Department of Labor and Industry
Board of Personnel Appeals
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO 12-2010

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 521, AFL-CIO Complainant, -vs- CITY OF BILLINGS, BILLINGS FIRE DEPARTMENT, Defendant,	INVESTIGATIVE REPORT AND FINDING OF PROBABLE MERIT

I. Introduction

On November 19, 2009, the International Association of Firefighters, Local 521, AFL-CIO, hereinafter Local 521 or Union, filed an unfair labor practice charge with the Board of Personnel Appeals alleging that the City of Billings, City of Billings Fire Department, hereinafter the City, "implemented a process which is in violation of 39-31-401 (1), (3) and (5)". The contention of the Union is that an investigative process used by the City contained coercive and intimidating elements contrary to Montana law. The investigatory process in question pertained to a complaint arising from a mutual aid agreement between the City of Billings and the City of Laurel. The firefighter interviewed was Captain Sandy Rogers, a member of IAFF Local 521. Pursuant to agreement of the parties, the City answered the complaint on December 9, 2009. The City denied any violation of Montana law.

On December 17, 2009, Local 521 responded to the answer of the City and added an amendment to the initial charge. This amendment alleges further conduct by City management officials constituting threatening, coercive and intimidating actions, again an alleged violation of 39-31-401 (1), (3) and (5). This amendment concerns actions taken by City officials in the investigation of the mutual aid incident and associated complaint, as well as alleged "shadow files" kept by the City. The amendment by Local 521 was supplemented with additional information pertaining to an arbitration award concerning another incident involving investigative and disciplinary actions taken by the City which were, by the reckoning of the Union, are indicative of a pattern of investigative irregularities by the City. The City was afforded until January 19, 2010, to

respond to the amendment and supplemental information and did so in a timely manner, again denying any violation of Montana law.

Bonnie Sutherland, Assistant City Attorney, represents the City in this matter and Local 521 is represented by Timothy McKittrick, attorney at law.

John Andrew was assigned by the Board to investigate the charge and has reviewed the information submitted by the parties, including listening to the recordings of investigatory interviews, and communicating with the parties as necessary in the course of the investigation.

II. Findings and Discussion

This case finds its roots, initially at least, in a structure fire of July 9, 2009. The fire was in Laurel, Montana. Pursuant to a mutual aid agreement between the City of Billings and the City of Laurel a firefighting unit was dispatched to the fire location. Those dispatched to the fire were Captain Sandy Rogers and firefighters Chasen Little and Cameron McCamley. The Battalion Chief on shift at the time was Terry Larson. If BC Larson was on the actual scene it appears that may have been for a limited time, perhaps at the time of call out and then near the end of the incident. The investigative transcripts simply aren't clear on this point. The actual call out was received by the City of Billings at approximately 2:30 a.m. and the firefighters who were on the scene were relieved at approximately 6:00 a.m. The shift in question would then be over at 7:00 a.m. As fires go, there appears to be nothing extraordinary about this incident and, to the extent that any fire can be deemed routine, this one appears to have been just that.

On July 29, 2009, Laurel Fire Chief Derek Yeager sent an e-mail to Billings Assistant Fire Chief Frank Odermann with a copy to Billings Fire Chief Paul Dextras. The e-mail was appreciative of the mutual support between the cities and anticipated future cooperative efforts between the two departments. On the less positive side, the e-mail brought up allegations that two of the Billings firefighters were seen sleeping at the scene of the fire. This, understandably, began an inquiry by the City of Billings.

On Wednesday, July 29, 2009, Firefighter Cameron McCamley was interviewed by Assistant Chief Odermann concerning the Laurel incident. Also present was Mike Spini, the City Fire Marshall. It is unclear why Fire Marshall Spini was present. The interview began at 4:58 p.m. and ended at an unknown time. The interview transcript is six pages in total and began with Assistant Chief Odermann saying "Cameron was just telling me about the fire that happened out at Kudo Avenue", the mutual aid incident. Assistant Chief Odermann continued by asking of Firefighter McCamley, "Tell me what happened from the time you got the call". Nothing in the transcript shows that written questions were given to Firefighter McCamley to answer either at the beginning of the interview process or during the interview.

On Friday August 7, 2009, Firefighter Chasen Little was interviewed as to his knowledge of the Laurel incident. Also present at the interview were Assistant Chief

Odermann (conducting the interview); Battalion Chief Terry Larson; and, Firefighter Joe Sands, a Union representative requested by Firefighter Little. The interview was recorded and copies supplied to the investigator. Very quickly in the interview (page 1 of a 17 page transcript) Firefighter Little was advised by Assistant Chief Odermann that the investigatory interview was complaint driven (no copy of the complaint was provided to either Firefighter Little or Firefighter Sands at the time of the interview) and concerned allegations that Billings firefighters were sleeping at the scene of the fire. Also very early in the interview process (page 2 of 17 pages) Firefighter Little was asked the open ended question, "Chasen, just walk me through, in your own words, what happened from the time you left the station [to respond to the fire]." Nothing in the transcript reflects that Firefighter Little was given any written questions to respond to either at the beginning of the interview or during the course of the interview. The interview began at 9:56 a.m. and concluded at 11:39 a.m. the same day.

After the McCamley and Little interviews Captain Rogers was interviewed. This interview took longer to set up for a variety of reasons but eventually was conducted on Saturday, August 22, 2009. In addition to Captain Rogers, also present were Assistant Chief Odermann (conducting the interview); Fire Chief Paul Dextras; Battalion Chief Boyd Vopel ; and Dan Cottrell, Local 521 President and Captain Rogers' Union representative. Although it is not entirely clear why Battalion Chief Vopel was present apparently it was because he was the Battalion Chief on shift at the time of the interview. As with the previous interviews this one was also recorded and a 39 page transcript of the interview prepared. The interview began at 10:14 a.m. and concluded at 12:27 p.m.

Unlike the previous interviews, this one began on a more contentious tone with objection made almost immediately by Dan Cottrell to the delay in scheduling the meeting; the recording of the meeting; the fact that the Union had not been supplied with copies of the Little and McCamley interviews; the uncertainty of the "charge"; and a question as to why Battalion Chief Vopel was present for the meeting. These objections were addressed by Assistant Chief Odermann before he supplied Captain Rogers and Union representative Cottrell with a letter from Chief Dextras on City of Billings letterhead explaining the reason for the investigatory interview. The letter also contained 23 questions for Captain Rogers to answer. The questions were to be answered in writing. It is not real clear if a copy of the complaint from the Laurel Fire Chief was also supplied to Rogers and Cottrell at this point in the interview, but at the least Chief Dextras explained that such a written complaint was on file. Two hours and five minutes into the interview it is clear that Dan Cottrell did actually view the complaint of Chief Yeager.

Very early in the interview process Dan Cottrell requested that he and Captain Rogers be allowed time to answer the questions and submit written responses to the City at a later time. The request was denied. Representative Cottrell then requested an opportunity for he and Captain Rogers to prepare the written responses in private. That request was denied as well and it was not until approximately 43 minutes into the recording of the interview that Captain Rogers completed the answers. Approximately

35 minutes of the interview was time spent writing the answers to the questions and asking for clarification on questions that were not clear. Because of the clarification requests some questions were explained, some clarified, and one additional question added, bringing the total to 24 questions requiring written answers. The actual recorded time of the interview was two hours and 13 minutes.

For some reason Battalion Chief Larson, apparently the ranking officer at the time of the incident was never interviewed, or at least there is no record he was, even though the Union questioned why this was the case. Ultimately no disciplinary action was taken against Firefighters McCamley and Little, or Captain Rogers, or Battallion Chief Larson.

All of the above leads to the amended charge and supplemental information filed with the Board on December 18, 2009 and January 15, 2010, respectively. Both filings continue the theme that the City engaged in actions that were in bad faith, coercive, and intimidating in nature.

The amended charge concerns statements attributed to Assistant Chief Odermann, the substance of which, according to the Union, establish that the City was doing its investigation with the intent of getting the answers it wanted, and most disturbingly, an allegation that the City was keeping a "shadow file" on Firefighters Little and McCamley as well as Battallion Chief Larson. In support of this the Union offers notes kept by Larson, McCamley, and Little relating to discussions with Assistance Chief Odermann as well as notes from e-board member and Union secretary/treasurerRobert Golubski concerning conversations with Assistant Chief Odermann occurring during the course of a Union investigation of another grievance.

In addition to the above information the Union asks the investigator to take notice of an arbitration award involving Local 521 and the City of Billings. The award in question came about as a result of a grievance filed by the Local 521 over a disciplinary letter issued by the City against Captain Martin on November 26, 2008. Under the terms of the collective bargaining agreement a three person arbitration panel was convened with the members being one from the City, one from the Union and the third member being an outside arbitrator, in this case, Jack Calhoun. The contention of the Union was that the discipline taken by the City against Captain Martin was inappropriate. This contention was supported by the arbitration panel with arbitrator Calhoun issuing the award that rescinded the disciplinary letter issued by the City. The Union contends that the award issued by arbitrator Calhoun is evidence of a flawed grievance investigatory process, the heart of the instant ULP involving the same parties.

In all of this the City contends that the Union simply has not shown that any actions taken by the City constitute violations of 39-31-401 (1), (3), and/or (5) MCA. Moreover, the City offers that no disciplinary action was taken against any firefighters as a result of the Laurel incident. To the extent that there are no blatant statements or actions taken by the City that constitute interference, coercion or restraint in the exercise of rights guaranteed by Montana law this is true. As is often the case such actions are usually not overtly manifested. The issue remains, however, as to whether, by its actions, the

City has otherwise interfered with, coerced, or restrained the Union in its protected rights under the collective bargaining laws and in doing so has also bargained in bad faith with the exclusive representative.

It is fundamental that the processing of grievances is a part of the ongoing obligation to bargain in good faith. It is equally fundamental that the presence of a Union representative in an investigative interview that may lead to discipline is a protected, concerted activity for purposes of the law, NLRB v J. Weingarten, 420 US 251, 88 LRRM 2689 (1975) and ULP 16 and 20 – 81, Kessler Association of Teachers v. Lewis and Clark School District #2. Moreover, the union representative's interest in attending such a meeting is not solely to safe-guard the employee's interest but also the assurance of other employees that the aid and protection provided to one employee will be available to all employees. Weingarten, supra. Thus, processing grievances and having solid, fair methods for processing grievances is paramount in state and federal collective bargaining laws.

If there is are "shadow files" as contended by the Union, and as denied by the City, this contested fact could be sufficient to trigger the need for an evidentiary hearing as such an allegation is clearly harmful to a viable grievance procedure, let alone labor relations in general. However, that alone is not what the investigator believes necessitates a finding of merit and an evidentiary hearing.

In the instant case, employees interviewed by the City were treated differently. Why was one given an extensive set of written questions to answer and others were not? Why was one of the officers in the command structure not interviewed? Why was there an insistence that one individual not only answer in writing, but that the answers be done immediately? And, why was the same individual not given the opportunity to confer in private with his Union representative at the time he was presented with these questions – the same day and time as the investigative interview?

In ULP 5-85, Billings Education Association, MEA, vs Montana Board of Personnel Appeals and Trustees of Yellowstone County School District #2, the Montana Board of Personnel Appeals approvingly cited Pacific Telephone and Telegraph Co. v NLRB, 711 F.2d 134, 113 LRRM 3529, CA9 (1983) wherein the 9th Circuit, referring to a National Labor Relations Board order stated in part:

> The Board's order that failure to provide such information and grant such pre-interview conferences constituted unfair labor practices is as permissible a construction of Section 7 as was the construction upheld in Weingarten. Without such information and such conference, the ability of the union representative effectively to give the aid and protection sought by the employee would be seriously diminished.

Dan Cottrell asked for an opportunity to confer with Sandy Rogers when they were presented with 23 written questions. That request was denied and the two then had no choice but to prepare answers without private consultation, and in the clear view and

earshot of the investigators. That action may well run afoul of Weingarten rights as a matter of law and it certainly is violative in spirit. In general terms, the whole concept of written questions, characterized by the Union as interrogatories or a form of interrogation, while while perhaps hyperbolized, does cast some question on the investigatory interview not meeting the stated purpose of the law, namely to utilize collective bargaining "to arrive at friendly adjustment of all disputes between public employers and their employees", 39-31-101 MCA. To be certain there is no prohibition against using written questions, but why for only one person and not for others? And why an open ended style in some interviews and not in others? In fact, it was not until page 32 of the Rogers transcript – over an hour and one half into the interview - when Battalion Chief Vopel brought up an earlier conversation with Captain Rogers that any sort of dialogue and real exploration of the incident occurred. Finally Captain Rogers got the opportunity to tell his view of the situation. Why was this case? Was this a case more of form over substance, or is there more here than meets the eye? Certainly what lead to this complaint being filed had to have felt intimidating and coercive of bargaining rights. As found in ULP 5-85, supra, the fact discipline was not actually imposed was "immaterial" to the perception of interference, restraint and coercion of employees exercising their protected rights.

To add further to the perception of a flawed investigatory process the decision of the arbitral panel on the Martin grievance is highly critical of the procedures used in that investigation and discipline. In fact, the discipline was set aside. It is relevant to the instant case if for no other reason than it supports the belief of the Union that this is part and parcel to an ongoing flawed process detrimental to the concerted rights of the Union and its members. Taking all the above into consideration the opinion of the investigator is that this matter warrants a hearing on the merits. There is substantial evidence to support such a finding and the hearing will bear out whether the Union can sustain its charges by a preponderance of the evidence.

III. Finding of Probable Merit

This investigation has shown that based on the available evidence there is probable merit to the unfair labor practice charge. Accordingly, pursuant to Section 39-31-405, MCA, the Board will be issuing a notice of hearing.

DATED this 2nd day of March 2010.

BOARD OF PERSONNEL APPEALS

By: _____
John Andrew
Investigator

NOTICE

ARM 24.26.680B (6) provides: As provided for in 39-31-405 (4), MCA, if a finding of probable merit is made, the person or entity against whom the charge is filed shall file an answer to the complaint. The answer shall be filed within ten (10) days with the Investigator at PO Box 201503, Helena MT 59620-1503

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CERTIFICATE OF MAILING

I, Cindy Knutson, do hereby certify that a true and correct copy of this document was mailed to the following on the 2nd day of March 2010, postage paid and addressed as follows:

TIMOTHY MCKITTRICK
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 12-2010:

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 521, AFL-CIO,	)	Case No. 879-2010
Complainant,	)	
vs.	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**
CITY OF BILLINGS, BILLINGS FIRE DEPARTMENT,	)	
Defendant.	)	

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I. INTRODUCTION

The International Association of Firefighters, Local 521, AFL-CIO (IAFF Local 521) filed an unfair labor practice charge against the City of Billings Fire Department and then amended that charge. The amended charge claims that the City committed an unfair labor practice in (1) its method of interrogating Captain Sandy Rogers about his conduct while acting as a crew chief at a structure fire on a mutual aid call in the city of Laurel, Montana, and (2) maintaining alleged "shadow" files on Rogers and the two other firefighters on his crew at the Laurel incident, Cameron McCamley and Chasen Little. The Board's investigator, John Andrew, determined that probable cause existed to find the allegation, if believed, to amount to an unfair labor practice.

Hearing Officer Gregory L. Hanchett held a hearing in Billings, Montana, on this matter on November 1, 2010. Timothy McKittrick, attorney at law, appeared on behalf of IAFF Local 521. Bonnie Sutherland, assistant city attorney, appeared on behalf of the City of Billings Fire Department. Captain Rogers, Firefighter McCamley, Firefighter Little, Firefighter Battalion Chief (BC) Terry Larson, Firefighter Robert Golubski, and Firefighter and IAFF Local Chapter President Dan Cotrell testified on behalf of IAFF Local 521. Fire Chief Dextras, Assistant Fire Chief Frank Odermann, and City of Billings Human Resources Manager Karla Stanton testified on behalf of the City. Complainant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11,

16, 17, 18, 19, 20, 21, 22, 23, and 24 and Defendant's Exhibits CC, DD, H, J, M, O, P, Q, V, and Y were admitted into evidence. Admission of Complainant's Exhibit 13 was preliminarily denied while reserving to the parties the opportunity to brief the admissibility of that document, a finding related to an arbitration from an incident of discipline related to fire personnel in fire apparatus crossing railroad tracks while the crossing guards were down. After reviewing the document and considering the issues related to this case, Exhibit 13 is admitted into evidence for the reasons stated below.

After the conclusion of testimony, the parties filed post-hearing briefs, the last of which were received on January 24, 2011 at which time the matter was deemed at issue. Based on the evidence adduced at hearing and the closing briefs of the parties, the following findings of fact, conclusions of law, and recommended order are made.

II. ISSUES

1. Did the City commit an unfair labor practice in its method of interrogating Rogers?

2. Did the City keep "shadow" files on Rogers, McCamley, and Little and if it did, did such conduct amount to an unfair labor practice?

III. FINDINGS OF FACT

1. The City of Billings Fire Department (City) is a public employer within the meaning of Montana Code Annotated § 39-31-103(10).

2. IAFF Local 521 is a labor organization within the meaning of Montana Code Annotated § 39-31-103(6). IAFF Local 521 is the exclusive bargaining representative for all personnel in the City of Billings Fire Department with the exception of Chief Dextras and Assistant Chief Odermann, who are management.

3. The collective bargaining agreement that is material to this case was in force from July 1, 2008 to June 30, 2010. That agreement makes no specific provision regarding methods of implementing investigations into conduct of personnel.

4. The City maintains a written policy on corrective action. Exhibit 19. That policy is to be followed by management when an employee has performance, attendance, or behavior problems that interfere with work. This process includes informal counseling and a formal corrective action process.

5. Under the corrective action policy, supervisors can use informal counseling to explain to employees the performance expectations required of them when they are not meeting performance expectations. As the policy notes, "[t]here are different levels of discipline that may be imposed for violations including informal counseling, oral warning, written warning, suspension, demotion and termination." Exhibit 19, page 135.

6. The policy also provides that an employee facing suspension or possible discharge due to the seriousness of the infraction must be informed in writing of the charges against him and be given an opportunity to respond to charges against him. No such requirements exist in the policy for lesser forms of discipline such as demotion or written warnings.

7. Rule Number 7 of the Billings Fire Department Rules and Regulations (Exhibit 16) also provides:

> All complaints against firefighters shall be reduced to writing and the firefighter shall be given the opportunity to respond. If the complaint directly affects the work performance of the member, or has an adverse impact on the City or Department the complaint shall be investigated.

8. On November 19, 2008, a 911 call came into the Billings Fire Department Dispatch indicating that a man was having abdominal and chest pain and requesting emergency response from the fire department. Billings Fire Station 2 dispatched a fire engine to respond to the call. Captain Martin, Firefighter Okin, and Firefighter Lowe responded in a fire engine with Lowe driving the engine.

9. At the 27th Street railroad crossing, the railroad crossing warnings were activated and the barricades were down. There are two parallel train tracks at this location, one which accommodates trains traveling eastbound and one which accommodates trains traveling westbound. Traffic was backed up for two or three blocks as a train traveling eastbound went through the crossing.

10. Captain Martin, under the impression that they were responding to a life or death situation, instructed Firefighter Lowe to drive the engine around the waiting vehicles to be in position to go through the barricades as soon as the train cleared. As soon as the eastbound train cleared the crossing, Lowe drove the engine around the downed barricades while the warning signals were still activated and onto the train tracks. After getting onto the tracks, Lowe and Martin saw a westbound train

proceeding at them. Lowe was able to drive the engine off the track before a collision occurred.

11. The train engineer felt that the fire truck had created an unsafe situation by coming around the barricades. He complained to his supervisor who in turn filed a complaint with Chief Dextras. As a result of the complaint, Dextras assigned Assistant Fire Chief Odermann to investigate the complaint. Odermann gave Martin, Okin, and Lowe a set of written questions to answer regarding the incident. Martin, Okin, and Lowe answered the questions and the answers were then provided to Chief Dextras.

12. As a result of the investigation, Chief Dextras issued a written reprimand to Lowe and to Martin. Martin grieved his reprimand and, as a result of the ensuing arbitration, the reprimand was reversed. The arbitration panel determined that the just cause standard required by the CBA had not been met based upon the procedure of the investigation because of the "City's failure to conduct a fair and unbiased investigation." Exhibit 13, page 17.

13. Odermann scheduled a meeting with Lowe on November 6, 2008 to discuss his reprimand. Captain Rogers accompanied Firefighter Lowe into the meeting as Lowe's *Weingarten* representative. At the meeting, Rogers told Odermann that going around downed barriers was common practice and that even he (Rogers) did that. Rogers then explained that there was no policy against going around the barriers and the Billings Police Department did it as well. Odermann became upset, put a yellow writing pad and pen in front of Rogers, and told him to write the name of everyone in the fire department that was driving around downed train barricades. Odermann felt Rogers was lying.

14. After leaving the meeting, Rogers assembled the list that Odermann had requested.

15. On December 2, 2008, Chief Dextras drafted, but apparently did not present, a memo directed to Rogers which contained several interrogatories generally directed at Rogers' discussion with Odermann about firefighters and police officers going around downed barricades. Exhibit 24. The tone of the interrogatories is generally that Rogers lied about other firefighters driving around downed train barricades.

16. It is apparent that both Dextras and Odermann felt initially that Rogers was lying about the apparently department-wide practice of going around downed

barricades, hence their treatment of Rogers during the Lowe interview and in subsequent meetings. Their belief that Rogers was lying and their treatment of him in that regard, however, shows no more than that they felt he was lying. It does not show anti-union animus.

17. On July 9, 2009, the Billings Fire Department received a request for mutual aid at a structure fire in Laurel, Montana. The page came in at 3:30 a.m. Captain Rogers and Firefighters McCamley and Little responded in a Billings fire engine.

18. Upon arriving at the scene, Captain Rogers checked in with the incident commander (IC), Laurel Fire Chief Derrick Yeager, and received instructions to speak to the operations officer to their assignment. After sizing up (looking over the fire) the situation, Rogers contacted the operations officer and was instructed to go into a defensive firefighting posture on the southwest side of the structure. The structure was a large industrial warehouse that, except for the office area of the structure, was fully involved (completely on fire). The side to which Rogers, McCamley, and Little were assigned was wide open countryside where no other structures were threatened.

19. The crew charged a water hose from their engine and began pouring water on the structure. The crew was wearing turn-outs while fighting the fire. They were also wearing self contained breathing apparatus (SCBA). They later entered the building and began to finish knocking down the fire. After they exhausted the air bottles on their SCBAs, they exited the building but continued to pour water on the building.

20. Understandably, Rogers, McCamley, and Little got tired fighting the fire. Little was suffering from flu-like symptoms and this compounded his exhaustion. Because McCamley and Little were tired, Rogers ordered them to go into "rehab," i.e., to rest up for a period of time before coming back to fight the fire. While McCamley and Little were in rehab, Rogers continued to man the water hose by himself.

21. McCamley and Little moved about 25 to 50 feet away from where Rogers was manning the fire hose and went into rehab. Rogers could still see them and they went to the area where Rogers had told them to go. While in rehab, McCamley and Little took off their SCBAs and removed their turn-out jackets. McCamley sat down and Little laid down, placing his head on his SCBA.

22. Rogers did not advise IC Yeager that he had released McCamley and Little to rehab. Although Rogers had the ability to order his subordinates into rehab, his failure to notify either the IC or the operations officer that he had done so may not have comported with National Incident Management System (NIMS) requirements for firefighter accountability.[1]

23. While McCamley and Little were in rehab, a citizen who was observing the fire noticed them and concluded that they were sleeping. The citizen complained to IC Yeager that the firefighters were sleeping on the job. As a result of the complaint, Yeager drove over to the southwest side of the structure to find out what Rogers, McCamley, and Little were doing. When Yeager arrived, he saw Rogers manning the water hose by himself. He also saw McCamley and Little approximately 20 feet away with their turn-out coats off and resting their heads on their SCBA packs. It appeared to Yeager that McCamley and Little were sleeping.

24. The operations officer became panicked upon learning that two Billings firefighters might be sleeping on the fire. Yeager was concerned that the Billings crew had violated operating procedure in not advising the IC or the operations officer that they were going into rehab.

25. While Rogers' crew was on scene at the incident, Billings BC Terry Larson responded to the scene. While Larson was there, he did not see McCamley or Little sleeping.

26. Rogers and his crew were released from the fire at about 6:00 a.m. and returned to their station. Their total time on scene at the Laurel fire was approximately three hours.

27. On or about July 28, 2009, Yeager met with Dextras and Odermann to discuss mutual aid responses between the Laurel Fire Department and the Billings Fire Department. At the meeting, Yeager raised concerns about Rogers' conduct and his crew's sleeping during the Laurel fire.

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[1]The United States Department of Homeland Security implemented the National Incident Management System in 2004 in response to Homeland Security Presidential Directive #5 issued by President George W. Bush on February 28, 2003. Broadly speaking, the purpose was to create a nationwide uniform methodology of incident command among the various federal, state and local law enforcement, firefighting, and emergency response agencies across the United States. The rationale behind creating uniform incident command procedures was to enhance coordination between agencies responding to emergencies and in this way enhance emergency preparedness and response in the United States.

28. Yeager related to Dextras and Odermann that Rogers' conduct in permitting the other firefighters to go to rehab did not conform to Laurel Fire Department protocol. Under Laurel protocol, a firefighter's rehab had to be undertaken in the Laurel rehab/recovery truck (a truck outfitted with an enclosed area for rehab/recovery to permit firefighters to take rehab). Under Laurel's protocol, any firefighter assigned to an incident wishing to go into rehab had to go to the rehab/recovery unit.

29. As a result of Yeager's concerns, Odermann sent an e-mail to Yeager on July 28, 2009 following up on Yeager's complaint. The e-mail indicates that Odermann was "embarrassed by the conduct you [Yeager] described. Please accept this administration's apology for the conduct you witnessed from our firefighters. Purposefully taking a nap on the fire ground, during firefighting operations is unacceptable, unprofessional and irresponsible." In the e-mail, Odermann also asked Yeager to forward an e-mail describing in writing what he had observed during the Laurel incident.

30. Shortly after receiving Yeager's complaint, Odermann interviewed BC Larson about the incident. Odermann did not tape record Larson's interview because he felt that Larson had no firsthand knowledge of the situation.

31. On July 29, 2009, McCamley was ordered to meet with Odermann at Station #1. Odermann, McCamley, and Fire Marshall Spini (also a union member) were present during the meeting. The meeting began cordially and then turned to Odermann investigating the Laurel incident. Odermann did not initially tape record the interview. After asking McCamley all the questions about the incident, Odermann then started taping the interview and began asking some of the same questions over again. After going over about 1/4 of the questions that he had originally asked McCamley, Odermann finished the interview.

32. After the interview, McCamley told Little about the fact that he had been interviewed by Odermann about the Laurel incident. On Friday, August 7, 2009, Odermann called Little in to Station #1 to interview him about the Laurel incident. Frank Sanders, Little's fellow union member and firefighter, attended the meeting as Little's union representative. Prior to commencing the interview, Odermann told Little that the interview related to Rogers' crew's conduct at the Laurel fire.

33. Odermann immediately began taping Little during his interview. The interview began at 9:56 a.m. and was interrupted at 10:05 a.m. when Little was paged out on a structure fire. The interview resumed at 11:19 a.m. when Little

returned from the page and concluded at 11:38 a.m. The entire interview was tape recorded. The interview lasted just under 30 minutes.

34. On August 8, 2009, Yeager forwarded an e-mail to Odermann regarding the conduct of Rogers' crew allegedly sleeping during the Laurel incident. Exhibit M. In that e-mail, the assistant fire chief of Laurel stated that he felt it to be "improper, unsafe, and un-professional behavior for any fire crew to 'nap' during an active scene." *Id.*

35. Although Dextras and Odermann wanted to interview Rogers about the incident at an earlier date, their first reasonable opportunity to do so did not appear until August 22, 2009. This was due to the fact that Rogers was on an extended vacation.

36. Dextras sent a letter to Rogers on August 21, 2009. Exhibit 8. In that letter, Dextras stated unequivocally that "Pending investigation, disciplinary action may be taken."

37. The interview commenced with Rogers, union Chapter President Cotrell (acting as Rogers' representative), Dextras, Odermann, and Battalion Chief Voepel in attendance. Odermann prepared a list of 24 written questions (henceforth identified as interrogatories) which he requested that Rogers answer in writing.

38. At the outset of the interview, Cotrell objected to taping the interview. Exhibit 10, page 1. Cotrell also stated that he and Rogers "hadn't heard the charges yet so I am assuming it is the same complaint that has been lodged." In response, Odermann explained why he was taping the interview and essentially stated that the interview was about the Laurel incident. Odermann further explained that "we have complaints and statements from multiple people that we had people sleeping on the scene - that is our crews - on the scene of a structure fire . . . ." Odermann then presented Rogers with a list of written questions that he wanted Rogers to fill out.

39. Cotrell also objected to the process being utilized. He questioned whether Odermann had followed the "proper channel" (Exhibit 10, page 2) outlined in the Billings Fire Department Rules and Regulations Number 6 by first interviewing Rogers and that Odermann should have first talked to the battalion chief in charge of Rogers on the day of the Laurel incident. Cotrell also objected to the process on the basis of Billings Fire Department Rules and Regulations Number 7, stating that under the rule as he perceived it "all complaints against firefighters shall be reduced to writing and the firefighter shall be given an opportunity to respond."

40. It is obvious from the tape recording of Roger's interview that neither Rogers nor Cotrell was provided with any notice of the charges that Dextras and Odermann were investigating until after Rogers' interview had begun. In response to Cotrell's request for a copy of Yeager's complaint, Chief Dextras said that what he needed was a formal request from Rogers or Cotrell. Cotrell responded that they had made a formal request by virtue of Rule 7. Odermann then provided a copy of Yeager's complaint.

41. Cotrell also asked that he and Rogers be permitted to take the interview questions with them, answer them at a later time, and then return them to Odermann. Odermann denied that request, reasoning that "It's management's right to reasonably ask questions and interview their personnel based on complaints of their concerns and so we are going to answer these today." Exhibit 10, page 4. He then ordered Rogers to answer the questions immediately.

42. Cotrell then asked for privacy for him and Rogers to answer the interrogatories. Exhibit 10, page 5. Odermann denied that request as well, indicating that answering the interrogatories in the presence of Dextras, Odermann, and BC Voepel was "part of the interview." Exhibit 10, page 5. Odermann added that Cotrell was "certainly welcome to advise [Rogers]." *Id.*

43. By failing to disclose the complaint prior to the time of the interview and by later prohibiting Rogers and Cotrell from privately conferring about the questions, Odermann deprived Rogers of the right to confer in private with his union representative prior to the interview.

44. Many of the interrogatories were directly related to the Laurel incident. Others were designed to inquire into Rogers' approach to decision making in circumstances that were similar to the decisions he made at the Laurel incident. Odermann repeated some questions and sought information by asking for the same information by utilizing different questions. His questions were closer to an attorney's cross-examination questions at trial than to a supervisor's investigatory questions. The nature of the questions, which included forays not only into the facts of the Laurel incident but also Rogers' general thought processes regarding safety of crews and appropriateness in general of methodologies of implementing rehab, reasonably caused Rogers and Cotrell to believe that discipline might result from the interview.

45. Rogers proceeded to answer the questions with Cotrell present and in the presence of Odermann and Dextras.

46. After Rogers completed the interrogatories, Odermann followed up with numerous oral questions about the incident. At the end of the interview process, which had lasted over two hours, Rogers spoke very frankly to Odermann about his concerns about the Laurel complaint and how he felt he and his crew were not being treated appropriately by management in even being subjected to the investigation of the complaint. In response, Odermann stated that he appreciated Rogers' comments. Odermann then noted management's concern about thoroughly investigating what occurred at the Laurel incident due to (1) concerns about the crew splitting up which is a fundamental concern on a structure fire and (2) concerns about one man being on a hose line by himself with the two other crew members not in contact with the person manning the fire hose (i.e,. out of line of sight or sleeping or unable to monitor the status of the person manning the hose line) in the event the one man working the fire got into trouble.

47. After completing the interviews with McCamley, Little, and Rogers, Dextras determined that no punishment would be imposed on the firefighters. Dextras relayed this to Odermann who then met with McCamley, Little, Rogers, and BC Terry Larson on September 30, 2009. The meeting lasted less than two minutes. During the meeting, Odermann stated that no discipline would be imposed as a result of the investigation and that the issue was "dead."

48. At the September 30, 2009 meeting, Odermann mentioned that he maintained an investigative file on the incident. Odermann apparently keeps investigative files on all incidents that occur regarding the Billings Fire Department. The purpose of keeping these incident files is not to create additional leverage for disciplining union members nor has it been undertaken to discriminate against union members.

49. Odermann has not had a great deal of experience in investigating disciplinary matters. Indeed, as his testimony at hearing indicated, he has only spear-headed two complaint investigations, the downed crossing guard incident and the Laurel incident.

50. Odermann's methodology in conducting the Rogers interview was not undertaken with an intent to discriminate against Rogers because of his union affiliation nor was it undertaken to get back at the union. It was done to get to the bottom of the allegations behind the Laurel incident.

51. At the direction of BC Voepel, Rogers was moved from Station 7 to Station 5. Dextras and Odermann had no part in this decision to move Rogers to

Station 5. Furthermore, it was not Dextras or Odermann who determined the Hi-C schedule for which Rogers applied. It was the BCs who made those schedules. The BCs are themselves union members.

52. At one point, it came to the attention of management that a storage room at Station 7 was being utilized for the storage of personal fishing equipment. Management did not feel it was appropriate for firefighter personnel to be taking up storage space with personal items. Odermann dispatched a photographer to take pictures of the storage space in Station 7 in order to visit with fire department officers about the appropriate use of station storage space. By the time the photographer arrived at Station 7 to take pictures, the items had been removed. As a result, no photos were taken and nothing further came of the storage space issue.

53. The union's complaint in this case alleged that the employer "has implemented a process which is in violation of § 39-31-401(1), (3) and (5) MCA." The complaint initially cited the Rogers interrogation as the sole basis for filing the complaint. Later, the union filed an amendment to the complaint alleging that the keeping of shadow files also violated Montana Code Annotated §§ 39-31-401(1), (3) and (5).

54. At no time prior to the hearing in this matter did the union give any notice to the employer that it intended to utilize the interview of McCamley or Odermann's suggestion to Little that a video tape of the Laurel incident existed as a separate basis for finding an unfair labor practice. Nor did the union suggest anywhere that a violation of Montana Code Annotated § 39-31-401(4) had occurred. It was not until after the hearing and during post-hearing briefing that the union argued for the first time to amend the pleadings to include the interview of McCamley and Odermann's treatment of Little as a separate basis for finding liability and that Montana Code Annotated § 39-31-401(4) had been violated. The employer could not reasonably be expected to know that the McCamley and Little interviews would be utilized as a separate basis for finding liability or that the union contemplated a Montana Code Annotated § 39-31-401(4) charge as a basis for finding liability and could not have reasonably been expected to defend against these allegations at hearing. The employer would be unfairly prejudiced if the union was permitted to make these amendments after the hearing had been held and with no notice to the employer that these claims would serve as a basis to independently find liability against the employer.

IV. DISCUSSION[2]

The Arbitrator's Decision In Captain Martin's Case Is Relevant and Admissible In This Case.

As a preliminary matter, the employer has objected to the admission of the decision in the Martin arbitration arguing that it has no relevance to the present complaints. The rules of evidence prevailing in judicial courts are not binding on this tribunal in this proceeding (Mont. Code Ann. § 39-31-406(2)). The definition of relevance under the rules of evidence, however, is useful to resolving this evidentiary question. Under the rules, evidence is relevant if it has any tendency in logic to make a fact that is of consequence to the determination more probable or less probable than it would be without the evidence. Mont. R. Evid. Rule 401.

As explained below, the union must introduce evidence of union animus to prove a violation of Montana Code Annotated § 39-31-401(3) or Montana Code Annotated § 39-31-401(5). The arbitration helps to prove that fact because it tends to show a continued practice of complaint investigation aimed at union members which (though not found to be so here) could be construed as anti-union animus. Thus, the evidence is relevant and the employer's objection to the admission of the arbitration is overruled.

Discussion Of The Substantive Claims.

The union contends that the City has violated Montana Code Annotated § 39-31-401(1), Montana Code Annotated § 39-31-401(3), and Montana Code Annotated § 39-31-401(5) both in its failure to accord *Weingarten* rights to Rogers and in keeping an incident file, to which employees have no access, separate from personnel files maintained by the City's human resources department. The employer responds that it did not violate *Weingarten* rights, that no anti-union animus has been established, and that it may keep such an incident file.

A. *The Refusal To Provide The Complaint To Rogers Before Conducting The Interview And To Permit Rogers To Consult Privately With Cotrell Constitutes An Unfair Labor Practice Under Montana Code Annotated § 39-31-401(1).*

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals of using federal court and National Labor Relations Board (NLRB)

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

precedents 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.

By statute, public employees are protected in the exercise of concerted activities for the purpose of collective bargaining. Mont. Code Ann. § 39-31-201. A public employer commits an unfair labor practice by interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Montana Code Annotated § 39-31-201. Mont. Code Ann. § 39-31-401(1). A public employer also commits an unfair labor practice when it discriminates in regard to hire, tenure, or a term or condition of employment in order to encourage or discourage membership in a labor organization. Mont. Code Ann. § 39-31-401(3). Under Montana Code Annotated § 39-31-401(5), a public employer commits an unfair labor practice if it refuses to bargain in good faith.

Proof of discriminatory animus toward the union or union activity is not necessary in order to prove a violation of Montana Code Annotated § 39-31-401(1). Proof of discriminatory animus is necessary in order to prove a violation of Montana Code Annotated § 39-31-401(3). *Young v. City of Great Falls* (1982), 198 Mont. 349, 355, 646 P.2d 512, 515.

The United States Supreme Court has long recognized an employee's right to union representation at an employer's investigatory interview when the employee reasonably believes the interview might result in disciplinary action. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 43 L.Ed.2d 171, 95 S. Ct. 959 (1975). In explaining the rationale behind the rule, the *Weingarten* court stated:

> Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards that the Act provided "to redress the perceived imbalance of economic power between labor and management." [citation omitted]. Viewed in this light, the Board's recognition that §7 guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres

> is within the protective ambit of the section "read in the light of the mischief to be corrected and the end to be attained."

420 U.S. at 262. Representation under such circumstances is recognized as protected concerted activity, the violation of which constitutes a violation of Sec. 8(a)(1) (the federal counterpart of Montana Code Annotated § 39-31-401(1)). *Id. See also, The Developing Labor Law,* p. 225, Ch. 6, III, B.4 (5th Ed. 2006).

The question of whether an investigatory interview may lead to disciplinary action is an objective inquiry based upon a reasonable evaluation of all the circumstances, not the subjective reaction of the employee. *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 410 (9th Cir. 1978). The right of representation arises when a significant purpose of the interview is to obtain facts to support disciplinary action that is being considered. *Id.* In addition, the NLRB has long recognized that an adjunct of the *Weingarten* rule is the right of the employee to be made aware of the charges being brought against him before commencing the interview and the right to confer privately with his union representative before the interview. *Pacific Telephone & Telegraph Co. v. NLRB*, 711 F.2d 134, 137 (9th Cir. 1983); *Climax Molybdenum Company, Inc.*, 227 NLRB 1189; *United States Postal Service,* 288 NLRB 864; 86; ULP 5-85, *Billings Education Association, MEA v. Montana Board of Personnel Appeals and Trustees of Yellowstone County.*

In *Pacific Telephone & Telegraph Co.,* the 9th Circuit upheld the NLRB's finding that an employer violated Sec. 8(a)(1) when the employer's interviewers held interviews of two employees without first advising them or their union representative of the subject matter of the interviews and not permitting the employees and the representative to engage in a pre-interview conference with the representative. In *Postal Service*, the NLRB upheld an administrative law judge's finding that the employer in that case purposefully did not provide the union member with a set time for the interview but instead ordered her into an interview with only a few minutes notice. As a result, she had no opportunity to privately discuss the matter with her union representative prior to the interview. When the interview started, the union representative asked to confer privately with the employee before the interview began. The investigator denied that request. Based upon these facts, the administrative law judge found that the employer's conduct amounted to a violation of the union member's *Weingarten* right to prior consultation.

The case before this tribunal is for all practical purposes the same as *Pacific Telephone* and *Postal Service*. Although the employer provided Rogers with a set time for the interview and gave him a few days notice, management refused to provide

Rogers or his representative with notice of the charge, wholly eviscerating Rogers' and Cotrell's ability to confer privately before the interview. Rogers' representative, at the first reasonable opportunity after getting some information from Odermann about the nature of the complaint, asked that he and Rogers at least be permitted to confer in private about the questions. His request was denied. By doing this, Odermann denied Rogers his *Weingarten* right to private consultation and committed an unfair labor practice.

In arguing that no unfair labor practice occurred, the employer contends that Rogers had no reasonable belief that he might be subject to discipline because the employer's policy regarding imposition of discipline would not permit Rogers to be disciplined at the investigatory stage. The employer further points to the fact that no discipline was imposed. This argument fails for three reasons. First, the absence of the imposition of discipline does not preclude the finding of an unfair labor practice. *ULP 5-85, supra*. Second, the language of the corrective action policy on its face does not preclude the imposition of any discipline at all but only suspension or dismissal. Third, the employer's argument ignores the fact that Dextra's August 21, 2009 letter specifically noted that "pending the outcome of the investigation, disciplinary action may be taken." The letter by itself created an objectively reasonable basis to believe that discipline might be imposed as a result of the Rogers interview. The employer is incorrect, therefore, in arguing that there was no objective basis to believe that discipline might be imposed as a result of the interview.

B. *There Has Been No Violation Of Montana Code Annotated §§ 39-31-401(3), (4) or (5).*

As previously indicated, to prove a violation of Montana Code Annotated §§ 39-31-401(3) and (5), the union must prove that management's conduct was motivated by anti-union animus. The union must first show that the protected activity is a substantial or motivating factor in the determination to take action against the employee. If the union can do this, the burden then shifts to the employer to show that it would have carried out the decision even without the employee having engaged in the protected activity. *Chauffeurs, Teamsters and Helpers, Local 190 v. City of Billings*, (1982), 199 Mont. 302, 313-14, 648 P.2d 1169, 1175.

The union takes a "scatter gun" approach to demonstrating anti-union animus in this case. The union points to Rogers' treatment during the railroad crossing investigation and the railroad investigation itself, the failure to permit Rogers to undertake Hi-C duties, management's reaction to the storage of personal fishing gear at Station 7 and management's reaction to a written comment on the chalk board at Station 7, Rogers' treatment during the investigation of his crew's conduct at the

Laurel incident, and management's conduct in maintaining incident files on various incidents to prove animus. While the number of factors is probably sufficient to meet the union's *prima facie* burden, a closer look at the incidents does not persuade the hearing officer that anti-union animus is the motivating factor because all of the decisions would have been made even in the absence of the employee's engaging in protected conduct.

While the railroad crossing incident was found not to have been undertaken with the process necessary to protect the rights of employees targeted by the investigation, it was almost certainly not done with anti-union animus. It is clear that Chief Dextras was legitimately concerned about driving fire apparatus around downed crossing guards. Such conduct was not permissible in the previous jurisdiction which he had headed up. Moreover, on its face, the complaint from the train engineer about the proximity of the train to the fire apparatus at the time the apparatus crossed the track would at least give rise to the need to investigate the incident regardless of whether Montana state law permits emergency vehicles to go around downed crossing guards. Going around crossing guards in such proximity to an oncoming train that a collision might have ensued is not rendered any less risky to lives or property nor less deserving of discipline if found to be true simply because a statute permits emergency vehicles to go around downed crossing guards.

Odermann's treatment of Rogers simply shows that Odermann felt that Rogers was not forthcoming in his assessment of other fire and law enforcement personnel driving around downed crossing guards. While Odermann was obviously wrong in that assessment, his conduct does not show that his disbelief of Rogers' assessment was driven by anti-union animus.

The failure to assign Rogers Hi-C duties did not emanate from management. The purpose for desiring to take photos of the storage locker at Station 7 does not demonstrate anti-union animus. All personal fishing items were removed from the locker before photos needed to be taken and as result, no photos were taken. There is no reason to believe that the chief's desire to take photos of the locker room was for any reason other than to document the need to make room at Station 7 for department items.

The preponderant evidence fails to show that the methodology of Rogers' interview arose out of anti-union animus. While it is true that the methodology violated Montana Code Annotated § 39-31-401(1), the motivation undoubtedly came about because of Odermann's desire to get at the truth behind the Laurel incident commander's complaint, not out of a desire to strike back at the union

through interrogation of Rogers. It is clear from Chief Yeager's credible testimony that the Laurel Fire Department had a legitimate concern about Rogers' crew's conduct at the Laurel incident. Rogers' failure to notify either the incident commander or the operations officer that two out of three crew members were going into rehab could legitimately be construed as a failure to comport with chain of command procedures under NIMS. At the very least, an investigation was necessary. Utilizing written interrogatories toward Rogers was not necessarily out of the bounds of reasonableness even though such interrogatories were not used in interviewing McCamley or Little. Written interrogatories had previously been utilized in interviewing Captain Martin with regard to the train barricade incident. Taken in light of all of the circumstances of this case, the hearing officer finds that management's conduct was not undertaken to undermine the union.

Finally, the preponderant evidence fails to show that Odermann's keeping of an incident file was done to coerce, threaten, or intimidate union members. Odermann keeps the file in order to maintain documentation in the event of potential department liability, not to keep a hammer over union members' heads. The remark which he is alleged to have made at the September 30, 2009 meeting of "not having to open up that file again," if it was made at all, was not done to threaten or intimidate any union member in the exercise of union rights. The suggestion that Odermann's conduct violates Article 2, Section 9 of the Montana Constitution, even if true, does not in itself confer jurisdiction upon this tribunal to intercede to stop the practice. Only a demonstration that such conduct violated Title 39, chapter 31 rights could give this tribunal the power to order Odermann and the City to stop that conduct. While Odermann's decision to maintain incident files might be considered to be less than stellar managing, it does not show anti-union animus.

The union has continued to use its scatter gun approach in asserting three additional bases for finding violations here, none of which was asserted in its complaint and none of which the employer could have reasonably been expected to have been on notice about in light of the complaint. These bases were: (1) an allegation that the discrimination against Sandy Rogers violated Montana Code Annotated § 39-31-401(4), (2) that the methodology of interviewing McCamley demonstrates an independent basis for finding a *Weingarten* violation, and (3) an allegation that telling Little that there was a video of the Laurel incident was effectively threatening impermissible surveillance. *See generally*, the union's proposed finding of facts Paragraphs 127, 134 and 137. Montana Code Annotated § 39-31-407 permits amendments at anytime prior to the issuance of a decision when there is no unfair prejudice to a party. The prejudice to the employer in permitting these allegations to serve as an independent basis for liability is manifest since there

is nothing in the complaint to suggest such a basis for finding liability and there was nothing filed by the union during the pendency of this proceeding nor was there even any suggestion at the hearing that indicated the union intended to rely on this evidence as an independent basis for liability. Evidence of the conduct of McCamley's interview was of course relevant to the question of anti-union animus flowing from the Rogers interview and background for the Rogers interview and it was admitted for that limited purpose. To go beyond that limited purpose and to now find an independent basis for liability based upon this conduct would violate the employer's due process rights. Therefore, the hearing officer refuses to permit an amendment to the complaint to permit McCamley's interview to be the basis of a *Weingarten* violation.

Moreover, there is no factual basis to find that mentioning the video of the Laurel incident was an effort by Odermann to do anything other than keep McCamley honest in his interview since it appears from the independent testimony of Chief Yeager that a video of Rogers' crew was in fact made by someone at the Laurel scene and, for reasons beyond the control of the Billings Fire Department, the video was not provided to the department. Mentioning the video was not done in order to create the impression that Odermann was engaged in surveillance of union members.[3] It was not done to threaten, coerce, or intimidate a union member.

C. *The Remedy For The Violation.*

Upon determining by a preponderance of the evidence that an unfair labor practice has occurred, the Board of Personnel Appeals shall issue and serve an order requiring the entity named in the complaint to cease and desist from the unfair labor practice. Mont. Code Ann. § 39-31-406(4). The Board shall further require the offending entity to take such affirmative action, which may include restoration to the *status quo ante*, "as will effectuate the policies of the chapter." *Keeler Die Cast*, 327 NLRB 585, 590-91, (1999); *Los Angeles Daily News,* 315 NLRB 1236, 1241, (1994).

The union has requested that the remedy in this case (1) order the City to cease and desist from engaging in any complaint and investigatory process that constitutes an unfair labor practice, (2) require the City of Billings to affirmatively

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[3]Union counsel's assertion that Odermann "admitted that he even installed hidden cameras in his own home" (Unions' Proposed Findings of Fact and Conclusions Of Law, Page 43) is not a fact that the hearing officer recalls being admitted into evidence since the Union's foray into that evidence was objected to by the employer and the objection was sustained on relevance grounds.

establish a complaint and investigatory procedure that complies with both Montana Code Annotated § 39-31-101 and the Montana Constitution, (3) that any complaint and investigatory procedure adopted by the City be reduced to writing and submitted to the department for approval, (4) that notice of the violation be posted, (5) that the City be ordered to destroy all files of firefighters which are not part of the personnel files maintained by the Billings human resource department in the normal course of business, (6) that the City cease and desist from maintaining incident files which are presently maintained by the assistant fire chief or, in the alternative, that such files be maintained by the human resources department, and (7) that the City be ordered to pay the union's attorney's fees.

Turning first to the attorney's fees, this tribunal has no power to award such fees as the Board of Personnel Appeals has recognized. An administrative tribunal, unlike the Montana district courts, is a forum of limited jurisdiction, with only those powers specifically granted to it by the legislature. *Auto Parts of Bozeman v. Emp. Rel. Div. U.E.F.*, ¶ 38, 2001 MT 72, 305 Mont. 40, 23 P.3d 193. Montana administrative tribunals cannot award attorney's fees to successful parties in the absence of either contractual or specific statutory authorization. *Thornton v. Comm. of Labor & Industry* (1981), 190 Mont. 442, 621 P.2d 1062. Montana Code Annotated § 39-31-406(4) does not reference attorney's fees and thus is not specific statutory authority to award attorney's fees in an unfair labor practice case. In conformity with *Thornton*, BOPA has declined to award such fees. *See e.g.*, *Anaconda Pol. Prot. Assoc. v. Anaconda-Deer Lodge County*, ULP 2-2001; *McCarvel v. Teamsters Local 45*, ULP 24-77.

Without reference to *Anaconda Pol. Protective Association*,[4] the complainant has argued that attorney's fees can be awarded pursuant to Montana Code Annotated § 39-31-406(4) as a component of the power granted to "effectuate the policies of this chapter." Complainant's reply brief, page 18. There plainly is no such power either in statute or rule that would confer such power on this administrative tribunal and the complainant does not explain how this tribunal can overcome that lack of power. Montana Code Annotated § 25-10-711 does not empower this tribunal to grant such fees as this tribunal is an administrative forum, not a district court. Moreover, this tribunal does not find that the defendant's defense of this matter was frivolous or undertaken in bad faith. Accordingly, even if the power existed to award such fees in this case, this tribunal would not be inclined to do so.

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[4]Complainant's failure to mention this case is somewhat perplexing since complainant's counsel was also the attorney representing the union in *Anaconda Pol. Protective Assoc.* which was seeking attorney's fees.

Turning next to the issue of Chief Odermann maintaining incident files, his purpose in doing so was not to maintain leverage over union members nor was it undertaken in an effort to thwart union rights. Without some factually supported nexus to this case, and in the absence of some bargaining right or City policy that would prohibit the assistant chief from maintaining such a file, this tribunal has no authority to enter an order telling the City where and how it must maintain incident files.

With respect to the issues related to the complaint and interview process, the union's suggestions are well taken. It is appropriate to require the City to produce written procedures for both presentation of the complaint to an employee and the methodology for handling any interview that might reasonably result in the imposition of discipline. In order to ensure that no further *Weingarten* violations occur, the City must be required to develop written procedures both for providing the complaint and ensuring that union employees are provided with a reasonable opportunity to confer privately with the employee's union representative. Furthermore, the City must be enjoined from engaging in any further conduct that would violate *Weingarten* rights.[5]

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to Montana Code Annotated § 39-31-405.

2. The union has demonstrated by a preponderance of the evidence that management violated Montana Code Annotated § 39-31-401(1) by failing to permit Rogers and Cotrell to confer in private prior to Rogers' interview.

3. The union has failed to show that management's conduct was discriminatory toward the union. Therefore, the union has failed to prove a violation of Montana Code Annotated §§ 39-31-401(3) and (5).

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[5]As the parties were made aware at hearing, this hearing officer has had the privilege and honor of serving as a volunteer firefighter in Montana for several years. My perspective as a volunteer firefighter has helped me to recognize that in the firefighting profession, the ability of management and labor to work together impacts far more than economic concerns. It directly affects the ability of the organization to efficaciously implement incident command and, ultimately, the ability to protect both life and property. Because of this, the hearing officer implores the parties to keep in mind that there is perhaps no other profession where the need for harmony between management and labor is more important and to conform their future conduct toward each other in conformity with that concern.

4. The union's claims which were not raised in the complaint nor argued at anytime prior to the filing of the closing briefs in this matter (which include an argument that the employer violated Montana Code Annotated § 39-31-401(4)) are rejected because they were not timely argued. To permit these arguments to form the basis of finding a violation would result in unfair prejudice to the employer.

5. Imposition of an order requiring the City of Billings (1) to cease and desist from engaging in any complaint and investigatory process that constitutes an unfair labor practice, (2) require the City of Billings to affirmatively establish a complaint and investigatory procedure that complies with both Montana Code Annotated § 39-31-101 and the Montana Constitution, (3) reduce the complaint and investigatory procedure developed to writing and submit the proposed procedure to the Board or its designee for approval and (4) to post notice of its violation is required and appropriate in this case.

6. Attorney's fees are not recoverable as this administrative tribunal has no authority to grant such fees.

VI. RECOMMENDED ORDER

The City of Billings Fire Department is hereby ORDERED:

1. To cease and desist from engaging in the unfair labor practice in this case;

2. To within 90 days after the Board's final order in this matter establish a written complaint and investigation procedure that complies with Montana Code Annotated § 39-31-101 et. seq.;

3. To within 100 days after the Board's final order in this matter submit the written complaint and investigation process to the Board of Personnel Appeals or its designee for the Board's or designee's approval of the written complaint and investigation procedure; and

4. To within 30 days of the Board's final order in this matter post copies of the notice contained in Appendix A at conspicuous places, including all places where

notices to employees are customarily posted at the fire department for a period of 90 days and to take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

DATED this 22nd day of March, 2011.

BOARD OF PERSONNEL APPEALS

By:

GREGORY L. HANCHETT
Hearing Officer

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

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

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

Bonnie Sutherland
Assistant City Attorney
City of Billings
P.O. Box 1178
Billings, MT 59103

DATED this 22nd day of March, 2011.

Sandy Duncan

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.

An employee is entitled to have union representation and a reasonable opportunity to confer in private with a union representative prior to submitting to an interview which may reasonably result in discipline. Prior to any interview that may result in discipline to the employee, we will timely advise the employee of the nature of any charge or complaint so that the employee will have time to confer in private with his or her union representative prior to submitting to the interview. We will not violate an employee's *Weingarten* rights when conducting any interview with an employee that may reasonably result in discipline.

DATED this _____ day of _____, 2011.

City of Billings Fire Department

By:_____

_____

Office: _____