

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

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 27-92:

MONTANA DISTRICT COUNCIL OF)
LABORERS,)
)
Complainant,)
)
vs.)
)
CITY OF HAMILTON,)
)
Defendant.)

AMENDED
FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND
RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

A formal hearing in the above-captioned matter was conducted by telephone on February 3, 1993. The hearing was conducted under authority of Section 39-31-406, MCA and in accordance with the Montana Administrative Procedures Act, Title 2, Chapter 4, MCA.

Complainant, Montana District Council of Laborers, was represented by Karl Englund, Attorney at Law, Missoula, Montana. Defendant, City of Hamilton, was represented by Don K. Klepper, The Klepper Company, Missoula, Montana. Witnesses included Charles G. Lambert, Jr., Hamilton city employee; David A. Trihey, Hamilton city employee; Russell Feister, Superintendent, Streets and Parks Departments, City of Hamilton; and, Don Williamson, Administrative Assistant, City of Hamilton.

Subsequent to the hearing, the parties submitted initial and reply post-hearing briefs.

1 **II. ISSUE**

2 The issue in this matter is to determine whether Defendant
3 has violated Section 39-31-401(1), (3), and (4), MCA. More
4 specifically, Complainant alleges that Defendant demonstrated its
5 anti-union animus by failing to hire more experienced former
6 seasonal employees who had been active and vocal in their support
7 of Complainant's organizing efforts and additionally alleged that
8 Defendant had unilaterally changed working conditions of employ-
9 ees in the bargaining unit without bargaining with Complainant.

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11 On June 3, 1991, Complainant filed a Petition for New Unit
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21 order defining an appropriate bargaining unit and recommending an
22 election by secret ballot. The appropriate bargaining unit
23 consisted of all part-time, seasonal, temporary, and full-time
24 employees excluding management employees, confidential employees,
25 law enforcement employees, and all other employees excluded by
26 the Collective Bargaining Act for Public Employees. No excep-
27 tions were filed to the Hearing Examiner's recommended order. A
28 secret mail ballot election was conducted and the ballots were

1 counted on February 26, 1992. A majority of the eligible voters
2 selected to be represented for collective bargaining purposes by
3 Complainant. Since time of certification of Complainant as the
4 exclusive bargaining agent, Complainant and Defendant have been
5 involved in collective bargaining. At date of this hearing, a
6 total collective bargaining agreement had not been reached.

7 **IV. FINDINGS OF FACT**

8 1. Charles G. Lambert, Jr. and David A. Trihey had been
9 previously employed as seasonal employees by Defendant. Mr.
10 Lambert had been employed in the Parks Department the 1991 summer
11 season. Mr. Trihey had been employed the summer seasons of 1989,
12 1990, and 1991, working in the Parks and Streets Departments.

13 2. Both Mr. Lambert and Mr. Trihey were hired by Russell
14 Feister, Superintendent of the Streets and Parks Departments, and
15 generally worked under his control and direction.

16 3. The position of "seasonal employee" held by Mr. Lambert
17 and Mr. Trihey and the position of "street department superinten-
18 dent" held by Mr. Feister were included in the collective bar-
19 gaining unit.

20 4. The position of Mayor of the City of Hamilton retains
21 the sole authority to hire city employees. The Mayor may, and
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23 son) authorization to hire. Defendant's formal hiring procedures
24 includes written applicants, reference checks, and interviews.
25 Contrary to Defendant's formal hiring procedures, Mr. Feister has
26 personally hired seasonal employees for both the Streets and
27 Parks Departments from time to time during his tenure with Defen-
28 dant. Mr. Feister's practice was to hire those individuals who

1 had previously worked for Defendant believing any prior experi-
2 ence qualified them to be re-hired. Furthermore, Mr. Feister
3 would sometimes verbally hire seasonal employees before such
4 employee even filled out a formal job application.

5 5. Defendant did not reverse or nullify seasonal employee
6 hirings made by Mr. Feister. Defendant did reprimand Mr. Feister
7 for his unauthorized hirings including his failure to follow
8 usual hiring procedures. Such reprimand occurred prior to any
9 union organizational efforts.

10 6. Both Mr. Lambert and Mr. Trihey were active in their
11 support for Complainant's organizational efforts and both did
12 testify at the Unit Determination hiring conducted on November 1,
13 1991. Defendant was aware of Mr. Lambert's and Mr. Trihey's
14 support of Complainant.

15 7. Both Mr. Lambert and Mr. Trihey submitted formal
16 written applications to Defendant for the 1992 summer season.
17 Neither Mr. Lambert nor Mr. Trihey were interviewed or hired for
18 the single available seasonal position in the Parks Department.
19 Defendant hired Elmer Hochholter for the single available season-
20 al position because of his work history, previous experience in
21 maintaining baseball fields, and commendations and recommenda-
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23 rehired for the 1992 seasons in the Parks Department because of
24 complaints about his work and his previous unilateral attempts of
25 substantial wage increases.

26 8. At the time of Mr. Lambert's and Mr. Trihey's non-
27 hiring for the 1992 season no collective bargaining agreement had
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1 | been tentatively agreed to during contract negotiations that
2 | provided employees with six months or more of continuous service
3 | would enjoy seniority rights for reductions in force, recall
4 | rights, consideration for promotion, and transfer. Neither Mr.
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7 | 9. On or about the first week of May 1992, Defendant
8 | modified its procedures on the reporting of annual leave and sick
9 | leave usage for all employees. Basically, the new procedures
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11 | provided forms to use available annual leave. Such requests
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17 | Prior to the policy changes in annual leave and sick leave,
18 | annual leave requests were handled by the immediate supervisor
19 | with no formal procedures to involve Defendant's administration.
20 | Absences due to sick leave were reported to the immediate super-
21 | visor.

22 | Neither the policy change regarding annual leave or sick
23 | leave affected in any way the number of leave credits earned by
24 | employees, the accrual of such leave credits, or the use of such
25 | credits.

26 | **V. DISCUSSION**

27 | The basic element of this case is whether Defendant's
28 | actions of failing to hire former seasonal employees and modify-

1 ing annual leave/sick leave policies was motivated by anti-union
2 animus.

3 The Montana Supreme Court has approved the practice of the
4 Board of Personnel Appeals in using federal court and National
5 Labor Relations Board (NLRB) precedence as guidelines interpret-
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17 for an employer to encourage or discourage membership in a labor
18 organization by means of employment discrimination. Radio Offi-
19 cers v. NLRB (A. H. Ball Steamship Co.), 347 US 17, 33 LRRM 2417
20 (1954). However, not all discrimination is unlawful, Radio
21 Officers v. NLRB, supra:

22 The language of §8(a)(3) is not ambiguous.
23 The unfair labor practice is for an employer
24 to encourage or discourage membership by
25 means of discrimination. Thus this section
26 does not outlaw all encouragement or discour-
27 agement of membership in labor organizations;
28 only such as is accomplished by discrimina-
tion is prohibited. Nor does this section
outlaw discrimination in employment as such;
only such discrimination as encourages or
discourages membership in a labor organiza-
tion is proscribed.

1 Most claims involving employment discrimination arise out of
2 employer decisions of which individuals are hired or fired. Such
3 decisions by the employer are not unfair labor practices if such
4 actions are motivated by legitimate and substantial business
5 reasons and not desire to penalize or reward employees for union
6 activity. Laidlaw Corp., 171 NLRB 1366, 68 LRRM 1252 (1968)
7 enforced, 414 F2d 99, 71 LRRM 3054 (CA 7, 1969), cert. denied,
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14 (1982). (Also, see Mt. Healthy City School District Board of
15 Education v. Doyle, 429 US 274 [1977]). Governed by the Wright
16 Line Rule, in order to prove employment discrimination motivated
17 by employer union animus, the affected employee must first prove
18 the existence of protected activity, knowledge of that activity
19 by the employer, and any degree of union animus motivation.
20 Proof of these elements establishes a prima facie case and the
21 burden then shifts to the employer. The employer may argue that
22 prohibited motivations did not play any part in its actions.
23 Should this argument fail to rebut the established prima facie
24 case, then the employer must demonstrate that the same personnel
25 action would have taken place for legitimate business reasons
26 regardless of the employee's protected activity.

27 In this present case, there is no question that both employ-
28 ees, Mr. Lambert and Mr. Trihey, were engaged in protected

1 activities and that Defendant was aware of the activities. Anti-
2 union animus has been alleged by Complainant. Defendant's
3 initial denial of anti-union animus failed. At hearing, however,
4 Defendant showed it did not re-hire either Mr. Lambert or Mr.
5 Trihey for the single Parks Department 1992 seasonal position for
6 business reasons. Another individual was hired for the position
7 who had previous experience in the parks area, had been applauded
8 for his work performance and dedication, and had the support of
9 local citizens. Neither Mr. Lambert nor Mr. Trihey had property
10 interest in the seasonal position - no existing collective bar-
11 gaining agreement, policy, or rule provided for previous seasonal
12 employees to have claim or rights to future seasonal positions.
13 Defendant's arguments are convincing that the personnel action
14 taken would have occurred regardless of Mr. Lambert's and Mr.
15 Trihey's union activity.

16 Secondarily, Complainant alleges that Defendant's actions of
17 modifying rules and policies concerning annual leave and sick
18 leave was an unfair labor practice. Normally, unilateral changes
19 by an employer during the course of a collective bargaining
20 relationship concerning mandatory subjects of bargaining are
21 regarded as per se refusals bargain in good faith. NLRB v. Katz,
22 369 US 736, 50 LRRM 2177 (1962). In this matter, however,
23 Defendant did not alter the "benefits" of annual leave or sick
24 leave. Such benefits are set out in Sections 2-18-611 and
25 2-18-618, MCA respectfully. More specifically, Complainant
26 argues the procedure for approval to use annual leave by an
27 employee was modified unilaterally. On or about May 1992, annual
28 leave request/approval procedures were changed to include final

1 approval by Defendant's administration. With respect to Section
2 2-18-616 MCA which provides, "The dates when employees' annual
3 vacation leaves shall be granted shall be determined by agreement
4 between each employee and his employing agency with regard to the
5 best interests of the state, any county or city thereof as well
6 as the best interests of each employee", and in regards to
7 Section 39-31-303 MCA, Management rights of public employers, it
8 is arguable whether a procedure for final approval of a vacation
9 request of a public employee is a mandatory subject of bargain-
10 ing. Defendant's argument of maintaining "management rights" is
11 convincing.

12 **VI. CONCLUSIONS OF LAW**

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

15 2. Defendant, City of Hamilton, did not violate Sections
16 39-31-401(1), (3), and (4) MCA.

17 **VII. RECOMMENDED ORDER**

18 Unfair Labor Practice Charge No. 27-92 is **DISMISSED**.

19 DATED this 29th day of July, 1993.

20 BOARD OF PERSONNEL APPEALS

21
22 BY: 

23 Stan Gerke
24 Hearing Examiner

25 **SPECIAL NOTICE**

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

* * * * *

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:

Karl Englund
Attorney at Law
P. O. Box 8142
Missoula, MT 59801

Don K. Klepper
THE KLEPPER COMPANY
P. O. Box 4152
Missoula, MT 59806

Eugene Fenderson
Montana District Council of Laborers
P. O. Box 1173
Helena, MT 59624

DATED this 29th day of July, 1993.

Christine S. Roland

DA279.2

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10 ing. Defendant's argument of maintaining "management rights" is
11 convincing.

12 **VI. CONCLUSIONS OF LAW**

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

15 2. Defendant, City of Hamilton, did not violate Sections
16 39-31-401(1), (3), and (4) MCA.

17 **VII. RECOMMENDED ORDER**

18 Unfair Labor Practice Charge No. 27-92 is **DISMISSED**.

19 DATED this 28th day of July, 1993.

20 BOARD OF PERSONNEL APPEALS

21
22 BY: 

23 Stan Gerke
24 Hearing Examiner

25 **SPECIAL NOTICE**

26 In accordance with Board's Rule ARM 24.25.107(2), the above
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CERTIFICATE OF MAILING

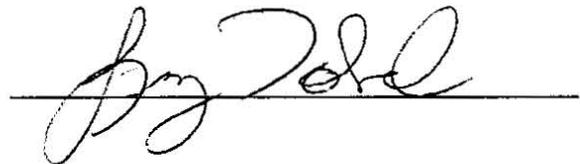
The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Karl Englund
Attorney at Law
P. O. Box 8142
Missoula, MT 59801

Don K. Klepper
THE KLEPPER COMPANY
P. O. Box 4152
Missoula, MT 59806

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