

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 27-87:

CHAUFFEURS, TEAMSTERS and )  
HELPERS LOCAL UNION NO. 190, )

Complainants, )

- vs - )

CITY OF BILLINGS, )

Defendant. )

FINAL ORDER

\*\*\*\*\*

The Findings of Fact, Conclusions of Law and Recommended Order was issued by Hearing Examiner John Andrew on July 12, 1988.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Paul J. Luwe, attorney for the Defendant, on August 2, 1988.

Oral argument was scheduled before the Board of Personnel Appeals on September 30, 1988.

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

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

2. IT IS ORDERED that this Board therefore adopt the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner John Andrew as the Final Order of this Board.

DATED this 3rd day of November, 1988.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn  
Alan L. Joscelyn  
Chairman

\* \* \* \* \*

CERTIFICATE OF MAILING

I, Jennifer Jacobson, hereby certify that a true and correct copy of this document was mailed to the following on the 4<sup>th</sup> day of November, 1988:

Paul J. Luwe  
Staff Attorney  
City of Billings  
City Attorney's Office  
P.O. Box 1178  
Billings, MT 59103-1178

D. Patrick McKittrick  
McKittrick Law Firm  
P.O. Box 1184  
Great Falls, MT 59403

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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 27-87

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

\* \* \* \* \*

I. INTRODUCTION

A hearing on the above matter was held on April 12, 1988, in Billings, Montana before John Andrew. D. Patrick McKittrick represented the complainant. The defendant was represented by Paul J. Luwe, staff attorney, City of Billings.

During the course of post-hearing briefing the complainant filed a Motion To Amend Complaint. All briefs were filed as of June 15, 1988. On June 30, 1988, the defendant advised the hearing examiner it did not intend to file a response to the Motion To Amend Complaint. The matter was thus submitted on June 30, 1988.

II. ISSUE

Whether the defendant violated 39-31-401(1), 39-31-401(5) and 39-31-201 MCA by refusing to process the grievance of Jim Adkins.

1 III. FINDINGS OF FACT

2 1. James Adkins attended school at Chemeketa Communi-  
3 ty College in Salem, Oregon, with the intention of becoming  
4 a building inspector. As part of his training at Chemeketa  
5 Mr. Adkins was required to participate in a cooperative work  
6 experience program (CWE). The CWE was with the City of  
7 Billings. Since the schooling at Chemeketa was all part of  
8 an industrial accident rehabilitation program Mr. Adkins'  
9 CWE was reviewed by Linda Reynolds, a counselor at Vocation-  
10 al Resources, Inc.

11 2. Mr. Adkins CWE began in June of 1986 and continued  
12 until approximately March of 1987. He was placed on the  
13 City payroll as of May 6, 1987. From June 1986 until March  
14 of 1987 Mr. Adkins was not paid by the City. For the month  
15 of April Mr. Adkins received disability pay and in his words  
16 donated this time to the City.

17 3. In June of 1986 Mr. Adkins began working eight  
18 hours per day, five days per week. He did plumbing, gas,  
19 building and zoning inspections. In December of 1986 he  
20 also assumed duties dealing with the Billings sign ordinance  
21 and continued to work a forty hour week.

22 4. Mr. Adkins was assigned a city credit card, city  
23 car and a zoning inspector badge. From June 1986 throughout  
24 his involvement with the City he issued citations and  
25 warnings; did plumbing and mechanical inspections; and

1 generally enforced the building codes. All of the work  
2 performed by Mr. Adkins was bargaining unit work and was  
3 covered by the bargaining agreement.

4 5. Steve Baker was the Building Official for the City  
5 of Billings. Gene Carmichael, Deputy Building Official, was  
6 Mr. Adkins' immediate supervisor. Throughout his involve-  
7 ment with the City Mr. Adkins reported to one or the other  
8 of these people. He did so both orally and on time records  
9 reporting where he had been and what he had done.

10 6. In late April a combination inspector job opened  
11 up in the City of Billings. Mr. Adkins testified that Mr.  
12 Carmichael told him to falsify his resume when he applied  
13 for this job. Mr. Carmichael is now deceased but Linda  
14 Reynolds confirmed that Mr. Adkins told her he had been told  
15 by Mr. Carmichael to falsify the resume. Be that as it may,  
16 the resume was allegedly falsified and Mr. Adkins was hired.

17 7. In the spring of 1987 it came to the attention of  
18 Bud Henman, business representative for the Union, that Mr.  
19 Adkins was doing bargaining unit work. It was not until  
20 this time that Carlene DeVeau, City Personnel Director,  
21 became aware that Mr. Adkins was doing bargaining unit work.  
22 The Union had never concurred in CWE personnel performing  
23 bargaining unit work. Once Mr. Henman and Ms. DeVeau became  
24 aware of the CWE situation they sat down and began  
25

1 discussions concerning the CWE program as it related to  
2 bargaining unit work in the building department.

3 8. In June of 1987, after Mr. Henman had complained  
4 of Mr. Adkins' presence in the building department, the City  
5 in accordance with the Union Security Clause, Article 3,  
6 withheld Union dues from Mr. Adkins pay - this in spite of a  
7 six month grace period.

8 9. Mr. Adkins was terminated on July 8, 1987.

9 10. From the testimony it is apparent that several  
10 portions of the contract (Complainant's Exhibit #3) are at  
11 issue. They are listed below.

12 Article 10.7, B, provides:

13 For other than serious infractions,  
14 disciplinary actions shall be based upon  
15 progressive discipline based upon  
16 warning letters, suspension and/or  
17 termination. The employee and the Union  
18 shall be notified in writing of any  
19 disciplinary action within fifteen (15)  
20 days after the violation, or the first  
21 knowledge of the violation in question  
22 is known to the City.

19 Article 10.7, C, goes on to provide:

20 New employees shall be on probation for  
21 a period of six (6) months from the date  
22 of their employment and may be dis-  
23 charged at the sole option of the  
24 Employer without recourse to the griev-  
25 ance procedure. Probationary periods  
for seasonal/temporary employees shall  
be from the first day of employment as a  
permanent employee in a new job classi-  
fication.

1 Article 10.9 provides:

2 The City agrees to notify the Union each  
3 Monday morning of all new hires within  
4 the bargaining unit excluding seasonal/  
5 temporary help. However, the City  
6 agrees to notify the Union if the  
7 seasonal/temporary help should become a  
8 full-time regular or part-time employee.  
9 The City shall also notify the Union of  
10 all terminations.

7 Article 4, Seniority, provides:

8 Seniority means an employee's length of  
9 continuous service with his or her  
10 division and shall be computed from the  
11 date the employee began service in the  
12 division.

11 Article 2 E, provides the definition of seasonal  
12 and temporary employees. Specifically it provides:

13 The City agrees that any seasonal,  
14 temporary, or on call employee will be a  
15 member of the bargaining unit if that  
16 employee works for more than 132 days in  
17 a 365 day period in any twelve month  
18 period.

17 11. James Adkins was discharged without recourse to  
18 the grievance procedure.

18 III. CONCLUSIONS OF LAW

19 The City of Billings refused to process the grievance  
20 of James Adkins on the grounds that Mr. Adkins was a proba-  
21 tionary employee and not entitled to the grievance procedure  
22 because of Article 10, Paragraph 10.7, C. The Union takes  
23 issue with the position of the City and contends that the  
24 contract does apply to Mr. Adkins' situation.  
25

1 Bud Henman testified based on his understanding of the  
2 contract - an understanding gained as chief negotiator for  
3 the Union - that Mr. Adkins, because he had been doing  
4 bargaining unit work was not a "new employee" and thus was  
5 entitled to the grievance process. Moreover, it was  
6 Henman's understanding that the contract provisions requir-  
7 ing written notice of disciplinary matters applied to all  
8 employees, whatever their status.

9 Mr. Henman's disagreement with the City over this  
10 interpretation of the contract when coupled with the plain  
11 language of the contract is convincing that this matter  
12 should proceed through the grievance process. Article 5,  
13 Paragraph 5.1 provides:

14 A grievance is defined as a dispute or  
15 difference of interpretation between an  
16 employee and the employer involving an  
17 economic or disciplinary issue as  
18 expressly provided in the terms of the  
19 agreement. Disciplinary actions,  
20 involving warning letters, suspension,  
21 or discharge shall be grievable; all  
22 lesser disciplinary actions are not  
23 grievable....

24 This language is broad in its intent. It is to afford  
25 the grievance procedure to an employee who has a dispute  
with the application of disciplinary actions. It is also  
intended to cover differences in the interpretation of the  
terms of the agreement. That is precisely what the com-  
plainant is asking - to have the terms of the agreement  
interpreted through application of the grievance procedure.

1 From the testimony and evidence it cannot be said with  
2 positive assurance that the City is correct in its interpre-  
3 tation of the meaning of the contract. Conversely, it  
4 cannot be said with positive assurance that the Union is  
5 incorrect in the way it interprets the contract. Therefore,  
6 the processing of the grievance up to and including binding  
7 arbitration is required. See United States Steelworkers of  
8 America v. Warrior and Gulf Navigation Company, 363 US 564,  
9 80 S. Ct. 1343, (1960)

10 The City of Billings committed an unfair labor practice  
11 by failing to process the grievance of James Adkins. See  
12 City of Livingston vs. Montana Council No. 9., 174 Mont.  
13 421, 571 P.2d 374. In failing to process the grievance the  
14 City violated 39-31-401(5) MCA. Derivatively the City also  
15 violated 39-31-401(1) MCA and 39-31-201 MCA. The City is  
16 not prejudiced by the amendment to the complaint.

17 V. RECOMMENDED ORDER

18 1. It is hereby recommended and this does order that  
19 the City of Billings cease and desist from refusing to abide  
20 by the terms of the collective bargaining agreement and  
21 process the grievance of James Adkins as per the contract;

22 2. that the City of Billings cease and desist from  
23 its violation of 39-31-201 MCA, 39-31-401(1) MCA and  
24 39-31-401(5) MCA;



\* \* \* \* \*

NOTICE

THE MONTANA BOARD OF PERSONNEL APPEALS HAS DETERMINED THAT THE CITY OF BILLINGS HAS COMMITTED AN UNFAIR LABOR PRACTICE BY FAILING TO PROCESS THE GRIEVANCE OF JAMES ADKINS IN VIOLATION OF SECTIONS 39-31-201, 39-31-401(1) AND 39-31-401(5) MCA. THE CITY OF BILLINGS HAS BEEN ORDERED TO:

1. Process the grievance of James Adkins.
2. Cease and desist from violation of 39-31-201, 39-31-401(1) and 39-31-401(5) MCA.
3. Advise the Board of Personnel Appeals in writing that the grievance procedure has been implemented.
4. Advise the Board of Personnel Appeals in writing as each step of the grievance procedure is completed up to and including final resolution.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1988.

CITY OF BILLINGS

By \_\_\_\_\_  
City Manager

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

Questions about this notice or compliance therewith may be directed to the Board of Personnel Appeals, P. O. Box 1728, Helena, Mt. 59624.