

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 38-81:

R. KELLY BUCK,)
)
 Complainant,)
)
 - vs -)
)
 L. JOHN ONSTAD, SHERIFF OF)
 GALLATIN COUNTY, MONTANA,)
)
 Defendant.)

FINAL ORDER

No exceptions having been filed, pursuant to ARM 24.26.215, to the Findings of Fact, Conclusions of Law and Recommended Order issued on March 31, 1982, by Hearing Examiner Jack H. Calhoun;

THEREFORE, this Board adopts that Recommended Order in this matter as its FINAL ORDER.

DATED this 27th day of April, 1982.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy
John Kelly Addy
Chairman

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 28th day of April, 1982:

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STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 38-81:

1	R. KELLY BUCK,)	
2)	
3	Complainant,)	FINDINGS OF FACT,
4)	CONCLUSION OF LAW,
5	-vs-)	AND
6)	RECOMMENDED ORDER
7	L. JOHN ONSTAD, SHERIFF OF)	
8	GALLATIN COUNTY, MONTANA,)	
9	Defendant.)	

* * * * *

INTRODUCTION

On October 22, 1981 Mr. Buck filed this unfair labor practice charge against Sheriff Onstad alleging that he had violated 39-31-401 MCA. More specifically, he alleged that Defendant had interfered with his right to organize, form, join or assist a labor organization and to bargain collectively through a chosen representative; that Defendant had interfered with his activities related to union representation of department employees; that he was discriminated against in the terms and conditions of his employment for the purpose of discouraging membership in a labor organization. Defendant denied any violation. A formal hearing, under the authority of 39-31-405 and 406, MCA, was held in Bozeman on December 21, 1981. Complainant was represented by Mr. Douglas R. Drysdale, Defendant by Mr. John P. Atkins. Briefs were filed and the case submitted on February 11, 1982.

ISSUE

The question raised by the charge filed is whether Defendant violated 39-31-401(1) or (3) MCA.

FINDINGS OF FACT

Based on the evidence on the record, including the

1 sworn testimony of witnesses, I find as follows.

2 1. Mr. Buck was hired as a civilian dispatcher and
3 jailor in the Gallatin County Sheriff's Department in February
4 of 1979. He worked the midnight to 8:00 a.m. shift for
5 approximately one year. He was then changed to the 4:00
6 p.m. to midnight shift where he and Mr. Reynolds shared the
7 dispatch duties. Mr. Buck was the senior dispatcher on that
8 shift. The midnight to 8:00 a.m. shift is handled by one
9 dispatcher.

10 2. Mr. Buck's career objective was to become a sworn
11 law enforcement officer. He had applied to the Montana
12 Highway Patrol and was second on a list of eligibles for
13 appointment as a Gallatin County Deputy Sheriff. During the
14 summer of 1981 he was rejected as a Highway Patrol Officer
15 candidate and the Gallatin County Commissioners refused to
16 fund additional deputy sheriff positions for the ensuing
17 fiscal year. Those two occurrences left him without hope of
18 becoming a law enforcement officer within the near future.

19 3. The 4:00 p.m. to midnight shift is supervised by
20 Sgt. Slaughter. He observed Buck's work over a period of
21 about two years and was of the opinion that he was a good
22 employee until he found out he was not going to have the
23 opportunity to become a law enforcement officer within the
24 foreseeable future.

25 4. After Mr. Buck's chances for becoming a Deputy
26 Sheriff or a Highway Patrol Officer diminished, he neglected
27 to do his part on his shift. His fellow dispatcher, Mr.
28 Reynolds, did most of his work for him. When confronted by
29 Sgt. Slaughter on September 1, 1981 with that fact, he
30 admitted it was true. During the course of approximately
31 two months prior to that date his inattention to his duties
32 as a dispatcher was noticed by the deputies and by the
Sheriff himself.

1 5. During a shift, different individuals, both civilian
2 and uniformed, congregated at times in the office where the
3 dispatchers perform their duties. Such gatherings were
4 described as "bull sessions" and at one time or another were
5 participated in by most of the employees. The Sheriff had
6 expressed concern about the gatherings on a few occasions;
7 however, nothing further was done. During the month of
8 August the sessions became more frequent and Buck was the
9 most consistent participant. Reynolds had to do most of the
10 work. Sgt. Slaughter received a number of complaints about
11 the work getting bogged down because of Buck.

12 6. During the month of August, 1981, Mr. Buck contacted
13 a number of labor organizations in an attempt to find out
14 whether any would be interested in organizing the department.
15 During the last week of that month he had a conversation
16 with the Sheriff about the possibility of unionization. The
17 sheriff expressed no hostility toward the idea and Buck
18 offered to keep him informed.

19 7. The union which expressed the most interest was
20 the American Federation of State, County and Municipal
21 Employees, Council No. 9. On September 1, 1981 a meeting
22 was arranged and intent cards were obtained. Mr. Buck
23 contacted several employees about the union and the organi-
24 zation effort. There were others who were as active as he
25 in the unionization effort.

26 8. The next day after the meeting with the AFSCME
27 representative Mr. Buck drove to Big Sky and met with
28 Sgt. Schumacher and another deputy to talk about the unioniza-
29 tion effort. He told them that the union was responsible
30 for getting a deputies' pay raise bill through the legislature.
31 Sgt. Schumacher questioned the truth of the assertion because
32 he had served on the board of directors of the Sheriff's and

1 Peace Officer's Association during that legislative session
2 and believed it (SPOA) to be the organization responsible
3 for getting the bill passed.

4 9. Prior to a sergeant's meeting in early September,
5 1981, Sgt. Slaughter talked to dispatcher Reynolds who
6 agreed that Buck was not doing his part of the work on the
7 shift. At the meeting the Sheriff informed Slaughter that
8 Buck was not doing his job, that Reynolds was doing the
9 majority of the dispatch work and that he wanted Buck to
10 straighten out and work. He specifically directed Slaughter
11 to speak to Buck about his performance. After the meeting
12 Sgt. Schumacker told the Sheriff what Buck had said regarding
13 the union's effort in getting the pay raise bill passed.
14 Onstad later talked to Buck and told him his information was
15 incorrect. He directed him to stop telling the story. Mr.
16 Buck admitted he did not know whether the information he had
17 been given was true.

18 10. A few days after the sergeant's meeting Onstad
19 observed Buck's inattention to his duty while on shift. He
20 immediately directed the Undersheriff to place Buck on a
21 shift where he would have to do the dispatch work himself.
22 The shift was not changed immediately, Mr. Buck was permit-
23 ted to finish the work on his 4:00 p.m. to midnight shift
24 and have his regular days off.

25 11. Sheriff Onstad had been aware during the months
26 after his, Buck's, rejection by the Highway Patrol and after
27 the Commissioners' decision on funding more positions that
28 Buck was not doing his job as a dispatcher and that Reynolds
29 was doing most of the work on their shift. Others in the
30 department were also aware of Mr. Buck's decline in perfor-
31 mance and because of that fact the Sheriff would not have
32 been able to promote him even if the occasion had arisen.

1 The change in shift was made to force him to work and to
2 give him an opportunity to change his attitude regarding his
3 duties.

4 12. After his shift was changed Mr. Buck, even after
5 encouragement from Sgt. Slaughter to do so, refused for
6 several weeks to go to the Sheriff and talk to him. Sgt.
7 Slaughter on one occasion drove to Buck's home and asked him
8 to talk to Onstad.

9 13. On September 25th the Sheriff wrote a letter to
10 Mr. Buck in which he reviewed his past inadequate performance,
11 placed him on a 90 day probationary period, advised him to
12 improve or be terminated and urged him to come to his office
13 and discuss the matter. On October 1st he went to the
14 Sheriff and talked about getting some vacation time, no
15 comment was made about his changed shift.

16 14. During the period between the filing of the unfair
17 labor practice charge on October 22, 1981 and the date of
18 the hearing on December 21, 1981, Mr. Buck voluntarily
19 terminated his employment with the Gallatin County Sheriff's
20 Department and went into business for himself. The remedy
21 he seeks is a finding that Sheriff Onstad committed an unfair
22 labor practice and the issuance of a cease and desist order,
23 no reinstatement demand is sought.

24 15. An election conducted by this Board among the
25 Sheriff department employees on October 30, 1981 resulted in
26 AFSCME being certified as exclusive representative.

27 OPINION

28 Two actions of Sheriff Onstad are alleged to have
29 violated Complainant's right under 39-31-401 MCA. The first
30 was his admonition to Mr. Buck to stop telling other depart-
31 ment personnel that the union was responsible for getting
32 the pay raise bill through the legislature. The other was

1 the change of shift imposed on Mr. Buck. The question
2 raised by the allegations is whether those actions amount to
3 an unfair labor practice.

4 More specifically stated, 3931-401(3) MCA makes it an
5 unfair labor practice for a public employer to:

6 . . . discriminate in regard to hire or tenure of
7 employment or any term or condition of employment in
8 order to encourage or discourage membership in any
9 labor organization . . .

10 Under 39-31-401(1) MCA it is deemed an unfair labor
11 practice for a public employer to interfere with, restrain,
12 or coerce employees in the exercise of the rights guaranteed
13 in 39-31-201 MCA, where it is stated:

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

23 The same prohibitions of employer conduct are found in
24 sections 8(a)(1) and (3) of the National Labor Relations
25 Act. Because of the similar language of the two acts, the
26 Board of Personnel Appeals has frequently looked to National
27 Labor Relations Board precedent for guidance in this and
28 other areas of labor law.

29 In Board of Trustees Billings School District No. 2
30 vs. State of Montana ex. rel. Board of Personnel Appeals
31 and Billings Education Association, _____ Mont. _____, 604
32 P.2d 770 (1979) the Montana Supreme Court adopted the "but
for" test used by the U.S. Supreme Court in dual motivation
cases. Mt. Healthy City School District vs. Doyle, 429 U.S.
274, 97 S. Ct. 568 (1977). Dual motivation cases are those

1 in which the employee is said to have provided the employer
2 with some cause for disciplinary action, but at the same
3 time the evidence indicates the employer had a discrimina-
4 tory reason for imposing the discipline. The facts in this
5 instant case appear to fit that description. Dual motivation
6 cases must first, however, be distinguished from pretext
7 cases where the reasons advanced by the employer to explain
8 the disciplinary action were not the real reasons, but
9 rather, were a mere smokescreen for the true reasons. The
10 facts here do not seem to fall under that category because,
11 as the above findings show, the Sheriff clearly had reason
12 to take actions to correct Mr. Buck's lack of work. The
13 imposition of discipline under such circumstances is not a
14 pretext, it is what one would expect an employer to do to an
15 employee who pushes his work off on another.

16 In Board of Trustees the Court said " . . . The task of
17 determining motivation is not easy, and agencies and courts
18 must rely on the outward manifestation of the employer's
19 subjective intent. The task is compounded in employment
20 cases where there exist permissible and impermissible reasons
21 for a particular discharge. This is a problem of dual
22 motivation." The task becomes one of determining what role
23 the protected activity played in the decision of the employer
24 to discipline.

25 The National Labor Relations Board recently attempted
26 to clarify its policy concerning dual motivation cases and to
27 distinguish between those cases and pretext cases. With
28 respect to pretext cases the NLRB, in Wright Line, 251 NLRB
29 150, 105 LRRM 1169 (1980), stated:

30 . . . In modern day labor relations, an employer will
31 rarely, if ever, baldly assert that it has disciplined
32 an employee because it detests unions or will not
tolerate employees engaging in union or other protected
activities. Instead, it will generally advance what it

1 asserts to be a legitimate business reason for its
2 action. Examination of the evidence may reveal, however,
3 that the asserted justification is a sham in that the
4 purported rule or circumstances advanced by the employer
5 did not exist, or was not, in fact, relied upon. When
6 this occurs the reason advanced by the employer may be
7 termed pretextual. Since no legitimate business justifi-
8 cation for the discipline exists, there is, by strict
9 definition, no dual motive.

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 U.S. Circuit Courts of
13 Appeal and the NLRB itself, went on to adopt the same test
14 of causation used by the U.S. Supreme Court in Mt. Healthy,
15 supra, in cases dealing with alleged violations of Sections
16 8(a)(1) and (3) of the National Labor Relations Act. The
17 test requires that the employee show that the protected
18 conduct 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 dual
29 motivation cases, while at the same time serving to
30 effectuate the policies and objectives of the act...
31 Under the Mt. Healthy test, the aggrieved employee is
32 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 estab-
lish 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 to demonstrate that the discipline or other action
would have occurred absent protected activities, the
employee cannot justly complain if the employer's
action is upheld. Similarly, if the employer cannot
make the necessary showing, it should not be heard to
object to the employee's being made whole because its

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action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

The Facts here do not permit one to conclude with any degree of certainty that Complainant showed that his protected activities played any role in the employer's decision to : (1) admonish him for spreading tales of the union's effort in getting the pay bill passed, and (2) change his shift to one which would require he be more attentive. On the contrary, the Sheriff, when advised of the unionization effort, expressed no hostility according to Mr. Buck himself. When he learned of the message being spread by Complainant about the pay bill, he told Mr. Buck the story was not true and directed him to stop spreading it. Although the Sheriff cannot restrict his employees' First Amendment right to free speech^{1.}, and although Mr. Buck was under no obligation to comply with the verbal order, there was no antiunion animus expressed or implied in the statement. That is especially clear when one considers his lack of any hostility earlier toward unionization and the fact that Mr. Buck's inattention to duty had, immediately previous to the incident, just been brought to his attention again. The shift change decision was not only warranted based on Mr. Buck's inattention to duty over a period of about two months -- as he himself admitted -- it was necessary to preserve any semblance of fair treatment by the Sheriff toward Mr. Reynolds. Mr. Reynolds, it must be remembered, was the one who bore the brunt of Buck's frustrations by assuming most of the workload while Mr. Buck did other things.

The first part of the test was not met here; however, assuming arguendo that it was, Defendant carried his burden and showed that it would have reached the same decision

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

1 anyway. After Complainant showed he had engaged in the
2 unionization effort, that the Sheriff reacted in the manner
3 previously described when he heard about the pay bill rumor
4 and that the Sheriff changed his shift; Defendant showed:
5 (1) that he had expressed no hostility toward the unionization
6 effort, (2) that in countering the rumor he did not try to
7 stop union activities, (3) that Buck's performance had been
8 known to him for some time, (4) that Buck himself knew he
9 was not doing a good job, and (5) that others knew and
10 complained of Buck's lack of attention to his duties. Aside
11 from those matters which Defendant raised to justify his
12 actions, it must also be noted that Mr. Buck refused to go
13 see the Sheriff after the shift change, even when urged by
14 Sgt. Slaughter to do so. When he finally did talk to the
15 Sheriff he did not mention his shift change and he voluntarily
16 resigned and started his own business, he was not fired nor
17 was he forced to resign.

18 CONCLUSION OF LAW

19 Defendant did not violate 39-31-401 MCA.

20 RECOMMENDED ORDER

21 IT IS ORDERED, there being no violation found, that
22 this unfair labor practice charge be dismissed.

23 NOTICE

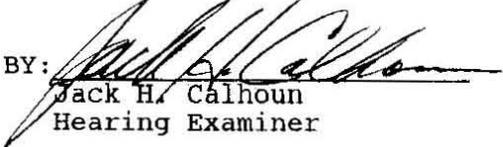
24 Exceptions to these findings, conclusion and recommended
25 order may be filed within twenty (20) days service thereof.
26 If exceptions are not filed the Recommended Order will
27 become the Final Order of the Board of Personnel Appeals.

28 Address exceptions to the Board of Personnel Appeals,
29 Capitol Station, Helena, Montana 59620.
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1 Dated this 31st day of March 1982.

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BOARD OF PERSONNEL APPEALS

BY: 
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 31 day of March, 1982:

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PAD5:L/11