

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 7-89 & 9-89

INTERNATIONAL UNION OF )  
OPERATING ENGINEERS LOCAL 400, )

Complainant, )

AND )

INTERNATIONAL BROTHERHOOD OF )  
TEAMSTERS, CHAUFFEURS, )  
WAREHOUSEMEN, AND HELPERS OF )  
AMERICA, LOCAL NO. 2, )

Complainant, )

vs. )

FLATHEAD COUNTY COMMISSIONERS, )

Defendant. )

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
RECOMMENDED ORDER

\* \* \* \* \*

I. INTRODUCTION

The above matter was heard on June 23, 1989, before John Andrew, hearing examiner of the Board of Personnel Appeals. Daniel Johns represented Flathead County. The International Union of Operating Engineers #400 (IUOE) was represented by John Whiston and Len Blancher. Jack Cutler represented the International Brotherhood of Teamsters Local #2 (IBT).

The hearing concerned complaints filed by the IUOE on March 2, 1989 and by the IBT on March 7, 1989. Both initial complaints alleged violations of 39-31-401(5) MCA, refusing to bargain in good faith by submitting final offers containing illegal proposals. A supplemental charge was filed by the IUOE alleging retroactive implementation of a last proposal and further alleging that the proposal violated

1 2-18-603 and 39-4-107 MCA. The supplemental charge further  
2 alleged that implementation occurred in the absence of a good  
3 faith impasse in bargaining. All charges were denied by the  
4 Defendant.

5 Since the issues concerning the IUOE and IBT were common  
6 and since some joint bargaining had occurred between the  
7 parties, the charges were heard concurrently.

8 The matter has been briefed and submitted on July 31,  
9 1989. The hearing examiner being fully advised on the matter  
10 now makes the following:

## 11 II. ISSUES

12 The issues as submitted by the parties and as further  
13 defined by the hearing examiner are as follows:

14 1. Whether Flathead County bargained in good faith  
15 with the IUOE and IBT.

16 2. Whether good faith impasse existed between the  
17 parties in their negotiations.

18 3. Whether the Defendant implemented an illegal offer  
19 as applied to 2-18-603 and 39-4-107 MCA.

## 20 III. FINDINGS OF FACTS

21 1. IUOE 400 represents employees in the Flathead  
22 County Road and Bridge Department and the Refuse Disposal  
23 District, bargaining units of approximately forty and  
24 fourteen employees respectively. IBT represents drivers in  
25 the Road and Bridge Department.

1           2.    The previous contract between IBT, IUOE and  
2 Flathead County was a three year agreement whose duration was  
3 July 1, 1985 through June 30, 1988. The Refuse District was  
4 governed by its own agreement. The Road and Bridge  
5 Department was governed by two agreements, one for the IUOE  
6 and one for the IBT. In all material respects the agreements  
7 were identical.

8           3.    There is a long bargaining history between the  
9 Defendant and the two unions. Prior to these most recent  
10 negotiations the parties had always succeeded in reaching  
11 successor agreements. The agreements were reached after the  
12 expiration date of the contracts, however, the County had  
13 always maintained the status quo pending a successor  
14 agreement. There was a good working relationship between the  
15 Unions and the County.

16           4.    The Unions and the County opened their contracts  
17 for negotiations upon proper notice.

18           5.    On June 23, 1988, the first negotiation session was  
19 held between the IBT and the County. The IUOE and the County  
20 first met on June 27, 1988. These initial meetings were to  
21 exchange proposals. No negotiations actually occurred.

22           The initial proposal of Flathead County is contained in  
23 Plaintiff's Exhibit # 3. The primary thrust of the proposal  
24 is to roll back the contract provisions on holidays and  
25 overtime to the statutory requirements of 1-1-216 MCA  
(holidays) and 39-3-405 MCA or 29 USC 201 et seq. (overtime).

1 The proposal also gives the County full latitude to designate  
2 and change shifts. Further parts of the proposal deal with  
3 calculation of holiday pay, sick leave language, insurance  
4 coverage and eligibility (including discretionary payment by  
5 the County) as well as a \$.50 per hour wage reduction.

6 In response to the County proposals the IUOE proposed  
7 adding a shift differential for the Refuse District; deleting  
8 the summer shift schedule contained in Article V, paragraph  
9 H - the four tens; maintaining insurance coverage for  
10 employee and dependent with full premium being paid by the  
11 County; and a three year contract with six percent raises  
12 each of the three years.

13 The expired contracts between the County and the Unions  
14 provided for overtime pay at time and one half if the  
15 employees worked beyond their designated shift, over forty  
16 hours per week, or on Saturday or Sunday. The expired  
17 contracts also designated shift times including specific  
18 summer and non-summer shifts - a shift of four ten hour days  
19 versus five eight hour days; provided for shift differential  
20 pay; provided fully paid health insurance for the employee  
21 and dependents; and provided for Lincoln's Birthday,  
22 Washington's Birthday, Good Friday and Fair Day as holidays  
23 in addition to the statutory holidays. The statute on  
24 holidays changed during the term of the contract. Thus,  
25 notwithstanding the number of holidays in the contract, the

1 County had an interest in changing the language to be more in  
2 line with the statute.

3 5. The testimony between the parties varies as to what  
4 was discussed in this initial session. Earl Bennett was the  
5 chief spokesperson for Flathead County. With him at the  
6 negotiations was Daniel Johns. Jack Cutler and Len Blancher  
7 along with their bargaining teams represented the IBT and the  
8 IUOE respectively.

9 On direct examination Len Blancher testified that the  
10 County's only reasoning given for changes in workweek and  
11 overtime was to allow flexibility and that little more was  
12 discussed. However, on cross examination it does appear that  
13 the County did say it was trying to reduce overtime and  
14 premium pay for Sunday.

15 Earl Bennett's testimony goes into considerably more  
16 depth and indicates that the County did want more flexibility  
17 in scheduling for such purposes as snow removal. Mr. Bennett  
18 testified that overtime had become an issue with the  
19 Commissioners and that the proposed changes would reduce  
20 overtime payments particularly for Sunday work. In the  
21 previous year Flathead County had spent approximately  
22 \$80,000 in overtime. Not all of thge overtime was for  
23 weekend work and work before or after the scheduled shift but  
24 certainly a portion of the overtime was for such work. The  
25 County wanted to diminish this liability.

1 Mr. Bennett also testified that the County wanted  
2 holidays of the Unions to be consistent with those of the  
3 other County employees. The same was true of insurance.  
4 When it is all said and done there is no mystery behind the  
5 proposals of the County as they relate to scheduling,  
6 overtime, holidays and insurance. They are all largely  
7 economic and are easily understood whether their full intent  
8 was conveyed to the Unions or not.

9 6. In this initial session as well as in all  
10 subsequent sessions there were no written proposals given to  
11 the County by the labor organizations. Flathead County did  
12 provide written proposals to the Unions. Although this is of  
13 no specific significance it should be recognized as it is  
14 easier to track inconsistencies on the part of the county  
15 than it is on the part of the Unions.

16 7. The next negotiation sessions occurred with the  
17 IUOE and IBT on July 12 and 13 respectively. Although it  
18 could be stated that little was accomplished, it was  
19 apparently at these meeting that the Unions combined  
20 Washington's and Lincoln's birthdays and made provision for  
21 the new Heritage Day. The parties remained apart on Fair Day  
22 and Good Friday as holidays.

23 8. The next substantive negotiations occurred on July  
24 27 with the IUOE. At this time, apparently in response to  
25 concerns expressed by the Union about work schedules, the  
County altered its previous proposal. Under the County's new

1 proposal employees would normally be scheduled to work ten or  
2 fewer hours per work day and five or fewer consecutive days  
3 per workweek. Further, if the County changed shifts, at its  
4 discretion, the affected employee would be given two weeks  
5 notice, if practical. In addition to this modification the  
6 County reduced its wage reduction proposal to \$.40 per hour.  
7 The remainder of the June proposal was resubmitted.

8 On July 27 an agreement was reached on some language  
9 dealing with Article VI, sick leave as reflected in  
10 Plaintiff's Exhibit #4.

11 9. The next meeting between the parties occurred on  
12 August 15, 1988 with IUOE and September 1, 1988 with the IBT.  
13 At that time, the County offered both units a two year  
14 agreement to take back to the membership. The offer was  
15 based largely upon the June 27 proposal in that the County  
16 stuck with its initial proposals on holidays, insurance and  
17 overtime. The proposal on shifts was as per the previous  
18 proposal modifying the June 27 proposal. Of additional  
19 significance the County dropped its proposal for a wage  
20 reduction and instead offered a wage freeze for the term of  
21 the contract.

22 At this point the testimony again diverges. The Unions  
23 contend that the County never made it clear that it intended  
24 to remain either with five eight hours shifts or four ten  
25 hour shifts. Mr. Bennett contended that the intention of  
the County had been clearly conveyed to the unit and that the

1 County intended either to go with five eight hour shifts or  
2 four ten hour shifts in the Road and Bridge Department  
3 provided there was employee approval. Regardless of whether  
4 Mr. Bennett clearly conveyed the intention of the County to  
5 the Unions it is clear that as with the other sessions, the  
6 Unions had not moved on the workweek, overtime, schedules or  
7 shifts.

8 10. The August 15/September 1 County proposals were  
9 taken to the membership of both Unions and rejected.

10 11. The next meeting occurred on October 18, 1988.  
11 In the October 18, 1988 meeting the County basically  
12 reiterated its previous proposals and tied all elements of  
13 the proposal into one comprehensive package. Language was  
14 added clarifying pyramiding or duplicating of overtime pay.  
15 Additionally language was proposed that memorialized language  
16 apparently discussed in the previous meeting. The language  
17 dealt with calculation of pay for holidays on the basis of  
18 average number of hours worked. The County's position on  
19 calculation of holiday pay was that the proposal meant that  
20 an employee who worked an eight hour shift would get eight  
21 hours of holiday pay and an employee who worked a ten hour  
22 shift would get ten hours of holiday pay. The Union did not  
23 understand the proposal this way although the Unions  
24 bargaining notes of August 15, Plaintiff's Exhibit #5, are  
25 silent as to what the Union thought the County intended.

1           11. Subsequent to the October 18 meeting, a request  
2 for mediation assistance was made and a mediator was provided  
3 by the Board of Personnel Appeals. The first session  
4 occurred on November 21, 1988. No new proposals came forth  
5 from either side at this meeting. It was at this meeting  
6 that the Unions took the position that Sunday was a legal  
7 holiday and that time and one half should therefore be paid  
8 for any Sunday work. The County disagreed with this  
9 position.

10           12. The next mediation session was on December 22,  
11 1988. Little, if any progress was made. On this date  
12 Flathead County presented a written proposal through the  
13 mediator, Plaintiff's Exhibit #8. The primary change in the  
14 County's position was an offer to pay up to \$155.00 per month  
15 of insurance premium.

16           It was at this session that the County dropped the words  
17 Saturday and Sunday from the language on minimum reporting  
18 pay. The Unions contend that this was regressive bargaining  
19 in that the old language stated the minimum pay would be paid  
20 for Saturday, Sunday and holidays. The County contended  
21 that this change was only clarification to conform with the  
22 County's new holiday language and position that Sunday work  
23 was not to be at a premium rate.

24           13. In a later proposal of December 22, 1988, the  
25 County amended its proposal on workday-workweek to read that  
ten or fewer hours will constitute a day's work. The

1 previous proposal had read eight or fewer hours. The Unions  
2 again contend this was a regressive proposal. The County  
3 contends that this language merely allows the latitude to go  
4 to a workweek of four ten hour days. It must be noted that  
5 one of IUOE's original proposals was to drop the language  
6 allowing for a schedule of four tens. The County's position  
7 was that this language would still leave the door open for  
8 such a schedule if agreed upon by the Unions.

9 14. A third mediation session was held on February 9,  
10 1989. By this point there had been informal discussions  
11 between the parties. Through those discussions the Unions  
12 knew that the County was considering implementation if  
13 settlement were not reached. The County also knew that the  
14 Unions considered the County's proposals on scheduling and  
15 overtime to be possible strike issues. It was also on or  
16 about this date that the Unions informed Mr. Johns that they  
17 the County's proposals on holidays and hours of work for the  
18 Road and Bridge Department were illegal.

19 During the February 9 mediation the County increased the  
20 insurance premium contribution to \$170.00 per month. The  
21 County also modified the workday-workweek language to read  
22 that forty hours of work consisting of five consecutive days  
23 of eight hours work or four consecutive days of ten hours  
24 shall normally constitute a workweek.

25 The County additionally proposed language that in its  
estimation clarified how the new language tied into premium

1 pay and application of non-work time (holidays, sick leave,  
2 etc.) towards overtime calculation.

3 The February 9 proposal of the County was reduced to  
4 writing, Plaintiff's Exhibit 9, and voted upon by the Unions.  
5 It was rejected.

6 15. On March 1, 1989, in a letter from Dan Johns, both  
7 Unions were advised that the County was firm in the positions  
8 indicated in the February 9 proposal. The letter also  
9 offered to meet again if the position of the membership  
10 changed. The letter asked for a response by no later than  
11 March 9, 1989.

12 16. There were no communications between the labor  
13 organizations and Mr. Johns by the March 9 request date.

14 17. On March 2, 1989 the first Unfair Labor Practice  
15 Charge was filed.

16 18. On March 21, 1989, Mr. Johns sent a letter to Len  
17 Blancher and Jack Cutler advising them that the County  
18 Commissioners were implementing the February 9 proposal  
19 effective with the current pay period.

20 19. At least one employee, Don Haverfield, worked the  
21 Sunday preceding the implementation period and did not  
22 receive the premium pay which would have been required in the  
23 expired contract. All other provisions of the expired  
24 contract, including three holidays in February had been  
25 maintained. Don Haverfield was not paid correctly.

1 IV. CONCLUSIONS OF LAW

2 1. The initial question before the hearing examiner is  
3 whether the proposals offered by Flathead County dealing with  
4 holiday pay and hours of work are either permissive or  
5 illegal offers.

6 You cannot bargain to impasse over illegal or permissive  
7 subjects of bargaining, NLRB v. Borg Warner, 356 U.S. 342  
8 (1958), 42 LRRM 2034; Bigfork Area Education Association v.  
9 Board of Flathead and Lake County School District No. 38, ULP  
10 20-78; and International Association of Firefighters Local  
11 448 v. City of Helena, ULP 19-78. Absent impasse a last  
12 offer cannot be implemented.

13 39-31-201 MCA provides that public employees are free to  
14 organize and negotiate over wages, hours, fringe benefits and  
15 other conditions of employment. The language proposed by the  
16 County on hours of work and scheduling is clearly a mandatory  
17 subject of bargaining. The holidays are a subject also  
18 recognized as a mandatory subject of bargaining, Singer Mfg.  
19 Co. v. NLRB, 313 U.S. 595, (1941), 8 LRRM 740. Moreover, the  
20 Board of Personnel Appeals has recognized that Montana  
21 statutes dealing with public employees are concerned with  
22 wages, hours and working conditions, mandatory subjects,  
23 Florence-Carlton v. School District No. 15-6, ULP 5-77.  
24 Holiday pay is not only a statutory right but also a  
25 condition of employment and therefore a mandatory subject of  
bargaining. See 38 AG Opinions #38, 1980.

1            Since it is decided that holiday pay and hours of work  
2 are mandatory subjects of bargaining the question then is  
3 whether the proposals of Flathead County are legal proposals.  
4 The County's offer to provide the statutory holidays complies  
5 with the statute in terms of days recognized as holidays.  
6 There is then an open question as to how the holiday pay  
7 should be calculated. Based on Mr. Bennett's testimony the  
8 County intended to pay eight hours pay to an employee who is  
9 regularly scheduled for eight hours. Similarly if an  
10 employee were regularly scheduled for four ten hours shifts,  
11 that employee would receive ten hours of holiday pay.  
12 Perhaps the proposal of the County could have been worded  
13 differently to be clearer. However, Mr. Bennett's  
14 explanation is not inconsistent with State law.  
15 Additionally, payment for work performed on a Sunday at less  
16 than time and one half is not inconsistent with State law.  
17 The law provides that work on a legal holiday, be it Sunday  
18 or otherwise, is compensable with either the regular day of  
19 pay plus another day of pay or in lieu of that the regular  
20 day of pay plus a day off at a later date. See 38 AG  
21 Opinions #16, 1979. There is no provision that provides for  
22 time and one half payment. But for the language in the  
23 expired contract and the language in the County's last offer  
24 there would be no requirement for time and one half for any  
25 holiday, be it Sunday or otherwise.

1           As to the question of application of the four ten work  
2 week 39-4-107 (3) MCA provides that there must be an  
3 agreement between the employer and the employees regardless  
4 of whether there are collective bargaining agreements. The  
5 law also provides that the days must be consecutive.  
6 Flathead County has not implemented a schedule of four ten  
7 hour work days. Clearly if Flathead County did implement  
8 such a schedule without the consent of the employees or  
9 their exclusive representative there would be a violation of  
10 the law and cause to file an unfair labor practice. In the  
11 absence of such implementation the law has not been violated  
12 and the language proposed by Flathead County does not violate  
13 the statute.

14           2. 39-31-305 MCA in addressing the duty to negotiate  
15 provides that "such obligation does not compel either party  
16 to agree to a proposal or require ...concessions." Flathead  
17 County took a hard bargaining position in its negotiations  
18 with the IUOE and IBT. This in and of itself does not  
19 constitute an unfair labor practice. Hard bargaining by  
20 either party is recognized by the NLRB and BOPA. The  
21 question is whether Flathead County bargained in good faith  
22 with the labor unions.

23           One of the elements of good faith bargaining is a  
24 willingness to meet to discuss proposals. There is no  
25 evidence that Flathead County ever postponed or failed to  
attend any negotiation or mediation sessions. Moreover,

1 Flathead County's negotiators did modify proposals within the  
2 parameters set by the Commissioners in an attempt to reach  
3 agreement. These changes were explained by Mr. Bennett. His  
4 explanations were very plausible. The problem is that in the  
5 key areas of workweek, overtime, scheduling and holidays the  
6 position of the County (and the Unions) changed little, if  
7 any, over the course of negotiations; however, the evidence  
8 simply does not demonstrate that the County set out to  
9 frustrate or impede negotiations by maintaining the positions  
10 it took. It cannot be said that the Unions proved by a  
11 preponderance of evidence that Flathead County bargained in  
12 bad faith or engaged in surface bargaining.

13 3. The final question to be resolved concerns whether  
14 there was a good faith bargaining impasse between the  
15 parties. Impasse has been defined as a situation where the  
16 negotiators could reasonably conclude "that there was no  
17 realistic prospect that continuation of discussion, at that  
18 time, would have been fruitful", NLRB vs. Independent  
19 Association of Steel Fabricators, 582 F.2d 135, (1978).  
20 Whether there is impasse is a matter of judgment. It is  
21 particularly difficult in this case given the skill of the  
22 negotiators, the well crafted argument of counsel and the  
23 impact this decision will have on the parties. Regardless of  
24 the outcome the parties are all to be commended for their  
25 efforts.

1 In Montana, five factors have been utilized to determine  
2 whether impasse exists. They were originally laid down by  
3 the NLRB in NLRB v. Taft Broadcasting, 64 LRRM 1387 and  
4 adopted by BOPA in ULP 20-78, supra. They are:

- 5 (1) the bargaining history,
- 6 (2) the good faith of the parties in negotiations,
- 7 (3) the length of the negotiations (frequent, numerous,  
8 exhausting-- exploring all grounds for settlement),
- 9 (4) the importance of the issue or issues as to which  
10 there is a disagreement (mandatory subject of  
11 bargaining), and
- 12 (5) the contemporaneous understanding of the parties as  
13 to the state of negotiations (positions solidified).

14 Looking at the tests for impasse, the bargaining history  
15 between these parties has been good. All items of the last  
16 proposal were mandatory subjects of bargaining. The issues  
17 at the heart of their proposals were of great importance to  
18 both parties - Flathead County with budget difficulties, the  
19 provisions of initiative 105 and potential future revenue  
20 losses through decreased timber sales and the Unions faced  
21 with possibly different work schedules, fewer holidays, a pay  
22 freeze and reduced premium pay. The labor organizations and  
23 Flathead County bargained in good faith. There were  
24 numerous sessions, with and without a mediator, over a nine  
25 month period. There was little change by either party on the  
key issues. The fact that there was little change had little

1 or nothing to do with the good faith intentions of either  
2 party. Given the nature of the items at issue the parties  
3 were far apart in the beginning and remained far apart at the  
4 end.

5 If there is an area where there is a question it is on  
6 the contemporaneous understanding of the parties as to the  
7 state of negotiations. It is hard to imagine that the  
8 parties did not understand the proposals and their impact. It  
9 is equally clear that both sides knew where the other was on  
10 the key issues. Given the state of negotiations there is  
11 little evidence to demonstrate that additional meetings would  
12 lead to a softening by either party. The proposals of the  
13 County were reasonably comprehended by the Unions and impasse  
14 was reached.

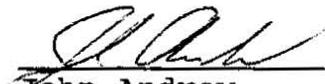
15 4. As to the issue of retroactive implementation there  
16 is no question that Flathead County did not pay Don  
17 Haverfield correctly for work performed on one Sunday. The  
18 County did not deny that Mr. Haverfield is owed additional  
19 pay for this day. That situation needs to be corrected if  
20 not done so already, but the error was just that, an error.  
21 The mistake does not rise to the level of an unfair labor  
22 practice. But for this one apparent instance the County  
23 maintained the status quo until such time as implementation  
24 occurred.  
25

1 V. RECOMMENDED ORDER

2 Unfair Labor Practice Charges 7-89, 9-89, and the  
3 supplemental charges thereon are dismissed.

4 Dated this 17th day of November, 1989.

5 Board of Personnel Appeals  
6

7  
8 By:  \_\_\_\_\_

8 John Andrew  
9 Hearing Examiner

10 NOTICE: Exceptions to these Findings of Fact, Conclusion of  
11 Law, and Recommended Order, may be filed within twenty (20)  
12 days of service. If no exceptions are filed the Recommended  
13 Order will become the Order of the Board of Personnel  
14 Appeals.  
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1 CERTIFICATE OF SERVICE

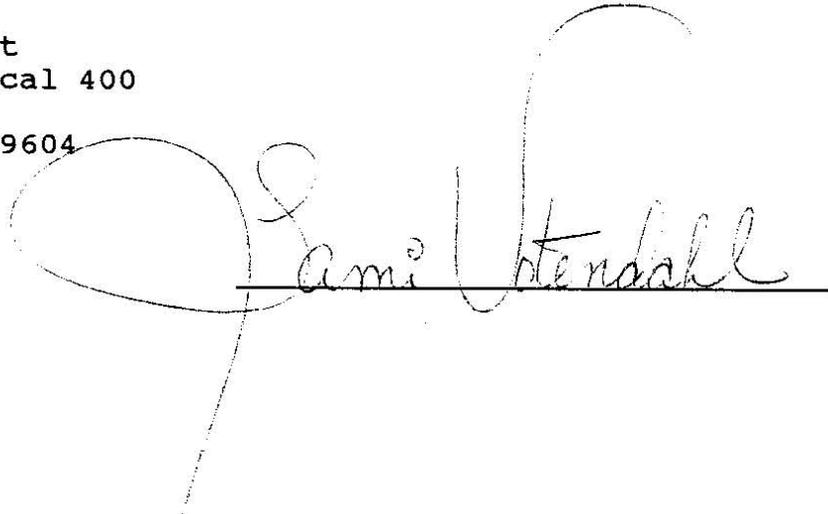
2 The undersigned does certify that a true and correct  
3 copy of this document was served upon the following on the  
4 17<sup>th</sup> day of November, 1989, postage paid and addressed as  
5 follows:

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