

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 6-2001:

INTERNATIONAL UNION OF)	Case No. 1435-2001
OPERATING ENGINEERS,)	
LOCAL NO. 400, AFL-CIO,)	
)	
Complainant,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND RECOMMENDED ORDER
)	
FERGUS COUNTY, MONTANA,)	
)	
Defendant.)	

* * * * *

I. INTRODUCTION

The International Union of Operating Engineers, Local 400 filed this charge against Fergus County on January 8, 2001. The matter was investigated by Board of Personnel Appeals investigator Michael Bentley, and on March 1, 2001, Bentley concluded that there was probable merit for the charge. A telephone pre-hearing conference was held on April 11, 2001. The hearing was held on June 21, 2001 in the Fergus County Courthouse in Lewistown, Montana.

The Complainant, International Union of Operating Engineers, Local 400, AFL-CIO, was represented by its attorney, Karl J. Englund. Fergus County was represented by Richard L. Larsen. Prior to taking any evidence or testimony, the Union moved that the allegations made in the complaint be deemed admitted by the County because of the County's failure to file the required answer. Fergus County stipulated that it had not filed an answer pursuant to § 39-31-405(4), MCA. The Hearing Officer denied the motion orally because the Union prosecuted the matter

throughout the course of the proceeding without any claimed prejudice, and because the Union failed to present that matter as an issue prior to the hearing. The hearing proceeded. Each side was given the opportunity to call witnesses, introduce exhibits, and cross-examine the witnesses called by the other. At the conclusion of the hearing, the parties waived oral closing arguments and agreed to file post-hearing proposed findings and conclusions to be postmarked July 19, 2001. The record was deemed fully submitted and ready for decision on July 23, 2001.

Exhibits 1 through 5, DE-1 through DE-6, and E-1 through E-16 were admitted into the record without objections.

II. ISSUE

1. Whether Fergus County committed an unfair labor practice pursuant to § 39-31-401(1) and (5), MCA, by refusing to grant the Complainant (Union) the same wage increase given to other County employees, and unilaterally changing wages and working conditions.

III. FINDINGS OF FACT

1. The employees of the Fergus County Road and Bridge Department (Bridge Department) chose the International Union of Operating Engineers, Local 400 as their exclusive collective bargaining representative in an election held and supervised by the Board of Personnel Appeals in December 1999.

2. The Union and the County commenced bargaining in April or May, 2000 and continued to do so up to the time of the hearing.

3. On September 1, 2000, the County completed its budget for fiscal year 2001 (July 1, 2000 to June 30, 2001). At that time, the County Commissioners raised the salaries for all County employees not in bargaining units by 3% retroactive to July 1, 2000. The County Commissioners provided raises for the Sheriff's Department employees covered by the collective bargaining agreement in accordance

with that agreement. The County did not grant raises for the members of the road and bridge bargaining unit.

4. In addition, effective September 1, 2000, the County's cost of insurance increased by \$45.00 per month per employee. The County increased its contribution to cover that cost for employees, except for the members of the bargaining unit. As a result of the County's failure to increase its contribution for insurance premiums for the members of the road and bridge bargaining unit, each employee in the bargaining unit experienced a \$45.00 per month increase in insurance premium effective September 1, 2000.

5. The County intended to delay any wage and insurance premium increase for employees of the Sheriff's Department and the Bridge Department until agreement on contracts for those departments was reached and fully consummated by signature of the respective parties. When the Sheriff's Department and the County reached agreement, the County granted the wage package. The proposal to the Bridge Department was the same as other employees, but the Union did not agree to and sign a final contract - it continued wage negotiations with the County.

6. From 1984 to 1999, the County gave wage increases to members of the bargaining unit in the same amount and at the same time as other County employees, except for 1995. For one year, from July 1, 1995 to June 30, 1996, the bargaining unit was represented by the Montana Public Employees Association (MPEA). In that year, the employees of the bargaining unit did not receive the wage increase provided to non-union employees while MPEA and the County were in the process of negotiations. When the County and MPEA settled their contract, the employees received the same wage increase as provided to other County employees. However, the County did not pay the Bridge Department the proposed wage package until the completion of negotiations and in accordance with the terms of a signed agreement.

7. Fergus County's contract wage proposal to the Union on January 10, 2001, states that "The above rates reflect 3% added to each employees' wage rate," and that the "effective date is negotiable."

8. The County's "last, best and final offer" on May 22, 2001 to the Union provided for a 3% wage increase retroactive to July 1, 2000, only if the Union ratified the contract by June 4, 2001. If the Union failed to ratify the contract by June 4, 2001, "any wages thereafter will be effective upon date of any future ratification." The offer also provided for an increase in the amount the County's contribution for employee insurance retroactive to September 1, 2000 only if the Union ratified the contract by June 4, 2001. If the Union failed to ratify the contract by June 4, 2001, "any insurance benefit thereafter will be effective upon date of any future ratification."

9. The County acted to maintain a status quo position during negotiations with the Union by not unilaterally changing the wage or increasing the County's contribution for insurance for the Bridge Department. The Union's letter to Fergus County on January 11, 2000 (although somewhat ambiguous) indicated it also wanted status quo, and placed Fergus County on notice that it was prohibited from making any changes during negotiations without agreement by both parties.

IV. DISCUSSION

Montana requires a public employer to bargain collectively in good faith with labor organizations representing its employees on issues of wages, hours, fringe benefits, and other conditions of employment. § 39-31-301(5), MCA. The failure to bargain collectively in good faith is a violation of §39-31-401(5), MCA.

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using federal court and National Labor Relations Board (NLRB) precedent as guidance in interpreting the Montana Collective Bargaining for Public Employees Act. State ex rel. Board of Personnel Appeals v. District Court,

183 Mont. 223, 598 P.2d 1117, (1979); Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals, 195 Mont. 272, 635 P.2d 1310 (1981); City of Great Falls v. Young (Young III), 211 Mont. 13, 686 P.2d 185 (1984).

It is firmly established that an employer violates its duty to bargain in good faith when it makes unilateral changes in wages, hours or terms and conditions of employment during the course of collective bargaining. This was explained by the court in NLRB v. McClatchy Newspapers, 964 F.2d 1153, 1162 (D.C. Cir. 1992):

A unilateral change not only violates the plain requirement that the parties bargain over "wages, hours and other terms and conditions" but also injures the process of collective bargaining itself. Such unilateral action minimizes the influence of organized bargaining. It interferes with the right to self organization by emphasizing to the employees that there is no necessity for a collective bargaining agreement.

The Union also contends that when a union is certified, the employer must maintain the status quo during the course of negotiations, and cites NLRB v. Katz, 369 U.S. 736 (1962) in support of its position. The Union believes that the status quo is the structure of wages and benefits that existed prior to the union certification, and Fergus County must continue to treat unit employees the same as it treated other non-union County employees during the course of bargaining. Failure to do so, under the Union's theory, is inconsistent with past practice. It cites NLRB v. Allied Products Corp., 548 F.2d. 644, 653 (6th Cir. 1977), where the employer unilaterally discontinued merit pay increases which were fixed as to timing but discretionary in amount in support of its position. In holding that the employer had violated its duty to bargain in good faith, the Court stated:

The Act is violated by a unilateral *change* in the existing wage structure whether that change be an increase or the denial of a scheduled increase.

Here, however, it is clear that Fergus County did not always follow a set structure. The County did not have an existing wage structure which called for raises in September 2000. All raises were at the discretion of the County in setting the FY2001 budget. As recently as 1995, Fergus County made it clear in negotiations with the MPEA that only upon final agreement and signing of the contract would the bargaining unit receive the benefits agreed to by the parties. That agreement became effective July 31, 1995, and contained an agreed-to wage package, which was not effective until October 1, 1995.

The court explained the effects of unilateral change and its relationship to past practices in NLRB v. McClatchy Newspapers, 964 F.2d 1153, 1162 (D.C. Cir. 1992):

Unilateral change doctrine is the basis for the related past practices doctrine. Under the past practices rule, an employer and union who are bargaining without a collective bargaining agreement in effect generally must maintain the status quo with regard to mandatory subjects of bargaining. However, where the employer has had unilateral discretion over a mandatory subject, the employer cannot continue to exercise that discretion without prior notice to the union. For example, an employer may not continue granting discretionary merit pay raises, even if the review process has become customary and itself must be continued. (McClatchy at 1162-1163)

In this case, the court's holding that an employer acts lawfully in granting a union a lesser than requested wage increase during negotiations is persuasive. Where there has been a history of good faith bargaining and the employer notified the union and its employees, no refusal to bargain existed. NLRB v. Bradley Washfountain Co., 192 F.2d 144 (7th Cir. 1951). See also Stone Container Corp., 313 NLRB No. 22 (1993), which held that even though the employer had an established practice of giving annual wage increases, it acted lawfully in failing to grant them during contract negotiations. The employer continued to bargain over the increase and discussed it while the union had agreed to prospectively accept an increase.

Further, in Peabody Coal Co. v. NLRB, 725 F.2d 357, 115 LRRM (6th Cir. 1984), the board held that although an employer withheld wage increases from recently unionized clerks that other similarly situated clerks of the same employer received, there was no refusal to bargain or any change in terms and conditions of employment.

In addition, the NLRB has held: “Absent an unlawful motive, an employer is privileged to give wage increases to his unorganized employees, at a time when his other employees are seeking to bargain collectively through a statutory representative. Likewise, an employer is under no obligation under the Act to make such wage increases applicable to union members, in face of collective bargaining negotiations on their behalf involving much higher stakes.” Empire Pacific Industries, Inc., 257 NLRB 1425 (1981).

As the Supreme Court made clear in American Ship Building Co. v. NLRB, 380 U.S. 300, 58 LRRM 2672 (1965), the Act accords employees no right to insist upon their bargaining demands free from economic disadvantages, and an employer’s use of economic pressures solely in support of a bargaining position cannot be held unlawful for that reason alone.

In examining the regularity of the practice, it appears Fergus County has generally withheld the granting of pay increases to bargaining unit employees until parties reached a final written contract incorporating the agreement reached. The contract would then establish the wages and benefits agreed upon and the effective date. That was the practice with the Sheriff’s bargaining unit and the previous Bridge Department bargaining unit. Here, the record does not show that Fergus County unilaterally changed an existing wage structure in the course of bargaining. The County essentially followed the same pattern and practice as they had in the past.

V. CONCLUSION OF LAW

1. Fergus County did not violate §§ 39-31-401(1) and (5), MCA, as charged by Complainant.

VI. RECOMMENDED ORDER

Unfair Labor Practice Charge No. 1435-2001 is dismissed.

DATED this 24th day of October, 2001.

BOARD OF PERSONNEL APPEALS

By: Gordon D. Bruce
GORDON D. BRUCE
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to ARM 24.26.215 within 20 days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. § 39-31-406(6), MCA. Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

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 8358
Missoula, MT 59807

Richard Larsen & Associates
1733 Parkhill
Billings, MT 59102

DATED this 24th day of October, 2001.

Sandy Duncan

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 6-2001:

INTERNATIONAL UNION OF OPERATING)
ENGINEERS, LOCAL 400, AFL-CIO,)
)
Complainant,)
)
- vs -)
)
FERGUS COUNTY, MONTANA,)
)
Defendant.)

FINAL ORDER

The above-captioned matter came before the Board of Personnel Appeals (Board) on April 25, 2002. The matter was before the Board for consideration of the Appellant's Amended Exceptions to Findings of Fact; Conclusions of Law; and Recommended Order filed by Karl J. Englund, attorney for the Complainant, to the Findings of Fact; Conclusions of Law; and Recommended Order issued by Gordon D. Bruce, Hearing Officer, dated September 7, 2001.

Appearing before the Board were Karl J. Englund, attorney for the Complainant, and Thomas Meissner, attorney for the Defendant. Both parties appeared in person.

After review of the record and consideration of the arguments, the Board concludes and orders as follows

1. IT IS HEREBY ORDERED that the phrase "acted to maintain" found in the first sentence of Finding of Fact #9 of the Hearing Officer's Proposed Order is hereby excepted and the phrase "believed it was maintaining" substituted in its place. The basis of this modification is that the excepted phrase, as drafted, appeared to improperly cross from a finding of fact to a conclusion of law. Moreover, a review of the complete record leaves the Board with the conclusion that the excepted phrase was not supported by substantial evidence or, if supported, misapprehended the effect of the evidence; or, alternatively, leaves the Board with a definite and firm conviction that a mistake had been committed.
2. IT IS FURTHER ORDERED that pages 5 and 6 of the Hearing Officer's Proposed Order are hereby excepted. Such action is necessary because the aforementioned pages constitute that portion of the Hearing Officer's "Discussion" which rationalizes a conclusion of law that this Board determines to be legally incorrect. In place of the excepted pages the Board substitutes the following language:

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2 "While both parties acknowledge that the status quo must be maintained during the ongoing
3 negotiations, particularly when dealing with a newly certified union, they differ as to whether that
4 was done in this case. Thus, the real issue becomes – what was the status quo? The County
5 argues that the status quo was for the members of the certified union to remain at their present
6 compensation – both as to hourly wage and the County's contribution to the health insurance
7 premium of its employees. Conversely, the Union maintains that the status quo was to follow the
8 County's established past practice of consistently granting discretionary wage and benefit
9 adjustments to both union and non-union employees.

10
11 Guidance from rulings of the National Labor Relations Board is helpful in addressing this issue.
12 For example, the NLRB's ruling in Rural/Metro Medical Services, 327 NLRB 49, 50 (1998) stated
13 that:

14
15 When an employer has an established practice of granting wage increases according to
16 fixed criteria at predictable intervals, a discontinuance of that practice constitutes a
17 change in the terms and conditions of employment even if the amounts of increases
18 have varied in the past.

19
20 Also relevant is the extensively litigated case of Daily News of Los Angeles v. NLRB, 73 F.3d 406
21 (D.C. Cir. 1996). After the federal circuit court remanded the case back to the NLRB to more
22 fully explain its reasoning, the Board specifically stated that:

23
24 Whenever the employer by promise or by a course of conduct has made a particular
25 benefit part of the established wage or compensation system, then he is not at liberty to
26 unilaterally change this benefit either for better or worse during . . . the period of
27 collective bargaining.
28 Daily News, 315 NLRB 1237, 1238 (1994), quoting from NLRB v. Dothan Eagle, 434 F2d
93, 98 (5th Cir. 1970).

Additional federal labor law cases establish that an employer's "course of conduct" can be
established over a very short period of time. See, for example, Rural/Metro Medical Services,
supra, [two years]; Kurdziel Iron of Wauseon, Inc., 327 NLRB 155 (1998) [two years]; Daily News
of Los Angeles, *supra*, [three years]; Litton Microwave Cooking Products v. NLRB, 949 F2d 238
(8th Cir. 1991) [three years]; and Laidlaw Transit, Inc., 318 NLRB 695 (1995) [four years].

In the instant case it is clear that Fergus County, as early as 1983, reviewed its wage and hour
benefit structure after determining its income for the coming year. Since at least 1983 all
employees not covered by a collective bargaining agreement received the same percentage of
annual wage adjustment and the same benefits. Since 1983, with one exception (fiscal year
1996) the represented employees of the road and bridge department received the same wage
increase at the same time as all other County employees not covered by bargaining contracts.
These facts clearly evidence an established course of conduct by the County to evaluate its
financial status on a regular basis, to make discretionary wage and benefit adjustments, and to
pay such adjusted wages/benefits to its employees (both union and non-union) at the same time.

In light of the above, the County did not maintain the status quo during negotiations with the
Union and unilaterally changed the wage and benefit structure for bargaining unit employees
when it failed to (1) increase the pay of unit employees by three percent effective July 1, 2000;
and (2) when it failed to increase the amount of the County's health insurance contribution for the
unit employees effective September 1, 2000."

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3. IT IS FURTHER ORDERED that Conclusion of Law #1 found on page 8 of the Hearing Officer's Proposed Order is excepted in its entirety for being legally incorrect. In its place the following language will constitute the new Conclusion of Law #1:

"Fergus County violated section 39-31-401(1) and (5), MCA, as charged by the Complainant, by unilaterally changing wages and working conditions when it failed to increase the pay of unit employees by three percent effective July 1, 2000 and when it failed to increase the amount of the County's health insurance contribution for the unit employees effective September 1, 2000."

4. IT IS FINALLY ORDERED that Fergus County:

- A. Cease and desist from failing to bargain with the Union over wages and insurance;
- B. Rescind all unilateral changes in wages, hours and terms and conditions of employment;
- C. Pay to each employee of the road and bridge department bargaining unit the retroactive wage increase of three percent beginning on July 1, 2000;
- D. Reimburse to each employee of the road and bridge department bargaining unit the additional health insurance premium charge which it imposed on September 1, 2000; and
- E. Post copies of a notice (similar to the one attached to Complainant's proposed findings of fact and conclusion of law) at conspicuous places, including all places where notices to employees are customarily posted, at the Fergus County Courthouse and ancillary facilities for a period of sixty days and to take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material.

DATED this 31st day of May, 2002.

BOARD OF PERSONNEL APPEALS

By: Alan Joscelyn
Alan Joscelyn
Alternate Presiding Officer

Alternate Presiding Officer Joscelyn concurs.
Board members Johnson, O'Neill and Reardon concur.
Alternate member Dwyer concurs.

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.

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CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify that a true and correct copy of this document was mailed to the following on the 31st day of May, 2002:

KARL J. ENGLUND
ATTORNEY AT LAW
PO BOX 8358
MISSOULA MT 59807

THOMAS MEISSNER
FERGUS COUNTY ATTORNEY
712 WEST MAIN STREET
LEWISTOWN MT 59457-2562
