

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE #34-87:

LYNN BRYANT,	)	
COMPLAINANT,	)	
	)	FINDINGS;
vs.	)	CONCLUSIONS;
	)	RECOMMENDED ORDER
CITY OF HAMILTON, POLICE	)	
DEPARTMENT,	)	
DEFENDANT.	)	

\* \* \* \* \*

I. INTRODUCTION

A hearing on the above captioned matter was held on December 3, 1987 in the Justice of the Peace Courtroom of the Ravalli County Courthouse in Hamilton, Montana. Arlyn L. Plowman was the duly appointed hearing examiner for the Board of Personnel Appeals. The Complainant, Lynn Bryant, was present. The Defendant, City of Hamilton Police Department, was represented by Larry Jones. The parties had an opportunity to present evidence and testimony, cross examine witnesses and make arguments. Post hearing briefs were filed and the matter was deemed submitted on February 5, 1987.

II. BACKGROUND

1. On September 24, 1986 the Complainant filed, with the Board of Personnel Appeals, an unfair labor practice charge alleging that:

[On] August 6, 1987 and September 1, 1987 the City Council voted and passed a resolution, cutting their portion of the difference in wages between Workers Compensation pay and full salary for myself and any future employee injured in the line of duty. As it has been the past practice of the City to make up

1 the full difference in wages for an injured  
2 employee and currently we are negotiating a  
3 contract and this has not been negotiated,  
this is a violation of 39-31-401(3).

4 2. The Defendant filed a timely answer to the  
5 Complainant's charge on October 5, 1987. In that answer the  
6 Defendant denied violating Section 39-31-401(3) MCA and  
stated the complainant's charge should be dismissed as  
lacking probable cause or merit.

7 3. On October 7, 1987 the Board of Personnel Appeals  
8 appointed Joseph Maronick to investigate the complainant's  
9 charge. On October 14, 1987 investigator Maronick issued an  
investigation report and determination finding probable  
merit for the complainant's charge.

10 Subsequently, Arlyn L. Plowman was appointed  
11 hearing examiner and the matter was noticed for hearing.

12 III. FINDINGS OF FACT

13 1. The Complainant is a police officer for the City  
of Hamilton.

14 2. On or about December 18, 1986 the Complainant  
15 suffered a work related injury. He continued to work until  
16 on or about February 10, 1987 when he was determined to be  
temporarily totally disabled and became eligible for, and  
began to receive, Workers Compensation disability benefits.

17 3. Consistent with past policy, the Defendant supple-  
18 mented the claimant's Workers Compensation disability  
19 benefits by paying to the Complainant, the difference  
between Workers Compensation disability benefits and the  
complainant's normal salary.

20 4. The Complainant remained on Workers Compensation  
21 and continued to receive Workers Compensation disability  
benefit supplementation from the Defendant until Septem-  
ber 30, 1987.

22 5. During May, 1987, Teamsters Local Union #2 was  
23 certified as exclusive collective bargaining representative  
24 for certain employees, including the Complainant, of the  
Defendant's Police Department.

1 Bargaining between the Defendant and Teamsters  
2 Local Union No. 2 began in June, 1987 and was continuing at  
3 the time of the hearing in this matter.

4 6. On September 1, 1987 the Hamilton City Council  
5 passed and approved Resolution 487 (Joint Exhibit #1) which  
6 which contained the following provisions:

7 ...it has been the practice of the City  
8 Council and the Mayor of the City to provide  
9 a program to supplement the Worker's Compen-  
10 sation amount paid to an officer injured in  
11 performance of duty, but that such practice  
12 is no longer deemed advisable or avail-  
13 able....

14 ...the program to supplement the Worker's  
15 Compensation amount paid to a member of the  
16 Hamilton Police Department injured in the  
17 performance of duty is hereby eliminated and  
18 discontinued as of October 1, 1987.

19 7. The Defendant did not provide the complainant's  
20 exclusive collective bargaining representative reasonable  
21 notice and an opportunity to negotiate regarding the policy  
22 changes contained within Resolution 487.

23 8. The evidence in the record will not support any  
24 finding showing discriminatory or retaliatory intent or  
25 purpose on the part of the Hamilton City Council in passing  
and approving Resolution 487.

#### 26 IV. CONCLUSIONS OF LAW

27 1. The Board of Personnel Appeals has jurisdiction in  
28 this matter pursuant to Section 39-31-405 et seq., MCA.

29 2. Pursuant to Section 39-31-401(3) MCA, it is unfair  
30 labor practice for a public employer to discriminate in  
31 regard to hire or tenure of employment or any term or  
32 condition of employment in order to encourage or discourage  
33 a membership in any labor organization.

34 3. Pursuant to Section 39-31-402(5) MCA, it is an  
35 unfair labor practice for a public employer to refuse to  
bargain collectively in good faith with an exclusive repre-  
sentative. Good faith bargaining is defined in Section  
39-31-305 MCA.

4. The Montana Supreme Court has approved the prac-  
tice of the Board of Personnel Appeals in using Federal

1 Court and National Labor Relations Board precedents as  
2 guidelines interpreting the Montana Collective Bargaining  
3 for Public Employees Act as the State Act is so similar to  
4 the Federal Labor Management Relations Act, State ex rel.  
5 Board of Personnel Appeals v. District Court, 183 Mont. 223  
6 (1979), 598 P.2d 1117, 103 LRRM 2297; Teamsters Local #45 v.  
7 State ex rel. Board of Personnel Appeals, 195 Mont. 272  
8 (1981), 635 P.2d 1310, 110 LRRM 2012; City of Great Falls v.  
9 Young (III), 686 P.2d 185 (1984), 119 LRRM 2682.

6 5. Pursuant to Section 39-31-406(5) MCA, the com-  
7 plainant's case must be established by a preponderance of  
8 the evidence before an unfair labor practice may be found,  
9 Board of Trustees v. State ex rel. Board of Personnel  
10 Appeals, 103 LRRM 3090, 604 P.2d 770, 185 Mont. 89 (1979);  
11 see also Indiana Products v. NLRB, 31 LRRM 2490, 202 F.2d  
12 613, CA 7 (1953) and NLRB v. Kaiser Aluminum and Chemical  
13 Corporation, 34 LRRM 2412, 217 F.2d 366, CA 9 (1954).

11 6. As a matter of law, Section 39-31-401(3) MCA cited  
12 in the complainant's charge does not conform with the  
13 evidence nor with Complaint's narrative. A charge alleging a  
14 violation of Section 39-31-401(5) would conform with the  
15 evidence and better conform with the charge's narrative.

14 Actions before the Board are not subject to  
15 technical pleading requirements that govern  
16 private lawsuits, NLRB v. IBEW Local 112  
17 (Fischbach/Lord Electric Company), 126 LRRM  
18 2292, CA 9 (1987).

17 The importance of pleadings in adminis-  
18 trative proceedings lies in the notice they  
19 impart to affected parties of the issues to  
20 be litigated at the hearing. Thus the  
21 pleadings are to be liberally construed to  
22 determine whether the charged parties were  
23 given fair notice. Fair notice is given if a  
24 charged party having read the pleadings  
25 should have been aware of the issues which it  
had to defend, Billings Board of Trustees v  
state ex rel. Board of Personnel Appeals, 103  
LRRM 2285, 604 P.2d 778, 185 Mont. 104 (1979)  
citations omitted.

24 7. An employer violates its duty to bargain collec-  
25 tively in good faith when it institutes a material change in  
the terms and conditions of employment that are compulsory  
subjects of bargaining without giving the exclusive

1 collective bargaining representative both reasonable notice  
2 and an opportunity to negotiate about the proposed change. See

3 Felbro, Inc. (Garment Workers Local 512) v NLRB, 122 LRRM  
4 3133, 795 F.2d 705, CA 9 (1986); City Cab Company of  
5 Orlando, Inc., 122 LRRM 2392, 787 F.2d 1475, CA 11 (1986);  
6 Teamsters Local 175 (Bell Transit Company) v NLRB, 121 LRRM  
7 3433, 788 F.2d 27, CA DC (1986) and NLRB v Cabonex Coal  
8 Company, 110 LRRM 2567, 697 F.2d 200, CA 10 (1982).

9 8. Pursuant to Section 39-31-305 MCA wages, hours and  
10 fringe benefits are compulsory subjects of bargaining.  
11 Black's Law Dictionary, Abridged Fifth Edition defines  
12 fringe benefits as:

13 Side non-wage benefits which accompany or are  
14 in addition to a person's employment such as  
15 paid insurance...sick leave...etc. Such  
16 benefits are in addition to regular salary or  
17 wages and are a matter of bargaining in union  
18 contracts.

19 Workers Compensation disability benefit supplementation  
20 payments are a compulsory subject of bargaining. See NLRB v  
21 Allis-Chalmers Corporation, 102 LRRM 2194, 601 F.2d 870, CA  
22 5 (1979); Southern California Edison, 126 LRRM 1324, 284  
23 NLRB 142 (1987) and NLRB v Laredo Coca Cola Bottling Compa-  
24 ny, 103 LRRM 2904, 613 F.2d 1338, CA 5 (1980).

25 9. The Defendant violated its Section 39-31-401 MCA  
duty to bargain in good faith and engaged in an unfair labor  
practice pursuant to Section 39-31-401(5) when it unilaterally  
eliminated a fringe benefit (Workers Compensation  
supplementation) for certain police officers, including the  
Complainant.

10. Pursuant to Section 39-31-406 MCA if, upon the  
preponderance of the evidence taken, the Board is of the  
opinion that the Defendant named in the complaint has  
engaged in or is engaging in the unfair labor practice, then  
the Board shall state its findings and issue an order  
requiring the Defendant to cease and desist from the unfair  
labor practice and to take such affirmative action as will  
effectuate the policies of the Montana Collective Bargaining  
for Public Employees Act.

11. A remedy of affirmative action cannot be fashioned  
on the basis of an assumption as to what may have occurred  
absent the Defendants failure to bargain in good faith, Gulf

1 States Manufacturing, Inc. v NLRB, 114 LRRM, 217 F.2d 1020,  
2 CA 5 (1983).

3 In developing remedies for specific situations there  
4 must be an attempt to create a restoration of the situation  
5 as nearly as possible, to that which would have obtained but  
6 for the unfair labor practice (status quo ante), NLRB v  
7 Keystone Consolidated Industries, 107 LRRM 3143, 653 F.2d  
8 304, CA 7 (1981); Southwest Forest Industries, 121 LRRM  
9 1158, 278 NLRB 31 (1986); St. John's General Hospital v  
10 NLRB, 125 LRRM 3463, CA 3 (1987).

11 V. RECOMMENDED ORDER

12 It is hereby ordered that after this order becomes  
13 final, the City of Hamilton, Police Department, its offi-  
14 cers, agents, and representatives shall:

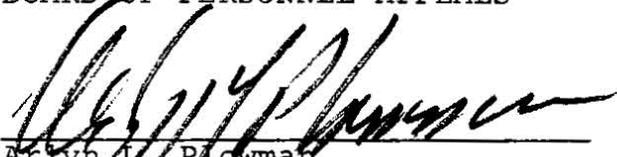
- 15 1. cease and desist its violation of  
16 Section 39-31-401 MCA;
- 17 2. take affirmative action by rescinding  
18 Resolution 487 and reinstate its  
19 previous policy of supplementing the  
20 Workers Compensation disability benefits  
21 of a police officer injured in the  
22 performance of duty;
- 23 3. cease and desist from instituting any  
24 material changes in the terms and  
25 conditions of employment, that are  
compulsory subjects of collective  
bargaining, without giving the affected  
employees' exclusive bargaining  
representative both reasonable notice  
and an opportunity to negotiate about  
the proposed change;
4. post in a conspicuous place in the  
Hamilton City Police Department copies  
of the attached notice marked  
"Appendix";
5. notify this Board in writing within  
twenty (20) days what steps have been  
taken to comply with this order.

1 VI. SPECIAL NOTICE

2 Exceptions to these findings and conclusions and to  
3 this recommended order may be filed within 20 days of  
4 service thereof. If no exceptions are filed the recommended  
5 order shall become the final order of the Board of Personnel  
6 Appeals. Address exceptions to the Board of Personnel  
7 Appeals, P.O. Box 1728, Helena, Montana 59624.

8 Dated this 16<sup>th</sup> day of February, 1988.

9 BOARD OF PERSONNEL APPEALS

10   
11 Arlyn L. Plowman  
12 Hearing Examiner

13 \*\*\*\*\*

14 CERTIFICATE OF MAILING

15 I, Sara Shepherd, do hereby certify that a true  
16 and correct copy of this document was mailed to the follow-  
17 ing on the 16<sup>th</sup> day of February, 1988.

18 Larry W. Jones  
19 P.O. Box 7909  
20 Missoula, MT 59807-7909

21 Howard F. Recht  
22 P.O. Box 149  
23 Hamilton, MT 59840-0149

24 Lynn Bryant  
25 217 North Fourth Street  
Hamilton, MT 59840

City of Hamilton  
Police Department  
175 South Third Street  
Hamilton, MT 59840

AB2:0201s

EXHIBIT LIST

- 1
- 2
- 3 Joint Exhibit #1 -- Resolution #487;
- 4 Joint Exhibit #2 -- Hamilton City Council Meeting  
Minutes of September 1, 1987;
- 5 Complainant's Exhibit #1 -- Hamilton City Council Meeting  
6 Minutes of August 4, 1987, a  
two-page legal size document;
- 7 Defendant's Exhibit #1 -- one-page letter size document,  
8 Workers Compensation information  
9 on Lynn Bryant
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A P P E N D I X

In accordance with the order of the Board of Personnel Appeals and to effectuate the policies of Title 39, Chapter 312, Montana Codes Annotated, the City of Hamilton acting through its officers, agents, and representatives, does hereby notify employees of the City of Hamilton Police Department that:

The City of Hamilton will cease and desist its violation of Section 39-31-401, will rescind Resolution Number 487, will reinstate its previous policy of supplementing Workers Compensation disability benefits for police officers injured in the performance of duty, and institute no material change in the terms and conditions of employment that are compulsory subjects of bargaining without giving the exclusive bargaining representative reasonable notice and an opportunity to negotiate about the proposed change.

CITY OF HAMILTON

By: James Whitlock, Mayor

Posted and dated this \_\_\_\_\_ day of \_\_\_\_\_ 1988

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, P.O.Box 1728, Helena, Montana 59624-1728, telephone 444-3022.