

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 8-92:

WARM SPRINGS INDEPENDENT UNION)
NO. 5070, MONTANA FEDERATION)
OF STATE EMPLOYEES, AFT,)
AFL-CIO,)

Appellants,)

- vs -)

DEPARTMENT OF CORRECTIONS AND)
HUMAN SERVICES, STATE OF MONTANA,)

Respondent.)

FINAL ORDER

* * * * *

The Findings of Fact; Conclusions of Law; and Order were issued by Stan Gerke, Hearing Examiner, on July 6, 1992.

Exceptions to the Findings of Fact; Conclusions of Law; and Order were filed by Michael Dahlem on behalf of the Complainant on July 17, 1992.

Oral argument was scheduled before the Board of Personnel Appeals on August 20, 1992.

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 Order are hereby denied.

2. IT IS ORDERED that this Board therefore adopts the Findings of Fact; Conclusions of Law; and Order of Hearing Examiner Stan Gerke as the Final Order of this Board.

DATED this 11th day of December, 1992.

BOARD OF PERSONNEL APPEALS

By [Signature]
ROBERT A. POORE
CHAIRMAN

* * * * *

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

* * * * *

CERTIFICATE OF MAILING

I, [Signature], do hereby certify that a true and correct copy of this document was mailed to the following on the 14th day of December, 1992:

Michael Dahlem
Staff Director
Montana Federation of State Employees
P.O. Box 6169
Helena, MT 59604

David Ohler, Legal Counsel
Department of Corrections and Human Services
1539 Eleventh Avenue
Helena, MT 59620

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STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 8-92:

WARM SPRINGS INDEPENDENT UNION)
NO. 5070, MONTANA FEDERATION)
OF STATE EMPLOYEES, AFT,)
AFL-CIO,)

vs.)

DEPARTMENT OF CORRECTIONS AND)
HUMAN SERVICES, STATE OF)
MONTANA,)

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
ORDER**

* * * * *

I. INTRODUCTION

On August 30, 1991, the Complainant, Warm Springs Independent Union No. 5070, Montana Federation of State Employees, AFT, AFL-CIO, filed an unfair labor practice charge with the Board alleging that the Defendant, Department of Corrections and Human Services, State of Montana, violated Sections 39-31-401(1) and (3) MCA by its action of cancelling pre-approved leaves during the state employees strike at Montana State Hospital. This Board conducted an investigation and issued an Investigation Report and Determination on October 18, 1991. The Report found probably merit for the charge and concluded a formal hearing in the matter was appropriate.

The Parties to this matter agreed not to hold a formal evidentiary hearing and to submit the matter on briefs. The Parties formulated a Stipulation which stated the issue, the facts

1 and outlined a briefing schedule. Exhibits were attached and
2 incorporated therein to the Stipulation.

3 **II. ISSUE**

4 Did the Defendant violate Sections 39-31-401(1) and (3), MCA,
5 when it cancelled pre-approved leaves during the state employee
6 strike at Montana State Hospital?

7 **III. STIPULATED FACT**

8 1. That the Complainant is the authorized collective
9 bargaining agent for certain employees of the Defendant.

10 2. That the Union [Complainant], as agent for certain
11 employees of Defendant, entered into a collective bargaining
12 agreement on September 20, 1989, which is attached hereto as
13 Exhibit "A". Said agreement was in effect throughout all periods
14 relevant to this Unfair Labor Practice complaint.

15 3. That on April 24, 1991, the Defendant issued a memorandum
16 which notified employees that pre-approved leave would be cancelled
17 in the event of a strike.

18 4. That on April 26, 1991, Union members commenced a strike
19 against the Defendant. Said strike continued until April 30, 1991.

20 5. That on April 26, 1991, all pre-approved leave of
21 Defendant's employees was cancelled.

22 6. That the cancellation of pre-approved leave remained in
23 force throughout the strike.

1 7. That the cancellation of pre-approved leave applied to
2 all employees of Defendant, whether union or non-union, organized
3 or unorganized.

4 8. That on the date of the strike, recall orders were issued
5 to some non-union employees.

6 9. That no recall orders were issued to union employees.

7 10. That on May 6, 1991, Lucille Siegle, Director of
8 Treatment and Residential Services at Montana State Hospital issued
9 a Memorandum, attached hereto as Exhibit "B".

10 11. That certain employees, through their agent Union, filed
11 grievances. Exhibit "C".

12 12. That the grievance was denied by the Defendant. Exhibit
13 "D".

14 13. That the Defendant has adopted an Attendance/Leave
15 Policy, attached hereto as Exhibit "E".

16 **IV. DISCUSSION**

17 On April 24, 1991 the Defendant Employer issued a memorandum
18 which notified all employees that pre-approved annual vacation
19 leave would be cancelled in the event of a strike. On April 26,
20 1991 members of the Complainant Union commenced an economic strike
21 against the Defendant Employer. Also, on April 26, 1991, all pre-
22 approved annual vacation leave of all employees, whether union or
23 non-union, organized or unorganized, was cancelled. The
24 cancellation of pre-approved annual vacation leave remained in
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1 force throughout the duration of the strike from April 26, 1991
2 until April 30, 1991. The Complainant Union requests this Board to
3 find the Defendant Employer in violation of Sections 39-31-401(1)
4 and (3) MCA for its action of cancelling employees; pre-approved
5 annual vacation leave:

6 **39-31-401. Unfair labor practices of public**
7 **employer.** It is an unfair labor practice for
8 a public employer to:

- 9 (1) interfere with, restrain, or coerce
10 employees in the exercise of the
11 rights guaranteed in 39-31-201;
- 12 (2) ...
- 13 (3) discriminate in regard to hire or tenure
14 of employment or any term or condition of
15 employment in order to encourage or
16 discourage membership in any labor
17 organization; however, nothing in this
18 chapter or in any other statute of this
19 state precludes a public employer from
20 making an agreement with an exclusive
21 representative to require, as a condition
22 of employment, that an employee who is
23 not or does not become a union member,
24 must have an amount equal to the union
25 initiation fee and monthly dues deducted
from his wages in the same manner as
checkoff of union dues;
- (4) ...
- (5) ...

21 **39-31-201. Public employees protected in**
22 **right of self-organization.** Public employees
23 shall have and shall be protected in the
24 exercise of the right of self-organization, to
25 form, join, or assist any labor organization,
to bargain collectively through
representatives of their own choosing on

1 questions of wages, hours, fringe benefits,
2 and other conditions of employment, and to
3 engage in other concerted activities for the
4 purpose of collective bargaining or other
mutual aid or protection free from
interference, restraint, or coercion.

5 The Montana Supreme Court has approved the practice of the
6 Board of Personnel Appeals in using federal court and National
7 Labor Relations Board (NLRB) precedence as guidelines interpreting
8 the Montana Collective Bargaining for Public Employees Act as the
9 State Act is so similar to the Federal Labor Management Relations
10 Act, State ex rel Board of Personnel Appeals v. District Court, 183
11 Mont. 223 (1979), 598 P.2d 1117, 103 LRRM 2297; Teamsters Local
12 No. 445 v. State ex rel Board of Personnel Appeals v. District
13 Court, 183 Mont. 223 (179), 598 P.2d 1117, 103 LRRM 2297; Teamsters
14 Local No. 45 v. State ex rel Board of Personnel Appeals, 195 Mont.
15 272 (1981) 635 P.2d 1310, 110 LRRM 2012; City of Great Falls v.
16 Young (III), 686 P.2d 185 (1984) 199 LRRM 2682.

17 The language of 401(1) and (3) are similar, if not identical,
18 respectively to 8(a)(1) and 8(a)(3) of the Federal Act. The
19 protection mandated by 8(a)(1) or 401(1) is the broadest of the
20 five subdivisions framed under employer unfair labor practices.
21 Violations under this first subdivision are regarded as either
22 "independent" or "derivative".

23 Some employer unfair labor practice acts infringe upon 8(a)(1)
24 only and are not incidental to the violation of the other four
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1 subdivisions. These acts are regarded as independent and,
2 therefore, stand alone. The National Labor Relations Board (NLRB)
3 has long noted that, "a violation by an employer of any of the four
4 subdivisions of Section 8, other than subdivision one, is also a
5 violation of subdivision one." 1938 NLRB Ann. Rep. 52 (1939). In
6 this matter at hand, the Complainant Union alleged violations of
7 401(1) and (3). Therefore, the 401(1) charge is regarded as
8 derivative and should a 401(3) violation be found then a 401(1)
9 violation would also be held.

10 In Texaco, Inc., 285 NLRB No. 45, 1126 LRRM 1001 (1987), the
11 National Labor Relations Board held that the question whether an
12 employer violated 8(a)(3) by its action of suspending benefits to
13 disabled employees during a strike is governed by the test for
14 alleged unlawful conduct set forth in NLRB v. Great Dane Trailers,
15 388 US 26, 65 LRRM 2465 (1967). Under the adopted test, the
16 General Counsel meets its prima facie burden of proving some
17 adverse effects of the benefits denial on employee statutory rights
18 by showing "(1) the benefit was accrued and (2) the benefit was
19 withheld on the apparent basis of a strike." Once the General
20 Counsel makes prima facie showing if at least adverse effect on
21 employee rights, the burden then shifts to the employer to come
22 forward with proof of legitimate and substantial business
23 justification for its cessation of benefits. The employer may meet
24 this burden by 1) proving that a collective bargaining

1 representative clearly and unmistakably waived employees' statutory
2 right to be free of such discrimination or coercion, or 2) by
3 demonstrating reliance on a non-discriminatory contract
4 interpretation that is reasonable and arguably correct and thus
5 sufficient to constitute legitimate and substantial business
6 justification for its conduct. (NOTE: In both Great Dane Trailers
7 and Texaco the employee benefits at issue were disability benefits
8 and accident and sick benefits that provided periodic cash payments
9 to injured, disabled, or otherwise ill employees.)

10 There can be no dispute that annual vacation leave is an
11 "accrued benefit". Section 2-18-601 et seq., MCA governs this well
12 established benefit for public employees in Montana. Additionally,
13 the existing collective bargaining agreement (Exhibit "A") between
14 the Parties to this matter contains the terms and conditions of
15 annual vacation leave as outlined by statute. Therefore, the first
16 test in Great Dane Trailers has been met - the benefit was accrued.

17 Two days prior to commencement of the strike the Defendant
18 Employer gave notice to all employees that pre-approved annual
19 vacation leave would be cancelled in the event of a strike. There
20 is no dispute concerning this fact. Thus, the second test has been
21 met - the benefit was withheld on the apparent basis of a strike.

22 The burden now shifts to the Defendant Employer. In this
23 matter, the Defendant Employer admits, and there is no showing
24 otherwise, that employees did not waive their right to be free from
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1 discrimination. The Defendant Employer does rely on the second
2 defense test under Great Dane Trailers and argues that the language
3 of the existing contract, certain employer policy and State statute
4 allowed for the cancellation of pre-approved annual vacation leave.
5 And, such cancellation of leave was for legitimate business
6 reasons.

7 The existing collective bargaining agreement (Exhibit "A")
8 provides under Article 13, Section 1, Part (K): "There is no
9 guarantee that any annual leave request will be granted at any
10 specific time. The needs of the hospital and unit will be given
11 first consideration." Exhibit "E", Hospital Operating Policy and
12 Procedures, Montana State Hospital Warm Springs, Montana, provides:

13 **ANNUAL LEAVE**

14 **There is no guarantee that any annual leave**
15 **request will be granted at any specific time.**

16 The needs of the hospital and unit will be
17 given first consideration. If the hospital
18 and unit needs are met, the requests for
annual leave will be administered according to
Administrative Rules of Montana 2.21.201
through 2.21.234 and MOM Policy 3-0305,
Department of Institutions

19 Section 2-18-616 MCA provides, "The dates when employees' annual
20 vacation leaves shall be granted shall be determined by agreement
21 between each employee and his employing agency with regard to the
22 best interest of the state, any county or city thereof as well as
23 the best interests of each employee." The interpretation of the
24 collective bargaining agreement, the employer policy, and State

1 statute place great emphasis on the importance of the hospital
2 operation and, in no manner, discriminates against any employee,
3 group of employees, or union affiliation. The Defendant Employer
4 cancelled pre-approved annual vacation leave of all employees -
5 both union and non-union employees. Discrimination has not been
6 shown. Antiunion animus has not been shown. Legitimate and
7 substantial business justification has been shown.

8 In a case regarding the cancellation of vacation at time of
9 strike, Stokely-Van Camp v. NLRB, 722 F.2d 1324, 114 LRRM 3569 (CA
10 7, 1983), the Court held that the employer did not violate 8(a)(3).
11 In this case, the employer cancelled and rescheduled vacations of
12 union employees on the eve of an announced strike date to a period
13 commencing after conclusion of the strike. The Court held the
14 action was not "inherently destructive" of important employee
15 rights and even though "comparatively slight" harm was suffered by
16 union members the employer had demonstrated substantial business
17 reasons for its conduct. As in this matter at hand, the annual
18 vacation leave was not lost - State statute protects the property
19 right aspect of earned vacation leave. The actual dates of leave
20 would have to be rescheduled. The affected employee(s) would have
21 suffered only the inconvenience of rescheduling vacation days.
22 Additionally, in this matter, the Defendant Employer provided a
23 medical emergency exception to its position of cancelling pre-
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1 approved annual vacation leave which would have alleviated any real
2 hardship (Exhibits "B" and "D").

3 **V. CONCLUSIONS OF LAW**

4 1. The Board of Personnel Appeals has jurisdiction in these
5 matters pursuant to Section 39-31-405 et seq., MCA.

6 2. The Defendant, Department of Corrections and Human
7 Services, State of Montana, has not violated Sections 39-31-401(1)
8 or (3) MCA.

9 **VI. RECOMMENDED ORDER**

10 Unfair Labor Practice Charge No. 8-92 is hereby dismissed.

11 DATED this 6th day of July, 1992.

12 BOARD OF PERSONNEL APPEALS

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14 By:


15 Stan Gerke
16 Hearing Examiner
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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Michael Dalhem
Montana Federation
of State Employees
P. O. Box 6169
Helena, MT 59604

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day, served upon the following parties or such parties' attorneys of record by means of the State of Montana's Deadhead mail service.

Steve Johnson, Chief
Labor Relations and Employee Benefits Bureau
State Personnel Division
Department of Administration
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David L. Ohler, Legal Counsel
Department of Corrections and Human Services
1539 Eleventh Avenue
Helena, MT 59620

DATED this 6th day of July, 1992.

Michelle Bally

DA279.8