

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 42-79:

CHAUFFEURS, TEAMSTERS AND HELPERS,)
LOCAL #190, REPRESENTING DENNIS A.)
MUELLER,)

Complainant,)

- vs -)

CITY OF BILLINGS,)

Defendant.)

FINAL ORDER

* * * * *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Kathryn Walker on February 17, 1981.

Exceptions to the Findings of Fact, Conclusions of Law, and Recommended Order were filed by V.E. Henman on behalf of the Complainant, on March 6, 1981.

Complainant's Amended Exceptions were filed by Attorney for Complainant, Emilie Loring, on March 24, 1981.

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

1. IT IS ORDERED, that the Exceptions and Amended Exceptions of Complainant to the Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

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

DATED this 14th day of April, 1981.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy
John Kelly Addy, Chairman

cc: K.D. Peterson
Emilie Loring

STATE OF MONTANA
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IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE #42-79:

CHAUFFEURS, TEAMSTERS AND HELPERS,)		
LOCAL #190, REPRESENTING DENNIS A.)		
MUELLER,)		
)	
Complainant,)	FINDINGS OF FACT,	
)	CONCLUSION OF LAW,
vs.))	AND RECOMMENDED ORDER.
)	
CITY OF BILLINGS,)		
)	
Defendant.)		

On September 19, 1979, Dennis A. Mueller filed an unfair labor practice complaint with this Board that charged the City of Billings with violation of sections 39-31-401(1), (2), and (4) MCA. The City of Billings denied those charges on October 5, 1979.

Kathryn Walker, hearing examiner, presided over the pre-hearing conference and hearing in this matter on September 18, 1980, in Billings, Montana. Vincent E. Hemmen, business agent for Teamsters Local #190, represented the Complainant. K.D. Peterson, Billings City Attorney, represented the Defendant. At the pre-hearing conference the Complainant withdrew the charges that the Defendant had violated sections 39-31-401(2) and (4) MCA. Complainant pursued to hearing the charge that the Defendant had violated section 39-31-401(1) MCA. Specifically, the Complainant alleged the City of Billings had suspended Mr. Mueller because of his union activities. The Defendant maintained the City of Billings suspended Mr. Mueller for insubordination.

Following the hearing, the parties presented briefs, the last of which was received on November 7, 1980.

FINDINGS OF FACT

Having reviewed the entire record in this matter, including sworn testimony, exhibits, and briefs, these are the findings of fact:

1 1. At all times relevant to this matter, Complainant Dennis
2 A. Mueller was employed in the Public Utilities Department of
3 Defendant City of Billings.

4 2. In January, 1979, Mr. Mueller became president of the
5 American Federation of State, County, and Municipal Employees
6 (AFSCME) Local #2390, at that time the exclusive representative of
7 his bargaining unit. As union president Mr. Mueller participated
8 in numerous union activities, many of which involved the City
9 administration.

10 3. The collective bargaining agreement in effect at the
11 time these events transpired provided the following regarding a
12 union officer's use of leave to perform union business:

13 The Employer may grant reasonable leaves of absence
14 to employees whenever required in the performance
15 of duties as "duly authorized representatives of
16 the Union". "Duly authorized representatives"
17 means members of regularly constituted committees
18 and/or officers of the Union, a list to be supplied
19 to the City Administrator.

20 4. The collective bargaining agreement in effect when these
21 events transpired also provided for a grievance procedure. That
22 procedure provided for "stewards" who could "process grievances
23 during regular working hours without loss of pay, subject to
24 notification of their supervisor." It also provided for a four-step
25 grievance procedure with the steward and division head involved at
26 the first step; the chief steward and department head (and possibly
27 the union grievance committee) involved at the second step; the
28 union president and city administrator involved at the third step;
29 and arbitration proceedings at the fourth step.

30 5. Between January (when Mr. Mueller became union presi-
31 dent) and May, 1979, the union experienced difficulties processing
32 grievances. A strong decertification drive was in progress,
numerous grievances were being filed, and the City Administrator
was denying grievances at step three of the procedure because of
improper filing.

1 6. In an effort to alleviate these grievance-related prob-
2 lems, Mr. Mueller appointed himself a "steward at large" so that
3 he could function as a steward not designated to a specific work
4 location. Even though there was no history of the unit having a
5 "steward at large" and the contract made no mention of such a
6 position, Mr. Mueller thought the executive powers of his office
7 as union president enabled him to make the designation. He be-
8 lieved this designation brought him under the coverage of the
9 contract provision that allowed stewards to "process grievances
10 during regular working hours without loss of pay, subject to
11 notification of their supervisor."

12 7. Mr. Mueller notified the City administration that he was
13 a "steward at large" in a letter to R.L. Larsen, City Administrator,
14 dated May 13, 1979.

15 8. On May 17, 1979, the City Administrator responded to Mr.
16 Mueller's May 13, 1979, letter. In reference to Mr. Mueller's
17 designation as a "steward at large" Mr. Larsen commented that "the
18 purpose of a Chief Shop Steward and Shop Steward are to remove
19 grievance processes from the responsibilities of the Union Presi-
20 dent and other officers." Noting that he needed to know the
21 union's position "because in grievance handling, a past practice
22 of dealing with the Chief Shop Steward seems to be changed," Mr.
23 Larsen asked: "Is this a new policy of AFSCME or one in which I
24 have not been aware?"

25 9. There was no further correspondence between the parties
26 about Mr. Mueller's designation as "steward at large" until the
27 specific events giving rise to this Complaint were transpiring.

28 10. On May 16, 1979, Gerald D. Underwood, Public Utilities
29 Director, wrote to C. Brent Hunter, Personnel Director, to comment
30 that Mr. Mueller had "been spending an inordinate amount of time
31 absent from his position with the Department under the auspices of
32

1 AFSCME Union activities" and to request "a definitive determina-
2 tion as to just how much time and under what particular circum-
3 stances Mr. Mueller is permitted to be absent from his depart-
4 mental position with pay for the purpose of tending to union
5 activities."

6 11. Mr. Mueller used leave with/without pay to conduct union
7 business. His leave with/without pay record indicated:

8 a. Between January 11, 1979 (date Mr. Mueller became union
9 president) and May 16, 1979 (date of the Department
10 Director's letter about Mr. Mueller's use of work time
11 to conduct union business), Mr. Mueller took 89.5 hours
12 leave without pay and 19 hours leave with pay, for a
13 total of 108.5 hours or approximately 15% of his time.

14 b. Between January 11, 1979 (date Mr. Mueller became union
15 president) and June 18, 1979 (date of Mr. Mueller's
16 absence that precipitated warning letter), Mr. Mueller
17 took 149.5 hours leave without pay and 27 hours leave
18 with pay, for a total of 176.5 hours or approximately
19 20% of his time.

20 12. During this time period but before June 18, 1979, Mr.
21 Walter, Mr. Mueller's immediate supervisor, had several discus-
22 sions with Mr. Mueller about how much work time he was missing for
23 the purpose of conducting union business.

24 13. Before beginning his vacation on June 18, 1979, Mr.
25 Walter met with Mr. Mueller on several occasions to instruct Mr.
26 Mueller to refrain from taking any time off while he (Mr. Walter)
27 was on vacation, except for situations specifically authorized by
28 the City Administrator or the Personnel Director.

29 14. Buford (Bud) Heiser, an assistant superintendent in the
30 Public Utilities Department, was designated to "cover" for Mr.
31 Walter while he was on vacation. Before leaving for vacation Mr.
32 Walter "stressed" to Mr. Heiser that Mr. Mueller was not to take

1 any time off while he was gone unless the City Administrator or
2 Personnel Director requested a meeting or there was a personal
3 emergency. Mr. Heiser considered this a "special instruction."

4 15. Shortly after 8:00 a.m. on Monday, June 18, 1979, the
5 first day of Mr. Walter's vacation, Mr. Mueller asked Mr. Heiser
6 for one hour off to attend to a grievance at the Animal Shelter.
7 Mr. Heiser asked Mr. Mueller if he needed the time off to meet
8 with the City Administrator or Personnel Director; Mr. Mueller
9 answered "no." After checking with the City Administrator and
10 Personnel Director to verify that they had not summoned Mr. Mueller,
11 Mr. Heiser denied Mr. Mueller's request for leave.

12 Mr. Mueller left anyway. He thought this action was justi-
13 fied because the problem at the Animal Shelter needed taking care
14 of very quickly, because Mr. Heiser didn't give him a "job related
15 reason" for denying the time off, and because the contract allowed
16 stewards to process grievances on work time after notification
17 (not permission) of their supervisors.

18 Mr. Mueller returned to work approximately one hour later.

19 16. Mr. Heiser discussed this incident with Mr. Christensen,
20 the Assistant Public Utilities Director. They decided to issue a
21 warning letter advising Mr. Mueller that if the infraction was
22 repeated further disciplinary action would be taken.

23 17. At approximately 8:00 a.m. two days later, on Wednesday,
24 June 20, 1979, Mr. Mueller asked Mr. Heiser for the day off. He
25 informed Mr. Heiser that he needed this time off to go to the
26 various departments to talk to people about the possibility of
27 layoffs of union members. The discussion that ensued between Mr.
28 Mueller and Mr. Heiser established that the request had nothing to
29 do with a request from the City Administrator or Personnel Director.
30 Therefore, Mr. Heiser denied Mr. Mueller's request for leave.

31 After he had requested the leave but before he left the
32 worksite, Mr. Mueller, who had not yet received the warning letter

1 for the June 18 absence, received a "verbal warning" from Mr.
2 Christensen. Mr. Christensen informed Mr. Mueller that the written
3 warning was coming and advised him that a repeat of the June 18
4 incident would result in up to a three-day suspension.

5 Mr. Mueller left for the entire day anyway.

6 18. After Mr. Mueller left work on Wednesday, June 20, 1979,
7 Mr. Heiser and Mr. Christensen met to discuss the problem of his
8 unauthorized absences. They decided to proceed with disciplinary
9 action and had the necessary letters drafted and signed by the
10 Department Head.

11 19. At 8:05 a.m. Thursday, June 21, 1979, Mr. Mueller re-
12 ceived three letters, each dated June 20, 1979. The first letter
13 was a warning from the Department Head regarding the June 18,
14 1979, incident; the second, also signed by the Department Head,
15 notified Mr. Mueller that he was suspended because of the June 20,
16 1979, incident; and the third, signed by the City Administrator,
17 informed him the City would not recognize him as "steward at
18 large."

19 The body of the warning letter stated, in its entirety:

20 On June 18, 1979 you requested that your
21 supervisor, Mr. Bud Heiser, authorize you time off
22 with pay to process a grievance for an employee in
23 the Animal Shelter Department. Article III Grievance
24 and Arbitration Procedure in the Union Agree-
25 ment specifically authorizes the Union President
26 time off with pay only when the grievance is being
27 presented to the City Administrator. Therefore,
28 your request was denied. You then told your super-
29 visor, Mr. Heiser, that you were going to take the
30 time off anyway and left the job without permission.

Your actions were not only in violation of the
Union Agreement, but were also insubordinate to
your supervisor.

We are hereby issuing you this warning letter
advising you that if this should happen again you
will receive from one to three days off without
pay. In addition, you will not be paid for the time
you were absent from the job on June 18, 1979
without authorization.

Please contact me if you have any questions.

31 The body of the letter notifying Mr. Mueller of his suspension
32 stated, in its entirety:

1 On June 20, 1979 you requested time off with
2 pay to process an employee grievance. You were
3 again informed that Article III Grievance and
4 Arbitration Procedure in the Union Agreement speci-
5 fically authorizes the Union President time off
6 with pay only when a grievance is being presented
7 to the City Administrator. You were also advised
8 at approximately 8:15 a.m. on June 20, 1979, by Mr.
9 Carl Christensen with Mr. Bud Heiser present that
10 you would be receiving a warning letter today for
11 the time you were absent from the job without
12 authorization on June 18, 1979. In addition, you
13 were told that your request for leave with pay on
14 the morning of June 20, 1979 was denied, and if you
15 left the job without authorization, you would be
16 suspended without pay for a maximum of three work-
17 ing days.

18 You informed Mr. Christensen and Mr. Heiser
19 that you were processing the grievance in the
20 capacity of Steward-at-Large and the time spent in
21 this capacity should be with pay. You were then
22 advised by Mr. Christensen that Article III Griev-
23 ance and Arbitration Procedure in the Union Agree-
24 ment did not provide for a Steward-at-Large and the
25 City did not recognize your acting in that capacity.
26 However, you subsequently refused to follow the
27 directive as stated by Mr. Christensen and left the
28 job without authorization.

29 Your actions on June 20, 1979 were not only in
30 violation of the Union Agreement but also insubor-
31 dinate. Therefore, your pay will be docked for the
32 time you were absent without authorization and you
are hereby suspended from work without pay for two
days, June 21st and 22nd, 1979.

Please be advised that if this type of behavior
should occur again your employment with the Public
Utilities Department of the City of Billings will
be terminated.

Please contact me if you have any questions.

The letter from the City Administrator stated, in its
entirety:

I have not yet received a reply to my letter
of May 17, 1979, (copy attached). Neither the
contract "Article III", nor AFSCME past practice
make reference to provisions for a "Steward-at-
large". You have unilaterally changed the process
of dealings with Union-Management questions of
grievances, inquiries, etc. This practice appears
to be an unreasonable departure from past practices.

Until I receive an answer, and until this is
mutually resolved, you will not be recognized as a
"Steward-at-large".

20. Mr. Mueller was suspended without pay on June 21 and 22,
1979.

DISCUSSION

The Complainant in this matter charges the Defendant City of Billings with violation of section 39-31-401(1) MCA. That section provides it is an unfair labor practice for a public employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201." Section 39-31-201 MCA states:

Public employees protected in right of self-organization. Public employees shall have and shall be protected in the exercise of the right of self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion.

Mr. Mueller contends the City suspended him without pay on June 21 and 22, 1979, for reasons related to his union activities. The City denies it disciplined Mr. Mueller because of his union activities and insists it invoked the disciplinary measure because Mr. Mueller was insubordinate to his supervisor.

Because the question raised by this unfair labor practice charge turns on the City's reason for disciplining Mr. Mueller, the National Labor Relations Board's Wright Line decision¹ will be helpful. In that decision the NLRB:

1. Adopted the "but for" test used by the U.S. Supreme Court in Mt. Healthy City School District vs. Doyle². This test has been adopted by Montana's Supreme Court for dual motivation cases arising under Montana's Collective Bargaining Act for Public Employees.³

¹ Wright Line, 251 NLRB 150, 105 LRRM 1169 (1980).

² Mt. Healthy City School District vs. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977).

³ Board of Trustees of Billings School District No. 2 vs. State of Montana ex rel Board of Personnel Appeals and Billings Education Association, Mont. _____, 604 P 2d 770 (1979).

1 2. Distinguished "dual motivation" cases from merely "pre-
2 textual" cases. It described a "dual motivation" case
3 as one in which:

4 . . . the discipline decision involves
5 two factors. The first is a legitimate
6 business reason. The second reason,
7 however, is not a legitimate business
8 reason but is instead the employer's
9 reaction to its employees' engaging in
10 union or other protected activities. . .

11 and a "pretextual" case as one where:

12 . . . the asserted justification for the
13 discipline is a sham in that the pur-
14 ported rule or circumstance advanced by
15 the employer did not exist, or was not,
16 in fact, relied upon. . . .

17 3. Set forth the following test for dual moti-
18 vation cases:

19 . . . henceforth [the NLRB will] employ
20 the following causation test in all cases
21 alleging violation of Section 8(a)(3) or
22 violations of Section 8(a)(1) [39-31-401(1)
23 MCA] turning on employer motivation.
24 First, we shall require that the General
25 Counsel [the Complainant] make a prima
26 facie showing sufficient to support the
27 inference that protected conduct was a
28 "motivating factor" in the employer's
29 decision. Once this is established, the
30 burden will shift to the employer to
31 demonstrate that the same action would
32 have taken place even in the absence of
the protected conduct. [Footnote omitted.]

Applying the Wright Line test to the Complaint now under
consideration, it is the hearing examiner's opinion that:

1. Defendant City of Billings' defense to Complainant
Dennis Mueller's charge was not merely pretextual. Mr. Mueller
did provide the City some cause for invoking disciplinary action
when he took a second unauthorized leave of absence even though
(a) his immediate supervisor had instructed him to refrain from
taking any time off during this period (except in certain circum-
stances not applicable here), (b) his substitute supervisor had
denied his leave request, and (c) following the first unauthorized
absence he had received a verbal warning that he would be suspended
if he repeated the infraction.

1 2. Complainant Dennis Mueller made "a prima facie showing
2 sufficient to support the inference that protected conduct was a
3 'motivating factor' in the employer's decision." The record
4 established that Mr. Mueller was active in union affairs and that
5 the City was aware of this. It also established that Mr. Mueller
6 used most, if not all, of his leave with/without pay for the
7 purpose of conducting union business and that the City was aware
8 of this, too. By extension, then, any involvement of the City in
9 Mr. Mueller's use of leave with/without pay necessarily had some
10 effect on his participation in union activities. Therefore, when
11 the City disciplined Mr. Mueller for taking leave to conduct union
12 business it could have been attempting to interfere with, restrain,
13 or coerce Mr. Mueller in the exercise of his collective bargaining
14 rights.

15 3. Defendant City of Billings would have taken "the same
16 [disciplinary] action . . . even in the absence of the protected
17 conduct [Mr. Mueller's union activities]."

18 It must be recognized that Mr. Mueller's union activities
19 were inextricably related to the events which gave rise to this
20 Complaint. That is, the genesis of this unfair labor practice
21 charge was the parties' disagreement as to whether Mr. Mueller was
22 entitled to unchecked leaves of absence to conduct union business.
23 Mr. Mueller argued that as a "steward at large" he was entitled by
24 provision III.B of the collective bargaining agreement to "process
25 grievances during regular working hours without loss of pay,
26 subject to notification [not approval] of their supervisor." On
27 the other hand, the City believed it could legitimately question
28 or even limit Mr. Mueller's use of leave to conduct union business
29 because:

30 a. The language of provision VIII.G.3 of the collective
31 bargaining agreement was permissive rather than manda-
32 tory:

1 The Employer may grant reasonable leaves of
2 absence to employees whenever required in the
3 performance of duties as "duly authorized
4 representatives of the Union". "Duly author-
5 ized representative" means members of regularly
6 constituted committees and/or officers of the
7 Union, a list to be supplied to the City
8 Administrator. [Emphasis added].

- 9 b. The collective bargaining agreement made no mention of
10 the designation "steward at large."
11 c. There was no past practice for a "steward at large."
12 d. The appointment of Mr. Mueller, the union president, as
13 "steward at large" appeared to conflict with the collec-
14 tive bargaining agreement's explicit call for the union
15 president's involvement at step three of the grievance
16 procedure.

17 It was not necessary for the hearing examiner to decide this
18 question of contract interpretation to determine whether the City
19 was improperly motivated when it disciplined Mr. Mueller. It was
20 sufficient that she found the City's position to be at least
21 arguably legitimate, not patently erroneous or flagrantly violative
22 of Mr. Mueller's collective bargaining rights.

23 The hearing examiner then looked to the manner in which the
24 City effectuated its position regarding Mr. Mueller's use of leave
25 to conduct union business. The record indicated that officials of
26 the City had discussions with Mr. Mueller about the amount of time
27 he was taking to conduct union business and specifically instructed
28 Mr. Mueller to refrain from taking any leave while his immediate
29 supervisor was on vacation (except for certain situations indis-
30 putedly related to his capacity as union president). After Mr.
31 Mueller ignored these instructions he was verbally warned that
32 continued disregard for the instructions would result in his
suspension. It was only after he ignored the instructions and the
warning, and took a second unauthorized leave, that he was sus-
pended.

CERTIFICATE OF MAILING

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I, William J. Decker, do hereby
certify and state that I did on the 10th day of
February, 1981, mail a true and correct copy of
the above Findings of Fact, Conclusions of Law, and Recommended
Order to the following:

Dennis A. Mueller
4224 South Frontage Road
Billings, MT 59101

V.E. Henman, Business Representative
Chauffeurs, Teamsters, and Helpers Local Union #190
P.O. Box 1017
Billings, MT 59103

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William J. Decker

PAD3:a/13

