

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 16-84:

BILLINGS FIRE FIGHTERS,)
LOCAL NO. 521, I.A.F.F.,)
Complainant,)
- vs -)
ROBERT S. WILLIAMS, FIRE)
CHIEF, CITY OF BILLINGS,)
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 January 15, 1985, by Hearing Examiner Jack Calhoun;

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

DATED this 5th day of February, 1985.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn
Alan L. Joscelyn
Chairman

CERTIFICATE OF MAILING

I, Jennifer Jackson, do certify that a true and correct copy of this document was mailed to the following on the 6th day of February, 1985:

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STATE OF MONTANA
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IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 16-84:

BILLINGS FIRE FIGHTERS,)	
LOCAL NO. 521, I.A.F.F.,)	
)	FINDINGS OF FACT,
COMPLAINANT,)	CONCLUSIONS OF LAW
)	AND
vs.)	RECOMMENDED ORDER
)	
ROBERT S. WILLIAMS, FIRE)	
CHIEF, CITY OF BILLINGS,)	
)	
DEFENDANT.)	

* * * * *

INTRODUCTION

Local No. 521 of the International Association of Fire Fighters, Billings Fire Fighters (the Union) filed an unfair labor practice charge against Robert S. Williams, Fire Chief, City of Billings (the City) on April 26, 1984 alleging that the Fire Chief had violated Sections 39-31-401(1), (2) and (5) MCA. Specifically, the Union charged that Chief Williams' assignment of certain tasks, which had been performed in the past by members of the bargaining unit represented by the Union, to temporary employees, who were not members of the bargaining unit, constituted an interference with the Section 39-31-201 MCA rights of the Union's bargaining unit members and that such interference violated Section 39-31-401(1) MCA. The Union also charged that Chief Williams violated Section 39-31-401(2) MCA when he asked certain members of the bargaining unit to furnish him with a list of duties which the temporary employees could perform thereby interfering with the administration of the labor organization. Further, the Union charged that the Fire Chief committed a violation of Section 39-31-401(5) MCA when he went ahead and hired two temporary employees after he unsuccessfully attempted to negotiate with members of the

1 bargaining unit a part time work clause into the parties'
2 collective bargaining agreement.

3 The City filed its answer to the charges on May 11,
4 1984 and denied any violations. An investigation, pursuant
5 to Section 39-31-405(1) MCA, was conducted and a determina-
6 tion was made that probable merit for the charge existed. A
7 notice of hearing was issued.

8 On October 11, 1984 a hearing was held under authority
9 of Section 39-31-406 MCA in Billings. The Union was repre-
10 sented by Mrs. Rosemary Boschert; the City was represented
11 by Mr. James L. Tillotson.

12 ISSUES

13 The issues raised by the charges filed are: (1) whether
14 the City violated Section 39-31-401 MCA, if in fact Chief
15 Williams hired temporary employees to perform tasks which
16 had been performed by members of the Union's bargaining
17 unit; (2) whether the City interfered in the administration
18 of the Union in violation of Section 39-31-401(2) MCA; (3)
19 whether the City violated Section 39-31-401(5) MCA, if in
20 fact, Chief Williams employed temporary workers to do bargain-
21 ing unit work, and (4) whether the City violated Section
22 39-31-401(5) MCA, if in fact, the Union was denied certain
23 information to which it was entitled.

24 FINDING OF FACT

25 Based on the evidence on the record, including the
26 sworn testimony of witnesses, I make the following findings.

27 1. The International Association of Fire Fighters,
28 Local No. 521, is the recognized exclusive representative of
29 all employees of the City of Billings Fire Department,
30 except the Fire Chief, Assistant Chief and all probationary
31 employees for the first six months of their employment.

32

1 2. Negotiations between the Union and the City for
2 their July 1, 1983 through June 30, 1985 collective bargain-
3 ing agreement began in April of 1983 and lasted into October
4 of that year. Early on during negotiation sessions the City
5 proposed to the Union that members of the bargaining unit
6 perform certain non-suppression division duties on a part-
7 time basis at a rate of pay less than that required by the
8 overtime provision of the agreement.

9 3. The Union negotiators rejected the proposal because
10 they believed that agreeing to a part-time rate less than
11 the time and one-half overtime rate provision contained in
12 their previous contracts would jeopardize the overtime
13 provision itself.

14 4. The City continued to press its part-time work
15 proposal by reproposing the matter during several subsequent
16 bargaining sessions. At the June 28, 1983 session the City
17 made a written proposal to the Union for voluntary part-time
18 work, outside the suppression division, at an hourly rate of
19 \$7.00. The \$7.00 rate would have been less than the one and
20 one-half time rate at which bargaining unit members would
21 have been paid under the overtime provision of the parties'
22 contract. Throughout their negotiations on the City's
23 proposal to modify the overtime provision of the collective
24 bargaining agreement, the City told the Union negotiators if
25 they were unable to reach agreement, whereby bargaining unit
26 members would perform the proposed work, the City would
27 employ persons other than bargaining unit members.

28 5. Since the parties' were not able to agree on the
29 part-time work issue and other issues, they went to media-
30 tion. During the course of mediation the parties agreed to
31 the current overtime provision which requires that bargaining
32 unit members be paid at one and one-half times their regular

1 hourly rate for all work performed in excess of their regular
2 work schedule.

3 6. The Union and the City entered into their current
4 contract on October 13, 1983. The contract contains the
5 overtime provisions referenced in No. 5 above.

6 7. The recognition clause of the parties' agreement
7 defines who is in the bargaining unit represented by the
8 Union; however, it does not define the work of the bargaining
9 unit, that is, it does not contain a jurisdiction clause.

10 8. On January 23, 1984 the Fire Chief hired a tempo-
11 rary employee at \$6.00 per hour. A second temporary employee
12 was hired by the Chief on March 5, 1984 at the same rate of
13 pay. They were both hired from a future fire fighter elig-
14 ibility list; both were later (mid 1984) appointed as proba-
15 tionary fire fighters.

16 9. On January 26, 1984 two officials of the Union met
17 with the Fire Chief and requested certain information about
18 the wages, hours and conditions of work of the temporary
19 employees. The Chief informed them about the duties of the
20 temporary employees, but he was unwilling to answer all
21 their questions.

22 10. On February 10, 1984 the Union forwarded a written
23 request for information to the City Administrator about the
24 temporary employees. On February 21, 1984 the City Admin-
25 istrator answered the request giving the Union the requested
26 information.

27 11. During the course of their employment the two
28 temporary employees performed duties such as copying, filing,
29 designing forms, picking up and delivering parts, compiling
30 data from fire reports, copying films, answering telephones,
31 assisting in maintenance work and assisting in auction
32 preparation. All of such duties were performed intermit-

1 tently by bargaining unit members before the temporary
2 employees were hired; however, the volume of such work was
3 not being reduced. The temporary employees did work which,
4 in most cases, was not otherwise being done.

5 12. No member of the bargaining unit suffered a reduc-
6 tion in regular hours of work nor was their overtime reduced
7 as a result of the employment of the two temporary employees
8 by the City. No bargaining unit member was laid off by the
9 City.

10 13. Battalion Chiefs are members of the bargaining
11 unit and they are responsible for making recommendations to
12 the Fire Chief on matters of personnel. During the course
13 of planning for the tasks to be performed by the temporary
14 employees the Fire Chief asked that the Battalion Chiefs
15 submit a list of duties, which the temporary employees might
16 perform, at a later staff meeting. The Battalion Chiefs
17 submitted the list. None believed it conflicted with their
18 bargaining unit status.

19 14. The parties' collective bargaining agreement
20 contains a management rights provision which reads as follows:

21 ARTICLE II - MANAGEMENT RIGHTS

- 22 A. The Association recognizes the prerogative of the
23 City to operate its affairs in all respects in
24 accordance with its responsibilities, and the
25 powers or authority which the City has not offic-
26 ially abridged, delegated or modified by this
27 Agreement are retained by the City, and in such
28 areas as, but not limited to the following, to-wit:
29 1. Directing employees;
30 2. Hiring, promoting, transferring, assigning,
31 and retaining employees;
32 3. Relieving employees from duties because of
lack of work or funds or under conditions
where continuation of such work would be
inefficient and non-productive.
4. Maintaining the efficiency of government
operations;

- 1 5. Determining the methods, means, job classifications, organization, and personnel by which
2 operations of the City of Billings Fire
3 Department are to be conducted;
- 4 6. Taking whatever actions that may be necessary
5 to carry out the mission of the City of
6 Billings Fire Department in situations of
7 emergency;
- 8 7. Establishing the methods and processes by
9 which work is to be performed;
- 10 8. Establishing reasonable work rules;
- 11 9. Scheduling overtime work as required, in a
12 manner most advantageous to the City Fire
13 Department and consistent with requirements.

14 B. The Association recognizes that the Employer has
15 statutory and other rights and obligations in
16 contracting for matters relating to municipal
17 operations. The right of contracting or subcon-
18 tracting is vested in the Employer. The right to
19 contract or subcontract shall not be used for the
20 purpose or intention of undermining the Association,
21 nor to discriminate against any of its members.

22 DISCUSSION

23 Section 39-31-401(5) MCA makes it an unfair labor
24 practice for a public employer to refuse to bargain collect-
25 ively in good faith with an exclusive representative.
26 Similarly Section 8(a)(5) of the National Labor Relations
27 Act prohibits an employer from refusing to bargain in good
28 faith with the exclusive representative. Because of the
29 similarity of the language of the two acts the Board of
30 Personnel Appeals has been guided by National Labor Relations
31 Board and federal court precedent. The Montana Supreme Court
32 has approved that practice. State Department of High-
ways v. Public Employees Craft Council, 165, Mont. 349, 529
P.2d 785 (1974), 87 LRRM 2101; AFSCME Local 2390 v. City of
Billings, 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753 (1976).

The Union alleged that the City violated Section 39-31-
401(1) MCA, when it hired the two temporary employees, by
interfering with the bargaining unit members' protected
rights under Section 39-31-201 MCA. Given the facts found

1 above, it appears that any violation of Section 39-31-401(1)
2 MCA necessarily will derive from, and be dependent upon
3 whether an independent violation of Section 39-31-401(2) or
4 (5) MCA is found. The NLRB has long held that a violation
5 of Section 8(a)(2), (3), (4) or (5) of the NLRA is also a
6 violation of Section 8(a)(1) of the Act. Sections 8(a) (2),
7 (3), (4) and (5) are subclasses or subdivisions of Section
8 8(a)(1). Employer conduct held to be violative of one of
9 the more specific subdivisions of Section 8(a) necessarily
10 violates Section 8(a)(1). See 52 Cornell L.Q. 491 (1967).

11 The Union also alleged that the City violated Section
12 39-31-401(2) MCA when the Fire Chief requested the Battalion
13 Chiefs to furnish him with a list of duties for the temporary
14 employees to perform. Section 39-31-401(2) provides that it
15 is an unfair labor practice for a public employer to "...dom-
16 inate, interfere, or assist in the formation or administration
17 of any labor organization..." Section 8(a)(2) is the comparable
18 federal sector prohibition. Interference or support of a
19 labor organization by an employer may constitute domination
20 amounting to control of the organization. The test of
21 whether a union is employer controlled is subjective and
22 must be viewed from the point of the employees. Hershey Metal
23 Products, 21 LRRM 1237 (1948); NLRB v. Tappan Stove Co., 24
24 LRRM 2125 (1949). The NLRB generally finds two degrees of
25 violations of Section 8(a)(2). First are those cases where
26 the employer's activity is so extensive as to constitute
27 domination of the labor organization. There the NLRB will
28 order disestablishment of the union. NLRB v. Jack Smith Bev-
29 erages, Inc., 202 F.2d 100 (6th CA) 31 LRRM 2366 (1953).
30 The second class of cases are those where the NLRB finds the
31 employer's activity was limited to interference and support
32 which never reached the point of domination. The NLRB in

1 such cases does not order the extreme remedy of disestablish-
2 ment. In either class of cases the underlining principle is
3 that the employer engaged in an unlawful means of undermining
4 employee rights to effective bargaining representation of
5 their own choice. Such conduct by the employer goes beyond
6 interference with other protected collective bargaining
7 rights and is aimed at the labor organization as an entity.
8 Nassan & Suffolk Contractors Association, 118 NLRB 174, 40
9 LRRM 1146 (1957).

10 There is no evidence on the record in the instant case
11 to support a conclusion that the City interfered with the
12 administration of IAFF Local No. 521. There was no conduct
13 engaged in by the City which can be said to undermine bargain-
14 ing unit members' rights to effective representation by the
15 union. The act of the Fire Chief in asking his Battalion
16 Chiefs to submit a list of duties which the temporary
17 employees might be able to perform is a far cry from inter-
18 fering with the effectiveness of the Union as the represent-
19 ative of the bargaining unit members. There is no evidence
20 on the record to show that the Union was seen to be less
21 effective after Chief Williams' request. The presence of
22 potential means for interference by an employer is always
23 present; however, without evidence of actual interference,
24 an unfair labor practice finding cannot be made. Chicago
25 Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th CA), 35 LRRM
26 2665; Coppus Engineering Coys. v. NLRB, 240 F.2d 564 (1st
27 CA), 39 LRRM 2315.

28 As to the question of whether the City violated Section
29 39-31-401(5) MCA by refusing to disclose information requested
30 by the Union, it is clear that the NLRB and the federal
31 courts impose a duty on an employer to turn over, upon
32 request of the labor organization, information in its pos-

1 session which is necessary or relevant to the union in
2 discharging its function as bargaining representative. The
3 duty to disclose applies both during negotiations over the
4 terms of a contract and during the existence of a contract.
5 NLRB v. Truitt Mfg. Co., 351 U.S. 149, 38 LRRM 2042 (1956).
6 Lengthy delays in furnishing requested information will
7 support a conclusion that the employer failed to bargain in
8 good faith; short delays are considered reasonable. United
9 Engines, Inc., 222 NLRB 50, 91 LRRM 1208 (1976). Although
10 the conduct of the Fire Chief in refusing to answer all
11 questions about the terms and conditions of employment of
12 the temporary employees could be termed a technical viola-
13 tion of his duty under the Act, the City did furnish all
14 information requested by the Union within a few days once
15 the Union submitted a formal, written request. The Union
16 suffered no harm because it received the requested informa-
17 tion within a reasonable time and its purpose in requesting
18 the information was not frustrated, i.e., the Union was able
19 to use the information furnished to formulate a timely
20 decision on what its recourse was to be.

21 The remaining issue raised by the Union was whether the
22 City violated Section 39-31-401(5) MCA when it employed the
23 two temporary employees. The general rule laid down by the
24 U.S. Supreme Court in NLRB v. Katz, 369 U.S. 736, 50 LRRM
25 2177 (1962), is that an employer has the duty to bargain
26 with the representative of his employees before unilaterally
27 changing the terms and conditions of their employment. An
28 employer's unilateral change in conditions of employment was
29 held by the Court in Katz, supra, to be tantamount to a
30 refusal to bargain and a violation of Section 8(a)(5). The
31 rule applies during negotiations for a new contract and
32 during the term of an existing agreement.

1 The allocation of work to a bargaining unit is a term
2 and condition of employment and an employer may not unilat-
3 erally attempt to divert work away from a bargaining unit
4 without fulfilling its duty to bargain. Fiberboard Paper
5 Products Corp. v. NLRB, 379 U.S. 203, 57 LRRM 2609; Interna-
6 tional Union, UAW v. NLRB, 381 F.2d 265 (D.C. CA), 64 LRRM
7 2489, Cert. denied, 389 U.S. 857, 66 LRRM 2307 (1967).
8 Improper transfers of work have been found where an employer
9 set up a runaway shop at another location, NLRB v. Triumph
10 Curing Center, 571 F.2d 462, (9th CA), 98 LRRM 2047 (1978);
11 subcontracted work, Fiberboard, supra; or diverted work from
12 bargaining unit employees to non-bargaining unit employees,
13 Soule Glass & Glazing Co. v. NLRB 652 F.2d 1055 (1st CA),
14 107 LRRM 2781 (1981).

15 The NLRB, in Westinghouse Electric Corp., 150 NLRB
16 1574, 58 LRRM 1257 (1965), interpreted the Fiberboard decision
17 and held that bargaining over the decision to subcontract
18 bargaining unit work would not be required where: (1) the
19 subcontracting was motivated solely by economic reasons; (2)
20 it was customary for the employer to subcontract various
21 kinds of work; (3) no substantial variance was shown in kind
22 or degree from the established past practice of the employer;
23 (4) no significant detriment resulted to the employees in
24 the unit; and (5) the union has had an opportunity to bargain
25 about changes in existing subcontracting practices at general
26 negotiating meetings.

27 In both Fiberboard and Westinghouse, supra, the Court
28 and the NLRB in their analyses placed heavy emphasis on the
29 detriment, or absence thereof, to the bargaining unit. While
30 both cases utilized the five factors test noted above, in
31 Retail, Wholesale & Dept. Store Union (Coca Cola Bottling
32 Works, Inc.) v. NLRB, 466 F.2d 380 (D.C. CA), 80 LRRM 3244,

1 enforcing in part and remanding 186 NLRB 1050, 75 LRRM 1551
2 (1970), the Court of Appeals affirmed an NLRB decision which
3 found no unfair labor practice when the employer changed his
4 operations without consulting with the bargaining unit. The
5 Administrative Law Judge focused primarily on the fact of no
6 adverse impact on the bargaining unit. The ALJ finding was
7 affirmed by the NLRB and the Court of Appeals. See Coca Cola,
8 supra, 186 NLRB 1050 at 1062. Also see Vegas Vic., Inc.,
9 213 NLRB 841, 87 LRRM 1269 (1974) where the NLRB focused its
10 analysis on the fact that there was no adverse impact on
11 employees in the unit when the employer changed his opera-
12 tions without consulting the union.

13 Decisions subsequent to Fiberboard and Westinghouse,
14 supra, have made clear the importance of impact on the
15 bargaining unit as the factor in determining whether partic-
16 ular transfers of work from a bargaining unit constitute an
17 issue over which bargaining is required. Plumbers Local
18 669 (A-1 Fire Protection, Inc.) v. NLRB, 676 F.2d 826 (D.C.
19 CA), 110 LRRM 2125 (1982); Westinghouse Electric Corp., 153
20 NLRB 443, 59 LRRM 1355 (1965).

21 Where the decision to transfer work out of the bargain-
22 ing unit adversely affects members of the bargaining unit by
23 causing lay offs, reducing overtime or causing transfers to
24 lower paying jobs the employer must bargain with the union.
25 Western Mass. Electric Co. v. NLRB, 573 F.2d 101 (1st CA),
26 98 LRRM 2851 (1978); ACF Industries Inc. v. NLRB, 592 F.2d
27 422 (8th CA), 100 LRRM 2710 (1979); UAW v. NLRB, 381 F.2d
28 265 (D.C. CA), 64 LRRM 2489.

29 I believe the principles set forth in Fiberboard and
30 Westinghouse, supra, are applicable to the facts of the
31 instant case. Although there is no evidence on the record
32 to support a conclusion that it was customary for the City

1 to transfer work out of the bargaining unit or that there
2 was no substantial variance from the City's past practices,
3 it is clear that the determinative factor in cases such as
4 the case sub judice is whether there has been a significant
5 adverse impact on bargaining unit members. See Coca Cola,
6 supra, 186 NLRB at 1062 and 80 LRRM at 3246. The duty to
7 bargain over the decision to transfer work to non-bargaining
8 unit members did not arise because there was no significant
9 adverse impact on bargaining unit members. The Union conten-
10 tion that the assignment of the duties in question here to
11 the temporary employees had the effect of extending their,
12 the temporary employees', probationary period is without
13 merit. Those individuals were not in the bargaining unit
14 and, therefore, could not have been adversely affected. The
15 recognition clause in the collective bargaining agreement
16 clearly places such employees outside the unit until after
17 they have served their initial probationary period. The
18 Union does not represent non-bargaining unit employees, it
19 only represents those employees whom it and the City have
20 caused to be in the unit via a voluntary agreement as ex-
21 pressed in the recognition clause. The temporary workers
22 were like any other non-bargaining unit City employee during
23 the course of their temporary duty.

24 Counsel for the City in his brief cites University of
25 Chicago v. NLRB, 514 F.2d 942 (7th CA), 89 LRRM 2113 (1975),
26 and Boeing Co. v. NLRB, 581 F.2d 793 (9th CA), 99 LRRM 2847
27 (1978) and says that the principle of those cases should be
28 applied to the facts of this case and that, therefore, no
29 unfair labor practice should be found. In University of
30 Chicago, supra, Justice Clark stated:

31 "As we read the cases, unless transfers are spec-
32 ifically prohibited by the bargaining agreement,
an employer is free to transfer work out of the

1 bargaining unit if: (1) the employer complies with
2 Fiberboard Paper Products v. NLRB, 379 U.S. 203,
3 57 LRRM 2609 (1964), by bargaining in good faith
4 to impasse; and (2) the employer is not motivated
5 by anti-union animus. Textile Workers V. Darlington
6 Mfg. Co., 380 U.S. 263, 58 LRRM 2657 (1965)"

7 I do not believe the test in University of Chicago,
8 supra, and its progeny need be applied in analyzing the
9 facts of the present case for the reason that the duty to
10 bargain did not arise because there was no significant
11 adverse impact on the bargaining unit members; therefore,
12 the test announced in University of Chicago, supra, need not
13 be reached.

14 There was no duty to bargain because there was no
15 detriment to the bargaining unit members. There was no
16 unfair labor practice because the duty never arose.

17 CONCLUSIONS OF LAW

18 The Defendant, Robert S. Williams, Fire Chief, City of
19 Billings, did not violate Sections 39-31-401(1), (2) or (5)
20 MCA.

21 RECOMMENDED ORDER

22 That the unfair labor practice charge filed by the
23 Complainant against the Defendant be dismissed.

24 NOTICE

25 Exceptions to these finding of fact, conclusions of law
26 and recommended order may be filed within twenty days of
27 service. If no exceptions are filed within such time, the
28 recommended order will become the final order of the Board
29 of Personnel Appeals. Address exceptions to the Board of
30 Personnel Appeals, Capitol Station, Helena, Montana, 59620.

31 Dated this 15th day of January, 1985.

32 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 15th day of Jan, 1985.

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