

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 3-2001:

FIREFIGHTERS LOCAL NO. 8	)	
AFFILIATED WITH THE	)	CASE NO. 513-2001
INTERNATIONAL ASSOCIATION	)	
OF FIREFIGHTERS,	)	
	)	
Complainant,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW, AND
vs.	)	RECOMMENDED ORDER
	)	
CITY OF GREAT FALLS FIRE	)	
DEPARTMENT, AFFILIATED WITH	)	
THE CITY OF GREAT FALLS	)	
	)	
Defendant.	)	

\* \* \* \* \*

I. INTRODUCTION

On September 18, 2000, Firefighters Local No. 8 affiliated with the International Association of Firefighters filed a charge with the Board alleging that on August 31, 2000, the City of Great Falls terminated the bargaining unit positions of Battalion Chief and created new positions entitled "Division Chief." The union contended that in doing so, the City committed unfair labor practices by unilaterally changing the makeup of the bargaining unit represented by Firefighters Local No. 8, by negotiating directly with employees of the unit, and by removing bargaining unit work from the unit. The City filed an answer to the charge on October 5, 2000, denying the allegations.

On December 1, 2000, Firefighters Local No. 8 filed an amended charge and a second amended charge. The amended charge alleged that on or about September 27, 2000, the City committed an unfair labor practice by establishing an assessment process for the position of Division Chief. The second amended charge alleged that upon receipt of a grievance concerning overtime, the City manager told the president of Firefighters Local No. 8 that the City would reduce personnel. On December 15, 2000, the City filed an answer, admitting certain factual allegations but denying the rest, and denying that it committed any unfair labor practice.

On February 15, 2001, an investigator for the Board issued a finding that the charges had probable merit and transferred the case to the Hearings Bureau for a hearing on the charges.

On July 26, 2001, Firefighters Local No. 8 filed a third amended charge, alleging that the unfair labor practice charge is a blocking charge against a related case entitled Unit Clarification No. 8-94, City of Great Falls v. International Association of Firefighters, Local Union No. 8. On August 1, 2001, the City filed an answer denying the allegations.

On August 9, 2001, an investigator for the Board issued an investigative report stating that the parties had waived an investigation report and determination regarding the third amended charge and agreed to transfer the charge to the Hearings Bureau for consolidation with the other allegations. The investigator transferred the third amended charge to the Hearings Bureau.

On August 30, 2001, the Montana Supreme Court ordered the City to file a response to Firefighters Local No. 8's application for a writ of supervisory control and stayed proceedings before the Board in Unit Clarification No. 8-94 pending the Supreme Court's disposition of the application for the writ. In light of the Supreme Court decision, Firefighters Local No. 8 considered the third amended charge to be moot to that extent.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on January 16 and 17, 2002 in Great Falls, Montana. Timothy J. McKittrick represented Firefighters Local No. 8. Patrick R. Watt represented the City of Great Falls. John Lawton, Jim Hirose, Mike Walker, Randall McCamley, Doug Neil, Steve Gonser, Wayne Young and Linda Williams testified as witnesses in the case. Exhibits 1 - 13, 15 - 41, A - C, H, I, Y, YY-1, YY-3, DDD, FFF, XXX, WWW, and YYY were admitted into evidence. Exhibits 39 and BBBB were excluded. The other exhibits listed on the prehearing order, including page 2 of exhibit YY were either withdrawn or never proposed for admission.

On January 31, 2002, the Supreme Court accepted supervisory control over the district court and reversed Judge Macek's order which set aside Judge Johnson's order affirming the Board's order in Unit Clarification No. 8-94.

On February 20, 2002, the parties filed post-hearing briefs and the case was deemed submitted for decision.

## II. ISSUE

The issue in this case is whether the City of Great Falls Fire Department committed unfair labor practices in violation of § 39-31-401, MCA, as alleged in the charge filed by Firefighters Local No. 8 on September 18, 2000, and its subsequent amendments on December 1, 2000 and July 26, 2001.

## III. FINDINGS OF FACT

1. Firefighters Local No. 8 is a “labor organization” within the meaning of § 39-31-103(6), MCA.
2. The City of Great Falls is a “public employer” within the meaning of § 39-31-103(10), MCA.
3. The City maintains a Fire/Rescue Department for the purpose of insuring public safety. Among the employees of the Fire/Rescue Department was a classification of employees entitled Battalion Chief.
4. Battalion Chiefs were shift commanders in the Fire/Rescue Department. As shift commanders, they planned and directed the work of a shift platoon in the protection of life and property. They directed, supervised, and reviewed the activities of subordinate fire fighting personnel and had the authority to investigate and adjust grievances. They recommended to the Chief of the Department matters of budget, personnel, apparatus, equipment, and rules and regulations. They evaluated the performance of subordinate personnel. They performed a variety of other duties.
5. By at least 1967, Battalion Chiefs were members of the collective bargaining unit represented by Firefighters Local No. 8.
6. The Battalion Chief positions remained in the unit until August 30, 2000.
7. On July 16, 1994, the City filed a unit clarification petition with the Board of Personnel Appeals seeking to have Battalion Chiefs removed from the collective bargaining unit.
8. The basis of the City's request to remove the Battalion Chiefs from the unit was that the Battalion Chiefs were either management officials or supervisory employees, and not properly included in a unit established for collective bargaining purposes under the law.

9. On November 20, 1996, the Board denied the City's petition to remove the Battalion Chiefs from the collective bargaining unit.

10. The basis for the Board's decision was that, even though the Battalion Chiefs were in fact supervisors, they should remain in the bargaining unit as "grandfathered" employees, since their inclusion in the unit predated the adoption of the statute excluding supervisors from collective bargaining units. The City appealed the decision of the Board to district court. On April 15, 1998, District Judge Marge Johnson heard argument on the City's petition for judicial review. She pronounced orally that she would affirm the decision of the Board. She reduced her order to writing on December 31, 2000.

11. In April 2000, the incumbents in the Battalion Chief positions were George Sisko, Mike Walker, Steve Gonser, and Randy McCamley. The Chief of the Department was James Hirose, a 33-year employee of the Department. The City Manager was John Lawton.

12. Sometime in March 2000, Sisko, Walker, Gonser, and McCamley had a meeting. They were concerned about their potential for advancement in the agency, and believed they would have little opportunity to be considered for a position such as Chief of the Department. They expected Hirose to retire in the near future. Only a few positions in the Department were considered management positions. They believed the Battalion Chief positions did not provide a career ladder to the Department Chief position.

13. On April 4, 2000, Sisko, Walker, Gonser, and McCamley had a meeting with Hirose. The meeting took place at Gonser's house.

14. Hirose wanted to reorganize the Department. He wanted a more decentralized management structure. He believed management should have broader representation on the City's negotiating team. He considered the inclusion of the Battalion Chiefs in the collective bargaining unit to be a barrier to designating their positions as management.

15. At the meeting on April 4, 2000, Hirose discussed with the Battalion Chiefs the issue of leaving the union, and what the positions would look like if they did. In answer to questions posed by the Battalion Chiefs, they discussed whether the positions would have parity with police department shift commanders for salary, whether they would continue to work shifts, and issues such as compensatory time, holidays, vacation, and sick leave. Hirose was unable to answer most of the questions,

and said he could not negotiate with them. He said that if the Battalion Chiefs intended to leave the union, they needed to “give him something.”

16. The four Battalion Chiefs gave Hirose a document dated April 4, 2000 and signed by each of them stating that they requested to be removed from the Firefighters Local No. 8 collective bargaining unit.

17. On June 1, 2000, Hirose sent a memorandum to Lawton.

18. The memorandum stated:

As we discussed in your office here are the proposed changes I would like to make in our organization. I feel the timing is right with the retirement of Dick Swingley and the efforts to exclude the Battalion Chief from the bargaining unit.

**I would change the current Battalion Chiefs from a “two bugle” position to a “three bugle”, Division Chief or with the same title.**

The job description would need to change to reflect additional duties that would be assigned to them.

This could enhance our appeal that is pending to remove them from the bargaining unit. They would be responsible to the Deputy Chiefs or the Fire Chief

. . . .  
**Some additional positive implications include:**

This would provide for another career advancement opportunity in an organization that has limited upward mobility.

Distribution of the work load with existing staff.

This organizational change would expand the management team made up from all facets of our organization. . . .

(Emphasis in original).

19. On June 15, 2000, Hirose sent a memo to all personnel in the Fire/Rescue Department concerning the reorganization of the Department. In the memo he stated, “I plan to change the Battalion Chiefs from two bugles to a 'three bugle' position and change the name to Division Chiefs. I would change the job description to reflect their added responsibilities.”

20. At a staff meeting on August 30, 2000, Hirose promoted the four Battalion Chiefs to Division Chiefs. The Division Chief is a 3-Bugle position whereas

Battalion Chiefs were a 2-Bugle position. The four Battalion Chiefs, who were promoted to Division Chiefs, received an increase in wages and benefits.

21. At the meeting, Hirose gave the new Division Chiefs their “badges and bugles” and asked them if they “were okay” with the changes. They asked him questions about salaries, duties, compensatory time, meetings, and “hirebacks.” Hirose told them that he could pay them the same salaries as the police department shift commanders. McCamley told Hirose that the shift commanders had just gotten raises. Hirose said he would check on the police department salaries and get back to them. They accepted the promotions after Hirose confirmed that they would get the same salaries as the police shift commanders.

22. In the new positions, the Division Chiefs received a salary of \$49,500.00, representing base pay increases of between \$3,047.00 and \$5,910.00.

23. On August 31, 2000, Hirose delivered a memo to the President of the Firefighters Local No. 8.

24. The memo stated that the Battalion Chief position would cease to exist as of September 1, 2000, that a new position of Division Chief would become operational, that the incumbents in the Battalion Chief positions would be promoted to the Division Chief positions, and that the Division Chief positions were exempt supervisory positions.

25. On or about August 31, 2000, the four Battalion Chiefs requested withdrawal cards from Firefighters Local No. 8 because they accepted the newly created position of Division Chief.

26. The duties performed by the Division Chiefs after the reorganization were substantially identical to those performed by Battalion Chiefs before the reorganization. The Division Chiefs had some greater authority and responsibility than they had as Battalion Chiefs but there was no material change in their duties. The bargaining unit experienced a significant loss of work as a result of the change.

27. At no time did the City and Firefighters Local No. 8 bargain over wages, hours, terms or conditions of employment concerning the newly created Division Chief positions described in Hirose’s memo dated August 31, 2000.

28. The City did not bargain with Firefighters Local No. 8 over the creation of the Division Chief position or the removal of the work performed by the Battalion Chiefs from the collective bargaining unit.

29. The City bargained directly with the Battalion Chiefs, who were members of the bargaining unit, about the creation of the Division Chief positions and the terms and conditions of employment for the positions.

30. On or about September 27, 2000, an employee of the City prepared an interoffice memorandum setting forth a process for employees of the Fire Department to be considered for promotion to the position of Division Chief.

31. The City did not bargain with Firefighters Local No. 8 over the promotion process.

#### IV. DISCUSSION

Firefighters Local No. 8 contends that the City committed unfair labor practices when it unilaterally and without negotiation changed the makeup of the bargaining unit, negotiated directly with members of the unit, removed bargaining unit work from the unit, established a process for selection for the Division Chief position, and threatened a reduction of personnel for filing a grievance. The City denies committing any unfair labor practice and contends it was within its management rights to create the Division Chief positions and promote the Battalion Chiefs to those positions.

Montana law requires public employers and labor organizations representing their employees to bargain in good faith 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. Montana law also prohibits a public employer from interfering with, restraining, or coercing employees in the exercise of their rights under the collective bargaining laws, including the processing of grievances. § 39-31-401(1), 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 laws. State ex rel. Board of Personnel Appeals v. District Court, 183 Mont. 223, 598 P.2d 1117 (1979); City of Great Falls v. Young (Young III), 211 Mont. 13, 686 P.2d 185 (1984).

##### A. Creation of the Division Chief Positions and Transfer of the Battalion Chiefs

An employer is required to bargain with a union representing its employees over the transfer of work out of the bargaining unit when the bargaining unit will suffer a significant loss of work. The Board has previously held that the loss of bargaining unit work due to the reassignment of a union member is a mandatory

subject of bargaining. Florence-Carlton Classified Employees Ass'n v. Florence-Carlton High School and Elementary District No. 15-6, ULP No. 14-93 (1993). See also Legal Aid Bureau, Inc., 319 NLRB 159 (1995), Health Care and Retirement Corp., 317 NLRB 1005 (1995), Central Cartage, 236 NLRB 1232, 1258 (1978), enf. granted, 607 F.2d 1007 (7<sup>th</sup> Cir. 1979), Fry Foods, 241 NLRB 76, 88, enf. granted, 609 F.2d 267 (6<sup>th</sup> Cir. 1979), Susy Curtains, 309 NLRB 1287, 1289 (1992), enf. granted, 106 F.3d 391 (4<sup>th</sup> Cir. 1997), Lutheran Home of Kendallville, Ind., 264 NLRB 525 (1982).

In a case in which an employer created a classification of supervising attorneys and transferred unit employees who had previously been called managing attorneys to the supervising attorney classification, the NLRB held:

In this [combined certification and unfair labor practice] proceeding, . . . the judge found, that the certified unit was appropriate and that the Union was the exclusive representative of unit employees. As noted, the Board has refused . . . to disturb that certification. Therefore, the Respondent was obligated to bargain with the Union regarding employees' terms and conditions of employment. We note that in [the certification case] the Board's denial of review was without prejudice to the Respondent's right to file a unit clarification petition. The Respondent has not filed any such petition. If it does so, and if the Board reaches the merits, and if the Board decides that managing attorneys are supervisors, the Respondent could request reconsideration of the allegation that it unlawfully shifted work out of the unit. See Section 102.48(d)(1) of the Board Rules. However, given the speculative nature of this issue, we shall proceed on the basis of the original decision in [the certification case] that the managing attorneys have not been shown to be supervisors. The Respondent did not seek court review by refusing to bargain; instead it removed the work of the managing attorneys from the unit in disregard of the Board's express finding that they were not supervisors. In these circumstances, we deny the Respondent's motions and conclude that the Respondent's unilateral removal of unit work violated Section 8(a)(5) of the Act.

Legal Aid Bureau, Inc., *supra*, at 159-60 (footnotes omitted). The present case is even stronger because the City did file a unit clarification petition in which the Board concluded that the positions properly remained in the unit.

The City maintains that it had inherent management authority to restructure the Fire Department. It cites § 39-31-103, MCA, and a number of cases decided

under the federal Labor Management Relations Act, 5 U.S.C. § 7106, for this contention. As a general proposition, it is true that City had a management right to determine its organizational structure. However, none of the cases cited by the City involve sufficiently similar facts to be useful in analyzing this case. Thus, it is unnecessary to decide whether cases under the Labor Management Relations Act should constitute precedent for cases under Montana law. Under the facts of this case, the City was not within its rights to alter its structure without bargaining, and committed an unfair labor practice when it did so.

The City did not simply change its management structure. It transferred work which had historically been performed by members of Firefighters Local No. 8 to non-union positions without any effort to bargain with the union. Because it was all of the work performed by a class of unit members, it had a significant impact on the bargaining unit. It did so in flagrant disregard of an order of this Board that the work properly remained in the collective bargaining unit. The City may have had a management right to create new management positions but it did not have a right to transfer work performed by bargaining unit members out of the unit without bargaining.

The City makes a number of additional arguments concerning the decision to restructure without bargaining. It contends that it was within its rights to restructure because the positions were supervisory or management positions, that the City acted in good faith in attempting to reorganize, and that Firefighters Local No. 8 refused to bargain with the City about the issue in prior negotiations and never requested bargaining about the reorganization after receiving Chief Hirose's June 15, 2000 memo concerning the reorganization.

The contentions regarding management rights and good faith are an attempted end run around the Board's 1996 determination, which held that notwithstanding the fact that the positions were supervisory, they should remain in the unit. There are several additional aspects to the City's contentions. First, § 39-31-305, MCA, creates the obligation to "bargain collectively in good faith." The City, however, is attempting to make the case that its refusal to bargain was in good faith. The phrase "in good faith" in § 39-31-401(5), MCA, modifies "bargain collectively," not "refuse." The City's conduct was a unilateral change and was therefore a refusal to bargain. With respect to a mandatory subject of bargaining, a refusal to bargain is a per se violation of the statute. NLRB v. Katz, 369 U.S. 736, 742-43 (1962). Although the City managers may have held a good faith belief that the Battalion Chiefs did not belong in the bargaining unit, that belief cannot justify a refusal to bargain.

Finally, regarding the claim that Firefighters Local No. 8 had an obligation to request bargaining after receiving Hirose's June 15, 2000 memo, that memo was not sufficient to put a reasonable person on notice that the City was proposing to remove the Battalion Chief work from the unit. Nor does Lawton's letter to the Union dated May 3, 2000, (Exhibit 38) which states that the Battalion Chiefs had requested to be excluded from the union, describe the City's proposal in a way that would put the Union on notice that it should request bargaining. The City did not tell the Union what it proposed to do until it had actually implemented the change.

The City also contends that it proposed removing the Battalion Chiefs from the bargaining unit in earlier collective bargaining negotiations, but that Firefighters Local No. 8 refused to bargain the subject. There is no evidence that the City earlier attempted to bargain removal of work from the unit; instead both parties apparently viewed the issue to be the scope of the bargaining unit, a permissive subject. In any event, these earlier negotiations do not justify the ultimate action of the City in unilaterally transferring the work performed by the Battalion Chiefs out of the unit.

B. Direct Bargaining with Unit Members and Inducements to Leave the Collective Bargaining Unit

Engaging in direct dealings with members of a collective bargaining unit constitutes a refusal to bargain collectively in good faith. Medo Photo Supply v. NLRB, 321 U.S. 678, 683-85 (1944). Dealing directly with employees in an effort to induce them to disavow the bargaining agent is also an unfair labor practice. Central Cartage, *supra*, at 1253-54. In this case, Hirose met with the Battalion Chiefs on April 4, 2000, and discussed the creation of the Division Chief positions, and what the position would look like if the Battalion Chiefs left the union. Immediately after the meeting, the Battalion Chiefs signed a letter to Chief Hirose asking that their positions be removed from the unit. Although Hirose and the Battalion Chiefs who testified denied that they were negotiating, or that Hirose induced the Battalion Chiefs to leave the union, the only reasonable inference to be drawn from all of the testimony and McCamley's notes dated April 4, 2000, is that these matters were discussed and that the discussion induced the Battalion Chiefs to request to be removed from the Union. Although Hirose testifies that he declined to negotiate with the Battalion Chiefs, the issue is purely one of semantics. Further, Hirose bargained directly with the Battalion Chiefs in the staff meeting on August 30, 2000 on issues of duties, wages, and benefits. The City negotiated directly with the union members, implying if not telling them explicitly that they would benefit by agreeing to leave the union. In doing so, the City committed an unfair labor practice.

C. The Assessment Center

Firefighters Local No. 8 also contends that the City committed an unfair labor practice when it established a selection process (which it referred to as an assessment center) for the position of Division Chief without bargaining. The process for subsequent promotions to non-bargaining unit positions is a different issue than the initial promotion of the Battalion Chiefs and the removal of the work associated with their positions out of the unit. An employer is not generally required to bargain the process for promoting bargaining unit employees to positions outside the bargaining unit. Pittsburgh Metal Processing, 286 NLRB 734 (1987). The City was not obligated to bargain the creation of the assessment center.

D. Threats of Layoffs for Pursuing Overtime Grievances

Firefighters Local No. 8 further alleges that after it filed a grievance contending that the City failed to pay overtime as required by the collective bargaining agreement, the City threatened layoffs. The Union has provided no evidence at all of the alleged threats. The Union did not prove that the City unlawfully threatened the Union for pursuing overtime grievances. Because there was no proof on the issue, paragraph 14 of the stipulated facts has been omitted from the findings of fact in this decision.

E. Remedy

1. General Remedial Provisions

Section 39-31-406(4), MCA, provides that when the Board finds that an employer has engaged in an unfair labor practice, the Board shall order the employer to cease and desist from the unfair labor practice, and to take such affirmative action as will effectuate the policies of the Collective Bargaining Act. Thus the appropriate remedy for the City's failure to bargain in good faith is an injunction against future refusals to bargain and direct bargaining with employees, a return to the status quo ante, and a posting requirement.

A return to the status quo ante in this case requires that the City re-establish the Battalion Chief positions and transfer the work performed by the Battalion Chiefs prior to August 30, 2000 back to the bargaining unit, that it compensate Firefighters Local No. 8 for any loss of union dues related to the unlawful removal of the work of the Battalion Chiefs from the collective bargaining unit, and that it make

no further efforts to remove the positions from the unit without bargaining in good faith with Firefighters Local No. 8.

## 2. Overtime Pay

Firefighters Local No. 8 also seeks an award of back pay to members of the union for overtime worked. Its theory for this request is: the past practice of the City and the Union allowed unit members to work overtime at the straight time rate on a volunteer basis. However, once the “platoon strength” fell below a certain number of employees for a certain length of time, voluntary overtime was to be compensated at time and one-half. By taking the Battalion Chiefs out of the bargaining unit, platoon strength fell below the agreed number, and bargaining unit members were therefore entitled to overtime pay. However, the Union's theory is not persuasive. If the City had not committed the unfair labor practices at issue in this case, the platoon strength would have remained at levels which did not require volunteer overtime to be compensated at time and one-half. Thus, the status quo ante would not result in premium pay for voluntary overtime.

Firefighters Local No. 8 is entitled to be made whole for any damages incurred by it or its members as a result of the unfair labor practices committed by the City. However, an unfair labor practice claim is not the appropriate avenue to seek damages for overtime violations, unless the overtime was caused by the unfair labor practice. The Union has failed to establish that an unfair labor practice caused the overtime to be worked. See Gansat Inc., Cincinnati Inquirer Division, 279 NLRB 1023 (1986)(sufficient nexus required between unfair labor practices and damages for which compensation is sought). There is no nexus between the unfair labor practices at issue here and the overtime claimed. Whether the Division Chiefs should be considered part of the “platoon strength” for purposes of determining entitlement to overtime pay is an issue of contract interpretation. The proper avenue for seeking compensation is the grievance mechanism contained in the collective bargaining agreement or the wage claim process under either state or federal law. Firefighters Local No. 8 cannot recover overtime as a remedy for the unfair practices committed by the City.

## 3. Attorney Fees

Firefighters Local No. 8 has also requested an award of attorney fees as part of the remedy, contending that the City's egregious conduct over a period of years, including its disregard of the Board's order, justifies an award as an element of the of

the affirmative relief the Board is authorized to order under § 39-31-406(4), MCA, in order to “effectuate the policies” of the collective bargaining laws.

The Montana Supreme Court held that attorney's fees may not be awarded to the successful party in an administrative hearing unless there is a contractual agreement or specific statutory authorization. Thornton v. Commissioner of the Department of Labor and Industry, 190 Mont. 442, 621 P.2d 1062 (1981). The Board has no specific statutory authority to award attorney fees in an unfair labor practice case. The Board has followed Thornton in declining to award attorney fees in previous cases. See e.g. McCarvel v. Teamsters Local 45, ULP 24-77 (1983).

The Union cites a case decided by the NLRB for the proposition that when the conduct of the employer is flagrant, aggravated, persistent and pervasive, the employer's meritless, but arguably non-frivolous litigation justifies an award of attorneys fees and costs. J.P. Stevens and Co., Inc., 244 NLRB 407 (1979). However, the U. S. Supreme Court vacated the judgment in the case and remanded it for reconsideration in light of its opinion in Summit Valley Indus. v. Carpenters Local 112, 456 U.S. 717 (1982). J.P. Stevens and Co. v. NLRB, 458 U.S. 1118 (1982). In Summit Valley, the Court recognized a very limited exception to the American Rule on attorney fees in labor cases “where necessary to further the interests of justice,” including cases involving bad faith and willful disobedience of a court order. Following Summit Valley, the NLRB appears to have limited awards of attorney fees to those cases where the employer's position is frivolous and not debatable. Hardin, Developing Labor Law, at 666 (1997 cumulative supplement).

Regardless of the state of federal law on the question of attorney fees in unfair labor practice proceedings, Montana law requires specific statutory authority for an administrative agency to be able to award attorney fees. In the absence of such authority, Firefighters Local No. 8 is denied attorney fees for this administrative proceeding.

## V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this matter pursuant to § 39-31-405, MCA.
2. The City of Great Falls committed unfair labor practices in violation of § 39-31-401(1) and (5), MCA, when, without bargaining, it transferred the work performed by the Battalion Chiefs in its Fire/Rescue Department to positions outside

the bargaining unit and when it dealt directly with the Battalion Chiefs about promoting them to the new positions.

3. The City of Great Falls did not commit an unfair labor practice in establishing the assessment center.

4. The City of Great Falls did not threaten representatives of Firefighters Local No. 8 for filing grievances related to overtime pay, and therefore did not commit the alleged unfair labor practice of threatening the union or employees.

5. As a result of the unfair labor practices committed by the City of Great Falls, Firefighters Local No. 8, affiliated with the International Association of Firefighters, is entitled to cease and desist orders, an order to return to the status quo ante, and an order to post and publish the notice set forth in Appendix A.

6. Members of Firefighters Local No. 8 are not entitled to overtime pay as a result of the City's unfair labor practices.

7. Firefighters Local No. 8 may not recover attorneys fees in an unfair labor practice charge proceeding.

## VI. RECOMMENDED ORDER

1. The City of Great Falls is hereby **ORDERED**:

a. to cease its refusal to bargain collectively with Firefighters Local No. 8 with respect to wages, hours, fringe benefits, and other conditions of employment;

b. to refrain from transferring work from the bargaining unit to non-bargaining unit positions without first bargaining in good faith with Firefighters Local No. 8;

c. to refrain from bargaining directly with members of the collective bargaining unit;

d. to re-establish the Battalion Chief positions and transfer the work performed by the Battalion Chiefs prior to August 30, 2000 back to the Battalion Chief positions;

e. to maintain the Battalion Chief positions until it has properly bargained the removal of work from the bargaining unit with Firefighters Local No. 8;

f. to compensate Firefighters Local No. 8 for union dues lost to the Union as a result of the unlawful transfer of bargaining unit work to non-bargaining unit positions; and

g. to post copies of the notice contained in Appendix A at conspicuous places, including all places where notices to employees are customarily posted, including City Hall and all fire stations for a period of 60 days and to take reasonable steps to insure that the notices are not altered, defaced, or covered by any other material.

2. The claims regarding the assessment center and threats are dismissed.

3. The claim contained in the third amended charge is dismissed based on the prehearing agreement of Firefighters Local No. 8 that it was moot.

DATED this 15th day of July, 2002.

BOARD OF PERSONNEL APPEALS

By:   
Anne L. MacIntyre, Chief  
Hearings Bureau  
Department of Labor and Industry

## APPENDIX A

### NOTICE TO EMPLOYEES POSTED BY ORDER OF STATE OF MONTANA BOARD OF PERSONNEL APPEALS

The Montana Board of Personnel Appeals has found that we violated the Montana Collective Bargaining for Public Employees Act and has ordered us to post and abide by this notice.

We will bargain collectively with Firefighters Local No. 8 with respect to wages, hours, fringe benefits, and other conditions of employment as required by law.

We will refrain from transferring work from the Firefighters Local No. 8 bargaining unit to non-bargaining unit positions without first bargaining in good faith with Firefighters Local No. 8.

We will refrain from negotiating directly with members of the Firefighters Local No. 8 collective bargaining unit.

We will re-establish the Battalion Chief positions and transfer the work performed by the Battalion Chiefs prior to August 30, 2000 back to the Battalion Chief positions;

We will maintain the Battalion Chief positions until we have properly bargained the removal of work from the bargaining unit with Firefighters Local No. 8;

We will compensate Firefighters Local No. 8 for union dues lost to the Union as a result of the unlawful transfer of the bargaining unit work performed by the Battalion Chiefs to non-bargaining unit positions.

DATED this \_\_\_\_ day of July, 2002.

CITY OF GREAT FALLS  
FIRE/RESCUE DEPARTMENT

By: \_\_\_\_\_

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing Findings of Fact, Conclusions of Law and Recommended Order was, 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:

Timothy J. McKittrick  
McKittrick Law Firm P.C.  
P.O. Box 1184  
Great Falls MT 59403

Patrick R. Watt  
Jardine, Stephenson, Blewett & Weaver, P.C.  
P.O. Box 2269  
Great Falls MT 59403

DATED this 15<sup>th</sup> day of July, 2002.



A handwritten signature in cursive script, appearing to read "Audrey J. Papp", is written over a horizontal line.

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**BOARD OF PERSONNEL APPEALS**  
**PO BOX 6518**  
**HELENA MT 59604-6518**  
**Telephone: (406) 444-2718**  
**Fax: (406) 444-7071**

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 3-2001:

FIREFIGHTERS LOCAL NO. 8, AFFILIATED WITH THE )  
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, )  
Complainant, )

- VS - )

CITY OF GREAT FALLS FIRE DEPARTMENT, )  
AFFILIATED WITH THE CITY OF GREAT FALLS, )  
Defendant. )

ORDER

\*\*\*\*\*

The above-captioned matter came before the Board of Personnel Appeals on February 27, 2003. The matter was before the Board for consideration of the NOTICE OF APPEAL filed by Patrick R. Watt, attorney for the Defendant, and the NOTICE OF APPEAL, UNION'S EXCEPTIONS TO FINDING AND CONCLUSION ON ATTORNEY FEES AND COSTS filed by Timothy J. McKittrick, attorney for the Complainant, to the FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER issued by Anne L. Macintyre, Chief, Hearings Bureau, dated July 15, 2002.

Appearing before the Board were Patrick R. Watt, attorney for the Defendant, and Timothy J. McKittrick, attorney for the Complainant. Both parties appeared in person.

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

1. **IT IS HEREBY ORDERED** that the Hearing Officer's Findings of Fact are supported by substantial credible evidence of record and are, therefore, approved and adopted without modification.
2. **IT IS FURTHER ORDERED** that the Hearing Officer's Conclusions of Law are legally correct, however, the Board further finds an additional statutory ground for the unfair labor practice addressed in Conclusion of Law #2 and therefore modifies that conclusion as follows:
  - A. Excepting the phrase "39-31-401(1) and (5), MCA" and substituting therefore the phrase "39-31-401(1), (3) and (5), MCA".

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3. **IT IS FURTHER ORDERED** that the Hearing Officer's Recommended Order is adopted as the Order of this Board, subject to the following additional provision:

h. to compensate Firefighters Local No. 8 for all reasonable, necessary and lawful costs incurred to date in the litigation of this matter.

4. **IT IS FURTHER ORDERED** that Firefighters Local No. 8 shall file an affidavit of its costs within fifteen (15) days of the date of this order. The city of Great Falls will then have fifteen days to file any objections to the costs claimed by Firefighters Local No. 8. Alternatively, the parties may file a stipulation of costs within fifteen (15) days of the date of this order.

5. **IT IS FINALLY ORDERED** that once the costs have been determined by the Board, a Final Order will be issued in this matter.

DATED this 10<sup>th</sup> day of March, 2003.

BOARD OF PERSONNEL APPEALS

By:   
Jack Holstrom  
Presiding Officer

(First Motion: Unfair Labor Practice)

\*\*\*\*\*  
Board members Holstrom, O'Neill, Johnson, Reardon and Schneider concur.  
\*\*\*\*\*

(Second Motion: Denial of Attorney Fees)

\*\*\*\*\*  
Board members Holstrom, O'Neill, Johnson and Schneider concur.  
Board member Reardon dissents.  
\*\*\*\*\*

(Third motion: Award of Costs)

\*\*\*\*\*  
Board members Holstrom, Schneider and Reardon concur.  
Board members Johnson and O'Neill dissent.  
\*\*\*\*\*

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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 10<sup>th</sup> day of March, 2003:

PATRICK R. WATT  
JARDINE STEPHENSON BLEWETT  
& WEAVER PC  
PO BOX 2269  
GREAT FALLS MT 59403-2269

TIMOTHY J. MCKITTRICK  
MCKITTRICK LAW FIRM  
PO BOX 1184  
GREAT FALLS MT 59403-1184

\*\*\*\*\*

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**BOARD OF PERSONNEL APPEALS**  
**PO BOX 6518**  
**HELENA MT 59604-6518**  
**Telephone: (406) 444-2718**  
**Fax: (406) 444-7071**

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 3-2001:

FIREFIGHTERS LOCAL NO. 8, AFFILIATED WITH THE )  
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, )  
 )  
Complainant, )  
 )  
- vs - )  
 )  
CITY OF GREAT FALLS FIRE DEPARTMENT, )  
AFFILIATED WITH THE CITY OF GREAT FALLS, )  
 )  
Defendant. )

FINAL ORDER

\*\*\*\*\*

The above-captioned matter came before the Board of Personnel Appeals on February 27, 2003. The matter was before the Board for consideration of the NOTICE OF APPEAL filed by Patrick R. Watt, attorney for the Defendant, and the NOTICE OF APPEAL, UNION'S EXCEPTIONS TO FINDING AND CONCLUSION ON ATTORNEY FEES AND COSTS filed by Timothy J. McKittrick, attorney for the Complainant, to the FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER issued by Anne L. MacIntyre, Chief, Hearings Bureau, dated July 15, 2002.

Appearing before the Board at that time were Patrick R. Watt, attorney for the Defendant, and Timothy J. McKittrick, attorney for the Complainant. Both parties appeared in person.

Following the February 27, 2003, hearing the Board issued its ORDER dated March 10, 2003, which effectively resolved all outstanding issues save one – a determination as to the amount of costs incurred by Firefighters Local No. 8 in the pursuit of this case. Such a determination was necessary because the Board had modified the Hearing Officer's RECOMMENDED ORDER to include an award "for all reasonable, necessary and lawful costs incurred to date in the litigation of this matter."

In accordance with the Board's Order of March 10, 2003, the parties have filed a stipulation of costs agreeing that the sum of \$6,931.91 is appropriate in this case.

Whereupon after review of such affidavit of costs and consideration of the record as a whole, the Board concludes and orders as follows:

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1. **IT IS HEREBY ORDERED** that the Board's March 10, 2003 ORDER is incorporated by reference herein.
  2. **IT IS FURTHER ORDERED** that the stipulated costs of \$6,931.91 are determined to be reasonable, necessary and lawful costs incurred by Firefighters Local No. 8 in the pursuit of this action.
  5. **IT IS FINALLY ORDERED** that the above-stipulated costs are hereby awarded Firefighters Local No. 8.

8 DATED this 2nd day of April, 2003.

9 BOARD OF PERSONNEL APPEALS

10 By:   
11 Jack Holstrom  
12 Presiding Officer

13 \*\*\*\*\*

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

18 \*\*\*\*\*

19 CERTIFICATE OF MAILING

20 I, , do hereby certify that a true and correct copy  
of this document was mailed to the following on the 2nd day of April, 2003:

21 PATRICK R. WATT  
22 JARDINE STEPHENSON BLEWETT  
& WEAVER PC  
23 PO BOX 2269  
GREAT FALLS MT 59403-2269

24 TIMOTHY J. MCKITTRICK  
25 MCKITTRICK LAW FIRM  
26 PO BOX 1184  
GREAT FALLS MT 59403-1184

27 \*\*\*\*\*

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3-2-04

**Firefighters Local No. 8 v. City of Great Falls Fire Department, 2004 ML 1550**

*2004 ML 1550, \*; 2004 Mont. Dist. LEXIS 2025, \*\**

**FIREFIGHTERS** LOCAL NO. 8, affiliated with the INTERNATIONAL ASSOCIATION OF **FIREFIGHTERS**, Petitioner, v. CITY OF **GREAT FALLS** FIRE DEPARTMENT, affiliated with the CITY OF **GREAT FALLS**, Respondent.

Cause No. CDV 2003-225

FIRST JUDICIAL DISTRICT COURT OF MONTANA, LEWIS AND CLARK COUNTY

2004 ML 1550; 2004 Mont. Dist. LEXIS 2025

May 17, 2004, Decided

**CORE TERMS:** award attorney, battalion, private attorney, general doctrine, statutory authority, civil action, equitable power, administrative agency, political subdivision, unfair labor practice, substantial evidence, contractual agreement, award of attorney, collective bargaining unit, hearing examiner, unfair, American Rule, prevailing party, misapprehended, contempt, administrative proceeding, affirmative action, findings of fact, judicial review, effectuate, frivolous, pursued, cease

**JUDGES:** **[\*\*1]** **[\*\*1]** Thomas C. **Honzel**, DISTRICT COURT JUDGE.

**OPINION BY:** Thomas C. **Honzel**

**OPINION:**

**MEMORANDUM AND ORDER**

**[\*1]** Before the Court is the petition of **Firefighters** Local No. 8 for judicial review. The petition was heard on February 18, 2004 and is ready for decision.

BACKGROUND

**[\*2]** In 1994, the City of **Great Falls** (the City) filed a unit clarification petition with the Board of Personnel Appeals (the Board). The City's request to have the **Great Falls** Fire Department's battalion chiefs removed from the collective bargaining unit was denied. The City appealed to the Eighth Judicial District Court and on April 15, 1998, Judge Marge Johnson orally pronounced she would affirm the decision of the Board. Her decision was reduced to writing on December 31, 2000.

**[\*3]** In March 2000, the battalion chiefs discussed the disadvantages of their position and believed there was little opportunity for advancement. In April 2000, the

battalion chiefs met with the chief of the Fire Department who expressed a desire to reorganize the department. The battalion chiefs then sent a signed document to the Department chief requesting that they be removed from the **Firefighters** Local **[\*\*2]** No. 8 (the **[\*\*2]** **Firefighters**) collective bargaining unit. Subsequently, the battalion chiefs were promoted to division chiefs, for which they received an increase in wages and benefits.

**[\*4]** The Department chief indicated to the president of the **Firefighters** that the battalion chief position would cease to exist and would be replaced with the position of division chief, which would not be part of the collective bargaining unit. The bargaining unit lost a significant amount of work as a result of the change. The City and the **Firefighters** did not bargain over any the terms or conditions of the new positions.

**[\*5]** Shortly thereafter, the **Firefighters** affiliated with the International Association of **Firefighters** and filed a charge with the Board alleging, among other things, that by eliminating the battalion chief position and replacing it with the division chief position, the City committed unfair labor practices. The hearing examiner found for the **Firefighters** on the unfair labor practices claim. The Board affirmed the hearing examiner's decision with minor changes. The only issue raised in the petition for judicial review is whether the **Firefighters** should have been **[\*\*3]** awarded attorney fees. **[\*\*3]**

#### STANDARD

**[\*6]** The Montana Administrative Procedure Act (MAPA), Title 2, Chapter 4, MCA, governs a district court's review of an administrative agency's order. The standard of review for an agency decision is set forth in Section 2-4-704 (2), MCA, which provides:

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(b) findings of fact, upon issues [\*\*4] essential to the decision, were not [\*\*4] made although requested.

[\*7] The Montana Supreme Court has adopted a three-part test to determine if a finding is clearly erroneous. Weitz v. Montana Dep't of Natural Resources and Conservation, 284 Mont. 130, 943 P.2d 990 (1997). First, the court is to review the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, the court is to determine whether the agency misapprehended the effect of the evidence. Third, even if substantial evidence exists and the effect of the evidence has not been misapprehended, the court can still determine that a finding is clearly erroneous when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed. Weitz, 284 Mont. at 133-34, 943 P.2d at 992. Conclusions of law, on the other hand, are reviewed to determine if the agency's interpretation of the law is correct. [\*\*5] Steer, Inc. v. Dep't of Revenue, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).

## DISCUSSION

[\*8] The **Firefighters** contend attorney fees [\*\*5] were available under: (1) a grant of statutory authority pursuant to Section 39-31-406 (4), MCA; (2) a grant of statutory authority pursuant to Section 25-10-711, MCA; (3) the private attorney general theory; and (4) the Court's equitable power.

[\*9] Traditionally, in American courts each party is to bear its own attorney fees and the prevailing party is not entitled to look to the losing party for reimbursement of the attorney fees it incurred. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). Generally, a court may award attorney fees only if authorized by statute or an enforceable contract. The United States Supreme Court has allowed certain exceptions to the "American Rule" on attorney fees only when necessary to further the interests of justice. [\*\*6] Summit Valley Indus. v. United Bd. of Carpenters & Joiners, 456 U.S. 717, 721 (1982) (citing Vaughan v. Atkinson, 369 U.S. 527 (1962) (bad faith); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923) (willful disobedience of a court order); Central [\*\*6] R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885) (common fund doctrine)).

### I. Section 39-31-406 (4), MCA

[\*10] The **Firefighters** contend that Section 39-31-406 (4), MCA vests the Board with authority to award attorneys fees. That section provides in part:

If, upon the preponderance of the testimony taken, the board is of the opinion that any person named in the complaint has engaged in or is engaging in an unfair labor practice, it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice and to take such affirmative action, including reinstatement of employees with or without backpay, as will effectuate the policies [\*\*7] of this chapter.

[\*11] The **Firefighters** contend that the statutory language allowing for "such

affirmative action" to "effectuate the policies" of the Unfair Labor Practice Act authorizes the Board to award attorney fees. The **Firefighters** cite several federal court decisions that have allowed an award of attorney fees under the National Labor Relations Act. See e. **[\*\*7]** g., **Geske & Sons v. NLRB**, 103 F.3d 1366, 1379 (7th Cir. 1997) (a union may be awarded attorney fees incurred in defending a baseless and retaliatory lawsuit filed against it).

**[\*12]** In her recommended order which was adopted by the Board, the hearing examiner stated:

The Montana Supreme Court held that attorney's fees may not be awarded to the successful party in an administrative hearing unless there is a contractual agreement or specific statutory authorization. Thornton v. Commissioner of the Department of Labor and Industry, 190 Mont. 442, 621 P.2d 1062 (1981). The Board has no specific statutory author-ity to award attorney fees in an unfair labor practice case. The Board has followed Thornton in declining to award attorney fees in previous **[\*\*8]** cases. See e.g. McCarvel v. Teamsters Local 45, ULP 24-77 (1983).

Hr'g Exam'r Recommended Order at p. 13.

**[\*13]** After discussing several cases cited by the **Firefighters** where attorney fees had been awarded by the National Labor Relations Board, the hearing examiner concluded:

Regardless of the state of federal law on the question of attorney fees in unfair labor practice **[\*\*8]** proceedings, Montana law requires specific statutory authority for an administrative agency to be able to award attorney fees. In the absence of such authority, **Firefighters** Local No. 8 is denied attorney fees for this administrative proceeding.

Id.

**[\*14]** It is well settled in Montana that "[i]n the absence of a contractual agreement or specific statutory authority, a prevailing party may not recover attorney fees as costs." Delaware v. KDecorators, Inc., 1999 MT 13, P 68, 293 Mont. 97, P 68, 973 P.2d 818, P 68 (citing Selvidge v. McBeen, 230 Mont. 237, 247, 750 P.2d 429, 435 (1988)).

**[\*15]** It is also well settled that an administrative agency has only those powers specifically granted to it by the legislature. **[\*\*9]** Auto Parts of Bozeman v. Employment Rels. Div. Uninsured Employers' Fund, 2001 MT 72, P 38, 305 Mont. 40, P 38, 23 P.3d 193, P 38.

**[\*16]** Section 39-31-406 (4), MCA, provides no specific authorization for an award of attorney fees. Further, it does not specifically confer upon the Board the authority to enter an award of attorney fees. Therefore, the Board was **[\*\*9]** correct in denying the **Firefighters** request for attorney fees on this ground.

## **II. Section 25-10-711, MCA**

**[\*17]** The **Firefighters** also contend the Board is authorized to award attorney fees under Section 25-10-711 (1), MCA, which provides:

(1) In any civil action brought by or against the state, a political subdivision, or an agency of the state or a political subdivision, the opposing party, whether plaintiff or defendant, is entitled to the costs enumerated in 25-10-201 and reasonable attorney's fees as determined by the court if:

(a) he prevails against the state, political subdivision, or agency; and

(b) the court finds that the claim or defense of the state, political subdivision, **[\*\*10]** or agency that brought or defended the action was frivolous or pursued in bad faith.

**[\*18]** The City argues that an agency action is not a "civil action." See e.g., Thorton v. Comm'r of the Dep't of Labor and Indus., 190 Mont. 442, 448, 621 P.2d 1062, 1065 (1980) (administrative action was not a "suit at law" for the purposes of attorney fees under the Wage Collection Act, Title 39, Chapter 3, **[\*\*10]** MCA). The City contends its position is bolstered by the statutory requirement that attorney fees may be awarded only if the "court" finds the action frivolous or pursued in bad faith. The City argues that because the action before the Board was not a "civil action" and a "court" did not find bad faith, attorney fees cannot be awarded.

**[\*19]** The Court agrees with the City that the proceeding before the Board was not a civil action to which Section 25-10-711, MCA, applies. Rather, it was an administrative proceeding governed by MAPA. Section 25-10-711 is a part of Title 25 which governs procedures in court actions. As noted in the chapter compiler's comments, chapters 2-15 of Title 25 apply to district courts. Furthermore, **[\*\*11]** Rule 3, Montana Rules of Civil Procedure, provides: "A civil action is commenced by filing a complaint with the court."

### **III. Private Attorney General Doctrine**

**[\*20]** Next, the **Firefighters** contend that they should be allowed to recover attorney fees under the private attorney general doctrine. The City argues this is not a situation in which the attorney general doctrine is appropriate.

**[\*21]** The private attorney **[\*\*11]** general doctrine "seeks to encourage suits effectuating a strong congressional or national policy by awarding substantial attorney's fees, regardless of defendants' conduct, to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens." Serrano v. Priest, 569 P.2d 1303, 1312 (Cal. 1977) (quoting D'Amico v. Bd. of Med. Exam'rs, 520 P.2d 10, 29 (Cal. 1974)).

**[\*22]** The private attorney general doctrine is an exception to the American Rule that a party in a civil action is not entitled to attorney fees absent a contractual agreement or specific statutory authority, which has been recognized and applied in certain circumstances by the Montana Supreme **[\*\*12]** Court. Montanans for Responsible Use of the Sch. Trust v. State, 1999 MT 263, PP 62-67, 296 Mont.

402, PP 62-67, 989 P.2d 800, PP 62-67.

**[\*23]** The legislature has established an administrative procedure for resolving unfair labor practices claims and that procedure was followed here. While a court may have the equitable power to award attorney fees under the private attorney general doctrine, an administrative agency **[\*\*12]** does not have similar powers.

#### **IV. Equitable Relief**

**[\*24]** Finally, the **Firefighters** argue that attorney fees should have been awarded pursuant to the bad faith exception and for disobedience of a court order. Those two grounds fall under the rubric of the Court's equitable power. See **Foy v. Anderson**, 176 Mont. 507, 511, 580 P.2d 114, 116 (1978) (district court may award attorney fees under its equitable power when the action was prosecuted in bad faith); **Alyeska Pipeline Serv. Co.**, 421 U.S. at 258 (1975) (attorney fees may be levied as part of a fine for contempt of court).

**[\*25]** As noted, administrative agencies do not have the same equitable powers as the district **[\*\*13]** courts have. An agency's authority is limited to that granted by the legislature. **Auto Parts of Bozeman**, 2001 MT 72, P 38, 305 Mont. 40, P 38, 23 P.3d 193, P 38. Here, the **Firefighters** have not demonstrated any grant of equitable power to the Board. In addition, this Court, in reviewing a decision of an administrative agency, does not have jurisdiction to determine whether the City was in contempt of Judge Johnson's order.

**[\*26]** **[\*\*13]** For the foregoing reasons, the Court concludes that the decision of the Board denying the **Firefighters** their request for attorney fees should be affirmed.

**[\*27] IT IS SO ORDERED.**

DATED this 17th day of May, 2004.

Thomas C. **Honzel**  
DISTRICT COURT JUDGE

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