

file

STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 30-80:

BUTTE TEAMSTERS UNION,)
LOCAL NO. 2,)

Complainant,)

vs.)

COUNTY OF MISSOULA)
MISSOULA COUNTY AIRPORT,)

Defendant.)

AMENDED ORDER

* * * * *

Upon application of the parties this matter was remanded to the Board of Personnel Appeals by the Fourth Judicial District on September 3, 1982, directing that a hearing be held to determine the exact amount of money due Robert Moffett under the terms of the Board's final order dated July 24, 1981 and under the terms of the settlement agreement entered into by the parties on November 16, 1981. On October 14, 1982, a hearing was held in Missoula at which Complainant was represented by Mr. D. Patrick McKittrick and Defendant by Mr. Jeremy G. Thane. Mr. Karl H. Boehm appeared on behalf of Wiletta Malone to object to the seniority list contained in the settlement agreement.

ISSUES

During the course of the hearing the parties resolved some of the issues raised concerning Mr. Moffett's claim. They agreed that the following issues were in dispute and should be addressed by the Board.

1. A ruling on the joint petition filed by the parties seeking approval of the settlement agreement.
2. The total amount of back pay due Mr. Moffett.

1 Internal Revenue Service show the following figures for
2 their wage earnings during 1980 and 1981 (other earnings
3 reported were from interest and rents, no self-employment
4 income was shown):

5 1980

6 \$15,416.00 - total wages reported
7 7,929.95 - wages earned by Robert Moffett through
8 Missoula County (W-2 form)
9 27.50 - wages earned by Robert Moffett through
10 Missoula County (W-2) form)
11 7,459.00 - wages earned by Wanda Moffett through
12 Western Montana Clinic

13 1981

14 \$10,768.00 - total wages reported
15 110.50 - wages earned by Robert Moffett through
16 Missoula County (W-2 form)
17 1,197.00 - wages earned by Robert Moffett through
18 Missoula County (W-2 form)
19 11,441.56 - wages reported on W-2 form but which
20 Robert Moffett refused to accept from
21 the Airport Authority and so noted on
22 his 1981 income tax return
23 9,460.94 - wages earned by Wanda Moffett through
24 Western Montana Clinic

25 5. The \$1,051.00 claimed by Defendant as an offset to
26 back pay due Mr. Moffett was not earned by him and, there-
27 fore, may not be deducted from the wages due.

28 6. The parties agree that interest on the back pay
29 should be awarded pursuant to the Board's policy.

30 7. During the period of time pertinent to this issue
31 Mr. Moffett received \$2,448.00 in unemployment insurance
32 compensation.

1 At the hearing on October 14, 1982, Mr. McKittrick and
2 Mr. Thane agreed that the following issue was relevant and
3 should be addressed by the Board: Whether the settlement
4 agreement entered into by the parties for the purpose of
5 resolving the pending unfair labor practice case should be
6 approved.

7 Mr. Karl Boehm, representing Wiletta Malone, also ap-
8 peared at the hearing and spoke against the approval of the
9 settlement agreement alleging that paragraph two thereof con-
10 cerning seniority had been reached in an arbitrary or capri-
11 cious manner which injured Mr. Malone. He submitted a brief
12 in support of his position.

13 There is an issue over the propriety of the settlement
14 agreement; however, there are not sufficient facts on the
15 record at this time to reach a conclusion concerning whether
16 Ms. Malone or any other person affected by the agreement has
17 a valid claim. This, of course, involves the larger issue
18 of whether the settlement agreement comports with the make
19 whole order issued by the Board in this case. Therefore, at
20 this time, it would be inappropriate to either approve or
21 disapprove the parties' agreement. Since the Board has been
22 put on notice that a claim has been made against the agree-
23 ment, it cannot be acted upon without a resolution of the
24 factual allegations and legal implications raised by Mr. Boehm.

25 The parties' dispute relative to the number of days
26 credit to be given to Mr. Moffett's vacation leave records
27 centers around whether he would have taken 15 days vacation
28 during the period from August 1, 1980 through August 1, 1981
29 and was, therefore, compensated for those days as a part of
30 gross wages. Complainant argues that he is entitled to be
31 credited with the full 15 days, plus 3 3/4 days for the
32 period August 1, 1980 through October 31, 1981 for a total

1 of 18 3/4 days. There is nothing under those sections of
2 the law dealing with vacation leave for public employees
3 which requires that leave earned be used within the period
4 in question here. On the contrary, Section 2-18-617 MCA
5 allows an employee to accumulate up to two times the maximum
6 earned annually. No leave is forfeited if it is used within
7 90 days from the last day of the year in which it accrued.
8 If Mr. Moffett had been employed by Defendant during the
9 period in question, he could have elected to accumulate his
10 vacation leave. To allow him credit for those days now
11 appears reasonable, for to deny him those credits would
12 require that the Board assume he would have taken 15 days of
13 vacation during the period. He should be credited with a
14 total of 18 3/4 days vacation.

15 Based on the finding in No. 5 above, the contention of
16 the Employer that \$1,051.00 be deducted from Mr. Moffett's
17 gross wages for the period relevant here must be rejected.
18 There is nothing shown on his tax returns to indicate he
19 earned such amount.

20 Another area of dispute in this matter is: how should
21 the \$2,448.00 received by Mr. Moffett in unemployment com-
22 pensation be treated? The Employer contends that he is not
23 entitled to full pay for the period and the unemployment
24 compensation. They believe that the Employer should either
25 be credited with the \$2,448.00 in the form of an offset to
26 the gross wages due or that Mr. Moffett should be required
27 to reimburse the State for the unemployment he received.
28 Complainant's position is that unemployment compensation is
29 not a proper deduction from back pay due, that the matter is
30 between the State and Mr. Moffett as to whether he must make
31 reimbursement. The National Labor Relations Board has a
32

1 long history of disallowing unemployment compensation re-
2 ceived by a discriminatee to reduce back pay. In NLRB v.
3 Gullett Gin Co., 340 U.S. 361, 71 S.Ct. 337, 27 LRRM 2230
4 (1951), the U.S. Supreme Court, in upholding the NLRB posi-
5 tion, reasoned that unemployment benefits are not direct
6 benefits, but rather collateral benefits and since consider-
7 ation is not given to collateral losses, none should be
8 given to collateral benefits. See also Winn-Dixie Stores,
9 Inc., 413 F.2d 1008, 71 LRRM 3003 (CA5 1969); Sioux Falls
10 Stock Yards Co., 236 NLRB 543, 99 LRRM 1316; Cal-Pacific
11 Furniture Mfg. Co., 221 NLRB 1244, 91 LRRM 1059 (1975);
12 Hopcroft Art & Stained Glass Works, Inc., 258 NLRB 190, 108
13 LRRM 1237 (1981); Higgins v. Hardes, 644 F.2d 1348, 107 LRRM
14 2438 (CA9 1981). In Bruce Young, supra, the Board of Person-
15 nel Appeals stated that unemployment compensation benefits
16 are not to be used as an offset against back pay.

17 The only remaining issue is that of interest. The
18 parties agreed that the gross wages due are \$18,752.60 and
19 from that amount a total of \$3,812.04 (\$2,030.51 and
20 \$1,781.53) should be deducted as wages already paid. That
21 leaves a total of \$14,940.56 in back pay due for the period
22 August 3, 1980 through October 31, 1981. The additional
23 \$1,000.00 agreed upon as the settlement for Mr. Moffett's
24 claim for health insurance premiums and premium pay for
25 holidays has been included in the amount upon which interest
26 has been calculated below giving a total of \$15,940.56.

27 The Board of Personnel Appeals recently decided to adopt
28 the method of computing interest on back pay that is used by
29 the NLRB. Bruce Young, supra; Florida Steel Corp., 231 NLRB
30 651, 96 LRRM 1070 (1977); North Cambria Fuel Co. v. NLRB,
31 107 LRRM 2140 (CA3 1981). The method entails the use of the
32 Internal Revenue Service's adjusted prime interest rate,

1 which is the rate charged or paid by the IRS for federal tax
 2 purposes. It is a rate fixed by the Secretary of Treasury
 3 not more often than every six months to reflect money market
 4 changes and is defined as 90 percent of the average predomi-
 5 nant rate quoted commercial banks to large businesses,
 6 rounded to the nearest full percent. The Board also decided
 7 to use the quarterly method of computing back pay as set
 8 forth by the NLRB in F. W. Woolworth Co., 26 LRRM 1185, 90
 9 NLRB 289 and approved by the U.S. Supreme Court in NLRB v.
 10 Seven-Up Bottling Co., 244 U.S. 344, 73 S.Ct. 287, 31 LRRM
 11 2237 (1953).

12 In the instant case the exact amount Mr. Moffett would
 13 have earned in each of the 5 quarters from August 3, 1980
 14 through October 31, 1981, is not in evidence because the
 15 parties stipulated to a gross amount for the entire period.
 16 The method used below to make the monthly computation for
 17 the purpose of arriving at interest due was to divide the
 18 total amount due (\$15,940.56) by the 15 months and then
 19 multiply that quotient (\$1,062.704) by the number of compen-
 20 sable months in each quarter (months he would have worked)
 21 to determine the net amount (principal) due as of the end of
 22 each quarter. The net amount by quarter multiplied by the
 23 interest rate yields interest due as of June 30, 1983 by
 24 quarter. Interest due beyond that date will have to be
 25 computed at the end of each succeeding quarter, should it be
 26 necessary. Thus, by setting a prospective pay-off date of
 27 June 30, 1983 the amount of interest is computed as follows:

QTR. ENDING	RATE PER MONTH	x	COMPENSABLE MONTHS	=	NET AMOUNT	x
9-30-80	\$1,062.704		2 (Aug., Sept.)		\$2,125.41	
12-31-80	"		3		3,188.11	
3-31-81	"		3		3,188.11	

<u>QTR.</u> <u>ENDING</u>	<u>RATE PER</u> <u>MONTH</u>	x	<u>COMPENSABLE</u> <u>MONTHS</u>	=	<u>NET</u> <u>AMOUNT</u>	x
6-30-81	"		3		3,188.11	
9-30-81	"		3		3,188.11	
12-31-81	"		1 (Oct.)		<u>1,062.71</u>	
					\$15,940.56	

<u>INTEREST</u> <u>RATE*</u>	=	<u>INTEREST</u> <u>DUE 6-30-83</u>	<u>WAGES</u> <u>DUE 6-30-83</u>
43%		\$ 913.93	
40%		1,275.24	
37%		1,179.60	
34%		1,083.96	
31%		988.31	
28%		<u>297.56</u>	
		\$5,738.60	<u>\$15,940.56</u>

*The NLRB Regional Office in Seattle reported the following adjusted prime interest rates it used to compute back pay award interest in the private sector: 1980 - 12%; 1981 - 12%; 1982 - 20%; 1983 - 16%. To determine simple interest the NLRB prorates the annual interest rate according to the number of quarters interest would have been earned on the wages due, then applies that aggregate rate ($\frac{1}{4}$ of 12% + 12% + 20% + $\frac{1}{2}$ of 16% in this case) to the amount the employee would have earned, minus any interim earnings, as of the end of the first quarter after termination. To compute interest due on wages which would have been paid in subsequent quarters, the first rate (43% here) is reduced by one-fourth of the amount of the adjusted prime rate in effect at the time (12% x .25 = 3% here).

In summary, the amount due Mr. Moffett, as of the stated pay-off date, is \$15,940.56 in back pay and \$5,738.60 in interest.

CONCLUSION OF LAW

Robert Moffett is entitled to back pay and the restoration of other benefits which he would have earned but for the Employer's violation of his rights under Title 39, Chapter 31, MCA.

ORDER

IT IS ORDERED that Defendant, County of Missoula and Missoula County Airport take the following affirmative

1 action to make Robert Moffett whole under the terms of the
2 Final Order of the Board of Personnel Appeals dated July 24,
3 1981 and under the terms of the settlement agreement dated
4 November 16, 1981:

5 1. Tender to him back pay in the amount of \$5,738.60
6 as interest and \$15,940.56 (less the amount the Employer
7 would have deducted for Mr. Moffett's contribution to PERS,
8 Social Security and other such regular mandatory deductions)
9 as wages.

10 2. Deduct from his wages due and deposit with the
11 Montana Public Employees Retirement System that amount which
12 would have been deducted had there been no break in service
13 from August 3, 1980 through October 31, 1981, along with the
14 amount the Employer would have contributed.

15 3. Credit to his vacation leave account 18 3/4 days
16 of vacation time for the period August 3, 1980 through
17 October 31, 1981.

18 4. Credit to his sick leave account 15 days of sick
19 leave for the period August 3, 1980 through October 31,
20 1981.

21 Dated this 29th day of April 1983.

22 BOARD OF PERSONNEL APPEALS

23
24
25 By: Jack H. Calhoun
26 Jack H. Calhoun
27 Hearing Examiner
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32

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 29th day of April, 1983:

Jeremy Thane
WORDEN, THANE & HAINES, P.C.
P.O. Box 4747
Missoula, MT 59806

D. Patrick McKittrick
McKITTRICK LAW FIRM
P.O. Box 1184
Great Falls, MT 59403

Karl H. ~~B~~hm
MILODRAGOVICH, DALE & DYE, P.C.
Drawer R, 1800 Russell Street
Missoula, MT 59806



BPA3:bdP

1 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
2 OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MISSOULA

3 * * * * *

4 COUNTY OF MISSOULA, MISSOULA)
5 COUNTY AIRPORT,)

Cause No. 53714 / 6

6 Petitioner,)

ORDER
OF
REMAND

7 vs.)

8 BOARD OF PERSONNEL APPEALS)
9 OF THE STATE OF MONTANA AND)
10 BUTTE TEAMSTERS UNION LOCAL)
11 NO. 2,)

FILED SEP 7 1982

BONNIE J. HENRI, CLERK

By *James M. Havelly*
Deputy

12 Respondents.)

13 * * * * *

14 Upon application of the parties to this action, and
15 good cause appearing, this case is remanded to the Board of
16 Personnel Appeals for a hearing to determine the exact
17 amount of money due to Mr. Bob Moffett under the terms of
18 the BPA's Final Order, dated July 24, 1981, and also under
19 the terms of the Settlement Agreement, dated November 16,
20 1981.

21 Upon issuance of the BPA's Amended Final Order, this
22 court will again assume jurisdiction of the case and will
23 review all administrative decisions in this case pursuant to
24 the Petition for Judicial Review, dated August 24, 1981.

25 It is so ordered.

26 Dated this 31 day of Sept, 1982.

27 *John S. Henson*
JOHN S. HENSON
District Judge
Presiding

28 PAD5:H

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 30-80:

BUTTE TEAMSTERS UNION,)
LOCAL NO. 2,)

Complainant,)

- vs -)

FINAL ORDER

COUNTY OF MISSOULA,)
MISSOULA COUNTY AIRPORT,)

Defendant.)

* * * * *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on March 18, 1981.

Defendant's Exceptions to Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order were filed by Jeremy G. Thane, Attorney for Defendant, on June 12, 1981.

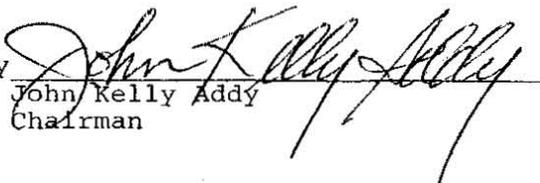
After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant 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 24th day of July, 1981.

BOARD OF PERSONNEL APPEALS

By 
John Kelly Addy
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 27 day of July, 1981:

Jeremy G. Thane
WORDEN, THANE & HAINES, P.C.
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 30-80:

BUTTE TEAMSTERS UNION,)
LOCAL NO. 2,)
)
Complainant,)
)
-vs.-)
)
MISSOULA, MISSOULA COUNTY)
AIRPORT,)
)
Defendant.)

D I S S E N T

* * * * *

I respectfully dissent from the majority order in this case and cast a "no" vote on the majority motion.

I would offer the following remedy as the order in this case:

1. The County of Missoula and the Missoula County Airport, its officers, agents and representatives shall:

a. Cease and desist from refusing to bargain collectively with the Union;

b. Cease and desist its threats of retaliation against the employees in the bargaining unit;

c. Make whole those employees who do not receive the cost of living increase and/or pay increases due on or after the receipt of the letter of May 23, 1981 from the representative of Local 2 to the Airport Director.

I will accept the Finding Of Fact and Conclusions that there were unfair labor practices committed by the employer during the pendency of the representation issue. However, I feel that the order proposed above, together with the favorable result of the election, deal adequately with those problems.

At the outset, there is a troublesome premise raised in the

majority opinion and that in itself concerns me. That is the assumption that as of the date of the budget adoption and the decision to transfer the work - late May or early June, 1981, and, in fact, at the time of the layoffs, August, 1980, the employer had an obligation to bargain at all with the representatives of the employees. That same concern exists through all times material herein up to and including the election.

At best, the employer had an obligation not to interfere with that developing relationship, but no obligation to bargain. I can find no authority for the proposition that a bargaining duty obligation under Section 39-31-401 (5) arises at the same time as obligations under Section 39-31-401 (1) (3) MCA. There are no cases in the private sector defining that obligation as early as the first indication of interest by the Union.

However, even a rebuttal of that presumption does not deal with the substantive issue embodied in Paragraphs 3 and 4 of the Recommended Order that prompted this Dissent.

Specifically, I find that the employer had no obligation to return to the status quo ante by reinstating the crash fire rescue program nor does it have the responsibility to reinstitute and/or make whole employees who were terminated or otherwise affected on August 3, 1980.

At the outset, let us remove any relationship between the independent unfair labor practices charged in the Complaint and the unilateral decision to subcontract the fire rescue work. That removal negates any obligation to bargain about the decision to close or subcontract.

While I cannot condone the acts of the employer and threatening retaliation against employees who voted for the Union, withholding

raises that were due, and polling employees as to their choice, I find that the Hearing Examiner made no finding of fact that there was a causal relationship between the conduct and the decision to close. As an aside, one has to go back several generations in labor relations to find conduct in the private sector as direct or naive. But since that conduct does not relate to the decision to close, the remedies for its abuse are adequate and are irrelevant to the offending portions of the majority position on paragraphs 3 and 4 of the Proposed Order.

Once that conduct is treated separately, we are left with a single issue - does Missoula County have a duty to bargain with the Union over the layoffs caused by its transfer of a function to another employer? The answer must be bifurcated: Assuming any bargaining obligation at all, it has no duty to bargain about the decision to close a part of the business; only a duty to bargain about the effects, viz. severance pay, if any, transfer rights, temporary continuation of benefits and the like.

As has been stated previously and accepted by the Board, private sector precedents are relevant in interpreting the Montana statute when the language of the Montana Act and LMRA are similar. See State Department of Highways v. Public Employee Craft Council, 165 Mont. 349, 87 LRRM 2101 (1974).

Up until this point there has been a split within the various circuits on the issue of decision bargaining. The Fibreboard case, Fibreboard Paper Products Corp. v. NLRB, 441 U.S. 203, 57 LRRM 2609 (1964), has been oft cited for the proposition that the employer has the duty to bargain over the decision to subcontract work. However

having made that citation, little additional analysis of the case has been undertaken. The Court made clear that:

"The company's decision to contract out maintenance work did not alter the basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the company merely replaced existing employees with those of an independent contractor to do the same work under the same conditions of employment."

On June 22, 1981, the Supreme Court of the United States refined even that position and concluded that, absent and independent unfair labor practice aimed at gaining an unfair advantage, there was no duty to bargain about the decision to close part of the business. In First National Maintenance Corp. v. NLRB, _____ U.S. _____, 107 LRRM 2705, the Court, in a 7 - 2 decision, held that the harm likely to be done to employer's need to operate freely in deciding whether to shut down part of the business purely for economic reasons outweighs the incremental benefit that might be gained through the Union's participation in making that decision. Accordingly, it held that the decision itself is not part of the "terms and conditions of employment" within the meaning of the LMRA over which Congress has mandated bargaining. In the most concise terms, decision bargaining is no longer a mandatory subject of bargaining and refusal to do so cannot be an unfair labor practice. I have attached copies of that opinion and support it fully.

Little would be served by a paragraph by paragraph analysis, but I would urge a review of Sections III on pages 2710 et seq. for the premise that this case at least distinguished Fibreboard and may well supersede it.

It is my conviction that public employers have at least a

coterminous obligation with private employers to prudently schedule work, assign it and delete those tasks that can be better done by employed agents.

I conclude that there was no finding of fact that anti-union animus motivated the termination of the fire rescue program and that the only basis for the allegations of an unfair labor practice is the refusal to bargain about the decision to close that portion of business. It did seem clear that the employer had that right, First National Maintenance Corp. removes any residual doubt to it.

Much reliance has been placed in the majority opinion on the Great Dane Trailer, Inc. case (NLRB v. Great Dane Trailer, Inc., 65 LRRM 2466 (1967)), and specifically the weight placed on the adverse affect of the inherently destructive conduct of important employee rights.

It would seem that if the conduct is inherently destructive - such as this case where an unknown number of the bargaining unit was laid off and the work contracted out - then the inquiry stops and the conclusion is reached, decision bargaining must occur.

I do not think the case stands for that premise, and as stated elsewhere, reliance on it does not go far enough. Rather I would conclude that the Court has instructed the parties that there is a shifting of the burden to the employer if the conduct is inherently destructive, regardless of motive.

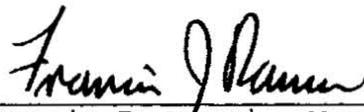
Note that this is a Section 8(a)(3) case, analogous to a 39-31-401 (3) violation and it deals with allegations of destroying the Union's majority status and discouraging membership. However, the Court states as follows:

"But ... in asserted Section 8(a)(3) violations, some conduct is so inherently destructive of employee interest that it may be deemed without the need for proof of an underlying improper motive ... that is some conduct carries with it unavoidable consequences that the employer not only foresaw, but that they must have attended the event. If the conduct (is such), the employer has the burden of explaining a way, or justifying or characterizing his actions as something different than they appear of their face."

I submit even in these "motive instances", establishment of conduct merely shifts the burden to the employer to show a valid purpose and, in this instance, there was a proper motive - the attempt to cut costs and to obtain an income from a facility that would otherwise remain vacant. Remember that there was a long history of providing the service through the agency that now has it.

While a public employer cannot go out of business in the traditional sense, it certainly can realign functions, including subcontracting functions to provide the best possible return on the taxpayer's investment.

For the reasons set out above, I dissent from the majority opinion on the Order and substitute the Order stated at the beginning of this Dissent.



Francis J. Raucchi - Management Member
Board Of Personnel Appeals

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 30-80:

BUTTE TEAMSTERS UNION,)	
LOCAL NO. 2,)	
)	
Complainant,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW AND
vs.)	RECOMMENDED ORDER
)	
COUNTY OF MISSOULA,)	
MISSOULA COUNTY AIRPORT,)	
)	
Defendant.)	

* * * * *

I. INTRODUCTION

Complainant filed this unfair labor practice charge against Missoula County on July 30, 1980 alleging that 39-31-401 MCA had been violated when it: (1) instituted and applied rules, regulations and a point system which affected bargaining unit employees; (2) withheld scheduled salary increases; and, (3) threatened termination of unit employees and began implementing such a plan. Defendant answered on August 11, 1980 and denied the allegation. Under authority of 39-31-406 MCA and in accordance with ARM 24.26.682 et seq. a formal hearing was held in Missoula on January 8, 1981. Complainant was represented by Mr. D. Patrick Mc Kittrick; Defendant by Mr. Michael W. Sehestedt. On February 3, 1981 Complainant filed a motion to amend the complaint to conform to the evidence and testimony on the hearing record. That motion is hereby granted pursuant to 39-31-407 MCA.

II. ISSUE

The issue raised here is whether Missoula County violated 39-31-401 MCA.



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III. FINDINGS OF FACT

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

1. The Missoula County Airport Board is responsible for the operation of Missoula's airport. It carries out this responsibility through an Airport Director. The Missoula County Board of Commissioners has authority over the Airport Board in, among others, matters related to budget and finances.

2. In early 1979 the Airport Board directed the Airport Director to provide a budgetary alternative which would allow the airport to provide its own crash fire rescue and security services independent of the Missoula Rural Fire District. The Board of County Commissioners approved the budget which permitted the establishment of an airport public safety unit comprised of a Chief, three Senior Public Safety Officers and eleven Public Safety Officers. The unit was under the general direction of the Airport Director and began operations in October of 1979.

3. During the life of the public safety unit the employees carried out regular duties of airport crash fire rescue and security personnel. Many of the individuals were sent away to attend the Montana Law Enforcement Academy at Bozeman during this period.

4. On or about the first week of January, 1980 the Airport Board became concerned with the costs of providing its own crash fire and security services and instructed the Airport Director to investigate the possibility of entering into an agreement with the Missoula Rural Fire District again.

5. During the first week of May, 1980 the employees of the public safety unit began to organize for collective bargaining. They contacted Mr. Cecil Williams of the Teamsters Union and obtained authorization cards which were later signed by some of the employees. Their petition for a new unit determination and election was filed with this Board on May 27, 1980.

1 6. A few days prior to May 15, 1980 County officials were
2 aware that the public safety unit employees were attempting to
3 organize. Barbara Evans who is on the Board of Missoula County
4 Commissioners contacted Rick Ochsner, a Public Safety Officer in
5 the unit and a friend of the family, and requested a meeting.
6 During the meeting on May 15, 1980 Ochsner told her they were
7 starting a union and that he was an instigator in the movement.
8 Evans knew of the unionization effort and advised Ochsner that he
9 could get into trouble for his efforts. On May 23, 1980 she
10 called him at his home and said that if they went union without
11 giving the personnel plan a chance; she had a mind to write the
12 whole bunch out of the budget.

13 7. On May 23, 1980 Cecil Williams sent a letter to the
14 Airport Director in which he requested recognition as the represen-
15 tative of the group, demanded to bargain collectively and advised
16 that the Union would protest any changes in wages, hours or working
17 conditions of the subject employees.

18 8. On two occasions Barbara Evans expressed her displeasure
19 over the unionization activities to Robert Moffett who was a
20 Senior Public Safety Officer. After Williams' bargaining letter
21 was received she told Moffett that if they went union, the County
22 would not fund their project. Prior to the letter she told him
23 she specifically disliked the Teamsters.

24 9. On May 23, 1980 the Chief of the Public Safety Division
25 wrote a memorandum to all employees in the unit and advised them
26 that it was "...the desire of the Director of Airports that the
27 officers of the Public Safety Division meet and establish an
28 employee's committee, and to elect one or two persons to act as
29 spokesmen for this committee in dealing with management." The
30 elected spokespersons were to meet with the Chief to attempt to
31 resolve grievances or other personnel problems. If the problems
32 were not resolved there, then the Director could be approached.

1 The memorandum went on to say, "Subjects of discussion could be,
2 but are not limited to, union membership, shift scheduling, shift
3 length, promotion, merit increases and other matters of interest
4 to the Division." At a meeting which the Director attempted to
5 conduct on May 28, 1980, all persons in the unit, except one,
6 walked out after informing him that the Teamsters Union was to be
7 their representative.

8 10. In late May or early June of 1980 the Chief of the
9 Public Safety Officers called Andy Wirth, a Senior Public Safety
10 Officer, at the Montana Law Enforcement Academy in Bozeman and
11 instructed him to poll the other Public Safety Officers who were
12 attending the academy at the same time. The purpose of the poll
13 was to determine who was against the union and who was for it.
14 The poll was taken and the results were reported back to the
15 Chief. Mr. Wirth was openly anti-union from the beginning and
16 had, in early May, let his feelings be known to the Director and
17 Chief. He advised them at that time that the employees were going
18 to form a union and that they, the officials, should call a meeting.

19 11. Also in late May or early June of 1980 the Airport
20 submitted two budgets to the County Commissioners. The intention
21 was to show the cost difference to the Airport between its providing
22 the crash fire program directly and contracting with the Missoula
23 Rural Fire District to provide the service. The saving to the
24 Airport was to be about \$66,000.00 per fiscal year. The Commission-
25 ers adopted the proposed budget under which the Airport would
26 relinquish the crash fire rescue program to the Rural Fire District.

27 12. On June 2, 1980 the County responded to Mr. Williams'
28 letter of May 23rd by advising him that the County was not under
29 an obligation to bargain until a unit determination had been made
30 and an election conducted in accordance with the law. The County,
31 in that same letter, expressed a willingness to bargain subsequent
32 to the determination, election and proper certification. At no

1 time did the County bargain with the group.

2 13. By means of a memorandum dated June 30, 1980 from the
3 Chairman of the Airport Board to the Public Safety Officers, the
4 unit was advised that the decision had been made to transfer the
5 crash fire rescue program to the Missoula Rural Fire District
6 effective August 3, 1980. As a result of that decision eight
7 positions which were once a part of the Airport Public Safety
8 Division were eliminated; six of the positions were retained to
9 carry out the Airport security function.

10 14. On August 2, 1980 eight officers were laid off. Of the
11 eight who were laid off, four were immediately hired by the Missoula
12 Rural Fire District which had assumed the crash fire rescue function
13 under contract with the Airport; one later took a job in the
14 Sheriff's Department. Later, in October another Public Safety
15 Officer was terminated. One Senior Public Safety officer was
16 reduced to Public Safety Officer on this date.

17 15. In determining who to lay off and who was to be retained
18 the Airport Director followed the provisions of the County's
19 personnel plan. The lay off was done under a point system which
20 quantified job performance and also took into consideration
21 length of service. Neither the union nor any of the individuals
22 in the unit was consulted or bargained with on the matter.

23 16. Three of the persons who were laid off had been hired in
24 March of that same year. They were not told that the Airport was
25 considering a change in its public safety unit at that time. All
26 three, however, were subsequently employed by the Missoula Rural
27 Fire Department.

28 17. Missoula County including the Airport, has in the past
29 given periodic merit increases and cost of living increases to its
30 employees. Since receiving the May 23rd letter from Cecil Williams
31 none of the employees in the Public Safety Division has received a
32 salary increase.

1 18. The County posted a "Grievance Procedure for Non-Union
2 Employees" on July 14, 1980." Between May and the date of the lay
3 off management made more frequent schedule changes, made telephone
4 use more restrictive and prohibited the eating of lunch while on
5 duty.

6 19. The Union has requested to bargain with management, but
7 there has as yet been no bargaining.

8 20. All eight of the officers who were terminated were
9 active in affairs of the bargaining unit; some of those who were
10 retained were also active.

11 21. This Board conducted an election in early October of
12 1980. On October 14, 1980 Teamsters Union was certified as the
13 exclusive representative for the public safety unit comprised of
14 Public Safety Officers and Senior Public Safety Officers.

15
16 IV. DISCUSSION

17 The primary question raised by this unfair labor practice
18 charge is whether there exists a duty on the part of the public
19 employer to bargaining collectively in good faith, under 39-31-401(5)
20 MCA, with a group of employees, which has begun union organization
21 efforts, over lay offs caused by a reduction in services chosen to
22 be provided by that employer. The duty to bargain is set forth in
23 39-31-305 MCA. The scope of bargaining is defined in 39-31-201
24 MCA to include wages, hours, fringe benefits and other conditions
25 of employment. The pertinent language from the National Labor
26 Relations Act, Section 8(d) states that "...wages, hours, and
27 other terms and conditions of employment..." are proper subjects
28 of bargaining. The Montana Supreme Court, in State Department of
29 Highways v. Public Employees Craft Council, 165 Mont. 349, 87 LRRM
30 2101 (1974), held that private sector precedents are relevant in
31 interpreting the Montana collective bargaining law when its language
32 and that of the NLRA are similar. With respect to the sections we

1 are concerned with here, they are almost identical. The Board of
2 Personnel Appeals has been guided, in most instances, by National
3 Labor Relations Board and federal court interpretation and applica-
4 tion of the NLRA.

5 In addition to the question of whether there was a refusal to
6 bargain collectively and in good faith under 39-31-401(5) MCA,
7 other sections of the statute are alleged to have been violated.
8 Section 39-31-401(3) MCA prohibits discrimination in employment to
9 encourage or discourage membership in a labor organization;
10 39-31-401(2) MCA prohibits interference in the formation of a
11 labor organization; and, 39-3-401(1) MCA makes it an unfair labor
12 practice for a public employer to interfere with, restrain or
13 coerce employees who are exercising their right to organize, form,
14 join or assist a labor organization. Violations of sub-sections
15 2, 3, 4 or 5 are also derivative violations of sub-section 1
16 because conduct which violates the more specific prohibitions of
17 sub-sections 2 through 5 would also coerce, restraint or interfere
18 with employees in exercising their basic collective bargaining
19 rights under 39-31-201 MCA. Section 39-31-401(1) MCA may, of
20 course, be violated independently without an attendant violation
21 of the remaining sub-sections, e.g., threats of reprisal for
22 voting union. The Board of Personnel Appeals has plenary authority
23 under 39-31-406 MCA to fashion remedial orders to effectuate the
24 policies of the Act where it finds that an unfair labor practice
25 has been committed.

26 The U.S. Supreme Court held in 1964 that an employer violated
27 section 8(a)(5) of the NLRA (39-31-401(5) MCA) by unilaterally
28 deciding to subcontract its maintenance work and terminate its own
29 employees. Fibreboard Paper Products Corp. V. NLRB, 379 US 203,
30 57 LRRM 2609 (1964). The Court upheld an NLRB finding that although
31 the company's motive in subcontracting its work was economic, the
32 failure to negotiate with the union over its decision to subcon-

1 tract constituted a violation of the NLRA. In Fibreboard the
2 Court went on to reason that the fundamental purpose of the Act
3 was promoted by requiring that an employer bargain on the subject
4 of contracting out, it stated:

5 Yet, it is contended that when an employer can effect
6 cost savings in these respects by contracting the work
7 out, there is no need to attempt to achieve similar
8 economics through negotiation with existing employees or
9 to provide them with an opportunity to negotiate a
10 mutually acceptable alternative. The short answer is
11 that, although it is not possible to say whether a
12 satisfactory solution could be reached, national labor
13 policy is founded upon the congressional determination
14 that the chances are good enough to warrant subjecting
15 such issues to the process of collective bargaining.

16 It is my opinion that the same reasoning and theory should be
17 used in this case. There is no dispute that the County did not
18 bargain over its decision. It knew that the employees were engaged
19 in activities protected under 39-31-401(1) MCA in early May. But,
20 even then, it proceeded to make unilateral changes in conditions of
21 employment. To uphold such conduct would ignore employee rights
22 under the Act. Contrary to what popular public employer opinion
23 might be, the Collective Bargaining for Public Employees Act was
24 passed for public employees, not employers. Those management
25 rights listed under 39-31-303 MCA were not intended to be used by
26 public employers as a shelter under which the duty to bargain
27 collectively could be avoided. Clearly, a public employer has the
28 right to "... relieve employees from duty because of the lack of
29 work or funds..." to "maintain the efficiency of government opera-
30 tions" and to do the other things listed under that section.
31 However, where those actions affect the rights of employees to
32 bargain collectively over, among other matters, conditions of
employment, they must not be taken unilaterally with out bargaining.
The County was under the same duty to bargain with the Union,
before making unilateral changes in working conditions, once it
knew an organization effort was being made as it would have been
after the Union was certified as exclusive representative by this

1 Board.

2 To require bargaining under circumstances like these seems
3 reasonable. Debate at the table could change fixed positions
4 especially if new facts were revealed or if the strength or weak-
5 ness of arguments became apparent. Much could be gained by giving
6 the other side a better picture of the strength of the other's
7 convictions. See Cox, *The Duty to Bargain in Good Faith*, 71
8 *Harvard Law Review*, 1401.

9 In *Town & County Mfg. Co.*, 136 NLRB 1022, 49 LRRM 1918,
10 enforced, 316 F.2d 846, 53 LRRM 2054, the NLRB held that contract-
11 ing out work, even for economic reasons, is a matter within the
12 phrase "other terms and conditions of employment" and is a manda-
13 tory subject of bargaining. In that case the employer was found
14 in violation of the NLRA when he discharged employees as a conse-
15 quence of a unilateral decision to subcontract work because the
16 employer had warned the employees he would not countenance unioniza-
17 tion. In *Westinghouse Electric Corp.*, 150 NLRB 1574, 58 LRRM 1257
18 (1965) the NLRB held that the unilateral subcontracting of bargain-
19 ing unit work is unlawful where it (the subcontracting) departs
20 from established operating practices; effects changes in conditions
21 of employment; or results in significant impairment of job tenure,
22 employment security or reasonably anticipated work opportunities
23 for those in the bargaining unit. The NLRB went on to say although
24 unilateral subcontracting of bargaining unit work in accordance
25 with established practice may be lawful, the employer is under an
26 obligation to bargain with the union upon request at an appropriate
27 time with respect to such restrictions or other changes in the
28 current practices as the union may wish to negotiate.

29 Whether Commissioner Evans influenced the decision to rid the
30 Airport of the crash fire rescue program and terminate the employment
31 with the County of several employees could reasonably be inferred
32 from the facts; however, such a finding is not necessary. The

1 County, acting through the Airport Board and its Director, violated
2 39-31-401(5) MCA when it made the unilateral decision to abolish
3 the program and as a consequence terminate the employment of the
4 individuals affected. The refusal to bargain under 39-31-401(5)
5 MCA is also a derivative violation of 39-31-401(1) MCA because it
6 restrains and interferes with the employees rights to bargain
7 collectively under 39-31-201 MCA. To insure full protection of
8 affected employee rights this Board, as did the NLRB in Fibreboard
9 and Town and Country, supra, must order the County to reinstitute
10 the crash fire rescue program previously provided by the employees
11 who were terminated and to reinstate those employees to their
12 former or substantially equivalent positions with back pay computed
13 from the date of discharge minus any wages earned elsewhere. See
14 F.W. Woolworth Company, 90 NLRB 289, 26 LRRM 1185.

15 Section 39-31-401(2)MCA prohibits interference with the
16 formation of a labor organization. One would be hard pressed to
17 find a more classic example of a violation under that section than
18 Commissioner Evans' conduct toward two of the Public Safety Officers.
19 Her threat to abolish the program clearly interfered with the
20 unionization effort and it, of course, would have restrained and
21 interfered with their rights under 39-31-201 MCA.

22 Section 39-31-401(3) makes it an unfair labor practice to
23 discriminate in employment to encourage or discourage membership
24 in a labor organization. Here we must view the unilateral decision
25 to terminate the program, which was made by the Airport Board and
26 approved by the Commissioners, in light of the conduct by Commis-
27 sioner Evans. Discriminatory conduct motivated by union animus
28 and having the foreseeable effect of either encouraging or discour-
29 aging union memberships violates employee rights regardless of
30 employer intent. The U.S. Supreme Court in Radio Officers Union
31 vs. NLRB, 347 U.S. 17, 33 LRRM 2417 (1954) reasoned:

32 The language of Section 8(a)(3) is not ambiguous. The
unfair labor practice is for an employer to encourage or

1 discourage membership by means of discrimination. Thus,
2 this section does not outlaw all encouragement or dis-
3 couragement of membership in labor organizations; only
4 such as is accomplished by discrimination is prohibited.
5 Nor does this section outlaw discrimination in employment
6 as such; only such discrimination as encourages or
7 discourages membership in a labor organization is pro-
8 scribed... But it is also clear that specific evidence
9 of intent to encourage or discourage is not an indispen-
10 sible element of proof of a violation of 8(a)(3)... An
11 employer's protestation that he did not intend to encour-
12 age or discourage must be unavailing where a natural
13 consequence of his action was such encouragement or
14 discouragement. Concluding that encouragement or dis-
15 couragement will result, it is presumed that he intended
16 such consequences.

9 The natural consequences of the threat made by Commissioner
10 Evans was to discourage union membership. It also coerced, re-
11 strained and interfered with the rights of the Public Safety
12 employees under 39-31-201 MCA.

13 The totality of the employer's conduct from the time it knew
14 the employees were attempting to organize until August 3, 1980
15 indicates disregard of its duty under the Act. The polling of the
16 employees to determine their feelings about the union, the posting
17 of a grievance procedure without bargaining, the withholding of
18 scheduled salary increases, the tightening up on work rules, in
19 addition to those actions discussed above show a lack of regard
20 for employee rights under the Collective Bargaining for Public
21 Employees Act. Although the employer's decision to withhold
22 scheduled merit and cost of living increases is somewhat under-
23 standable because the letter from the Union official put the
24 County on notice that changes would be protested, employee rights
25 under the act cannot be denied on that basis. It is worth noting
26 that the County chose to comply with one part of the letter from
27 Mr. Williams, i.e., that part protesting changes in wages; however,
28 it chose to ignore that part of the letter requesting voluntary
29 recognition and collective bargaining. Although it did not make
30 changes in wages, even previously scheduled changes, it did make
31 changes in working conditions by terminating the employment of
32 some of the unit members.

V. CONCLUSION OF LAW

1 The County of Missoula violated 39-31-401(1), (2), (3) and
2 (5) MCA when it unilaterally decided to contract with the Missoula
3 Rural Fire District for the provision of crash fire rescue services;
4 when Commissioner Evans threatened retaliation if the employees
5 organized; when it terminated the employment of certain Public
6 Safety personnel; when it polled the employees concerning union
7 activities; and, when it declined to award regular cost of living
8 and merit increases to the Public Safety employees.
9

10 VI. RECOMMENDED ORDER

11 IT IS ORDERED, when this Order becomes final, the County of
12 Missoula and the Missoula County Airport, its officers, agents and
13 representatives shall:
14

- 15 1. Cease and desist from refusing to bargain collectively
16 with the Union;
- 17 2. Cease and desist its threats of retaliation against
18 employees in this bargaining unit;
- 19 3. Take affirmative action by reinstating the crash fire
20 rescue program to the status quo ante.
- 21 4. Make whole those employees who were terminated or other-
22 wise affected on August 3, 1980 by offering reinstatement
23 to their former or substantially equivalent positions
24 without prejudice to their seniority or other rights and
25 privileges. Make them whole for any loss of earnings
26 they suffered by paying them for earnings they would
27 have received from the date of their discharge or demotion,
28 including any cost of living or merit increases, less
29 any net interim earnings and computed in accordance with
30 the principle set forth in F.W. Woolworth Company, 90
31 NLRB 289, 26 LRRM 1185.
- 32 5. Meet with Complainant's attorney and attempt to determine

1 the amount due affected employees under No. 4 above.

2 6. Post in a conspicuous place, where Public Safety employees
3 would normally see it, copies of the attached notice
4 marked "Appendix."

5 7. Notify this Board in writing within twenty days what
6 steps have been taken to comply with this Oder.

7
8 VII. NOTICE

9 Exceptions to these Findings of Fact, Conclusion of Law and
10 Recommended Order may be filed within twenty days service thereof.
11 If no exceptions are filed, the Recommended Order shall become the
12 Final Order of the Board of Personnel Appeals. Address exceptions
13 to Board of Personnel Appeals, Capitol Station, Helena, Montana
14 59601.

15
16 Dated this 18th day of March, 1981.

17
18
19 BOARD OF PERSONNEL APPEALS

20
21 BY Jack H. Calhoun
22 JACK H. CALHOUN
Hearing Examiner

23 CERTIFICATE OF MAILING

24 The undersigned does certify that a true and correct copy of
25 this document was mailed to the following on the 18th day of
26 March, 1981:

27
28 Michael W. Sehestedt
29 Deputy County Attorney
30 Missoula County Courthouse
Missoula, MT 59801

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

31
32 Jennifer Jacobson
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 County of Missoula and the Missoula County Airport, acting through its officers, agents and representatives, does hereby notify employees in the Public Safety Division that:

It will cease and desist its violation of 39-31-401 MCA, will reinstitute the public safety program to its status prior to the August 1980 change and will offer to reinstate and make whole those employees affected by the change.

COUNTY OF MISSOULA

BY _____
DIRECTOR OF AIRPORT

Dated this _____ day of _____, 1981.

This notice shall remain posted for a period of sixty (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.

PAD:5:B/15

