

1 Department of Labor and Industry
2 Board of Personnel Appeals
3 PO Box 201503
4 Helena, MT 59620-1503
5 (406) 444-2718
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8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS

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11 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO's 4-2010 and 9-
12 2010

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14 INTERNATIONAL ASSOCIATION OF)
15 FIREFIGHTERS, LOCAL 521, AFL-CIO)
16 Complainant,)
17 -vs-)
18)
19 CITY OF BILLINGS, BILLINGS FIRE)
20 DEPARTMENT,)
21 Defendant,)
22

INVESTIGATIVE REPORT
AND
NOTICE OF INTENT TO DISMISS

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25 **I. Introduction**

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27 On August 18, 2009, the International Association of Firefighters, Local 521, AFL-CIO,
28 hereinafter Local 521 or Union, filed an unfair labor practice charge with the Board of
29 Personnel Appeals alleging that the City of Billings, City of Billings Fire Department,
30 hereinafter the City, “unilaterally and without bargaining transferred the review and
31 approval of fire sprinkler systems on new construction and remodels out of the
32 bargaining unit and hired a private, for-profit firm to perform that work”. Violations
33 including, but not limited to, Sections 39-31- 401(1), (5) and 39-31-201 MCA are
34 alleged.
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37 On October 30, 2009, Local 521 filed a second charge with the Board of Personnel
38 Appeals alleging that the City violated 39-31-401(1) and (5) by bargaining directly with
39 the Fire Marshall, a member of the bargaining unit, “to remove work from the collective
40 bargaining unit”. The second charge relates directly to the first charge in that the work
41 in question was the sprinkler review process.
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43 The City has responded to both charges denying the same. Bonnie Sutherland,
44 Assistant City Attorney, represents the City in this matter and Local 521 is represented
45 by Timothy McKittrick, attorney at law. With no objection from counsel, these two
46 charges are consolidated since they concern the same subject matter.
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49 John Andrew was assigned by the Board to investigate the charge and has reviewed
50 the information submitted by the parties and communicated with them as necessary in

1 the course of the investigation. The final submission by Local 521 to ULP 9-2010 was
2 received on December 4, 2009.
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5 **II. Findings and Discussion**

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7 This case concerns the processes used to review and approve, or disapprove, fire
8 sprinkler system plans submitted for new construction and remodels in the City of
9 Billings. According to the Local 521 President Dan Cottrell, the work in question has
10 always been performed by Fire Prevention Bureau personnel, all of whom are
11 bargaining unit members. Thus, any change instituted by the City entails a change in
12 working conditions, a mandatory subject of bargaining. Local 521 contends that by
13 failing to bargain the change, the City committed an unfair labor practice.
14

15 In response to the charge the City contends that 1) the change took effect September 1,
16 2008, and is therefore time barred by 39-31-404 MCA, 2) the review of fire systems has
17 not been transferred to a private, for-profit firm and bargaining unit members still
18 perform that function, and 3) the change initiated by the City is a reserved management
19 right.
20

21 Fire sprinkler system review and approval historically has been performed in the Fire
22 Prevention Bureau staffed by bargaining unit members including the current Fire
23 Marshall, Mike Spini and Assistant Fire Marshall, Bill Tatum. Mr. Tatum is also a shop
24 steward for Local 521 personnel. Thus, the work in question has been performed in the
25 context of the bargaining unit. That said, any change in bargaining unit work was
26 known by these two members at the least.
27

28 The actual change has its roots in a letter co-signed by then Assistant Fire Marshall
29 Mike Spini and Fire Chief Paul Dextras. The letter was sent to fire sprinkler contractors
30 and designers on July 30, 2008. The letter cited a section of the International Fire Code
31 and the ability of a fire department to utilize consultants to provide technical assistance
32 in fire plan reviews. The letter advised the contractors and designers to submit their
33 plans – three sets - as well as a review fee, to Fire Safety Consultants, Inc. (FSCI) of
34 Elgin, Illinois. FSCI would then review the plans and, if approved, FSCI would return a
35 set to the contractor/designer as well as to the City. FSCI is not hired by the City, but
36 apparently has recognized expertise in fire plan review and is utilized by many local
37 governments. This change proposed in the July 30, 2008, letter was to become effective
38 September 8, 2008. In fact, it became effective that date. The contention of the City is
39 that this action by the City constituted notice to the Union by the City because members
40 of the Fire Prevention Bureau are members of Local 521. Thus, under 39-31- 404 MCA
41 the six month clock began ticking for filing an unfair labor practice complaint.
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43 The Union contends that it was not notified of this change in plan review methodology
44 until May of 2009. On May 17, 2009, Local President Cottrell e-mailed Chief Dextras
45 notifying him of the belief of the Union that the change matter was a mandatory subject
46 requiring bargaining.
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48 Members of Local 521 were aware of a change in the plan review process. However,
49 the Local contends that it is long established that the Executive Board of Local 521, and
50 its members – all of whom are known to the City -, constitute the duly appointed

1 bargaining representative of Local 521. Local 521 further asserts that the City never
2 contacted any of the e-board members concerning the change and therefore the
3 change was unknown to the Union until the spring of 2009, well within the 6 month filing
4 period. Moreover, Local 521 contends that each plan review carried out since
5 September of 2008 constitutes a continuing violation and for that reason as well the
6 complaint is timely. All things considered, the argument of Local 521 is persuasive.
7 Specifically, the knowledge of a change in wages or working conditions by individual
8 bargaining unit members is not sufficient to start the statute running thereby taking away
9 the right of the exclusive representative to demand to bargain over a change in a
10 mandatory subject. When the exclusive representative was aware of the change it
11 immediately asserted its right to bargain, and it did so in a timely manner. There was no
12 waiver by Local 521, either express or implied. See, for instance, ULP 3-2001, IAFF
13 Local #8 v. City of Great Falls Fire Department.
14

15 Turning to the question of the change in plan review procedures, an employer is
16 required to bargain with a union representing its employees over the transfer of work out
17 of the bargaining unit when the bargaining unit will suffer a significant loss of work. See
18 for instance, Florence-Carlton Classified Employees Ass'n v. Florence-Carlton High
19 School and Elementary District No. 15-6, ULP No. 14-93 (1993). See also Legal Aid
20 Bureau, Inc., 319 NLRB 159 (1995), Health Care and Retirement Corp., 317 NLRB
21 1005 (1995), Central Cartage, 236 NLRB 1232, 1258 (1978), enf. granted, 607 F.2d
22 1007 (7th Cir. 1979), Fry Foods, 241 NLRB 76, 88, enf. granted, 609 F.2d 267 (6th Cir.
23 1979), Susy Curtains, 309 NLRB 1287, 1289 (1992), enf. granted, 106 F.3d 391 (4th
24 Cir. 1997), Lutheran Home of Kendallville, Ind., 264 NLRB 525 (1982). However, not
25 every change in working conditions or instruction from management to union members
26 has to be bargained. An indirect or incidental impact on unit employees is not sufficient
27 to establish a matter as a mandatory subject. Rather, mandatory subjects include only
28 those matters that materially or significantly affect unit employees' terms and conditions
29 of employment. The phrase "terms and conditions of employment" does not include all
30 subjects that may merely be of interest or concern to the parties. Star Tribune Division
31 and Newspaper Guild of Twin Cities, et. al. 295 NLRB No. 543,547, 13 LRRM 1404
32 (1089). Also see Ekalaka Unified Board of Trustees and Wade Northrup,
33 Superintendent v. Ekalaka Teachers' Association, MEA-MFT, NEA, 2006 MT 337,
34 wherein the Court affirmed a decision of the Board of Personnel Appeals defining
35 mandatory subjects, and the obligation to bargain any changes to such subjects, to
36 include those subjects that "materially or significantly affect unit employees' terms and
37 conditions of employment". Also see, for instance, ULP 06-97, Browning Federation of
38 Teachers Local #2447 vs. Browning Public Schools, Roger Helmer, Superintendent as
39 well as Litton Microwave Cooking Products, 300 NLRB 324 (1990). For further
40 discussion on the question of the obligation to bargain over significant changes in
41 conditions or employment see ULP 16-84, Billings Fire Fighters Local No. 521 v Robert
42 S. Williams, Fire Chief, City of Billings.
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44 In the instant case, the facts establish several things. First, there was no contract
45 between the City and FSCI to do sprinkler plan reviews. Any contract would have been
46 between FSCI and the entity requesting plan review. FSCI was not substituted for the
47 Fire Prevention Bureau. Rather, FSCI performed an intermediary role in plan review but
48 final review and approval was retained in the Fire Prevention Bureau. This was not a
49 question of "contracting out" as that term is commonly understood in labor relations. In
50 reality, FSCI performs a role enhancing review, most likely reducing liability for the City,
but not substituting its work for duties preformed by bargaining unit members. Statistics

1 supplied by Fire Marshal Spini are most revealing in this regard. For the 20 months
2 prior to implementation of the new process 63 sprinkler reviews were conducted by one
3 bargaining unit member, Fire Marshall Spini. In the 15 months subsequent to
4 September of 2008, 44 reviews have been done by one bargaining unit member, Fire
5 Marshall Spini. There is no appearance of a significant loss of bargaining unit work and
6 any reductions could be the result of economic times as much as anything else.
7 Moreover, the bargaining unit member who would have been most impacted by the
8 change has seen no appreciable reduction in reviews and apparently no negative
9 change in working conditions and there have been no changes in wages or benefits.

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11 Concerning the second ULP, the allegation of individual bargaining, bypassing the
12 exclusive bargaining agent over mandatory subjects of bargaining, or the impact of such
13 changes, has been found to be an unfair labor practice. An abundance of cases support
14 this proposition including ULP 3-2001, supra. However, as found in ULP 16-84, supra,
15 "The duty to bargain over the decision to transfer work to non-bargaining unit members
16 did not arise because there was no significant adverse impact on bargaining unit
17 members". The findings in ULP 16-84 are very instructive to the instant case in this
18 regard. There is not a significant impact on the Local 521 bargaining unit and to that
19 extent there was no obligation on the part of the City to bargain with Local 521 over the
20 changes made. If there is no obligation to bargain, the fact that a bargaining unit
21 member was involved in the changes as a part of his job responsibilities does not
22 constitute individual bargaining and an unfair labor practice.

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25 Of special note, the City has contended that the changes made to the plan review
26 process were within the management rights of the City. It is the view of the investigator
27 that the City should prevail in these cases. However, that opinion is not made on the
28 basis of management rights, but rather on the fact that the impact of the changes was
29 not significant and thus did not require bargaining. That is an important distinction. It
30 would be hoped that, in the future, decisions of this nature do not rest on the perceived
31 significance of such changes, but rather that they are addressed in an appropriate
32 forum, such as a labor management committee, rather than as an issue before the
33 Board or an arbitrator.

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36 **III. Recommended Order**

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38 It is hereby recommended that Unfair Labor Practice Charges 4-2010 and 9-2010 be
39 dismissed.

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41 DATED this 23rd day of December 2009.

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45 BOARD OF PERSONNEL APPEALS

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48 By: _____
49 John Andrew
50 Investigator

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NOTICE

Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss may be appealed to the Board. The appeal must be in writing and must be made within 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to dismiss becomes a final order of the Board.

CERTIFICATE OF MAILING

I, _____, do hereby certify that a true and correct copy of this document was mailed to the following on the _____ day of _____ 2009, postage paid and addressed as follows:

TIMOTHY MCKITTRICK
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