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BOARD OF PERSONNEL APPEALS
PO BOX 201503
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE 3-2010:

INTERNATIONAL ASSOCIATION OF)
FIREFIGHTERS, LOCAL 613,)
)
Complainant,)
)
vs.)
)
CITY OF BOZEMAN)
)
Defendant,)

RECOMMENDED ORDER
OF DISMISSAL

I. Introduction

On July 21, 2009, the International Association of Firefighters, Local 613, hereinafter Local 613, filed an unfair labor practice charge with the Board of Personnel Appeals alleging that the City of Bozeman violated 39-31-401(1) and 39-31-401(5) MCA by making a unilateral change in wages and working conditions, both mandatory subjects of bargaining. Joel Fassbinder, President of Local 613 filed the complaint and Karl Englund, attorney at law, represents Local 613. On August 17, 2009, the City of Bozeman, hereinafter the City, filed its answer to the charge denying that it had committed an unfair labor practice. The City is represented in this matter by Cynthia Walker, attorney at law.

Pursuant to Section 39-31-405 (1) John Andrew was appointed by the Board of Personnel Appeals to investigate the charge. During the course of the investigation information was exchanged between the investigator and the parties.

II. Findings and Discussion

This matter concerns a decision by the City to reclassify the position of Training Officer from non-exempt status under the Fair Labor Standards Act (FLSA) to an exempt status. The significance of this change is that as an exempt employee the Training Officer would no longer be entitled to overtime or compensatory time at a time and one half rate. Local 613 contends this change was

1 material, substantial and significant and concerned mandatory subjects of bargaining.
2

3 The recognition clause of the collective bargaining agreement (CBA) includes combat firefighters
4 as well as uniformed day personnel and excludes only the Assistant Director of Public Safety/Fire
5 Operations & EMS and the Assistant Director of Public Safety/Inspectors. Thus, at all times
6 material to this complaint, and to the present day, the Training Officer position is covered by the
7 collective bargaining agreement between the City and Local 613.
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10 The City offers several defenses of the action taken. First, the City contends that the unfair labor
11 practice charge should be dismissed as untimely. Next the City offers that the question of job
12 classification is a management right of public employers and thus not a mandatory subject of
13 bargaining. Additionally the City argues that nothing in the collective bargaining agreement or state
14 law prohibited the City from appointing a union member to a uniformed day personnel position, and
15 thus there was no unfair labor practice. The City further offers that Local 613 waived its right to
16 bargain the compensation of the Training Officer in contract negotiations. Finally, the City
17 contends that the proper forum for resolving the question before the investigator is in the grievance
18 procedure and final and binding arbitration rather than through the Board of Personnel Appeals.
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21 Addressing the defenses of the City in order, MCA 39-31-404 provides:
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24 **Six-month limitation on unfair labor practice complaint -- exception.** A notice of
25 hearing may not be issued based upon any unfair labor practice more than 6 months
26 before the filing of the charge with the board unless the person aggrieved was prevented
27 from filing the charge by reason of service in the armed forces, in which event the 6-
28 month period must be computed from the day of discharge.
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31 As early as 2004, the City contemplated changing the status of the Training Officer position from
32 that of non-exempt to exempt. However, as part and parcel of negotiations between 2004 and until
33 March 24, 2009, the City maintained the position of Training Officer as a non-exempt position
34 subject to the overtime and comp time provisions of the FLSA. Thus, other than discussion no
35 actual change was made by the City until March of 2009, well within the period for filing a
36 complaint.
37

38 Addressing the other defenses of the City, separate and apart from the one that this matter be
39 deferred to the grievance procedure, the City does make valid points as to its ability to classify
40 employees as exempt or non-exempt under the FLSA. However, classifying an individual as
41 exempt or non-exempt is one thing, but how they are paid is another. If, for instance, the City
42 erroneously classified a position as exempt and failed to pay overtime to that position the law is
43 violated. The converse is not true. If a position is, in actual fact exempt, and the City continues to
44 pay that position overtime or time and one half comp time then the City has merely applied a higher,
45 or more conservative standard than required in law. There is no violation of law. However, when
46 the status of a position is changed, and neither overtime or comp time at time and one half is
47 available, then more than the exercise of management prerogative has occurred. There is a true
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1 change in wages, a mandatory subject of bargaining. At the least, even if designation of status is not
2 a mandatory subject of bargaining, and Local 613 has acknowledged the same, the impact of such a
3 change is. In a similar vein, although the CBA may well give the City the ability to appoint a
4 combat firefighter to a training position any change in the pay for the position, provided it is in the
5 bargaining unit, as is this position, must be bargained absent waiver.
6

7
8 Concerning the question of waiver, although a cogent argument is made by the City, it is well
9 settled that for waiver to exist the burden is on the party claiming waiver to demonstrate, through
10 bargaining history in this case, that the matter was full discussed, and consciously explored during
11 negotiations. The employer also needs to show that Local 613 consciously yielded or clearly and
12 unmistakably waived its interest in bargaining over wages to be paid to the Training Officer.
13 Although that may be the case on the question of status, it is not equally clear that the Local
14 acquiesced on any waiver of the obligation to negotiate the question of wages.
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17 In ULP 43-81, William Converse v Anaconda Deer Lodge County and ULP 44-81 James Forsman
18 v Anaconda Deer Lodge County, August 13, 1982, the Board of Personnel Appeals adopted
19 National Labor Relations Board precedent set forth in Collyer Insulated Wire, 192 NLRB 387, 77
20 LRRM 1931, deferring certain unfair labor practice proceedings to an existing negotiated
21 grievance/arbitration procedure.
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24 Here the employer has expressed its willingness to proceed forward with the grievance process. In
25 fact, the parties have selected an arbitrator, and through a memorandum of understanding
26 concerning four grievances, they have agreed to submit to arbitration one grievance which relates to
27 "FLSA status and the payment of wages of the Training Officer". According to Local 613, tied to
28 this particular grievance is whether or not the position would be considered exempt and whether the
29 position would no longer get overtime or comp time. In actuality, the CBA in Article 3 D references
30 non-exempt uniformed day personnel and the accrual of compensatory time in lieu of overtime pay.
31 The question of exempt or non-exempt status clearly implicates the FLSA and the language in the
32 CBA concerning the issue present in the unfair labor practice is susceptible to interpretation by the
33 arbitrator. Deferral by the Board of Personnel Appeals to the arbitration procedure is in the best
34 interest of the parties in carrying out the terms of the CBA and is also in the best interest of the
35 Board of Personnel Appeals.
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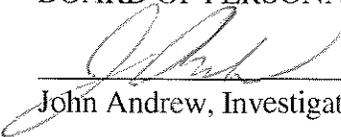
38 39 III. Recommended Order

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41 It is hereby recommended that the above matter be dismissed. To eliminate the risk of prejudice to
42 any party the Board of Personnel Appeals retains jurisdiction over this matter for the purpose of
43 entertaining an appropriate and timely motion for further consideration upon a proper showing that
44 either the dispute has not, within a reasonable time, been resolved pursuant to the parties' negotiated
45 grievance/arbitration procedure; or the grievance/arbitration proceedings have not been fair and
46 regular or have reached a result which is repugnant to the Montana Collective Bargaining for Public
47 Employees Act.
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Dated this 27th day of October 2009.

BOARD OF PERSONNEL APPEALS

By: 
John Andrew, Investigator

SPECIAL NOTICE

Exceptions to this Recommended Order may be filed within twenty (20) days of service thereof. If no exceptions are filed, this Recommended Order shall become the Order of the Board of Personnel Appeals. Address exceptions to the Board of Personnel Appeals, P.O. Box 201503, Helena, Montana 59620-1503.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing Recommended Order of Dismissal was served upon the following on the 7th day of October, 2009, postage paid and addressed or delivered as indicated:

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