

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 27-2004:

BILLINGS FIREFIGHTERS LOCAL)	Case No. 1758-2004
NO. 521, International Association)	
of Firefighters,)	
)	
Complainant,)	
)	
vs.)	
)	
CITY OF BILLINGS, MONTANA,)	
)	
Defendant.)	

* * * * *
**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
RECOMMENDED ORDER**
* * * * *

I. INTRODUCTION

On February 6, 2004, Billings Firefighters Local No. 521 (Local 521) filed a charge with the Board alleging that the City of Billings had unilaterally and without bargaining changed the probationary period for bargaining unit members from 6 months to 12 months. On March 12, 2004, the City filed a response to the charge denying that its actions constituted an unfair labor practice.

On July 8, 2004, 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.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on October 13, 2004. Timothy J. McKittrick represented Local 521. Bonnie J. Sutherland represented the City. Bob Jolubski, Joseph C. Sands, Budge Parker, Don Regnier, Jamie Mertz, and Marv Joechems testified as witnesses in the case. Exhibits J-1 through J-4 were admitted into evidence, pursuant to the stipulation of

the parties. Exhibits 2, 3, 5a, 6, 7, and 8 were also admitted. Complainant's exhibits 5 and 10 were excluded on the grounds of relevance, except that the Hearing Officer took official notice of the decision of the district court which was part of exhibit 10. Complainant made an offer of proof that exhibit 5, if admitted, would establish disparate treatment among probationary firefighters in the application of the performance appraisal process.

Exhibits 5 and 5a, the personnel files and payroll records of probationary firefighters as of the date of hearing, were sealed pursuant to the Hearing Officer's confidentiality order dated October 8, 2004. Portions of the testimony in which these records were discussed were also closed to the public and sealed.

The parties stipulated that the Hearing Officer could hold the record open for additional evidence and findings on the remedial provisions of any order issued by the Hearing Officer.

The parties filed post-hearing briefs on November 12 and 15, 2004. At that time, the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether the City of Billings committed unfair labor practices in violation of Mont. Code Ann. § 39-31-401, as alleged in the charge filed by Local 521.

III. FINDINGS OF FACT

1. Billings Firefighters Local No. 521 is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6).

2. The City of Billings is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10).

3. Local 521 and the City are parties to a collective bargaining agreement effective July 1, 2002 through June 30, 2005. The collective bargaining agreement provides that Local 521 is the exclusive bargaining agent for all employees of the

Billings Fire Department, except the fire chief, assistant fire chief, and all initial probationary employees.

4. Article II of the collective bargaining agreement, entitled management rights, states:

A. The Association recognizes the prerogative of the City to operate its affairs in all respects in accordance with its responsibilities, and the powers or authority which the City has not officially abridged, delegated or modified by this Agreement are retained by the City, and in such areas as, but not limited to the following, to-wit:

1. Directing employees;
2. Hiring, promoting, transferring, assigning, and retaining employees;
3. Relieving employees from duties because of lack of work or funds or under conditions where continuation of such work would be inefficient and non-productive;
4. Maintaining the efficiency of government operations;
5. Determining the methods, means, job classifications, organization, and personnel by which operations of the City of Billings Fire Department are to be conducted;
6. Taking whatever actions that may be necessary to carry out the mission of the City of Billings in situations of emergency;
7. Establishing the methods and processes by which work is to be performed;
8. Establishing reasonable work rules;
9. Scheduling overtime work as required, in a manner most advantageous to the City Fire Department and consistent with requirements.

B. The Association recognizes that the Employer has statutory and other rights and obligations in contracting for matters relating to municipal operations. The right of contracting or subcontracting is vested in the Employer. The right to contract or subcontract shall not be used for the purpose or intention of undermining the Association, nor to discriminate against any of its members.

5. Historically, the firefighters in the bargaining unit had an initial probationary period of 6 months. The collective bargaining agreement had no provision addressing the length of the initial probationary period. The basis for the 6-month period was Mont. Code Ann. § 7-33-4122, which states:

Each appointment shall be first made for a probationary term of 6 months, and thereafter the mayor or manager may nominate and, with the consent of the council or commission, appoint such chief and assistant chief or chiefs of the fire department and firefighters, who shall thereafter hold their respective appointments during good behavior and while they have the physical ability to perform their duties.

6. Prior to December 2002, the parties construed Mont. Code Ann. § 7-33-4122 to limit the duration of the initial probationary period for firefighters to 6 months. In December 2002, the Montana Supreme Court decided *Hunter v. City of Great Falls*, 2002 MT 331, 313 Mont. 231, 61 P.3d 764, in which it held that the probationary period for firefighters in the statute was a minimum period, not a maximum.

7. On or about December 4, 2003, Marv Joechems, Chief of the Billings Fire Department, decided that the length of the initial probationary period for firefighters should be increased from 6 to 12 months. He discussed the matter with the City Administrator, Kristoff Bauer. Bauer issued Administrative Order No. 76, dated December 4, 2003 (Exhibit J-2), adopting the change.

8. On December 5, 2003, the Billings Fire Department hired four new firefighters. It notified them that they were subject to a 12-month probationary period.

9. On December 10, 2003, Joechems met with Bob Jolubski, Jamie Mertz, and Budge Parker, members of the executive board of Local 521. During the meeting, he advised them of the extension of the length of the initial probationary period. He told them the change was a “done deal.”

10. On December 15, 2003, Joechems issued Policy Notice #821-03 informing the Billings Fire Department of the change in the length of the initial probationary period, effective December 19, 2003.

11. Joechems wanted to have a longer initial probationary period for a number of reasons, including:

- a. his belief that a longer period would better allow the Fire Department's supervisory personnel to evaluate new employees;
- b. a desire for consistency with all other City of Billings employees who were subject to a one-year initial probationary period; and
- c. his belief that the *Hunter* decision gave the City discretion to establish a longer initial probationary period.

12. In deciding to adopt a longer initial probationary period, Joechems was not motivated by anti-union animus. The act of extending the length of the probationary period was not done to interfere with, restrain, or coerce employees in their rights of self-organization.

13. The act of changing the initial probationary period was a unilateral change in a term or condition of employment of bargaining unit members.

14. The four firefighters hired in December 2003 commenced employment on or about January 5, 2004. On or about April 23, 2004, the City of Billings Fire Department hired three additional firefighters.

15. Under the recognition clause in the collective bargaining agreement between the parties, newly hired firefighters did not become members of the bargaining unit until they successfully completed their initial probationary period and were promoted to the status of firefighter. Because of this, they did not join Local 521 and start paying dues until they completed the probationary period. By its unilateral action the City of Billings has deprived Local 521 of the dues of employees who commenced employment after December 19, 2003.

16. Under the extended probationary period adopted by the City, the firefighters who commenced employment after December 19, 2003 received a pay raise from \$11.00 to \$15.52 at the completion of 6 months of employment. Under the past practice, these firefighters would have received a raise to \$16.29 on satisfactory completion of the 6 month probationary period.

IV. DISCUSSION¹

Local 521 contends that the City committed unfair labor practices when it unilaterally and without negotiation changed the probationary period from 6 months to 12 months. It further contends that the unilateral change adversely affected the wages, hours, fringe benefits and other conditions of employment of Local 521 and its members.²

The City denies committing any unfair labor practice. It contends that it had no obligation to bargain because the length of the probationary period for Billings' firefighters was set by state law, not contract. In 2002, the Montana Supreme Court held that the statutory 6 months was merely the minimum firefighter's probationary period and that the probationary period could be longer. Further, the City contends that, if it was required to bargain, Local 521 waived bargaining on the issue by failing to request bargaining after the City notified Local 521 it was implementing a one year probationary period.

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. Mont. Code Ann. § 39-31-301(5). The failure to bargain collectively in good faith is a violation of Mont. Code Ann. § 39-31-401(5). A violation of Mont. Code Ann. § 39-31-401(5) is also considered a "derivative" violation of Mont. Code Ann. § 39-31-401(1). *See Hardin, The Developing Labor Law*, 3rd Ed. 1992, at 75. The Montana Supreme Court has

¹Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

²In its post-hearing brief, Local 521 raised additional contentions, including an alleged independent violation of Mont. Code Ann. § 39-31-401(1) (as opposed to a derivative violation) and anti-union discrimination in violation of Mont. Code Ann. § 39-31-401(3). It also contended that the City acted in violation of the city charter in promulgating the change. Although the initial charge and the contentions alleged that the City had violated subsections (1) and (3) of Mont. Code Ann. § 39-31-401, nothing in the charge or the complainant's contentions or issues of fact and law were adequate to put the City on notice of these theories of the case, and they will not be further addressed in this decision. Even if the City had adequate notice of these theories, the complainant did not prove them. See ¶12 of the Findings of Fact. The Board lacks jurisdiction of the contention that the City violated its charter.

approved the practice of the Board of Personnel Appeals of 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* (1979), 183 Mont. 223, 598 P.2d 1117; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

The basic, fundamental purpose of labor relations is the good faith negotiation of the mandatory subjects of bargaining--wages, hours, and other terms and conditions of employment. For an employer to make unilateral changes during the course of a collective bargaining relationship concerning mandatory subjects of bargaining is considered a violation of the requirement of good faith bargaining. *NLRB v. Katz* (1962), 369 U.S. 736. Absent waiver or other relief from the obligation, it continues during the term of the collective bargaining agreement. *NLRB v. Sands Manufacturing Co.* (1939), 306 U.S. 332, 342.

A. Obligation to Bargain

The City contends that it was not required to bargain over the extension of the length of the probationary period, based on the management rights provisions of the collective bargaining agreement and on the *Hunter* decision, which it reads to give cities the discretion to require a longer probationary period than 6 months for newly hired firefighters.

As noted above, however, 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. Questions concerning the probationary period to be served by employees are unquestionably conditions of employment, and therefore mandatory subjects of bargaining. *Oliver Corp.* (1967), 162 NLRB 813; *Monmouth College* (1973), 204 NLRB 554. The 6-month probationary period, even though it was not expressly provided for in the collective bargaining agreement, was a longstanding past practice between Local 521 and the City. Although the past practice may have resulted from a mutual misunderstanding of Mont. Code Ann. § 7-33-4122, it was nevertheless the practice of these parties, and significant to issues of union membership, dues, and representation. The City clearly had an obligation to bargain before implementing a change in the length of the probationary period.

The *Hunter* decision does not relieve the City of its obligation to bargain in good faith about terms and conditions of employment. The City correctly construes

the decision to hold that the statutory 6-month period is a minimum period, not a maximum length. However, it does not follow that the City therefore has unilateral discretion to alter this term or condition of employment. The result of the decision is to clarify that the subject is one for which bargaining is necessary, since the length of the period is not set by law.³

The City's argument that the change was permissible under the management rights clause of the collective bargaining agreement is essentially an argument that Local 521 waived bargaining, to be addressed below.

B. Waiver

1. Express Waiver

The obligation to bargain collectively is an obligation that is subject to waiver by clear and unmistakable language. *Metropolitan Edison Co. v. NLRB* (1983), 460 U.S. 693. The NLRB has consistently rejected management rights clauses that are couched in general terms and make no reference to any particular subject area as waivers of statutory bargaining rights. *Smurfit-Stone Container Corp.*, 2003 NLRB LEXIS 557, at 23-25; *Michigan Bell Telephone Co.* (1992), 306 NLRB 281. The management rights clause of this collective bargaining agreement makes no express reference to changing the term of the probationary period, or any term from which such a waiver could reasonably be inferred. Thus, the management rights clause does not authorize the employer to make unilateral changes in the length of the probationary period without collective bargaining.

2. Implied Waiver

The City also contends that Local 521 waived bargaining by failing to request it when it learned of the change. It is true that when an employer notifies the union of a proposed change, and the union fails to request bargaining, the union has waived bargaining on the issue. *See e.g. Haddon Craftsmen, Inc.* (1990), 300 NLRB 789, 790, *review denied sub nom. Graphic Communications International Union, Local*

³Local 521 contends that, under the *Hunter* decision, Mont. Code Ann. § 7-33-4122 allows a city to extend a probationary period only when the initial period is extended because of unsatisfactory performance. Although the facts of the *Hunter* case involve an individual whose probationary period had been extended due to performance deficiencies, the Court's construction of the statute was not dependent on those facts.

Union No. 97B v. NLRB (3rd Cir. 1991), 937 F.2d 597. In this case, however, there is no evidence that the City notified the union of the proposed change prior to adopting the change. The City Administrator issued his order changing the length of the probationary period on December 4, 2003, before any notice to the members of Local 521 concerning the change. When Joechems met with the members of the union's executive board on December 10, 2003, it was to advise them of the change, not to afford them the opportunity for bargaining. He in fact told them that it was a "done deal." Because the City gave no notice of a proposed change, Local 521 could not have waived and did not in fact waive its right to bargain the issue.

C. Remedy

Mont. Code Ann. § 39-31-406(4) 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 making unilateral changes in terms and conditions of employment, a return to the *status quo ante*, an order to make Local 521, its members, and the newly hired firefighters whole for their losses resulting from the unfair labor practice, and a posting requirement.

A return to the *status quo ante* requires that the City rescind Administrative Order No. 76 and Policy No. 821-03 and return to an initial probationary period of 6 months for firefighters. Any firefighter who has now worked more than 6 months, but has not been promoted to Firefighter I, must be immediately promoted. In order to make the union and the firefighters whole, the City must pay the union the amount of union dues lost to the union as a result of the extension of the initial probationary period, and must pay the firefighters who commenced employment on or after December 19, 2003, the difference in pay between what they would have received at the conclusion of the 6 month probationary period and the raise they did receive after 6 months of employment. Individual employees of the City of Billings Fire Department are also entitled to have any leave used to participate in the hearing of this matter reinstated.

Local 521 has also sought an award of attorney's fees and costs as part of the remedy in the case but cites no authority supporting such an award. 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* (1981), 190 Mont. 442, 621 P.2d 1062. 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* (1983), ULP 24-77.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this case. Mont. Code Ann. § 39-31-207.

2. A public employer may not refuse to bargain collectively in good faith on questions of wages, hours, fringe benefits, and other conditions of employment with an exclusive representative of its employees. Mont. Code Ann. §§ 39-31-305 and 39-31-401(5). An employer that makes unilateral changes during the course of a collective bargaining relationship concerning wages, hours, fringe benefits, and other conditions of employment has refused to bargain in good faith. *NLRB v. Katz* (1962), 369 U.S. 736.

3. The length of the initial probationary period for newly hired employees is a condition of employment.

4. Billings Firefighters Local No. 521 did not waive its right to bargain over the length of the initial probationary period for firefighters newly hired by the City of Billings.

5. By unilaterally changing the length of the initial probationary period for firefighters hired by the City of Billings Fire Department on or after December 19, 2003, the City of Billings committed an unfair labor practice in violation of Mont. Code Ann. § 39-31-401(1) and (5).

6. Billings Firefighters Local No. 521 did not timely raise its contentions of fact or law concerning any violation except the allegation of failure to bargain in good faith based on the City's unilateral change of the length of the probationary period.

7. The Board of Personnel Appeals lacks jurisdiction of the allegation that the City of Billings violated its charter.

8. As a result of the unfair labor practice committed by the City of Billings, Billings Firefighters Local No. 521 is entitled to cease and desist orders, a return to the *status quo ante*, an order to make Local 521, its members, and the newly hired firefighters whole for their losses resulting from the unfair labor practice, and an order to post and publish the notice set forth in Appendix A.

9. Billings Firefighters Local No. 521 is not entitled to attorney's fees or costs.

VI. RECOMMENDED ORDER

The City of Billings is hereby **ORDERED**:

1. To immediately cease the practice of unilaterally altering terms and conditions of employment without bargaining with Billings Firefighters Local No. 521; and

2. Within 30 days of this order:

a. To rescind Administrative Order No. 76 and Policy No. 821-03 and reinstate an initial probationary period of 6 months for firefighters;

b. To promote any firefighter who has now worked more than 6 months, but has not been promoted to Firefighter I, with an effective date 6 months from the date of hire;

c. To calculate and pay to Billings Firefighters Local No. 521 the amount of union dues lost to Local 521 as a result of the extension of the initial probationary period;

d. To calculate and pay to the firefighters who commenced employment on or after December 19, 2003, the difference in pay between what they would have received at the conclusion of the 6 month probationary period and the raise they did receive after 6 months of employment;

e. To reinstate all leave taken by employees of the City of Billings Fire Department to participate in these proceedings;

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

DATED this 17th day of February, 2005.

BOARD OF PERSONNEL APPEALS

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

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than March 14, 2005. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must 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 document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

Timothy J. McKittrick
Attorney at Law
P.O. Box 1184
Great Falls, MT 59403

Bonnie J. Sutherland
City Attorney's Office
City of Billings
P.O. Box 1178
Billings, MT 59103

DATED this 18th day of February, 2005.

Sandy Durcan

APPENDIX A

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE 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 not fail to bargain in good faith with Billings Firefighters Local No. 521;

We will not unilaterally change the terms and conditions of employment of employees covered by the collective bargaining agreement with Billings Firefighters Local No. 521;

We will rescind Administrative Order No. 76 and Policy No. 821-03 and reinstate an initial probationary period of 6 months for firefighters;

We will make Local 521, its members, and the newly hired firefighters whole for their losses resulting from the unfair labor practice and reinstate all leave taken by employees to participate in the hearing of ULP 27-2004.

DATED this ____ day of March, 2005.

CITY OF BILLINGS

By: _____