

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

10  
11 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE 4-2013

12  
13 OPERATING ENGINEERS LOCAL 400, )  
14 Complainant, )  
15 -vs- ) INVESTIGATIVE REPORT  
16 ) AND  
17 FLATHEAD COUNTY, FLATHEAD ) NOTICE OF INTENT TO DISMISS  
18 COUNTY SOLID WASTE DISTRICT, )  
19 Defendant. )  
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25 **I. Introduction**

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27 On July 31, 2012, the Operating Engineers Local 400, hereinafter Local 400 or Union,  
28 filed a complaint against the Flathead County Solid Waste District, hereinafter County,  
29 alleging a violation of Section 39-31-401(1), MCA. The charges were filed by Craig  
30 Davis, Local 400 Business Agent. The specifics of the complaint allege that a  
31 bargaining unit member was deprived of his right to representation in an investigatory  
32 interview. Tammy Skramovsky, Flathead County Human Resource Officer, responded  
33 on behalf of the County and denied the County committed an unfair labor practice.  
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36 John Andrew was assigned to investigate the complaint, has reviewed the submissions  
37 of the parties and has communicated with the parties in the course of investigating the  
38 charge.  
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40 **II. Findings and Discussion**

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42 The events leading to this matter occurred on July 19, 2012. On that day, Kurt Carda, a  
43 bargaining unit member was working his scheduled shift at the Creston container site.  
44 Mr. Carda was operating truck number 68. During the course of the shift Mr. Carda  
45 moved a waste disposal container with the truck forks. The container came into contact  
46 with Terrance Ryder, a member of the public using the container site facility.  
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48 At approximately 4:00 p.m., Mr. Ryder spoke by phone with Jim Chilton, the Solid  
49 Waste Operations Manager and Mr. Carda's supervisor. Mr. Ryder told Mr. Chilton of  
50 an incident at the Creston container site. According to Mr. Ryder, the truck driven by

1 Mr. Carda moved a container Mr. Ryder was reaching into. The movement caused Mr.  
2 Ryder to slip and apparently hit the container. According to Mr. Ryder, this resulted in  
3 pain in his chest area. Mr. Chilton told Mr. Ryder to come to the landfill office the  
4 following day to fill out an incident report. Mr. Ryder subsequently did that.  
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6 The call from Mr. Ryder came at the end of Mr. Carda's shift. Complicating things, Mr.  
7 Carda was scheduled to leave for vacation at the end of his shift that day. Mr. Carda  
8 was not scheduled to return to his next shift until July 25, 2012. Recognizing the  
9 possible serious implications of the incident, Mr. Chilton determined to meet with Mr.  
10 Carda to get his account of the incident as soon Mr. Carda returned to the Kalispell  
11 shop at the end of his shift, 5:00 p.m. that day.  
12

13 Mr. Chilton was a past shop steward. He recognized that it was common practice for a  
14 shop steward to be present for a meeting like the one he was scheduling. However, on  
15 this particular day, Wynne Zellmer, the shop steward who would normally attend such a  
16 meeting was on vacation. Doyle Sampson, the recognized alternate steward was on his  
17 scheduled day off. Apparently there was no existing practice as to what to do in this  
18 type of situation. Given the press of time, Mr. Chilton approached Craig Irish about  
19 being present for the meeting. Mr. Irish is a union and bargaining unit member, as well  
20 as a working foreman in the bargaining unit. Mr. Irish agreed and did attend the  
21 meeting along with Mr. Carda and Mr. Chilton.  
22

23 The interview with Mr. Carda occurred at 5:15 in a pickup truck at the landfill office.  
24 Prior to beginning the meeting, Mr. Carda did ask that a union representative be  
25 present. He did not ask for anyone specifically, nor did he object to the presence of Mr.  
26 Irish. Normally, in a circumstance such as this, the employer has choices. Grant the  
27 request and have a union representative present; dispense with, or discontinue the  
28 interview; offer the employee the choice of continuing the interview without a  
29 representative; or, have no interview at all. Here, with no objection to Mr. Irish's  
30 presence the interview proceeded. Again, Mr. Irish was not a designated union  
31 representative. Nonetheless, the interview occurred, seemingly with the consent of Mr.  
32 Carda.  
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34 During the interview Mr. Carda related his version of what occurred at the Creston site.  
35 Mr. Chilton told Mr. Carda that when he, Mr. Carda, returned from vacation another  
36 meeting would be held where the matter could be discussed further. Subsequent  
37 investigation into the incident occurred, additional meetings were held, and ultimately  
38 the County imposed discipline of two unpaid days of leave on Mr. Carda. No grievance  
39 was filed over the imposed discipline. Rather, the instant charge was filed with the  
40 Board.  
41

42 The United States Supreme Court has long recognized an employee's right to  
43 union representation at an employer's investigatory interview when the employee  
44 reasonably believes the interview might result in disciplinary action. *NLRB v. J.*  
45 *Weingarten, Inc.*, 420 U.S. 251, 43 L.Ed.2d 171, 95 S. Ct. 959 (1975).  
46

47 Here, there was the potential for a serious liability on the part of the County. Mr. Chilton  
48 recognized that. He also recognized that getting as much information as possible, and  
49 as quickly as possible, was in the best interest of his employer and probably in the best  
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1 interest of the employee as well. He did not know whether the call from Mr. Ryder was  
2 credible or not. He did know that there was a real possibility Mr. Ryder would be in the  
3 next day to file an incident report. He did know that Mr. Carda would soon be  
4 unavailable and that information obtained as soon as possible to any incident is, more  
5 often than not, the most reliable information. There was good cause for Mr. Chilton to  
6 move quickly. This was not a "normal" incident, but was, in fact, out of the ordinary in  
7 terms of timing of the incident.  
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10 With the above in mind, there is authority that having a union member present for an  
11 interview that could lead to discipline is not a valid substitute for having a union  
12 representative present. See for example, Williams Pipeline Co., 315 NLRB 1, 147,  
13 LRRM 1168 (1994). However, the instant case is distinguishable in that, here, there  
14 were two stewards who were not available. Additionally, the clock was ticking on how  
15 soon information, information that could be the most accurate, could be obtained about  
16 the incident. Moreover, although it is clear Mr. Carda requested that a union  
17 representative be present, he nonetheless seems to have agreed to participate in the  
18 interview with Mr. Irish attending. This is not a case, nor is it alleged to be the case  
19 where the employer deliberately avoided a designated representative in order to have a  
20 representative more to their liking. This was a case of a supervisor dealing with the  
21 cards dealt him and doing what he could with them. Beyond this, there was a certain  
22 obligation on the part of Mr. Carda to have made his wishes on representation clear to  
23 Mr. Chilton. Mr. Carda may well have not done so. Regardless, this initial interview  
24 was only the starting point of the investigatory process. The ultimate action did not take  
25 place until additional due process was insured, with full opportunity for Mr. Carda to  
26 have a clearly designated union representative assisting him. It was at this later point  
27 that management determined the totality of information gathered in the investigation  
28 was sufficient to warrant discipline.  
29

30 In short, had there been additional protocol in place that the County did not follow, had  
31 there not been the clear extenuating circumstances, had there been any objection on  
32 the part of Mr. Carda to Mr. Irish being present, had Mr. Carda asked for someone else  
33 to be present as a Union representative, or had he asked for a delay in the  
34 investigation, it would be appropriate to find substantial evidence for an unfair labor  
35 practice. As things stand, there was a clear awareness on the part of management of  
36 the right to representation at the interview that was held. There were also extenuating  
37 circumstances in this case necessitating a quick investigatory interview. Most  
38 importantly, a worker knowledgeable enough to recognize the possible need for  
39 representation did not avail himself of other possible courses of action. He did not  
40 request a different representative and he did not request the interview be postponed or  
41 delayed. Given all there is, substantial evidence is not found to warrant a finding of  
42 probable merit.  
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### 44 **III. Recommended Order**

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46 It is recommended that unfair labor practice charge 4-2013 be dismissed.  
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DATED this 29<sup>th</sup> day of August 2012.

BOARD OF PERSONNEL APPEALS

By: \_\_\_\_\_  
John Andrew  
Investigator

NOTICE

Pursuant to Section 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 the mailing of this Notice, no later than November 9, 2011. The appeal is to be filed with the Board at P.O. Box 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 2012 postage paid and addressed as follows:

CRAIG DAVIS  
IUOE  
347 2<sup>ND</sup> AVENUE WEST  
KALISPELL MT 59901

TAMMY SKRAMOVSKY  
FLATHEAD COUNTY HUMAN RESOURCE OFFICER  
800 SOUTH MAIN ROOM 219  
KALISPELL MT 59901