

1 This is a review of the final order of the Board of
2 Personnel Appeals and that final order is reviewable pursuant to
3 Section 2-4-702 MCA. Venue is in Yellowstone County, Montana.

4 The hearing examiner for the Board of Personnel Appeals
5 has found the facts in this case and these facts are accepted by the
6 Court. The Court may not substitute its judgment for that of the
7 agency as to the weight of the evidence on questions of fact.

8 This case requires application of the "but for" test
9 enunciated in Mt. Healthy City School District Board of Education
10 vs. Doyle, 429 U.S. 274 (1977). This test has been adopted by the
11 State of Montana for dual motivation cases under Montana's Collective
12 Bargaining Act. As applied in this case, the Mt. Healthy test required
13 Carlson to show that her protected union activity was a substantial
14 or motivating factor in the City's determination to discharge her.
15 The burden then shifts to the City to show that it would have
16 terminated her, absent her protected activity.

17 There was substantial evidence to demonstrate that Carlson's
18 union activity was a motivating factor in her discharge, after
19 consideration of Carlson's entire work history.

20 Carlson was a union steward with the AFSCME from October, 1977
21 until May, 1979. As a steward, she filed several grievances on behalf
22 of herself and other employees. After filing a grievance against her
23 supervisor, she was asked by the City Administrator why she filed so
24 many grievances, whether she liked her job, and why she did not seek
25 employment elsewhere. After the supervisor had been fired, he told
26 a fellow union member that he should have fired Carlson.

27 In April of 1979, an unscheduled performance evaluation
28 was conducted on animal shelter employees. Carlson was told that
29 the evaluation would not be placed in her personnel file; she later
30 learned that it had been placed in her file. After objecting, she
31 returned to the personnel office and the evaluation had been removed,
32 and she filed a grievance on that matter.

1 On September 25, 1979, Carlson received a performance
2 evaluation which rated her as an average employee and resulted in her
3 merit pay increase.

4 On February 2, 1980, Carlson represented her department
5 during the bargaining between the Teamsters and the City of Billings.
6 She openly discussed problems that she felt existed at the Shelter.
7 Following that meeting, her supervisor orally reprimanded her for the
8 statements she made at the meeting.

9 After the February 2 meeting, Carlson was required to drive
10 Truck 1085, a truck that she had complained about at the bargaining
11 meeting, despite the fact that she had not been required to drive it
12 during the previous two years. On February 11, 1980, Carlson was
13 reprimanded for operating a truck without a tachometer, although this
14 was a common practice for the employees.

15 On March 10, 1980, Carlson was terminated by her supervisor
16 for insubordination and lack of cooperation.

17 There is substantial evidence in the record to support the
18 conclusion that Carlson clearly carried her burden of establishing
19 a prima facie case that her protected union activity was a motivating
20 factor in her dismissal.

21 The burden then shifted to the employer, to establish that
22 it would have taken the same action regardless of Carlson's protected
23 conduct. Upon consideration of Carlson's entire work history with
24 the City, the City has failed to carry its burden.

25 On May 11, 1979, Carlson's vehicle was struck from the
26 rear by another. Carlson used intemperate language in describing the
27 accident over the radio. Also during May, she was reprimanded for
28 having a rider in the van. During June of 1979, Carlson picked up
29 the wrong dog after a postman had been bitten by a dog. During this
30 course of events, Carlson conducted herself in an improper manner
31 and received a letter so advising from her supervisor.

32 On September 14, 1979, Carlson did damage to an animal

1 shelter vehicle while backing it out of the garage.

2 In late December of 1979, there was an incident involving
3 Carlson's alleged refusal to go home on sick leave, after being
4 ordered to do so. She was suspended for four days without pay, and
5 given a written reprimand for insubordination for this incident. There
6 was considerable confusion over this incident and whose fault it was.
7 There was no grievance procedure in effect at the time and there is
8 evidence to support the hearing officer's determination that the
9 incident was nothing more than an attempt by Carlson to work after she
10 had been belatedly adjudged sick by Larson, her supervisor.

11 In March of 1980, the incident involving Carlson and
12 the schnauzer dog occurred. Carlson had picked up a dog she believed
13 to belong to a friend and took it to her home because the friend was
14 in the hospital. A Mrs. Wertz came to the animal shelter looking for
15 her schnauzer dog and Carlson told her that she had picked up a
16 schnauzer dog and Carlson told her that she had picked up a
17 schnauzer, but had returned it to its owner. Wertz called Carlson's
18 supervisor and told him that she was convinced that the dog was being
19 kept from her. Carlson and her supervisor then went to her friend's
20 house. The friend told the supervisor that he did not have the
21 schnauzer anymore. Carlson then stated that the dog was at her house.
22 She initially refused to take her supervisor there, but later did,
23 after being ordered to do so by the Assistant Chief of Police.
24 Although the dog was eventually returned to Mrs. Wertz, there was
25 still some question as to the ownership of the dog.

26 It appears that Carlson received unequal treatment
27 concerning some of the incidences for which she was reprimanded. It
28 further appears that some of the reprimands received by Carlson were
29 the result of union animus. As such, these reasons could not be
30 considered to show that the City would have terminated Carlson absent
31 her protected activity. Other reprimands resulted from poor
32 communication. City officials testified that employees are very rarely

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discharged. Carlson did receive a merit pay increase based upon an average to above average evaluation, in September of 1979. The City did not introduce evidence as to its practice of firing an employee in a situation comparable to the facts presented here.

There is substantial evidence to support the conclusion that the City did not carry its burden of showing that it would have terminated Carlson absent her protected union activity.

The City of Billings objects that the Board of Personnel Appeals did not take additional evidence after the remand of this matter from the Supreme Court. It appears that there is no motion in the administrative record requesting that additional evidence be taken. The City did file a motion for an order directing that additional evidence be taken before this Court on May 6, 1983. The City has been given substantial opportunity to introduce all of the evidence it wished before the administrative agency. The agency has considered the evidence prior to the merit pay increase given Carlson and such evidence was already in the record. Therefore, the Court will not order that additional evidence be taken in this case.

Based upon the foregoing, the Court now enters the following ORDER:

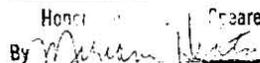
The decision of the Board of Personnel Appeals is supported by substantial evidence on the whole record and there has been no error of law warranting reversal under the standards of review of the Montana Administrative Procedure Act, Section 2-4-704(2) MCA. The decision of the agency ordering reinstatement of Susan Carlson and full back pay is hereby AFFIRMED.

DATED this 7 day of Feb, 1985.


WILLIAM J. SPEARE, District Judge

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was duly served upon the parties or their attorneys of record at their last known address this 8 day of February, 1985

Honor _____
By 

cc: K. D. Peterson
James Gardner
Emily Loring

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 10-80:

CHAUFFEURS, TEAMSTERS AND)
HELPERS, LOCAL UNION NO. 190,)
Complainant,)
- vs -)
CITY OF BILLINGS,)
Defendant.)

FINAL ORDER

The Amended Recommended Order was issued by Hearing Examiner Jack H. Calhoun on December 13, 1982.

Exceptions to the Amended Recommended Order were filed by K.D. Peterson, Attorney for Defendant, on January 3, 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 the Defendant to the Amended Recommended Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Amended Recommended Order of Hearing Examiner Jack H. Calhoun as the Final Order of this Board, with the typographical corrections of that decision noted below:

- Page 1, line 23 should read October 1, 1979 instead of 1981.

- Page 4, line 29 should read October of 1979 instead of December of 1979.

DATED this 2d day of February, 1983.

BOARD OF PERSONNEL APPEALS

By Joan A. Uda
Joan A. Uda
Alternate Chairman

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CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 2nd day of ~~January~~ ^{February}, 1983:

K. D. Peterson
PETERSON, SCHOFIELD & LECKIE
2906 3rd Avenue North
Park One Complex
Billings, MT 59101

Emilie Loring
HILLEY & LORING, P.C.
121 4th Street North - Suite 2G
Great Falls, MT 59401



12/10/82

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STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 10-80:

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|-------------------------------|---|-------------------|
| CHAUFFEURS, TEAMSTERS AND |) | |
| HELPERS, LOCAL UNION NO. 190, |) | |
| |) | |
| Complainant, |) | |
| |) | AMENDED |
| vs. |) | RECOMMENDED ORDER |
| |) | |
| CITY OF BILLINGS, |) | |
| |) | |
| Defendant. |) | |

* * * * *

This case was remanded from the Montana Supreme Court to the Board of Personnel Appeals on August 5, 1982, for consideration and decision in light of events occurring prior to Susan Carlson's merit increase as well as subsequent happenings. The Board of Personnel Appeals found, by its final order issued on April 4, 1981, that Carlson had been discharged because of her union activities in violation of Section 39-31-401(1) and (3), MCA, and ordered her reinstated with back pay. The District Court of the Thirteenth Judicial District reversed that decision.

The merit increase awarded Carlson on or about October 1, 198⁷⁹~~2~~, resulted from an evaluation of her performance as an employee by her immediate supervisor, Darlene Larson. The evaluation encompassed ten areas of concern including cooperation, judgment and dependability. The overall rating of Carlson showed her to be above average in most categories.

I reviewed Carlson's activities as an employee prior to the performance evaluation and concluded that those three occasions during which she performed poorly as an employee should be "ignored" because of the good evaluation. That is to say, since the City's evaluation indicated her conduct as



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an employee, especially in the areas of cooperation and judgment, was better than an average employee, I should accept that as her status at that point in time. Instead of ignoring the events prior to the evaluation and merit pay increase, I should have considered those occasions of poor performance, along with all other events which occurred prior and subsequent to the evaluation and increase.

Pursuant to the Supreme Court's decision in this case, the proper events which should have been considered in determining whether Sue Carlson was lawfully discharged by the City are those listed below:

1. From October 1977 until May 1979, when the American Federation of State, County and Municipal Employees' union was replaced by the Teamsters union, Sue Carlson served as a shop steward and filed six grievances against the City, both on her own behalf and on behalf of other union members. She was also a union trustee and a member of the executive board.
2. During July 1978 Carlson filed a grievance against her supervisor, Nixon, because of his harassment of her. At a meeting later in September the City decided to "wipe the slate clean."
3. On October 16, 1978 she filed another grievance over the harassment because the September meeting had not resolved anything. Nixon had threatened to "build a file" on her if she continued to run to the union. The grievance alleged continued harassment by Nixon, Captain Alles and Chief of Police Kiser. The City Administrator directed



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that Nixon cease harassing her, either directly or indirectly. Alles and Kiser were not found to be a part of the harassment. During a meeting on the grievance with the Administrator, Carlson was asked by him why she filed so many grievances, whether she liked her job and why did she not seek employment elsewhere.

4. At various times during her tenure as shop steward, Carlson was asked by the City Personnel Director, her supervisor, the Chief of Police, Captain Sampson and by Sergeant Hall why she did not quit rather than bucking them.
5. During March of 1979 Nixon was fired from his position. He thereafter went to one of Carlson's fellow union members and stated that he should have fired her. The fellow employer reminded him he, Nixon, did not live up to the contract.
6. In April of 1979 Sergeant Hall conducted an unscheduled performance evaluation on Animal Shelter employees. Carlson was told the evaluation would not be placed in her personnel file, however, she later learned that it had been placed in her file. Upon finding it in the file, she went to see Chief Kiser to object. By the time she returned to the personnel office the evaluation had been removed from her file. She filed a grievance on the matter which was finally resolved to her satisfaction.
7. On May 11, 1979 the City vehicle which Carlson was driving was hit in the rear by another vehicle. Carlson used intemperate language in describing



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the accident over the radio. Also during May she was warned about taking riders in the van without permission. She was later given a written reprimand for having a rider in the van.

8. During June of 1979 a postman was bitten by a dog. Carlson picked up the wrong dog and took it to the Animal Shelter. During the course of events surrounding the situation Carlson conducted herself in an improper manner toward the people involved in the incident. She later received a letter from her supervisor telling her similar future conduct would result in a written reprimand.

9. On September 14, 1979 Carlson backed a vehicle out of the Animal Shelter garage and did damage to the door. She was given a letter of reprimand, however, four other people who had done the same thing were not reprimanded. The damage Carlson did was repaired at no expense to the City.

10. On September 25, 1979 Carlson received her performance evaluation which resulted in her merit pay increase. Overall the evaluation showed she was an average employee and it showed she was above average in job knowledge, judgment, cooperation and initiative. The comment was noted on the evaluation form that although she let personal problems interfere, she worked well with other employees.

11. During late ~~December~~ ^{October} of 1979 Carlson gave her supervisors a request signed by her doctor that she be allowed light duty for ten days so that her leg problem would get better. Four days after



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receiving the request the City gave permission for her to work light duty. She had worked regular duty while awaiting permission and continued to work regular duty after permission to work light duty was granted. On what would have been the tenth day, a Friday, she was ordered home for three days, although she protested that her leg was better and that she did not have enough sick leave to cover the time off. Upon being ordered to use sick leave, Carlson talked to Captain Alles who led her to believe she could remain on duty. When Larson discovered she was still on duty she had her sent home. On Saturday she obtained a release from her doctor to return to work. She then reported for work, but her supervisor said she could not work. She returned home, but later went back because her supervisor changed her mind about her working. On Monday Carlson was sent to the City's doctor for an examination and was subsequently released for work. That same day she was given a written reprimand for insubordination for refusing to go home when first ordered to do so and suspended for four days without pay. She attempted to file a grievance but there was no extant collective bargaining agreement.

- 12. On February 2, 1980 Carlson appeared at a negotiating session between the Teamsters union and the City to explain and express concerns of Animal Shelter employees. She complained about equipment and working conditions in general, but she specifically complained about having to go into a trailer



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alone without police backup for a dog and about the condition of truck 1085. The next day her supervisor orally reprimanded her for speaking out at the meeting.

13. After February 2nd Carlson was required periodically to drive truck 1085, although she had not been required to drive it during the previous two years and despite the fact she had brought two doctors' statements which stated she should not drive it because of her back condition.

14. On February 11, 1980 Carlson was reprimanded for operating a truck without a tachometer. It was common practice for employees to drive trucks on the weekend without tachometers. Carlson was the only one who was admonished.

15. On March 10, 1980 Carlson was terminated by her supervisor for insubordination and lack of cooperation related to events the previous week concerning a Schnauzer dog.

On Wednesday, March 5, 1980 a Mrs. Wertz had gone to the Animal Shelter looking for her male Schnauzer dog which had been missing since the previous Monday. She had been told by her postman that he saw two Animal Wardens load her dog and a black Labrador into their van. On the previous Monday, March 3, 1980 Carlson and another Animal Warden, Dick Olson, had picked up the two dogs while on routine patrol. Carlson believed the Schnauzer to be the same dog she had given to her friend, Bill Ostwald, earlier in January and for that reason did not log the dog in when they returned to the



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Animal Shelter. It was customary to return dogs to their owners when a Warden knew to whom they belonged, instead of logging them in at the Animal Shelter. Instead she took it to Oswald's brother (Oswald was in the hospital). When Oswald got out of the hospital he asked Carlson if she would keep the dog for him; he did not feel up to it at that time. She agreed to do so. On March 6, 1980, prior to Oswald's release from the hospital and while the dog was at his brother's place, Larson called Carlson on her day off and asked if she had picked up a male Schnauzer. Carlson said she had and it had been returned to the owner. Returning dogs to their owners in this manner was standard, accepted procedure at the Animal Shelter. On Friday, March 7, 1980 Carlson returned to duty. Shortly after her return, Mrs. Wertz called the Animal Shelter from Bill Oswald's home where she had gone looking for her dog and where she had come to believe the dog was being hidden from her. Mrs. Wertz was upset and was urged by Larson to call back after the matter was investigated. After Mrs. Wertz left Oswald's place, he called Carlson at the Animal Shelter and told her about the situation. Carlson and Larson drove out to Oswald's place. On the way Carlson asked Larson if she could speak privately with Oswald when they first arrived. Larson denied her request. Upon arrival Larson asked Oswald if Carlson had brought him a Schnauzer. He said she had not. Carlson then remarked, "You don't have to lie."



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"This is my boss, you can tell the truth." He continued to say he did not have the Schnauzer and had not seen it. Upon re-urging by Carlson, he finally admitted that she brought him a dog, but that he did not have it anymore, in fact, never really did keep the dog. He gave them some registration papers on a male Schnauzer which Carlson had given him previously. Larson asked if those were the papers for the dog he had. He believed they were. When asked where the dog was, he said it was in Shepherd. Larson asked to go see it. Carlson said the people were not home, they were at work. On further questioning she said she had the dog at her own home. As they were leaving Oswald's place Mrs. Wertz showed up again and became very upset with Carlson. She wanted to go with Carlson and Larson to see the dog. Carlson refused to take them to her property because she did not want anyone to know where she lived. She offered to go get the dog and bring it back. ~~Mrs. Wertz~~ then decided they (she and Carlson) should go to the Police Department. At the police station the Assistant Chief gave Carlson the chance to get the dog accompanied by Larson. Together they retrieved the dog and took it to the Animal Shelter where they encountered Mrs. Wertz along with her friends and neighbors who were there to identify the dog. Carlson had also gathered people to identify the dog as Oswald's. In the confusion the dog did not know who its master was, nor were the people able to tell to whom it belonged. Mrs.



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Wertz and Larson took the dog to her veterinarian who informed them that it fit the age stated on Mrs. Wertz' papers and that the ear clipping was his work - work he had performed on her dog. When they returned to the Animal Shelter a former owner of the dog Ostwald was missing claimed the dog in question belonged to Ostwald. Carlson then decided to give the dog to Mrs. Wertz because Ostwald did not want it. Carlson finished her shift that day. She went to work the following day, Saturday, and was told by Larson she was suspended with pay pending an investigation. The following week she received a letter of termination.

An examination of the above events shows that from the time Carlson began her employment at the Animal Shelter in October of 1977 until May of 1979 there was not one occasion of poor performance on her part. During that period she did, however, pursue her activities as a union officer in a diligent manner which, according to the City Administrator and other City officers caused the City an amount of dissatisfaction with her. After May of 1979 she did, without question, falter as an employee and engaged in conduct which could be described as thoughtless reactions to particular situations. Given those occurrences and nothing more one could reasonably conclude that Carlson needed to be reprimanded and counseled on what the City's expectations of her were. However, there were extenuating circumstances. She had endured 18 months of harassment and grievous conduct by City supervisors and management personnel for pursuing union activities; she was involved in a divorce, which Larson noted on her evaluation; and she had no means of redress for the reprimands because



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2 there existed no grievance procedure during the time the
3 Teamsters Union was in the process of taking over the bargaining
4 unit. The incident when her supervisor made her go home in
5 spite of her protest that her leg was better is an example
6 of the latter proposition, it amounted to nothing more than
7 an attempt by Carlson to work after she had been belatedly
8 adjudged sick by Larson.

9 When the City, through its supervisor Larson and Police
10 Chief Kiser, evaluated Carlson's performance as an employee,
11 they evidently attached little or no importance to aspects
12 of her employment during the preceding months because they
13 gave her an above average rating -- they specifically rated
14 her high in cooperation, judgment, initiative, knowledge of
15 the job and rate of progress. The high rating came, it must
16 be remembered, within a few months of Carlson's misconduct
17 involving the use of intemperate language after the automobile
18 accident and the incident with the bitten postman. Although
19 a good evaluation and merit increase cannot excuse subsequent
20 misconduct, it seems clear that it should serve as an indication
21 of the lack of seriousness that the City attached to the
22 prior conduct. In the instant case the two above-mentioned
23 matters could not have been serious matters to the City,
24 otherwise Larson and Kiser would have made note of them and
25 evaluated her accordingly. They obviously did not serve to
26 deny her a merit raise.

27 The two cases cited by the City as holding that a
28 satisfactory performance rating does not erase prior disci-
29 plinary actions, Rockland-Bamberg Print Works, Inc., (1977),
30 231 NLRB 305, 96 LRRM 1237 and Concrete Technology, Inc.,
31 (1976) 224 NLRB 961, 93 LRRM 1282, do not so hold. Rockland-
32 Bamberg held that a satisfactory performance rating before

1 the election (union activity) cannot give rise to an infer-
2 ence that a discharge five months later for unsatisfactory
3 performance was motivated by the union activity. Here, the
4 misconduct (which the Supreme Court said must be considered)
5 occurred prior to the satisfactory rating. In Concrete
6 Technology the holding was that it is immaterial that the
7 employee received a wage increase shortly before his discharge
8 because the discharge was based on a single incident rather
9 than on an evaluation of his overall work performance.
10 Carlson was not terminated over a single incident. Her
11 discharge was stated as being for noncooperation with Larson
12 and other employees over a period of time. Yet, Larson
13 rated her high on cooperation on the performance evaluation.
14 After the evaluation and merit increase there was not one
15 incident of unjustified lack of cooperation on the part of
16 Carlson. The "leg incident" in December of 1979 reflects
17 negatively on Larson's supervisory ability, not on Carlson's
18 willingness to perform as an employee. The "Schnauzer
19 incident" evinced an overreaction by the City to a minor
20 mistake - if indeed it can be termed a mistake, inasmuch as
21 it was never clear to whom the dog belonged.

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23 What the NLRB cases do hold is that a prior good record
24 or merit increases serve to indicate, along with other
25 factors, either inconsistency on the part of the employer or
26 that the disciplinary action was in retaliation for union
27 activities rather than for the reason asserted by the employer.
28 In NLRB v. Evans Packing Co. (6th Cir. 1972), 463 F.2d 193,
29 80 LRRM 2810, the court upheld an NLRB decision to reinstate
30 an employee who had been discharged in violation of Section
31 8(a)(1) of the National Labor Relations Act. There, the
32 employee, after having been involved in protected activity;

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had been in a fight on company premises 15 months before his discharge; had been reprimanded two or three months prior to his discharge for spending too much time in the locker room; was repeatedly late; was absent without an excuse several times; and had a drinking problem, was nonetheless reinstated because he had been given several merit increases and was a good employee when he wanted to be. The court concluded from those circumstances that the reasons advanced by the employer for the termination was not the true reason, that his union activities were the reason. See also NLRB v. Charles H. McCauley Associates, Inc., (5th Cir. 1981) 657 F2d 685, 108 LRRM 2612; Draggoo Electric Co., Inc., 1974, 214 NLRB 847, 88 LLRM 1312.

After reviewing the events which occurred prior to Carlson's merit increase as well as subsequent happenings, I must conclude the City had a permissible and an impermissible reason to discipline her. The totality of her conduct as an employee provided the City with cause to invoke some disciplinary action; however, her union activities also caused the City to want to get rid of her as is evidenced by the comments made by the former City Administrator and other City officers about her union activities. And, the City's antiunion animus is further evidenced by the removal of the evaluation from her file, the adverse reaction by Larson to Carlson's statements about truck 1085 at the February union meeting with management, in thereafter making her drive truck 1085 and in interviewing her, and her only, because of the tachograph record, the overreaction by management personnel to the Schnauzer episode and finally the Personnel Director's comments. All the events taken together compel the conclusion that antiunion animus was definitely a motivating



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factor in the City's decision to terminate Carlson. The City's failure to come forth and prove that it would have terminated her for any of the individual events or that it would have done so on the basis of all alleged acts of misconduct taken together shows the City would not have terminated her but for her union activities. I use the word "alleged" to describe the events, exclusive of the Schnauzer dog incident, because: (1) she did not have a chance to aggrieve them because there was no collective bargaining agreement in existence, and (2) I have found that the earlier incidents show hostility toward Carlson because of her union activities or they show disparate treatment because of her union activities. See Board of Trustees 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), Bruce Young, et al. vs. City of Great Falls, 39 St. Repr. 1047. Had she not been a union activist who filed grievances for herself and others and who spoke up for her own concerns to management, she would still be employed by the City -- perhaps as Senior Warden as Larson indicated on Carlson's evaluation form in which Chief Kiser concurred. It cannot be seriously asserted that the City applied its usual rules and disciplinary standards to Carlson just as it would have to a nonactivist because there is no evidence to support such an assertion. NLRB v. Wright Line, (1st Cir. 1981) 108 LRRM 2513. After counsel for Carlson showed that her protected conduct was a factor in the discharge, the City had the opportunity to show it would have reached the same decision even in the absence of the union activity; it simply did not do so. In the absence of such evidence and despite the conduct prior to and subsequent to the



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performance evaluation and merit pay increase, I must conclude that Carlson's dismissal was motivated substantially by her union activism.

Susan Carlson was discharged by the City of Billings in violation of 39-31-401(1) and (3), MCA.

RECOMMENDED ORDER

IT IS ORDERED that the final order issued by this Board on April 4, 1981, be affirmed.

Exceptions to this amended order may be filed within twenty days of service. If no exceptions are filed, the amended order shall become the final order of the Board of Personnel Appeals. Address exceptions to Board of Personnel Appeals, Capitol Station, Helena, Montana, 59620.

Dated this 13th day of December, 1982.

BOARD OF PERSONNEL APPEALS

BY: Jack H. Calhoun
Jack H. Calhoun
Hearing Examiner

* * * * *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 13th day of December, 1982.

Kenneth D. Peterson
City Attorney
Suite 250, The Grand
27 Street & First Avenue North
Billings, Montana 59101

Emilie Loring
Hilley & Loring, P.C.
121 Fourth Street North
Suite 2G
Great Falls, Montana 59401

Jennifer Jackson

BPA1:cwG



RECEIVED

AUG - 6 1982

BOARD OF PERSONNEL APPEALS

No. 81-529

IN THE SUPREME COURT OF THE STATE OF MONTANA

1982

CHAUFFEURS, TEAMSTERS, AND HELPERS,
LOCAL UNION NO. 190,

Petitioner/Respondent

and

STATE OF MONTANA BOARD OF PERSONNEL APPEALS,
Respondent,
Appellants.

-vs-

CITY OF BILLINGS,

Petitioner/Respondent and Respondent.

Appeal from: District Court of the Thirteenth Judicial District,
In and for the County of Yellowstone, The Honorable
Diane G. Barz, Judge presiding.

Counsel of Record:

For Appellants:

Hilley and Loring, Great Falls, Montana
James Gardner, Jr., Helena, Montana

For Respondent:

K. D. Peterson; Peterson, Schofield &
Leckie, Billings, Montana

Submitted on Briefs: April 15, 1982

Decided: August 5, 1982

Filed: AUG 5 1982


Clerk

Mr. Chief Justice Frank I. Haswell delivered the Opinion of the Court.

Susan Carlson, an animal warden employed by respondent, was terminated on March 10, 1980. Appellant Board of Personnel Appeals (BPA) found that she had been discharged because of her union activities, in violation of section 39-31-401(1) and (3), MCA, and ordered her reinstated with back pay. The District Court reversed the BPA's ruling because of improper procedure. We vacate the District Court decision and remand the case for further consideration by the BPA, section 2-4-704(2), MCA.

Initially, we note that the brief of Carlson's bargaining representative, appellant Chauffeurs, Teamsters and Helpers, contains no references to the record for any assertions contained in its statement of facts, in violation of Rule 23(a)(3), M.R.App.Civ.P. As an appellate court, we are usually confronted with at least two conflicting versions of what the dispositive facts in a given case are. The above rule was instigated so that we needn't search the entire transcript for each "fact" asserted by a party. To do so merely lengthens the time necessary for the preparation of the opinion and prolongs any final determination of the case.

Carlson was first employed by respondent on January 17, 1977, as a water department clerk. On July 1, 1977, she began work as a meter maid. She became active in the union representing city employees at that time, the American Federation of State, County and Municipal Employees (AFSCME) and filed a grievance against respondent.

On October 3, 1977, Carlson began working as an animal warden at the city animal shelter and shortly thereafter she

became shop steward. She served as steward for AFSCME until the end of May 1979. During that time she filed about six grievances including one alleging harassment by her supervisor which culminated in her supervisor being sent a warning to discontinue the harassment. In April 1979, this supervisor was replaced by another supervisor, Darlene Larson.

In late May 1979, appellant Teamsters defeated AFSCME as the city employees' bargaining representative and, since objections to the election were filed, the Teamsters were not certified by BPA until October 1979. During this time, Carlson received several written reprimands, including warnings for having an unauthorized rider in the animal van and conducting herself improperly at the animal shelter. On September 25, 1979, Larson completed an evaluation form on Carlson which rated her above average in most categories, after which time Carlson received a merit pay increase. In October 1979, Carlson was suspended for four days "because of insubordination and failure to obey direct orders" involving a leg problem and the suspension letter concluded with the statement that "any further violations will result in immediate dismissal." Due to the changeover in unions and election objections, there was no grievance procedure in effect at this time.

On February 2, 1980, during the contract negotiations between the Teamsters and the City, Carlson voiced her concerns about the working conditions at the animal shelter and on the next working day, Larson told Carlson she shouldn't have said what she did and that her facts were wrong. The first contract between the Teamsters and respondent was signed in mid-May 1980. The final event which precipitated Larson's termination involved a male schnauzer dog which

Carlson had picked up running at large on March 3, 1980. Carlson did not check the animal in at the shelter because she believed it belonged to a friend of hers (Ostwald) who had reported that his dog was missing. After finding the dog and talking to Ostwald, Carlson kept the dog at her residence at Ostwald's request because he was in the hospital.

On March 5, 1980, another person who had lost a male schnauzer (Wertz) called the shelter. Larson then called Carlson who informed her that the dog had been returned to its owner. On March 7, Wertz called Larson from Ostwald's home, convinced that the dog was being hidden from her there. Carlson and Larson went to Ostwald's home and, after initially denying that Carlson had given him the dog, Ostwald admitted that he once had a male schnauzer but that he didn't have it any longer. Carlson stated the dog was at Shepherd, Montana (where Carlson lived), but that nobody was home. After further discussion, she stated the dog was at her house but refused to take Larson there. The assistant chief of police ordered Carlson (accompanied by Larson) to retrieve the dog from her home in Shepherd and Carlson complied, returning the dog to the shelter. At the shelter, Wertz claimed the dog was hers and a veterinarian who had cared for the dog corroborated her story. Carlson gave the dog to Wertz.

On March 10, 1980, Carlson was discharged by Larson in a letter which included the following statements:

"Due to insubordination and non-cooperation with your supervisors on incidents relating to events the week of March 3 to March 8, you are hereby terminated as of today.

"You were not cooperative in being truthful with me as to the whereabouts of a male schnauzer captured by you while on duty, March 3, nor in my

efforts to clear the situation with a public citizen's suspicions of the shelter and you concerning the dog.

"You have been previously warned on more than one occasion about cooperating with other city employees."

On March 17, 1980, Carlson filed an unfair labor practice complaint with the BPA. She alleged that the above reasons were pretextual and that the actual reason for her termination was her union activity, a violation of section 39-31-401 (1) and (3), MCA. A BPA-appointed hearing officer decided in Carlson's favor ordering respondent to reinstate her with back pay and this recommendation was adopted by the BPA. Respondent refused to do so and on May 5, 1981, the Teamsters filed a petition for enforcement in the District Court. On May 11, 1981, respondent filed a petition to review the BPA's final order and the cases were consolidated. On November 9, 1981, the District Court reversed the BPA and this appeal followed.

Before we begin discussing the issues involved in this case, a few words about our standard of review are in order. Both the District Court's and this Court's standard of review are dictated by section 2-4-704(2), MCA, which provides as follows:

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

"(a) in violation of constitutional or statutory provisions;

"(b) in excess of the statutory authority of the agency;

"(c) made upon unlawful procedure;

"(d) affected by other error of law;

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

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

"(g) because findings of fact, upon issues essential to the decision, were not made although requested."

The District Court reversed the BPA on two grounds of unlawful procedure, a legitimate subject of inquiry under section 2-4-704(2)(c), MCA. The District Court first found the BPA erred in giving primary weight to evidence of Carlson's union activities occurring more than six months prior to the filing of her unfair labor practices claim. The District Court also found that the BPA erred in excluding evidence of Carlson's discipline problems prior to her merit increase. Thus we frame the issues on appeal as follows:

1. Whether the District Court erred in reversing the BPA because it gave primary weight to incidents that occurred more than six months prior to the filing of Carlson's claim;

2. Whether the District Court erred in reversing the BPA because it did not admit evidence of Carlson's work history prior to her merit increase;

With regard to the first issue, the District Court found that the BPA erred in according substantial weight to Carlson's union activities occurring more than six months prior to the filing of her claim.

Conclusion of law no. 2 reads: "The Board erred in giving primary weight to union activities which occurred more than six (6) months prior to the filing of the claim of unfair labor practices."

In the court's memorandum accompanying its findings and conclusions, we find the following sentence: "The only evidence of union activity falling within the period is Carlson's appearance at negotiating sessions on February 2, 1980, wherein she appeared with about 25 other City employees to discuss conditions of their working areas."

In support of its decision, the District Court cited section 39-31-404, MCA and N.L.R.B. v. MacMillan Ring-Free Oil Co., Inc. (9th Cir. 1968), 394 F.2d 26. Section 39-31-404, provides as follows:

"39-31-404. Six-month limitation on unfair labor practice complaint--exception. No notice of hearing shall be issued based upon any unfair labor practice more than 6 months before the filing of the charge with the board . . ."

Respondent City cites MacMillan, supra, also and Sioux Quality Packers v. N.L.R.B. (8th Cir. 1978), 581 F.2d 153, in support of the proposition that the BPA should not have used evidence of Carlson's activity occurring outside the six-month period as the principal foundation for its reasoning. The Teamsters Union does not dispute the rationale of these cases but argues that they are inapplicable here because they hold that the six month period applies to the employer's activities and not the employee's. Appellant BPA contends that the federal equivalent of section 39-31-404, MCA, has never been interpreted the way the District Court did in this case and argues further that it is a statute of limitations barring the filing of a claim on an incident after six months, and not a rule of evidence prohibiting the consideration of relevant testimony concerning anti-union animus which is six months or more old.

All parties agree that section 39-31-404, MCA, is substantially similar to the National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (1976) and interpretations thereunder are pertinent here.

The District Court properly relied on MacMillan for the proposition that a violation within the six-month period must stand on its own:

"To recapitulate, then, we hold that while evidence of events occurring more than six months before the filing of a charge may be used to 'shed light' upon events taking place within the six-month period, the evidence of a violation drawn from within that period must be reasonably substantial in its own right."
394 F.2d at 33.

However, the actual holding of that case revolves around the charge of the employer's (MacMillan's) refusal to bargain with the union and the focus on the whole case is on the employer's activities and lack of promptness. The court continues from the above quote by saying:

"Where, as here, that condition is not met, it is impermissible under the policies embodied in section 10(b) for a finding of an unfair labor practice to be justified by primary reliance on the earlier events. Thus the Board's conclusion that MacMillan improperly refused to bargain with the union during the applicable limitations period cannot be upheld." 394 F.2d at 33.

The District Court erred in applying section 39-31-404, MCA, to Carlson's union activities and other interpretations of its federal counterpart bear this out. In Wilson Freight Co. (1978), 234 N.L.R.B. 844, 97 L.R.R.M. 1412, rev'd. on other grounds (1979), 604 F.2d 712, an employee (Smith) filed a number of grievances and was active in the union prior to his discharge for conduct exceeding his authority as a shop steward. The administrative law judge noted with regard to the employer's answer:

"It also raised as an affirmative defense that the activities in which Smith is alleged to have engaged in occurred more than 6 months prior to the filing of the unfair labor practice charge, therefore the matter is barred by Section 10(b) of the Act.

". . .

"Section 10(b) of the Act is unambiguous in clearly stating that it is the unfair labor practice, not the employees' concerted or union activity, which must be within the 10(b) period. The unfair labor practice in the present case occurred with Smith's discharge on September 3, 1976. Smith filed the unfair labor practice charge based upon this discharge on October 20, 1976. Therefore, Smith is well within the 10(b) period and I reject Respondent's affirmative defense in this regard." (Emphasis added.) 234 N.L.R.B. at 849, 97 L.R.R.M. at 1412.

Another case worthy of note is Inland Steel (1981), 257 N.L.R.B. No. 13 (¶ 18,238), 107 L.R.R.M. 1456. In Inland Steel, an employee had been active in his union (filing a number of complaints) and in workers' rights movements prior to his voluntary termination of employment. The N.L.R.B. found that his employer refused to hire him seven months later because of his union activities during his prior employment. There is no indication of union activities during his unemployment. Although the six month statute is not specifically addressed, the N.L.R.B. clearly examined and based its decision on the employee's activity which occurred more than six months prior to the filing of the claim.

In Axelson Manufacturing Co. (1950), 88 N.L.R.B. 761, 25 L.R.R.M. 1388, the National Labor Relations Board held:

"The employer asserts that Section 10(b) of the amended NLRB prohibits the introduction of evidence as to events occurring more than six months prior to the service of the charge. This contention is without merit.

"Section 10(b) forbids the issuance of complaints and consequently findings of violations of the

statute based on conduct which did not occur within the six months' period. However, it does not forbid the introduction of relevant evidence bearing on the issue of whether a violation has occurred during the six months. Section 10(b) enacts a statute of limitations and not a rule of evidence." (Emphasis added.) Axelson, 88 N.L.R.B. at 765-66, 25 L.R.R.M. at 1388.

Section 39-31-404, MCA, requires an employee to file a charge with the BPA within six months after an alleged unfair labor practice. Here the alleged unfair labor practice occurred on March 10, 1980, and Carlson filed her complaint on March 17, well within the six month period. The construction placed on the statute by the District Court is not borne out by the above cases or by the language of the statute itself. See also Local Lodge No. 1424 v. N.L.R.B. (1960), 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed.2d 832.

The second issue relates to the BPA's failure to consider Carlson's conduct prior to her merit increase. The hearings officer made the following statements, which were adopted by the BPA:

"All of the events which occurred prior to Carlson's merit increase must be ignored as far as the City's argument in support of its decision is concerned. At the time of the merit increase Carlson was considered to be just that -- an employee worthy of a merit increase."

The District Court stated the following with regard to this issue:

"In examining whether the City had met its burden of proof, the Board excluded from consideration all evidence of disciplinary problems relative to Carlson prior to her merit increase of October 3, 1979. Such exclusion has no basis in statutory or case law and was therefore improper. The fact, that an employer chooses to give a merit increase does not cause an employee's work history to vanish. It remains relative to the overall picture, and to ignore it is to place an unwarranted, artificial limitation on the employer's review process."

Respondent City argues that a satisfactory performance rating does not erase prior disciplinary actions, citing Rockland-Bamberg Print Works, Inc. (1977), 231 N.L.R.B. 305, 96 L.R.R.M. 1237 and Concrete Technology, Inc. (1976), 224 N.L.R.B. 961, 93 L.R.R.M. 1282. The Teamsters have not referred us to any case which directly holds (as the hearing officer did) that all events occurring prior to a pay raise must be ignored; however, a number of cases are cited where unlawful discharges were found after pay increases were given, including N.L.R.B. v. Evans Packing Co. (6th Cir. 1972), 463 F.2d 193; Lynch-Davidson Motors, Inc. (1970), 183 N.L.R.B. 841, 76 L.R.R.M. 1484 and Draggoo Electric Co., Inc. (1974), 214 N.L.R.B. 847, 88 L.R.R.M. 1312.

The District Court's position on this issue was correct and the hearing officer should have included evidence of events occurring prior to Carlson's merit increase. The hearing officer cited no authority for his position and the union has not cited any case directly on point. We find the more persuasive reasoning to be along the lines of the cases cited by the City above. For this reason, we remand this case to the BPA for consideration and a decision in light of events occurring prior to Carlson's merit increase as well as subsequent happenings.

Although not necessary to a resolution of this case, we will comment briefly on the other issues raised by appellant not previously addressed herein. Appellant argues that the District Court erred in considering alleged misconduct not mentioned in the notice of discharge, citing Board of Trustees v. Superintendent of Public Instruction (1977), 171 Mont. 323, 557 P.2d 1048. In support of this contention appellant quotes the following paragraph from the notice of discharge:

"Due to insubordination and noncooperation with your superiors on incidences relating to events the week of March 3 to March 8, you are hereby terminated as of today."

Appellant contends that only events relating to the schnauzer incident, i.e., the events occurring in the week of March 3 to March 8, should have been considered. However, a close examination of the rest of the letter (set out verbatim earlier in this opinion) indicates the basis of the charge was Carlson's noncooperation with other employees including her supervisors. There is a sufficient nexus between the other incidents considered by the District Court reflecting Carlson's noncooperation and the discharge letter to warrant the District Court's action.

Appellant next contends that the District Court erred in shifting the burden from the employer to the employee, pointing to the following language in the District Court's findings of fact:

"Susan Carlson did not show by reliable probative and substantial evidence on the whole record that the City would not have discharged her but for her union activity."

We recently adopted the "but for" test enunciated in *Mt. Healthy City School District Board of Education v. Doyle* (1977), 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471, for dual motivation cases under Montana's Collective Bargaining Act, *Board of Trustees v. State ex rel. Board of Personnel Appeals* (1979), ___ Mont. ___, 604 P.2d 770, 36 St.Rep. 2289.

In Board of Trustees, we quoted from the Mt. Healthy opinion as follows:

"Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'--or to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however,

the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." 429 U.S. at 285-287, 97 S.Ct. at 575-576. Mont. at ____, 604 P.2d at 777, 36 St.Rep. at 2297.

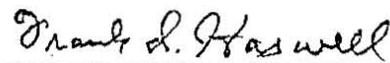
Here the District Court's statement was inaccurate.

The Mt. Healthy test in this case required Carlson to show that her protected union activity was a substantial or motivating factor in the City's determination to discharge her. The burden then shifts to the City to show that it would have terminated her, absent her protected activity, i.e., it would be an unfair labor practice by the City if, but for Carlson's union activity, she would not have been terminated.

Finally, appellant contends that the District Court erred in substituting its judgment for that of the agency on questions of fact. As an example, appellant refers us to the District Court's findings that "Carlson was untruthful, devious, deceptive" and that "[i]t is clear that the incident which resulted in her termination was sufficient cause for discharge without any previous warnings." Appellant argues there were no such findings of fact made by the hearings officer.

It is true that a court may not substitute its judgment for the agency's on questions of fact, section 2-4-704(2), MCA. Although these statements appear in the District Court's findings of fact, they are actually conclusions drawn from the facts found by the hearings officer, which the District Court accepted in finding of fact no. 3. There was no error committed by the District Court in this regard.

Vacated and remanded for proceedings not inconsistent with this opinion.



Chief Justice

We concur:

John S. Galt

John B. Morrison

Paul J. Fisher
Justices

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

4 CHAUFFEURS, TEAMSTERS AND HELPERS,) DV 81 1015
5 LOCAL UNION NO. 190,)
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11 CITY OF BILLINGS, a Montana Municipal) JUDGMENT
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18 This matter came on regularly before this Court for hearing on
19 Petition for judicial review and on a consolidated Petition for enforcement of
20 the ruling of the Board of Personnel Appeals and the Court having made and
21 entered its Findings of Fact and Conclusions of Law and Memorandum and the
22 Court being fully advised, it is

23 ORDERED, ADJUDGED AND DECREED that the City of Billings is not guilty
24 of any unfair labor practice in its discharge of Susan Carlson, and it is

25 FURTHER ORDERED, ADJUDGED AND DECREED that the Petition for
26 enforcement of the Board of Personnel Appeal's decision, is hereby denied, and
27 it is

28 FURTHER ORDERED, ADJUDGED AND DECREED that the decision of the Board
29 of Personnel Appeals is clearly erroneous, is in violation of statutory pro-
30 visions made upon unlawful procedure and affected by error of law and is hereby
31 reversed.

JUDGMENT DATED 12 November 1981.

DIANE G. BARR

Judge

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 10-80:

CHAUFFEURS, TEAMSTERS, AND)
HELPERS, LOCAL UNION NO. 190,)
Complainant,)
- vs -)
CITY OF BILLINGS,)
Defendant.)

FINAL ORDER

* * * * *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on December 22, 1980.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by K. D. Peterson, Attorney for Defendant, City of Billings, on January 9, 1981.

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

1. IT IS ORDERED, that the Exceptions of Defendants 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 Jack H. Calhoun as the Final Order of this Board.

DATED this 4th day of April.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy
John Kelly Addy, Chairman

cc: K.D. Peterson
Emilie Loring

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 10-80:

| | | |
|-------------------------------|---|------------------------|
| CHAUFFEURS, TEAMSTERS, AND |) | FINDINGS OF FACT, |
| HELPERS, LOCAL UNION NO. 190, |) | CONCLUSIONS OF LAW AND |
| |) | RECOMMENDED ORDER |
| Complainant, |) | |
| |) | |
| vs. |) | |
| |) | |
| CITY OF BILLINGS, |) | |
| |) | |
| Defendant. |) | |

* * * * *

I. INTRODUCTION

On March 17, 1980 this unfair labor practice charge was filed by Complainant alleging the City had violated 39-31-401 (1) and (3) MCA by discharging Sue Carlson because of her union activities. Defendant's answer denied any violation and set forth as an affirmative defense an alleged history of insubordination and refusal to follow orders. A hearing was held on August 6, 1980 in Billings at which Complainant was represented by Emilie Loring, Defendant by K.D. Peterson.

II. ISSUE

The issue presented here is whether the City violated Sue Carlson's rights as a public employee under the provisions of 39-31-401(1) and (3) MCA by terminating her employment in March, 1980.

III. FINDINGS OF FACT

Based on the evidence on the record, including the sworn testimony of witnesses, I find as follows:

1. Sue Carlson began her employment with the City of Billings on January 17, 1977 as a clerk in the Water Department. She transferred to a Meter Maid position on July 1, 1977 and worked there until October 3rd at which time she went to the Animal Shelter and became an animal warden. Her general duties were to pickup and impound dogs, write citations,



1 take bonds, answer complaints from the public and destroy
2 animals. Her employment was terminated by the City on March
3 10, 1980.

4 2. The American Federation of State, County and
5 Municipal Employees Union was the exclusive representative
6 of certain employees of the City of Billings, including Sue
7 Carlson and other employees of the Animal Shelter, until it
8 was decertified by Complainant in mid-1979. From the date
9 of the expiration of the AFSCME contract with the City on
10 June 30, 1979 until sometime after Sue Carlson's termination
11 there was no collective bargaining agreement in effect which
12 covered the former AFSCME bargaining unit. Carlson was a
13 member of AFSCME from early in her employment and until the
14 union's demise resulting from decertification proceedings.
15 She filed her first grievance against the City in July of
16 1977.

17 3. Shortly after her transfer to the animal shelter
18 on October 3, 1977 she became a union shop steward; she also
19 gained a position as union trustee and was on the executive
20 board. During the one and one half years she was a steward
21 she filed, on her own behalf and with others, approximately
22 six grievances against various supervisory and management
23 personnel of the City.

24 4. The City Animal Shelter is a subdivision of the
25 Police Department. The Animal Shelter Superintendent receives
26 directions from the Chief of Police and his subordinates.
27 When Carlson first transferred to the Shelter Jim Nixon was
28 the Superintendent, he remained until March of 1979. For
29 approximately three weeks after Nixon left Sgt. Hall supervised
30 the Shelter. Darlene Larson became the Superintendent in
31 April of 1979.

1 5. Carlson filed a grievance alleging several issues
2 of harassment by her supervisor, Jim Nixon, in July of 1978.
3 On September 29, 1978 Carlson, Nixon, and Art Trenk, the
4 President of the local, had a meeting with the Chief of
5 Police, Kiser. It was decided that the "slate would be
6 wiped clean." Letters were to be removed from her file, all
7 references to earlier charges were to be destroyed and a
8 letter of apology was to be written by Nixon to Carlson.
9 Later on, after Nixon was fired and during the interim of
10 the Teamster takeover, Carlson attempted to file grievances,
11 however, no procedure had been established at that time to
12 accommodate the filing of grievances. The Teamster representa-
13 tive told her that all grievances involving a difference of
14 opinion with the City would be handled after a procedure had
15 been negotiated.

16 6. On October 16, 1978 Carlson filed another grievance
17 alleging many of the same problems which were purported to
18 have been solved at the meeting with the Chief on September
19 29th. It also alleged that the Chief and Captain Alles were
20 not dealing with the harassment. The grievance was processed
21 through the procedural steps and ended when the City Administrator
22 directed that "no further elements of harrassment, direct or
23 indirect, be undertaken by Mr. Nixon toward Susan Carlson..."
24 No harrassment was found to have been engaged in by Chief
25 Kiser or Captain Alles. Upon first receiving the grievance,
26 Nixon told Carlson that if she continued to run to the union
27 he would have a "thick file" on her and she would be fired.
28 During their meeting, the City Administrator, asked Carlson
29 if she liked her job, why she filed so many grievances,
30 and further, why she didn't go elsewhere for a job.
31
32

1 7. Nixon was forced to resign in March of 1979. For
2 three weeks following Nixon's termination Sgt. Hall was in
3 charge of the Animal Shelter. Darlene Larson came on as
4 Superintendent in April of 1979. During the first several
5 days of Larson's tenure Sgt. Hall decided to complete a
6 performance evaluation of each Animal Shelter employee.
7 Carlson objected to the unscheduled evaluation and walked
8 out of her session with Hall and Larson informing them she
9 would attend with a union representative present. The
10 evaluation was done later. Carlson was told the evaluation
11 would not be put in her personnel file. She was later
12 informed that it had indeed been placed in her file. She
13 and Dennis Mueller, the Union President, went to City Hall
14 and found the evaluation in her file. They then went to see
15 the Chief of Police to object. By the time they returned to
16 the personnel office the evaluation had been removed from
17 the file. Carlson filed a grievance against Larson and Hall
18 over the matter. It was ultimately resolved to her satisfaction.

19 8. After Nixon's termination, he visited with Art
20 Trenk, a City employee for 17 years and the AFSCME President
21 during the period involving Carlson's harrassment grievance,
22 and asked questions about Sue Carlson. He, Nixon, said she
23 was the source of his problem and that he should have fired
24 her. Trenk told him he did not live up to the contract.

25 9. On May 11, 1979 the City vehicle which Carlson was
26 driving was hit from the rear by another vehicle. She
27 reported over the radio that "someone has just ass-ended
28 this truck." Larson told her that was inappropriate.
29 During the same month Larson warned her about taking riders
30 in the van without permission. Later, on October 22, 1979,
31 Larson issued a written reprimand to her for having a rider
32 in the van. On the particular occasion Carlson had encountered

1 a child-care problem and found it necessary to transport her
2 daughter to the animal shelter to await the child's father.

3 10. During early June of 1979 an incident occurred
4 wherein a postman was bitten by a dog. Carlson picked up a
5 dog, which she thought had done the biting, and took it to
6 the Animal Shelter. It later was determined that the dog
7 which she picked up was not the one which bit the postman.
8 However, Carlson, in the meantime, conducted herself in an
9 improper manner toward the people involved in the incident.
10 She received a letter from Larson dated June 5, 1979 concerning
11 the matter, it reads, in pertinent part, as follows:

12 ...The situation jepordized the public relations at the
13 shelter and the relations between co employes and
14 caused a good deal of anguish for the owner of the dog
15 who was not the one that did the biting in the first
16 place.

17 Telling a fellow employee to "shut up" in front of
18 people at the shelter even though you were speaking to
19 me on the phone, shows a lack of cooperation as does
20 throwing papers around the office.

21 ...In the future any verbal abuse, profanity, or non
22 cooperation will have to be handled with a written
23 reprimand in your file.

24 11. On September 14, 1979 Carlson backed a van out of
25 the garage area of the Animal Shelter with the door open.
26 The door caught on the edge of the building and did minor
27 damage to the vehicle. The door was repaired at no expense
28 to the City. Upon advice of a union representative she did
29 not attend the Accident Review Board meeting on the matter.
30 On November 21, 1979 she received a letter from the Assistant
31 Chief of Police informing her the accident had been ruled as
32 chargeable to her and that the Review Board had recommended
a letter of reprimand be placed in her file for one year.
Other Animal Wardens have received similar letters when they
had vehicle accidents.

12. On September 25, 1979 Larson completed a performance
evaluation form on Carlson. The purpose of the evaluation

1 was to determine whether she would receive a merit increase.
2 She did in fact receive the merit increase. The evaluation
3 form itself showed that, on a scale from one to ten, Larson
4 gave her the following ratings:

5 A. Quality of Work - 5
6 B. Quantity of Work - 5
7 C. Knowledge of Job - 6
8 D. Dependability - 5
9 E. Judgement - 6
10 F. Cooperation - 6
11 G. Initiative - 6
12 H. Safety - 4
13 I. Health - 5
14 J. Rate of Progress - 7
15

16
17 Beside a heading on the evaluation form entitled "Supervisory
18 Comments" Larson wrote "at times she lets personal problems
19 interfere with work. Works well with other employees at
20 shelter." The form was signed by Chief Kiser on September
21 28, 1979. It contained the initials "SC" under a date of
22 October 29, 1979. The "personal problems" referred to the
23 divorce in which Carlson was involved. None of the above-
24 noted ratings are below the requirements of the job. In
25 response to the question "What position do you think is most
26 possible for this employee's next assignment?" Larson wrote
27 "Senior Warden."

28 13. During late October of 1979 Carlson had a problem
29 with her leg. She obtained a doctor's statement saying she
30 should have light duty for ten days. By the time her supervisors
31 decided to allow her light duty she was feeling better and
32 went about her regular duties. Occasionally she went in the

1 office and raised her leg to rest it. After checking with
2 Carlson's doctor, the City's doctor and Captain Alles,
3 Larson decided to order Carlson to go home on sick leave.
4 Upon being ordered to use sick leave, Carlson talked to
5 Captain Alles who led her to believe she could remain on
6 duty. When Larson discovered she was still on duty she had
7 her sent home. The following morning, Saturday, October
8 27, 1979, Carlson had a statement from her doctor saying she
9 could work her regular duties. Larson said she would allow
10 her to work pending her visit to the City's doctor on Monday.
11 On Monday, Carlson was suspended without pay for four days.
12 The letter of suspension was dated October 29, 1979 and
13 read, in part, " Because of insubordination and failure to
14 obey direct orders given by me, my supervisor Captain Alles,
15 and his supervisor Assistant Chief Sampson on friday (sic)
16 October 25, you are receiving a four working day suspension
17 with no pay effective October 29 to commence immediately
18 following your appointment with the City Physician... Any
19 further violations will result in immediate dismissal."
20 Carlson attempted to file a grievance over the suspension;
21 however, at that time the Teamster's Union, which had decertified
22 AFSCME, and the City did not have a grievance procedure
23 negotiated into a contract. The Teamster representative
24 advised her that those kind of grievances would be handled
25 after the contract was settled.

26 14. On February 2, 1980 Carlson appeared at a negotiating
27 session between the Teamsters and the City to explain and
28 express concerns of employees of the Animal Shelter. She
29 complained generally about equipment and conditions; she
30 specifically complained about having to go into a trailer
31 alone without police backup for a dog and about the condition
32 of truck 1085. Larson told her the next day she should not
have said what she did, that her facts were wrong.

1 15. After February 2, 1980 Carlson was required periodically,
2 to drive truck 1085, although she had not been required to
3 drive it for the previous two years and despite the fact
4 that she had brought two doctors statements saying that she
5 should not drive it because it caused her to have back pain.
6 Carlson had injured her back two years earlier when she
7 slipped on ice. The seating in 1085 bothered her back
8 because of its cushioning.

9 16. On February 11, 1980 Larson held an interview with
10 Carlson regarding tachograph record keeping and activity
11 sheets. The form used to record the interview was entitled
12 "Billings Local Office Corrective Interview" and noted that
13 "tachs and sheets to be turned in daily or shift day following
14 tour of duty." Carlson, as did other persons at the Animal
15 Shelter, operated vehicles without a tachometer when they
16 were not readily available in the usual place of storage.
17 Carlson was talked to about it, the others were not.

18 17. On March 10, 1980 Carlson was terminated by means
19 of a memorandum from Larson, concurred in by the Chief of
20 Police, to her stating, in pertinent part, as follows:

21 Due to insubordination and non-cooperation with
22 your supervisors on incidences (sic) relating to
 events the week of March 3 to March 8, you are
 hereby terminated as of today.

23 You were not cooperative in being truthful with me
24 as to the whereabouts of a male schnauzer captured
25 by you while on duty, March 3, nor in my efforts
26 to clear the situation with a public citizen's
 suspicions of the shelter and you concerning the
 dog.

27 You have been previously warned on more than one
 occasion about cooperating with other city employees.

28 18. On Wednesday, March 5, 1980 a Mrs. Wertz had gone
29 to the Animal Shelter looking for her male Schnauzer dog
30 which had been missing since the previous Monday. She had
31 been told by her postman that he saw two Animal Wardens load
32 her dog and a black Labrador into their van. On the previous

1 Monday, March 3, 1980 Carlson and another Animal Warden,
2 Dick Olson, had picked up the two dogs while on routine
3 patrol. Carlson believed the Schnauzer to be the same dog
4 she had given to her friend, Bill Ostwald, earlier in January
5 and for that reason did not log the dog in when they returned
6 to the Animal Shelter. Instead she took it to Ostwald's
7 brother (Ostwald was in the hospital). When Ostwald got out
8 of the hospital he asked Carlson if she would keep the dog
9 for him; he did not feel up to it at that time. She agreed
10 to do so. On March 6, 1980, prior to Ostwald's release from
11 the hospital and while the dog was at his brother's place,
12 Larson called Carlson on her day off and asked if she had
13 picked up a male Schnauzer. Carlson said she had and it had
14 been returned to the owner. Returning dogs to their owners
15 in this manner was standard, accepted procedure at the
16 animal shelter.

17 19. On Friday, March 7, 1980 Carlson returned to duty.
18 Shortly after her return, Mrs. Wertz called the Animal
19 Shelter from Bill Ostwald's home where she had gone looking
20 for her dog and where she had come to believe the dog was
21 being hidden from her. Mrs. Wertz was upset and was urged
22 by Larson to call back after the matter was investigated.
23 After Mrs. Wertz left Ostwald's place, he called Carlson at
24 the Animal Shelter and told her about the situation. Carlson
25 and Larson drove out to Ostwald's place. On the way Carlson
26 asked Larson if she could speak privately with Ostwald when
27 they first arrived. Larson denied her request. Upon arrival
28 Larson asked Ostwald if Carlson had brought him a Schnauzer.
29 He said she had not. Carlson then remarked, "You don't have
30 to lie." "This is my boss, you can tell the truth." He
31 continued to say he did not have the Schnauzer and had not
32 seen it. Upon re-urging by Carlson, he finally admitted that

1 she brought him a dog, but that he did not have it anymore,
2 in fact, never really did keep the dog. He gave them some
3 registration papers on a male Schnauzer which Carlson had
4 given him previously. Larson asked if those were the
5 papers for the dog he had. He believed they were. When
6 asked where the dog was, he said it was in Shepard. Larson
7 asked to go see it. Carlson said the people were not home,
8 they were at work. On further questioning she said she had
9 the dog at her own home. As they were leaving Oswald's
10 place Mrs. Wertz showed up again and became very upset with
11 Carlson. She wanted to go with Carlson and Larson to see
12 the dog. Carlson refused to take them to her property
13 because she did not want anyone to know where she lived.
14 She offered to go get the dog and bring it back. Mrs. Wertz
15 was afraid she would return with a different dog. Larson
16 then decided they (she and Carlson) should go to the Police
17 Department. At the police station the Assistant Chief gave
18 Carlson the chance to get the dog accompanied by Larson.
19 Together they retrieved the dog and took it to the Animal
20 Shelter where they encountered Mrs. Wertz along with her
21 friends and neighbors who were there to identify the dog.
22 Carlson had also gathered people to identify the dog as
23 Oswald's. In the confusion the dog did not know who its
24 master was, nor were the people able to tell to whom it
25 belonged. Mrs. Wertz and Larson took the dog to her veterinarian
26 who informed them that it fit the age stated on Mrs. Wertz'
27 papers and that the ear clipping was his work--work he had
28 performed on her dog. When they returned to the Animal
29 Shelter a former owner of the dog Oswald was missing claimed
30 the dog in question belonged to Oswald. Carlson then
31 decided to give the dog to Mrs. Wertz because Oswald did
32 not want it. Carlson finished her shift that day. She went

1 to work the following morning, Saturday, and was told by
2 Larson she was suspended with pay pending an investigation.
3 The following week she received the letter of termination.

4 20. Carlson was placed on suspension at the request of
5 Chief Kiser pending an investigation of criminal charges for
6 thief. No basis for criminal charges was found.

7 21. Dennis Mueller, who did not participate in the
8 negotiations between the Teamsters and the City but who did
9 observe them, on one occasion talked to the City Personnel
10 Director, Brent Hunter, during a caucus. Hunter told Mueller
11 they were glad they had finally gotten rid of Carlson. He
12 mentioned the number of grievances she had filed as being
13 the basis of the comment.

14 IV. DISCUSSION

15 Section 39-31-401(1) MCA makes it an unfair labor
16 practice for a public employer to interfere with, restrain,
17 or coerce employees who exercise their rights under 39-31-201
18 MCA. Section 39-31-401 (3) MCA, prohibits discrimination by a
19 public employer "in regard to hire or tenure of employment
20 or any term or condition of employment to encourage or
21 discourage membership in any labor organization." The same
22 prohibition is found in Section 8 (a)(3) of the National
23 Labor Relations Act. Because of the similar language of the
24 two acts, the Board of Personnel Appeals has looked to
25 National Labor Relations Board precedent for guidance in
26 this and other areas of labor law. In addition to NLRB
27 cases we have the Montana Supreme Court's ruling in Board
28 of Trustees Billings School District No. 2 vs. State of
29 Montana ex rel Board of Personnel Appeals and Billings
30 Education Association, _____ Mont. _____, 604 P.2d 770
31 (1979). There the Court held that the "but for" test used
32 by the U.S. Supreme Court in Mt. Healthy City School District

1 vs. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977), was adopted
2 for dual motivation cases under Montana's Collective Bargaining
3 Act. The Court went on to say "... The task of determining
4 motivation is not easy, and agencies and courts must rely on
5 the outward manifestations of the employer's subjective
6 intent. The task is compounded in employment cases where
7 there exist permissible and impermissible reasons for a
8 particular discharge. This is a problem of dual motivation."

9 Dual motivation cases should be distinguished from the
10 so-called pretext cases where the reasons advanced by the
11 employer to explain a contested discharge were not the real
12 reasons for the termination; where the purported good cause
13 was merely a smokescreen. In dual motivation cases the
14 discharged employee is said to have provided the employer
15 with some cause for disciplinary action. At the same time,
16 however, the evidence indicates the employer also had a
17 discriminatory reason for making the discharge. The task
18 then is to determine whether the unlawful reason played any
19 part in the decision.

20 The NLRB recently attempted to clarify its policy
21 concerning dual motivation cases and to distinguish between
22 those cases and pretext cases. With respect to pretext
23 cases the NLRB, in Wright Line, 251 NLRB 150, 105 LRRM 1169
24 (1980), stated:

25 "... In modern day labor relations, an employer
26 will rarely, if ever, baldly assert that it has
27 disciplined an employee because it detests unions
28 or will not tolerate employees engaging in union
29 or other protected activities. Instead, it will
30 generally advance what it asserts to be a legitimate
31 business reason for its action. Examination of
32 the evidence may reveal, however, that the asserted
justification is a sham in that the purported rule
or circumstances advanced by the employer did not
exist, or was not, in fact, relied upon. When
this occurs the reason advanced by the employer
may be termed pretextual. Since no legitimate
business justification for the discipline exists,
there is, by strict definition, no dual motive.

1 Where it is found that the discharge or other discipline
2 imposed by the employer is, in fact pretextual, i.e., there
3 is not a legitimate business justification to be found, a
4 violation of 39-31-401 (3) MCA may be found without further
5 testing under the dual motive doctrine. But, where the
6 reason for imposing the discipline is two-fold, one being a
7 legitimate business reason, the other being a reaction to
8 the employee's protected union activities; a true dual
9 motive situation is presented.

10 In Wright Line, supra, the NLRB, after discussing the
11 various dual motive doctrines and the manner in which they
12 had been applied in the past by the Federal Circuit Courts
13 and the NLRB itself, went on to adopt the same test of causation
14 used by the U.S. Supreme Court in Mt. Healthy, supra, in
15 cases dealing with alleged violations of Sections 8(a) (1)
16 and (3) of the National Labor Relations Act. The test
17 requires that the employee show that the protected conduct
18 was a substantial or motivating factor in the employer's
19 decision to discipline. Once that is done, the burden
20 shifts to the employer to show it would have reached the
21 same decision even in the absence of the union activity.
22 That the Montana Supreme Court adopted the reasoning of
23 Mt. Healthy earlier has already been noted.

24 The NLRB went on in Wright to explain its rationale in
25 adopting the Mt. Healthy test:

26 ...Perhaps most important for our purposes, however,
27 is the fact that the Mt. Healthy procedure accommodates
28 the legitimate competing interests inherent in
29 dual motivation cases, while at the same time
30 serving to effectuate the policies and objectives
31 of the Act... Under the Mt. Healthy test, the
32 aggrieved employee is afforded protection since he
or she is only required initially to show that
protected activities played a role in the employer's
decision. Also, the employer is provided with a
formal framework within which to establish its
asserted legitimate justification. In this context,
it is the employer which has "to make the proof."
Under this analysis, should the employer be able

1 to demonstrate that the discipline or other action
2 would have occurred absent protected activities,
3 the employee cannot justly complain if the employer's
4 action is upheld. Similarly, if the employer
5 cannot make the necessary showing, it should not
6 be heard to object to the employee's being made
7 whole because its action will have been found to
8 have been motivated by an unlawful consideration in
9 a manner consistent with congressional intent,
10 Supreme Court precedent, and established Board
11 processes.

12 Finally, with respect to an alleged 39-31-401 (3) MCA
13 violation and the employer's intent, discriminatory conduct
14 motivated by union animus and having the foreseeable effect
15 of either encouraging or discouraging union membership must
16 be held to be in violation of employee rights. The U.S.
17 Supreme Court, in Radio Officers' Union vs. MLRB, 347 U.S.
18 17, 33 LRRM 2417 (1954), reasoned:

19 ...The language of Section 8 (a) (3) is not ambiguous.
20 The unfair labor practice is for an employer to
21 encourage or discourage membership by means of
22 discrimination. Thus, this section does not
23 outlaw all encouragement or discouragement of
24 membership in labor organizations; only such as is
25 accomplished by discrimination is prohibited. Nor
26 does this section outlaw discrimination in employment
27 as such; only such discrimination as encourages or
28 discourages membership in a labor organization is
29 proscribed... But it is also clear that specific
30 evidence of intent to encourage or discourage is
31 not an indispensable element of proof of violation
32 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
consequences.

33 The facts in the present case will not support a conclusion
34 that the reason advanced by the City for the discharge was
35 merely pretextual. If all other considerations are disregarded
36 for the moment, it is clear that Carlson had to be ordered
37 home when she had the leg problem and that she later refused
38 to take Larson to her home to get the Schnauzer. Therefore,
39 it may not be said the City had no legitimate business
40 justification. But, concluding the reason given for the
41 discharge (i.e., insubordination and non-cooperation) was
42

1 not pretextual and was not a mere sham, is not the equivalent
2 of saying the protected activities did not play a role in
3 the decision. For that reason we must look at the facts as
4 they relate to the two-part test set forth in Mt. Healthy.

5 The record is replete with evidence of Carlson's union
6 activities. She was a shop steward and union official at one
7 time, she filed numerous grievances against her superiors
8 (and would have filed more had a procedure been negotiated),
9 she insisted on her own rights as an employee and she criticized
10 management policies at a bargaining session. It cannot be
11 denied that she had a history of union activity. Some of
12 that activity was as recent as a couple of months prior to
13 her dismissal. Nor can it be said the City did not know of
14 her union activities. She was known to be a union activist
15 by all her supervisors including the former City Administrator.
16 Comments by City officials regarding their displeasure with
17 Carlson's activities support the conclusion that the City
18 did not like what she was doing.

19 Carlson, in coming forth with her evidence to show that
20 the decision to discharge was motivated by her union activities,
21 introduced substantial evidence from which such an inference
22 can be drawn. Immediately after she appeared at the February
23 2, 1980 negotiations her supervisor had critical words about
24 her remarks. A few days after that she gave her a corrective
25 interview about the tachometer, but she did not conduct such
26 an interview with other employees. And, two months after
27 her appearance Carlson was dismissed for refusing to take
28 Larson to her home to get the dog.

29 All of the events which occurred prior to Carlson's
30 merit increase must be ignored as far as the City's argument
31 in support of its decision is concerned. At the time of the
32 merit increase Carlson was considered to be just that -- an

1 employee worthy of a merit increase. In fact, on the "cooperation"
2 factor shown on the evaluation form she was rated, by the
3 two persons who later terminated her, above the median.
4 Whether Carlson's suspension for not taking sick leave while
5 she had her leg problem occurred after or before her merit
6 increase is not clear from a review of the record. She
7 initialled the merit review form on October 29, 1979 and
8 received a letter suspending her the same day. For sake of
9 argument and since Larson and Kiser signed the merit form a
10 month earlier, I will assume the leg incident came after the
11 merit increase. But even under such an assumption, I cannot
12 but conclude that Carlson's previous union activities in
13 filing grievances against superiors and her subsequent
14 appearance at the Teamster-City negotiating session was a
15 substantial factor in the City's decision to discharge her.
16 How else can one explain her suspension with pay pending an
17 investigation of criminal charges for thief, then her dismissal
18 for insubordination and non-cooperation when no such charges
19 were found. Also, the punishment imposed by Larson and
20 Kiser for Carlson's role in the Schnauzer incident does not
21 fit the "crime." All she did was refuse, for a while, to
22 take anyone to her house.

23 It seems that all of Carlson's activities both as a
24 unionist and as a sometimes-less-than-ideal employee became
25 a thorn in the sides of certain City supervisory personnel.
26 For those reasons, I am convinced, they intended to use
27 whatever situation which availed itself to get rid of her.
28 She was not without fault, however, the City did not carry
29 its burden of showing that it would have reached the same
30 decision as to the dismissal even in the absence of the
31 protected activity.
32

1 There is nothing on the record to show that the City
2 had a policy of dismissing employees under similar circumstances.
3 Nor is there anything to show the City has in fact dismissed
4 employees for like behavior. There is evidence showing
5 events which occurred after Carlson appeared at the February
6 bargaining session. She was verbally informed of her supervisor's
7 displeasure, she was required to drive a vehicle which
8 bothered her back and she was given a corrective interview
9 while others were not.

10 There was no explanation of why the City did not withhold
11 the merit increase if it believed she was not a good employee.
12 To later come to an unfair labor practice hearing and drag
13 out every negative event which occurred in which Carlson was
14 involved, even those which occurred prior to the merit
15 award, makes the City's motive for discharge even more
16 suspect. That, coupled with its subsequent harsh action in
17 suspending and later dismissing the employee for her conduct
18 involving the Schnauzer, convinces me the City had more in
19 mind than simple termination of a "recently less than average"
20 employee. I believe the vocal manner in which she pursued
21 her grievance filing and other union activities caused her
22 to fall into extreme disfavor with management. They were
23 looking for an excuse to get rid of her.

24 The foreseeable consequences of the discriminatory
25 termination of Sue Carlson, where her protected activity was
26 a motivational factor in the decision, is the discouragement
27 of union activity, Radio Officers Union, supra.

28 V. CONCLUSION OF LAW

29 Sue Carlson was discharged by the City of Billings in
30 violation of 39-31-401 (1) and (3) MCA.

31 VI. RECOMMENDED ORDER

32 IT IS ORDERED THAT, after this Order becomes final, the

1 City of Billings, its officers, agents, and representatives
2 shall:

- 3 (1) Cease and desist its violation of 39-31-401 MCA;
- 4
- 5 (2) Take affirmative action by reinstating Sue Carlson
6 as an Animal Warden at the City Animal Shelter;
- 7
- 8 (3) Make Sue Carlson whole by repaying her for all
9 lost wages, including interest and all benefits
10 which she would have received had she not been
11 terminated on March 10, 1980;
- 12
- 13 (4) Meet with union representatives of Sue Carlson and
14 attempt to determine the amount due her under No.
15 3 above, if a mutual determination cannot be made
16 within ten days, notify this Board so that a
17 hearing may be held and a detailed remedial order
18 issued;
- 19
- 20 (5) Post in a conspicuous place in the Animal Shelter
21 copies of the attached noticed marked "Appendix."
- 22
- 23 (6) Notify this Board in writing within twenty days
24 what steps have been taken to comply with this
25 Order.

26 VII. NOTICE

27 Exceptions to these Findings of Fact, Conclusion of
28 Law and Recommended Order may be filed within twenty days
29 service thereof. If no exceptions are filed, the Recommended
30 Order shall become the Final Order of the Board of Personnel
31 Appeals. Address exceptions to Board of Personnel Appeals,
32 Capitol Station, Helena, Montana 59601.

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Dated this 22nd day of December, 1980.

BOARD OF PERSONNEL APPEALS

BY *Jack H. Calhoun*
JACK H. CALHOUN
Hearing Examiner

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 22 day of December, 1980:

Kenneth D. Peterson
City Attorney
Suite 250, The Grand
27th Street & 1st Ave. North
Billings, Montana 59101

Emilie Loring
HILLEY & LORING, P.C.
1713 Tenth Avenue South
Great Falls, Montana 59405

Jennifer Jacobson



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APPENDIX

In accordance with the Order of the Board of Personnel Appeals and to effectuate the policies of Title 39, Chapter 31 MCA, the City of Billings, acting through its officers, agents, and representatives, does hereby notify employees in the Animal Shelter that:

It will cease and desist its violation of 39-31-401 (1) and (3) MCA and will reinstate Sue Carlson with appropriate back pay and benefits.

CITY OF BILLINGS

BY _____
CITY ADMINISTRATOR

DATED this ____ day of _____, 198__.

This notice shall remain posted for a period of 60 consecutive days from the date of posting and shall not be altered, defaced, or covered.

Questions about this notice or compliance therewith may be directed to the Board of Personnel Appeals, 35 South Last Chance Gulch, Helena, Montana 59601, or telephone 449-5600.

