

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 24-92:

TEAMSTERS UNION LOCAL NO. 2, )  
IBT, AFL-CIO, )  
Complainant, )  
vs. )  
CITY OF MISSOULA, )  
Defendant. )

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
RECOMMENDED ORDER

\* \* \* \* \*

I. INTRODUCTION

On March 5, 1992, the Teamsters Union Local No. 2, IBT, AFL-CIO (Complainant) filed an Unfair Labor Practice Charge with this Board alleging the City of Missoula (Defendant) was violating Section 39-31-401(1)(5) MCA. The Defendant denied any violation of the law cited. A May 6, 1992 Investigation Report and Determination found sufficient factual and legal issues to warrant referral to an evidentiary hearing.

A hearing was conducted in Missoula, Montana on July 16, 1992 before Joseph V. Maronick. Parties present were: Pat McKittrick, Attorney representing the Complainant and Jim Nugent, Missoula City Attorney. The parties at hearing opening, requested the matter be considered based upon jointly stipulated facts, exhibits, and subsequent concurrently submitted briefs and response briefs. Stipulated facts were submitted and final response briefs received August 25, 1992.

1 II. FINDINGS OF FACT

2 1. Kim Bagnell, a member in good standing of the Teamsters  
3 Union, was a seasonal probationary employee of the Defendant for 89  
4 days as a laborer/operator in the street division. She was  
5 discharged October 4, 1991 (Exhibit 3) prior to completion of her  
6 probationary period. She was paid pursuant to Article VIII,  
7 "Wages", "Schedule A" of the Collective Bargaining Agreement  
8 between the Complainant and the Defendant. The probationary period  
9 identified in contract is 180 days (Article XVIII) or, as explained  
10 in Exhibit 2, 3 months.

11 2. On October 23, 1991, Ms. Bagnell filed a grievance under  
12 the Collective Bargaining Agreement Article XIX "Discrimination"  
13 (Exhibit 4) protesting her termination as based on gender  
14 discrimination.

15 3. Article XVIII of the Collective Bargaining Agreement  
16 provides:

17 Probationary Period

18 All new employees shall serve a one hundred and eighty  
19 (180) day probationary period. The employer may dismiss  
20 a probationary employee at any time during the  
21 probationary period. A probationary employee who is  
22 dismissed shall not be able to use the grievance  
23 procedure set forth herein as a means of contesting the  
24 probationary employee's dismissal.

25 4. Article XIX of the Collective Bargaining Agreement  
26 provides:

27 Discrimination

28 The employer agrees not to discriminate against any  
employee for his activity in behalf of, or membership in,  
the Union.

The Union recognizes its responsibility as the exclusive  
bargaining agent and agrees to represent all employees in the  
unit without discrimination.

1 The provisions of this agreement shall be applied equally to  
2 all employees in the bargaining unit without discrimination as  
3 to age, sex, marital status, race, color, creed, national  
4 origin, or political affiliation. The Union shall share  
5 equally with the Employer the responsibility for applying this  
6 provision of the Agreement.

7 The Union recognizes that the City of Missoula is an Equal  
8 Employment Opportunity/Affirmative Action employer.

9 5. Article XVII of the Collective Bargaining Agreement  
10 provides in part:

11 Grievance Procedure

12 A grievance is defined as any dispute involving  
13 interpretation, application or alleged violation of a  
14 provision of this agreement. Grievances or disputes  
15 which may arise shall be settled in the following manner:  
16 ...

17 6. The Complainant contended; there is a dispute regarding  
18 interpretation of the Collective Bargaining Agreement and Montana  
19 has consistently looked to Federal Law in deciding labor issues.  
20 Precedent case law provides:

21 "Where the contract contains an arbitration clause, there is  
22 a presumption of arbitrability in the sense that '[a]n order  
23 to arbitrate, the particular grievance should not be denied  
24 unless it may be said with positive assurance that the  
25 arbitration clause is not susceptible of any interpretation  
26 that covers the asserted dispute. Doubt should be resolved in  
27 favor of coverage." (emphasis added) AT&T Technologies v.  
28 Communications Workers, 475 US 643, 121 LRRM 3329 (1986) at  
3332

1 The Defendant contended Ms. Bagnell was precluded from  
2 use of the Contract Grievance Procedure by the clear unmistakable  
3 Grievance Procedure contract language. The parties are free, the  
4 Defendant pointed out, to delineate the provisions of the contract  
5 of the Collective Bargaining Agreement and probationary employees  
6 may not grieve termination. Ms. Bagnell's dismissal was not  
7 grievable under contract.

1 8. The Defendant also point out that Article I of the  
2 Collective Bargaining Agreement provides the Complainant shall be  
3 recognized as the bargaining agent for street employees: ...

4 except for the Superintendent or Director of the Street  
5 Division of the Public Works Department, supervisors,  
6 clerical/office employees, part-time custodial and  
seasonal employees employed less than three months in any  
period of continuous employment service.

7 III. CONCLUSIONS OF LAW

8 1. The determinative facts in this case are that Ms. Bagnell  
9 was a seasonal probationary employee who was terminated. The  
10 Collective Bargaining Agreement specifically precludes Ms.  
11 Bagnell's grievance under contract because she was a probationary,  
12 seasonal employee with less than three months service.

13 2. Ms. Bagnell was a member of the Union in good standing  
14 but under the unmistakable provisions of contract may not grieve  
15 her termination because she was probationary. The Defendant did  
16 not violate Section 39-31-401(1)(5) MCA but refused to process the  
17 grievance in conformance with the contract terms.

18 3. As the Defendant pointed out, in post hearing brief;

19 It is permissible and legal for parties to a Collective  
20 Bargaining Agreement to agree to exclude specific matters  
21 from the collective bargaining agreement's grievance  
22 procedure. 48a am jur2d Labor and Labor Relations  
23 Section 1862....

24 Section 1862. Rules of construction; presumptions. as cited  
25 provides;

26 As a general rule, all questions on which the parties  
27 disagree come within the scope of the grievance and  
28 arbitration provisions of the collective bargaining  
agreement unless they are specifically excluded from  
arbitration. There is a strong presumption in favor of  
arbitration of labor disputes, and language excluding  
certain disputes from arbitration must be clear and  
unambiguous, or unmistakably clear. Doubts should be  
resolved in favor of coverage of the grievance by the

1 arbitration clause, and a grievance will be held  
2 arbitrable unless it may be said with positive assurance  
3 that the arbitration clause is not susceptible of an  
4 interpretation which covers the asserted dispute. Absent  
5 any express provision excluding a particular grievance  
6 from arbitration only the most forceful evidence of  
7 purpose to exclude the claim from arbitration can  
8 prevail, particularly where the exclusion clause is vague  
9 and the arbitration clause is quite broad.

10 4. Also as pointed out in the Defendant's Brief;

11 The United States Court of Appeals for the second circuit  
12 in Monroe Sander Corporation v. Livingston, 377 F.2d 6,9-  
13 10 (1967) explained the Hearing Examiner or Court's role  
14 as follows:

15 The Supreme Court has ruled that "whether or  
16 not the company was bound to arbitrate, as  
17 well as what issues must arbitrate, is a  
18 matter to be determined by the Court on the  
19 basis of the contract entered into by the  
20 parties, Atkinson v. Sinclair Ref. Company,  
21 370 U.S. 238, 241, 82 S.Ct. 1318, 1320, 8  
22 L.Ed. 2d 462 (1962)...Thus, the rule is that  
23 unless the parties expressly exclude a matter,  
24 the court will conclude that they intended to  
25 submit it to arbitration...in the absence of  
26 any express provision excluding a particular  
27 grievance from arbitration, we think only the  
28 most forceful evidence of purpose to exclude  
the claim from arbitration can prevail,  
particularly where, as here, the exclusion  
clause is vague and the arbitration clause  
quite broad." Id at 584-585, 80 S.Ct. at  
1354. See also Drake Bakeries Incorporated v.  
Local 50, American Bakery and Confectionery  
Workers Int'l., 370 U.S. 254, 258-260, 82  
S.Ct. 1346, 8 L.Ed.2d 474 (1962) (emphasis  
supplied).

1 The exclusion language in this case is very clear and  
2 expressly excludes dismissed formerly probationary employees from  
3 use of the Collective Bargaining Agreement Grievance Arbitration  
4 Procedure.

5 5. The three cases of the Steel Workers trilogy are cited by  
6 the Complainant as basis for submission of this matter to  
7 arbitration are not found applicable. In United States Steel  
8 Workers v. American Manufacturing Company, 363 US 564, 568, 46 LRRM

1 2414 (1960), involving a discharge based on a Doctor's Workers  
2 Compensation opinion, the Court stated "whether the moving party is  
3 right or wrong is a question of contract interpretation for the  
4 arbitrator." The Courts are not to construe a Collective  
5 Bargaining provision. In the case at bar, there is no need to  
6 interpret. There is simply a need to apply contract terms. In  
7 United Steel Workers v. Warrior and Golf Navigation Company, 363  
8 U.S. 574, 46 LRRM 2416 (1960) involving an issue in a Collective  
9 Bargaining Agreement which stated that issues which were "strictly  
10 a function of management" are not arbitrable. The Court in that  
11 decision announced the **presumption of arbitrability**, which states:

12 An order to arbitrate a particular grievance should not  
13 be denied unless it can be said with positive assurance  
14 that the arbitration clause is not susceptible of an  
interpretation that covers the asserted dispute. Doubts  
should be resolved in favor of coverage.

15 In the case at bar, there is no interpretation which would allow  
16 arbitration without completely disregarding the parties clear  
17 contract language. In United Steel Workers v. Enterprise Wheel and  
18 Car Corporation, 363 U.S. 593, 46 LRRM 2423 (1960) which involved  
19 a case where an arbitrator found that although a work stoppage was  
20 improper, discharge of employees was improper and therefore,  
21 modified the discipline received by the workers. On review, the  
22 Court found the parties had contracted for the arbitrator's  
23 judgment and the Court would not reject that judgment because they  
24 disagreed with the interpretation. The case at bar can not reach  
25 the threshold of opportunity for an arbitrator's judgement because  
26 the terms of the contract exclude probationary employee grievance  
27 processing.

28

1           6. This case as stated above is distinguishable from the  
2 Steel Workers trilogy. This case does not involve interpretation.  
3 The Defendant only asks for application of the clear unmistakable  
4 contract language. This Court is not in a position to disregard or  
5 interpret contract language regarding a circumstance, Ms. Bagnell's  
6 discharge grievance, to which the contract language clearly applies  
7 and prohibits the availability of the grievance procedure to Ms.  
8 Bagnell.

9           7. The issue for determination in this case is whether the  
10 Defendant, in refusing to process the claimant's grievance under  
11 the Collective Bargaining Agreement, violated Section 39-31-  
12 401(1)(5). The basis for the termination, possible remedy for  
13 sexual discrimination in the work place, if it occurred, is not  
14 addressed by this decision.

15 IV. ORDER

16           The Defendant, City of Missoula, did not violate Section 39-  
17 31-401(1)(5) as alleged. The above-captioned Unfair Labor Practice  
18 Charge should be dismissed.

19 V. RECOMMENDED ORDER

20           IT IS ORDERED that Unfair Labor Practice Charge No. 24-92 be  
21 dismissed.

22 VI. SPECIAL NOTE

23           In accordance with Board Rule ARM 24.25.107(2), the above  
24 RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless  
25 written exceptions are filed within twenty (20) days after service  
26 of these FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER  
27 upon the parties.

28

1 Dated this 15 day of September, 1992.

2  
3 Joseph V. Maronick  
4 JOSEPH V. MARONICK  
5 Hearing Examiner

6 \* \* \* \* \*

7 CERTIFICATE OF MAILING

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

12 Jim Nugent  
13 Missoula County Attorney  
14 Missoula City Hall  
15 435 Ryman  
16 Missoula, MT 59802

17 D. Patrick McKittrick  
18 Strain Bldg. - Ste 622  
19 410 Central Avenue  
20 P.O. Box 1184  
21 Great Falls, MT 59403

22 DATED this 15<sup>th</sup> day of September, 1992.

23 Christine A. Roland

24 SP321.1n  
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