicial Review was heard on  
17 October 21, 1981. The Defendant was represented by its attorney,  
18 Mr. David V. Gliko, and the Complainant was represented by his  
19 attorney, Mr. D. Patrick McKittrick.

20 Briefs in Support of said Petition and in opposition thereto  
21 had been filed by both counsel before the hearing.

22 Oral argument was presented by each attorney. The Court then  
23 took the matter under advisement and now enters the following  
24 Memorandum Decision and Order.

25  
26  
27  
28  
29  
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31  
32  
MEMORANDUM DECISION

33 This case involves Bruce Young (Young), the Construction  
34 and General Laborers' Local #1334, AFL-CIO (Union), the City of  
35 Great Falls (City), and the Board of Personnel Appeals (Board).

36 After Young was laid off by the City on October 31, 1978,  
37 Young's Union filed an Unfair Labor Practice Charge with the  
38 Board on January 10, 1979. That filing culminated in a hearing  
39 in May 1979, before a Hearings Examiner, his decision dated  
40 October 12, 1979, and a Final Order by the Board dated February  
41 21, 1980. The Board found unfair labor practices committed by

1 the City, ordered reinstatement of Young plus payment of back  
2 wages, benefits and interest.

3 On March 21, 1980, the City filed herein its Petition for  
4 Judicial Review of the Final Order of the Board. Young's attorney  
5 filed a Motion to Dismiss the Petition for the reason that the  
6 City had failed to join an indispensable party, i.e., the Board.  
7 This Court granted the Motion and an appeal to the Montana Supreme  
8 Court followed, resulting in a reversal of the Order dismissing  
9 the Petition, and remanding the case to this Court for a review  
10 of the Petition. (Montana Supreme Court Decision #80-367 decided  
11 August 20, 1981.)

12 Section 39-31-401 thru 409 MCA are the relevant statutory  
13 provisions to this proceeding. Those sections define an unfair  
14 labor practice, grant the Board jurisdiction to remedy viola-  
15 tions, set forth the procedure for hearing charges of unfair  
16 labor practices, and describe court enforcement and review of  
17 the Board's Order.

18 The unfair labor practice charges filed with the Board  
19 by the Union alleged that the City committed a violation of  
20 each of the five subsections of Section 39-31-401 MCA. The  
21 Hearings Examiner found and concluded that the alleged violations  
22 of subsections (2) and (5) were not proven. However, he found  
23 that the City had committed an unfair labor practice under sub-  
24 sections (1), (3) and (4). Hence, reinstatement of Young was  
25 ordered along with payment of his back wages, benefits, and  
26 interest since the date he was laid off on October 31, 1978.

27 The City challenges the jurisdiction of the Board at the  
28 outset, contending that Young's seniority status or lack thereof  
29 is governed by the terms of the Collective Bargaining Agreement  
30 between the Union and the City and if Young has a complaint it  
31 should involve a question of contract interpretation to be lit-  
32 igated by Young and the Union and the City in District Court.

1 The City contends that the circumstances of this case do not fit  
2 within any of the unfair labor practices detailed in Section  
3 39-31-401 MCA and therefore the Board has no jurisdiction and the  
4 Final Order of the Board must be reversed and the entire matter  
5 dismissed.

6 In reviewing the transcript of the Board's Hearing this  
7 Court notes that page 6 of the Collective Bargaining Agreement  
8 (an exhibit admitted into evidence at the Hearing) is missing.

9 The jurisdiction issue, always a crucial issue in any legal  
10 proceeding, was addressed by the Hearings Examiner in his Find-  
11 ings, Conclusions and Recommended Order beginning at page 5  
12 thereof. The Examiner concluded that the Board did have jur-  
13 isdiction and that the Board would not defer to the grievance  
14 procedure established in the Collective Bargaining Agreement  
15 because there was alleged employer discrimination or interfer-  
16 ence with an employee's protected rights and the grievance proce-  
17 dure did not terminate with binding arbitration. This Court  
18 agrees with the reasoning of the Hearings Examiner and additionally  
19 holds that because an employee may have recourse to a district  
20 court as a possible choice of forum to file his claim (possibly  
21 a declaratory judgment action) does not foreclose him from filing  
22 an unfair labor practice charge with the Board if he can assert  
23 a statutory violation under Section 39-31-401 MCA.

24 The City's attorney also challenges each finding of an  
25 unfair labor practice, i.e., subsections (1), (3), and (4) by  
26 the Hearings Examiner. This Court has reviewed the transcript,  
27 considered the Petition and the Briefs in support of and in  
28 opposition thereto, and concludes that there is substantial  
29 evidence on the record considered as a whole to support the  
30 findings and conclusions of the Board with regard to the violations  
31 of Section 39-31-401 (1) and (3).

32 However, this Court disagrees with the findings of a violation

1 of 39-31-401(4). Subsection (4) refers to a public employer  
2 discharging an employee because he has signed or filed an affidavit-  
3 vit, petition, or complaint or given any information or testimony  
4 under the statute. The Hearings Examiner admits that an employee's  
5 filing of a grievance pursuant to the provisions of a grievance  
6 procedure contained in a Collective Bargaining Agreement is not  
7 included within the definition of filing an affidavit, petition,  
8 or complaint under Subsection (4). The Hearings Examiner goes  
9 on to reason that the City has violated subsection (4) because  
10 the City refused to rehire Young after he filed his unfair labor  
11 practice charge with the Board. This Court concludes that any  
12 alleged violation of subsection (4) must have occurred before  
13 the filing of the unfair labor practice charge, not afterward.  
14 Therefore, this Court concludes that the Board's findings of a  
15 violation of 39-31-401(4) by the City must be reversed.

16 This Court agrees with the Final Order's ruling that the  
17 alleged violations under 39-31-401(2) and (5) were not proven.

18  
19 ORDER

20  
21 THEREFORE, IT IS HEREBY ORDERED that the Board's Final  
22 Order dated February 21, 1980 is affirmed except as to that part  
23 finding a violation of Section 39-31-401(4), which is reversed.

24 DATED this 26<sup>th</sup> day of October, 1981.

25  
26 Joel H. Rosta  
27 DISTRICT JUDGE

28 cc: David V. Gliko  
29 D. Patrick McKittrick  
30 Board of Personnel Appeals  
31 Mike Greely  
32

1 IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE  
2 STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

3 -----

4 IN THE MATTER OF UNFAIR LABOR PRACTICE: )  
5 BRUCE YOUNG BY CONSTRUCTION AND )  
6 GENERAL LABORERS' LOCAL NO. 1334, )  
7 AFL-CIO, )  
8 Complainant. ) No. ADV-80-304  
9 vs ) MEMORANDUM DECISION  
10 CITY OF GREAT FALLS, ) AND ORDER  
11 Defendant. )

12 -----

13 The Complainant's Motion to Dismiss the City's Petition  
14 for Judicial Review herein was heard on July 24, 1980. The  
15 Complainant was represented by attorney, Mr. D. Patrick  
16 McKittrick and the Defendant was represented by attorney, Mr.  
17 David V. Gliko.

18 Oral argument was presented by both counsel. Briefs in  
19 support of and in opposition to said Motion to Dismiss had  
20 been filed prior to the hearing.

21 The Court, having considered the Petition, Motion, the  
22 briefs, and the oral arguments, now enters the following  
23 Memorandum Decision and Order.

24 MEMORANDUM DECISION

25  
26 The City of Great Falls filed its Petition for Judicial  
27 Review of a final decision issued on February 21, 1980, by the  
28 Board of Personnel Appeals, a board allocated to the Depart-  
29 ment of Labor and Industry of the State of Montana. Section  
30 2-15-1705 MCA.

31 Section 2-4-702 MCA governs the procedure for initiating  
32 judicial review of a final administrative agency decision.

1 Generally, a petition must be filed within 30 days after  
2 service of the final decision in the district court where the  
3 petitioner resides and copies of the petition shall be promptly  
4 served upon the agency and all parties of record. All those  
5 requirements were satisfied herein.

6 It is crucial to this decision to note that the statute  
7 2-4-702 MCA does not specify what persons or agencies should be  
8 named as parties in the Petition.

9 The Complainant's position is that the Board of Personnel  
10 Appeals is an indispensable party to the judicial review pro-  
11 ceeding and because it was not so named, the attempted judicial  
12 review was not properly perfected within the limited 30 day  
13 time period and hence the district court is without jurisdiction  
14 to review the matter and the Petition must be dismissed.

15 On the other hand, the City of Great Falls contends that  
16 the Board of Personnel Appeals is not an indispensable party,  
17 that said Board was promptly served with process, that it is  
18 clear from the allegations contained in the Petition that it  
19 is the Board's final decision dated February 21, 1980 that is  
20 being appealed, and hence the District Court has jurisdiction  
21 of the Petition and the Board.

22 The private persons who were parties in the administrative  
23 agency proceeding are also parties in the instant review pro-  
24 ceeding and there is no problem as to them. However, should  
25 the Board of Personnel Appeals of the Department of Labor and  
26 Industry be a party to the judicial review proceeding? This  
27 Court concludes that said Board is a necessary party and the  
28 failure to name the Board as a party in the Petition constitutes  
29 a fatal defect in the perfection of the review proceeding,  
30 ousts this Court of jurisdiction herein, and subjects the  
31 Petition to dismissal.

32 The conclusion of this Court is partly based upon statements

1 contained in 2 Am Jur 2nd, Administrative Law, 641, which  
2 provides in part:

3 "Where relief or review of action of an admin-  
4 istrative agency is sought in Court, the absence  
5 of a necessary party may preclude the granting  
6 of relief. Who are necessary or proper parties  
7 in a proceeding to review agency action is largely  
8 determined by statutes governing the particular  
9 agency, the nature of its powers, and the effect  
10 of the exercise of such powers . . . ."

11  
12 "The administrative agency whose action is sought  
13 to be reviewed may be, and normally is, a nec-  
14 essary, proper, and sufficient party. In par-  
15 ticular it has been held that the action of an  
16 administrator may not be challenged except in a  
17 proceeding to which he is a party . . . ."

18  
19 To further buttress this Court's decision herein,  
20 attention is directed to "Handbook of Administrative Procedure"  
21 by Roger Tippy, at page 105 thereof wherein a sample petition  
22 for judicial review is set forth. Said sample petition de-  
23 nominates the party seeking the review as the 'Petitioner',  
24 and clearly indicates the administrative agency and the success-  
25 ful party in the administrative proceeding as the 'Respondents'.

26 The failure to join the Board of Personnel Appeals as a  
27 party in the Petition for Judicial Review subjects the Petition  
28 to dismissal and the fact that said non-party Board was served  
29 with process herein does not make the Board a party when the  
30 Board was not named as a party Respondent.

31 The City's Motion to Amend the Petition to add the Board  
32 of Personnel Appeals as a party, which was filed on April 30,

1 1980, comes too late because the Petition which must name  
2 the necessary parties, must be filed within 30 days after  
3 service of the agencies' final decision, and April 30, 1980  
4 is beyond said 30 day period which expired near the end of  
5 March.

6  
7 ORDER

8  
9 THEREFORE, IT IS HEREBY ORDERED that the Respondent's  
10 (labeled Complainant herein) Motion to Dismiss the Petition  
11 for Judicial Reveiw is granted.

12 DATED this 29<sup>th</sup> day of July, 1980.

13  
14 Joel H. Roth  
15 DISTRICT JUDGE

16 cc: D. Patrick McKittrick  
17 David V. Gliko  
18 Mike Greeely  
19 Board of Personnel Appeals  
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IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 3-79:

BRUCE YOUNG by CONSTRUCTION AND )  
GENERAL LABORERS' LOCAL NO. 1334, )  
AFL-CIO, )  
Complainant, )  
- vs - )  
CITY OF GREAT FALLS, )  
Defendant. )

FINAL ORDER

\*\*\*\*\*

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun, on October 12, 1979.

Exceptions and Objections to Findings of Fact, Conclusions of Law and Recommended Order were filed by David V. Gliko, Great Falls City Attorney, on behalf of the Defendant, on October 31, 1979.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the exceptions of Defendant to the Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopt the Findings of Fact, Conclusions of Law and Recommended Order as the Final Order of this Board.

DATED this 21<sup>st</sup> day of February, 1980.

BOARD OF PERSONNEL APPEALS

By Brent Cromley  
Brent Cromley  
Chairman

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that I mailed a true and correct copy of the above FINAL ORDER to the following persons on the 15<sup>th</sup> day of February, 1980:

David Gliko  
City Attorney  
City of Great Falls  
P.O. Box 5021  
Great Falls, MT 59403

D. Patrick McKittrick  
Attorney at Law  
315 Davidson Building  
3 Third Street North  
P.O. Box 1184  
Great Falls, MT 59403

Gerald E. Pottratz  
Construction and General Laborers  
Local No. 1334, AFL-CIO  
1112 Seventh Street South  
Great Falls, MT 59403

  
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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR )  
PRACTICE NO. 3-79: )

BRUCE YOUNG by CONSTRUCTION AND )  
GENERAL LABORERS' LOCAL NO. 1334, )  
ALF-CIO, )

Complainant, )

vs. )

CITY OF GREAT FALLS, )

Defendant. )

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
AND RECOMMENDED ORDER

\* \* \* \* \*

On January 10, 1979, Complainant filed unfair labor practice charges against Defendant alleging that the City had violated:

(1) 39-31-401(1) MCA by laying off Bruce Young and keeping a person with less seniority on and because of Mr. Young's union activities; (2) 39-31-401(5) MCA by failing to abide by a settlement of a grievance filed by Mr. Young; (3) 39-31-401(2) MCA by interfering with the administration of the union; (4) 39-31-401(4) MCA by discouraging union membership; and (5) 39-31-401(4) MCA by discharging Mr. Young. These charges were identified at a pre-hearing conference held on March 21, 1979. A formal hearing, under authority of 39-31-405 MCA, was conducted on May 15, 1979. Mr. D. Patrick McKittrick represented complainant; Mr. David V. Gliko represented defendant.

I. ISSUES

1. Whether the Board of Personnel Appeals has jurisdiction over this matter.

2. If the Board has jurisdiction, should it defer to the grievance procedure which exists in the contract between the Union and City?

3. If the Board has jurisdiction and does not defer to the contract grievance procedure, did the City commit, by its actions which affected Mr. Young's employment, a violation of 39-31-401 MCA?



1 between Union and City officials, it was agreed that Spilde  
2 would not do laborer's work. The Union believed later that he  
3 was still performing laborer's work and set up a grievance  
4 meeting with City representatives who stated that Spilde would  
5 not do laborer's work.

6 4. Mr. Bob Duty is the superintendent of the Street  
7 Department which includes the Traffic Division. He testified  
8 that Young was laid off for lack of work, not disciplinary  
9 reasons; that Spilde worked as a laborer and engineering  
10 technician from May, 1978, to January 5, 1978; that he (Spilde)  
11 was transferred to the Traffic Division after October, 1978;  
12 that he did labor work during emergencies.

13 5. Several employees of the Street Department observed  
14 Harold Spilde performing laborer work after October, 1978,  
15 until January 5, 1979. His employment record, Complainant's  
16 Exhibit No. 2, shows him as a laborer from May 1, 1978, to  
17 January 5, 1979; prior to that, he was shown as an Engineering  
18 Tech. 1 and Junior Engineer.

19 6. Mr. Duty stated to employees of the Street Department  
20 that he would not hire Bruce Young back in the Department.

21 7. Mr. Young had gained seniority rights under terms of  
22 the collective bargaining agreement during 1977. Article XII  
23 of that agreement provides that "...Seniority means the rights  
24 secured by permanent full-time employees by length of continuous  
25 service to the city. Seniority rights shall apply to layoffs,  
26 scheduling of vacation, and transfer of employees; that is, the  
27 last employee hired shall be the first laid off. Seniority  
28 shall not be effective until a ninety (90) day probationary  
29 period has been completed, after which seniority shall date  
30 back to the date of last hiring. Seniority shall be determined  
31 by craft and division. Recall rights are not earned until  
32 after six (6) months continuous [sic] service."

1           8.    The grievance procedure provided for under terms of the  
2 collective bargaining agreement between the Craft Council and the  
3 City does not require final and binding arbitration.  Instead, it  
4 provides that, if both parties cannot agree to submit to binding  
5 arbitration, either party may take legal or economic action.

6           9.    The City agreed that Harold Spilde would not perform  
7 laborer's work as part of the settlement of a grievance which has  
8 been filed by the Complainant and Union.  The Union believed the  
9 matter was resolved.

10          10.   Bruce Young had more seniority as a laborer in the  
11 Street Department as of October 31, 1978, than did Harold Spilde  
12 and he was to have been the first to be recalled if anyone was  
13 recalled in the Street Department.

14          12.   Persons are employed by the City Street Department as  
15 laborers under the Comprehensive Employment and Training Act and  
16 perform some of the duties which a regular laborer would be  
17 expected to perform.

18          13.   Article IV, 4.1 of the parties' collective bargaining  
19 agreement provides, in part, "Employees who are members of the  
20 union on the date of [sic] this AGREEMENT is executed shall, as  
21 condition of continuing employment, maintain their membership in  
22 the union.  All future employees performing work with the juris-  
23 diction of the union involved shall, as a condition of continuing  
24 employment, become members of such union within thirty (30) days  
25 of the date of their employment and the union agrees that such  
26 employees shall have thirty-one (31) days within which to pay  
27 union's initiation fees and dues.  If the employees fail to pay  
28 initiation fees or dues within thirty-one (31) days or fails to  
29 affectuate [sic] the provisions of Section 59-1603(5) of the  
30 Montana Statutes, the union may request in writing that the  
31 employee be discharged.  The city agrees to discharge said  
32 employee upon written request from the union..."



1 and alleged contract violations.

2 Generally, the holding in Collyer established the following  
3 factors to determine whether deferral is appropriate: (1) the  
4 dispute must arise within the confines of a stable collective  
5 bargaining relationship, without any assertion of enmity by the  
6 respondent toward the charging party; (2) the respondent must be  
7 willing to arbitrate the issue under a clause providing for  
8 arbitration in a broad range of disputes, and (3) the contract  
9 and its meaning lie at the center of the dispute. Where the  
10 respondent's conduct has been a complete rejection of the prin-  
11 ciples of collective bargaining and the organizational rights of  
12 employees, the NLRB has not deferred, Capitol Roof & Supply Co.,  
13 217 NLRB 173, 89 LRRM 1191 (1975). Certain alleged conduct alone  
14 has been so flagrant as to prevent the NLRB from deferring to  
15 prospective arbitration regardless of the parties' previous  
16 collective bargaining relationships, e.g., the NLRB will not  
17 defer where the unfair labor practice charge alleges that the  
18 employer's conduct was in retaliation or reprisal for an  
19 employee's resort to the grievance procedure, North Shore  
20 Publishing Co., 206 NLRB 42, 84 LRRM 1165 (1973). If no final  
21 and binding grievance procedure exists, the NLRB will not defer,  
22 Wheeler Const. Co., 219 NLRB 104, 90 LRRM 1173 (1975); Tulsa  
23 Whisenhunt Funeral Homes, 195 NLRB 106, 79 LRRM 1265 (1972);  
24 Atlas Tack Corp. 226 NLRB 38, 93 LRRM 1236 (1976).

25 In 1977, the NLRB altered its prearbitral deferral policy a  
26 enunciated in Collyer. In General American Transportation Corp.  
27 228 NLRB 102, 94 LRRM 1483 (1977), the Board held that deferral  
28 was no longer appropriate in cases of alleged employer discrimi-  
29 tion or interference with protected rights.

30 In the instant case, I believe the Board of Personnel Appeal  
31 should follow NLRB precedent on deferral and not defer this  
32 charge to the contract grievance procedure. The grievance procedure

1 dure provided in the contract does not culminate in a final and  
2 binding decision. It may end in a "binding" decision, if a  
3 majority of a six-member committee formed by the city manager and  
4 comprised of three city and three union representatives can reach  
5 agreement. This charge also involves an alleged violation of  
6 complainant's basic rights under 39-31-401(1) MCA and should  
7 not, for that further reason, be deferred. The City's conduct  
8 with respect to abiding by the settlement reached on the grievance  
9 filed by Mr. Young does not lead one to conclude that a stable  
10 collective bargaining relationship exists between the parties.  
11 There was no indication of a willingness on the part of the City  
12 to arbitrate.

13 Section 39-31-401(3) MCA prohibits discrimination by a  
14 public employer "in regard to hire or tenure of employment or an  
15 term or condition of employment to encourage or discourage membe  
16 ship in any labor organization." This is the same prohibition  
17 written into Section 8(a)(3) of the National Labor Relations Act  
18 In *Radio Officers' Union v. NLRB*, 347US17, 33 LRRM 2417 (1954)  
19 the U.S. Supreme Court stated:

20 The language of Section 8(a)(3) is not ambiguous. The  
21 unfair labor practice is for an employer to encourage  
22 or discourage membership by means of discrimination.  
23 Thus, this section does not outlaw all encouragement or  
24 discouragement of membership in labor organizations;  
25 only such as is accomplished by discrimination is  
26 prohibited. Nor does this section outlaw discrimina-  
27 tion in employment as such; only such discrimination as  
28 encourages or discourages membership in a labor  
29 organization is proscribed ... But it is also clear  
that specific evidence of intent to encourage or  
discourage is not an indispensable element of proof of  
violation of 8(a)(3) ... An employer's protestation  
that he did not intend to encourage or discourage must  
be unavailing where a natural consequence of his action  
was such encouragement or discouragement. Concluding  
that encouragement or discouragement will result, it is  
presumed that he intended such consequence.

30 Discriminatory conduct motivated by union animus and having the  
31 foreseeable effect of either encouraging or discouraging union  
32 membership must be held to be violative of public employee rights  
under 39-31-401(3) MCA. I must conclude here that Mr. Young was

1 laid off and Mr. Spilde retained by the City because Young had  
2 filed a number of grievances. Had the City followed the seniori  
3 clause of the agreement and laid off Spilde first or had it  
4 placed Spilde in a true non-bargaining unit position doing non-  
5 bargaining unit work, one would be inclined to believe no union  
6 animus existed. However, Young was laid off, Spilde remained  
7 (with less seniority as a laborer) and did laborer work, the  
8 supervisor stated publicly that he would not rehire complainant,  
9 the City had CETA employees doing laborer work, and Young has not  
10 yet been recalled. The evidence clearly points to the conclusio  
11 that the City's discriminatory motive was a factor, and probably  
12 the dominate factor, in its decision to lay off complainant and  
13 thereby violate the agreement. Its actions caused unrest among  
14 union members and had the effect of discouraging membership.

15 Complainant also charged a violation of 39-31-401(4) MCA  
16 which prohibits employer discrimination against an employee for  
17 signing or filing an affidavit, petition or complaint or giving  
18 information, or testifying under the act. The same prohibition  
19 is found in Section 8(a)(4) of the NLRA. The narrow scope of  
20 this unfair labor practice should be noted. Filing a grievance  
21 under the terms of a contract grievance procedure does not equate  
22 to signing or filing an affidavit, petition, or complaint under  
23 the act. However, Mr. Young was discriminated against (for  
24 aggrieving a number of employer personnel actions) when he was  
25 laid off and a person with less seniority kept on doing laborer  
26 work. And, in my view, he was further discriminated against  
27 after he filed this unfair labor practice charge because he was  
28 not called back by the city. The evidence shows that laborer-  
29 type work was being done by CETA personnel and by Mr. Spilde.  
30 Mr. Young and his union added fuel to the already existing dis-  
31 criminatory flame by charging the City with unfair labor practice  
32 under Montana law.

1 Section 39-31-401(2) MCA makes it an unfair labor practice  
2 for a public employer to dominate, interfere, or assist in the  
3 formation or administration of any labor organization. I believe  
4 the purpose of this provision is to insure that a union which  
5 purports to represent employees in collective bargaining will not  
6 be subjected to employer control. There is no evidence on the  
7 record to indicate that the City dominated, interfered, or assisted  
8 in the administration of the Union. The type of activity set out  
9 in paragraph (4) of this section goes beyond interfering with  
10 the rights of individual employees as guaranteed by paragraph  
11 (1); it goes to those activities which are aimed at the labor  
12 organization as an entity.

13 The city was also charged with a violation of 39-31-401(5)  
14 MCA for refusing to bargain collectively in good faith with an  
15 exclusive representative. This would be an 8(a)(5) charge under  
16 the NLRA. The U.S. Supreme Court held, in *Conley v. Gibson*  
17 355US41, 46, 41 LRRM 2089 (1957), that collective bargaining is  
18 a continuing process. Clearly, it is not limited to the negoti-  
19 ation of an agreement under which the parties intend to operate.  
20 In many cases, bargaining can and must be carried on during the  
21 term of an agreement. However, the duty to bargain during the  
22 term of the agreement has generally been limited to subjects  
23 which were neither discussed nor incorporated into the contract.  
24 A waiver of bargaining rights may occur by reason of the express  
25 agreement of the parties. The contract between the city and the  
26 union contains a seniority clause which deals specifically with  
27 the rights of employees relative to lay offs, recalls, etc.  
28 Since the contract provides for such, I cannot find any obliga-  
29 tion by the city to bargain on the subject. But, bargaining is  
30 not the problem in the instant case; the parties did that prior  
31 to entering into the agreement. The problem is one of enforce-  
32 ment of contractual and statutory rights. Therefore, I must

1 conclude that there was no refusal to bargain because there was  
2 no obligation to bargain on the subject.

3 Section 39-31-401(1) MCA makes it an unfair labor practice  
4 for a public employer to interfere with, restrain, or coerce  
5 employees in the exercise of their rights guaranteed in 39-31-20  
6 MCA. That section states, "Public employees shall have and shall  
7 be protected in the exercise of the right of self-organization,  
8 to form, join, or assist any labor organization, to bargain  
9 collectively through representatives of their own choosing on  
10 questions of wages, hours, fringe benefits, and other conditions  
11 of employment and to engage in other concerted activities for the  
12 purpose of collective bargaining or other mutual aid or protection  
13 free from interference, restraint, or coercion." The NLRA sets  
14 forth the same prohibition on the national level. In Cooper  
15 Thermometer Co., 154 NLRB 502, 59 LRRM 1767 (1965) the NLRB held  
16 that motive is not the critical element in a section 8(a)(1)  
17 violation, that "interference, restraint, and coercion under  
18 Section 8(a)(1) of the act does not turn on the employer's motive  
19 or on whether the coercion succeeded or failed. The test is  
20 whether the employer engaged in conduct which, it may reasonably  
21 be said, tends to interfere with the free exercise of employee  
22 rights under the act." The NLRB has generally held that dis-  
23 charging or disciplining employees for filing or processing  
24 grievances is a violation of Section 8(a)(1), Ernst Steel Corp.,  
25 212 NLRB 32, 87 LRRM 1508 (1974); Seven-Up Bottling Co. of Detroit,  
26 223 NLRB 136, 92 LRRM 1001 (1976). I find here that the fact  
27 that Mr. Young had a record of filing grievances affected the  
28 judgment of those city officials responsible for laying him off  
29 and keeping a person with less seniority on the payroll as a  
30 laborer. The City's action in employing CETA personnel to per-  
31 form laborer work and not recall Mr. Young is a further indica-  
32 tion of its disregard for his statutory and contractual rights.

1 Whether they (City officials) intended such interference is not  
2 known; however, that is not the test which I believe should be  
3 adopted by the Board of Personnel Appeals. The BPA should adopt  
4 the same rule, with respect to 39-31-401(1) MCA violations as has  
5 been adopted by the NLRB as noted above.

6 IV. CONCLUSION OF LAW

7 The Board of Personnel Appeals has jurisdiction under  
8 39-31-403 MCA.

9 The defendant, City of Great Falls, violated 39-31-401(1)(3)  
10 and (4); it did not violate 39-31-401(2) or (5).

11 V. RECOMMENDED ORDER

12 IT IS ORDERED THAT, after this Order becomes final, the City  
13 of Great Falls, its officer, agents, and representatives shall:

14 (1) Cease and desist from its violations of 39-31-401 MCA;

15 (2) Take affirmative action by reinstating Bruce Young as a  
16 laborer with the city;

17 (3) Make Bruce Young whole by repaying him for lost wages,  
18 benefits, and interest incurred since October 31, 1978;

19 (4) Meet with representatives of the Union and attempt to  
20 determine the amount due under No. 3 above; if a mutual deter-  
21 mination cannot be made within ten days, notify the Board of  
22 Personnel Appeals' hearing examiner who will hold a hearing and  
23 issue a detailed remedial order;

24 5. Post in conspicuous places in its major place of busi-  
25 ness and appropriate work stations copies of the attached notice  
26 marked "Appendix."

27 6. Notify the Board of Personnel Appeals in writing within  
28 20 days what steps have been taken to comply with this Order.

29 The Union shall not be reimbursed for legal or other expenses  
30 incurred as a result of bringing these charges.

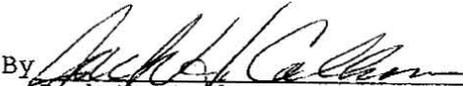
31 NOTICE

32 Exceptions may be filed to these Findings of Fact, Conclu-

1 sions of Law, and Recommended Order within 20 days of service  
2 thereof. If no exceptions are filed with the Board within that  
3 time, the Recommended Order shall become the Final Order of the  
4 Board. Exceptions shall be addressed to the Board of Personnel  
5 Appeals, Box 202, Capitol Station, Helena, Montana, 59601.

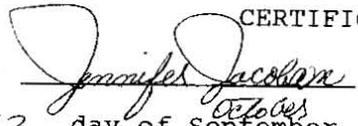
6 DATED this 12<sup>th</sup> day of ~~September~~<sup>October</sup>, 1979.

7 BOARD OF PERSONNEL APPEALS

8  
9  
10 By   
11 Jack H. Calhoun  
Hearings Examiner

12  
13 \* \* \* \* \*

14 CERTIFICATE OF MAILING

15 I, , hereby certify and state that on  
16 the 12 day of ~~September~~<sup>October</sup>, 1979, a true and correct copy of the  
17 above captioned FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER  
18 was mailed to the following:

19 David Gliko  
20 City Attorney  
City of Great Falls  
21 P.O. Box 5021  
Great Falls, MT 59403

22 D. Patrick McKittrick  
23 Attorney at Law  
315 Davidson Building  
24 3 Third Street North  
P.O. Box 1184  
25 Great Falls, MT 59403

26 Gerald E. Pottratz  
Construction and General Laborers  
27 Local No. 1334 AFL-CIO  
1112 Seventh Street South  
28 Great Falls, MT 59403

29  
30  
31   
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