No. 13648

IN THE SUPREME COURT OF THE STATE OF MONTANA

1977

ULP-2-1975

---

THE CITY OF LIVINGSTON et al.,

Petitioners,

-vs-

MONTANA COUNCIL NO. 9, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, et al.,

Respondents.

---

Appeal from: District Court of the Sixth Judicial District, Honorable Jack D. Shanstrom, Judge presiding.

Counsel of Record:

For Petitioners:

Alexander, Buenning, Miller and Dgrin, Great Falls, Montana
Neil Dgrin argued, Great Falls, Montana

For Respondents:

Byron L. Robb argued, Livingston, Montana

---

Submitted: October 4, 1977

Decided: NOV 10 1977

Filed: NOV 10 1977

Thomas J. Kearney
Clerk

RECEIVED

NOV 17 1977

BOARD OF PERSONNEL APPEALS

Mr. Chief Justice Paul G. Hatfield delivered the Opinion of the Court.

Montana Council No. 9, American Federation of State, County and Municipal Employees brought an unfair labor practice charge against respondent City of Livingston. The Board of Personnel Appeals hearing examiner found that the city did commit an unfair labor practice. The Board of Personnel Appeals affirmed its hearing examiner. The city sought judicial review in the District Court under the Administrative Procedure Act. The District Court reversed the Board of Personnel Appeals and appellants appeal from that District Court ruling.

Respondent City of Livingston (the City) entered into a written collective bargaining agreement with its employees on January 2, 1973. Paragraph X of the agreement dealt with discharge or suspension and stated in pertinent part:

> "1. After an employee has attained seniority he will not be disciplined or discharged without first being given a hearing by the employer and the Local Committee."

Appellant Kenneth Dyer had attained seniority as a city employee. In September, 1973, he was reduced from full-time to half-time employee status pursuant to City Superintendent Bulletin No. 27. In October, 1973, Dyer requested a hearing to review his reduction to half-time status. The grievance committee held a hearing in October, 1973, with Dyer present, but no decision was reached. In February, 1974, Dyer asked for another review of his half-time status. A city councilman told Dyer it was unnecessary for Dyer to attend the hearing. Dyer did not attend the February 4, 1974 hearing.

At the February 4, 1974 hearing, evidence was introduced, but since Dyer was not present he could not contest it. Councilman Gilbert testified that "Had he been there, he probably would

have contested it vociferously". City Superintendent Tom Sharp issued "Bulletin No. 31", which was a written statement of the Committee's conclusions, and delivered a copy to Dyer. The bulletin announced Dyer was:

> " * * * placed on one-half month work basis for the second one-half of each month (the first one-half work was not affected by the previous bulletin), subject to the following conditions: * * *
>
> * * * *
>
> "5. Before being placed full time, permanent, with the Water Dept., he will become licensed by the Montana State Board of Certification for Water Operators, treatment and distribution.
>
> "6. Acceptance of this placement by Ken Dyer is construed as his acceptance of these conditions * * *.
>
> "ANY VIOLATION OF ANY CONDITION SET FORTH WILL BE CAUSE FOR IMMEDIATE TERMINATION OF CITY EMPLOYMENT."

Dyer had twice previously failed a written water operator's test. He failed a third time in April, 1974, and was discharged effective July 15, 1974. Subsequent to his dismissal, he took a written test, his fourth, and also an oral water operator's test, but he failed both. In December, 1974, almost six months after Dyer's losing his job, the union requested a grievance committee hearing on Dyer's discharge, pursuant to the collective bargaining agreement. The city refused to hold a hearing.

The issue presented on appeal is whether the city's failure to provide Dyer a dismissal hearing constituted an unfair labor practice.

By failing to grant Dyer a grievance hearing, the city breached its collective bargaining agreement, and thereby committed an unfair labor practice in violation of section 59-1605(1)(a), R.C.M. 1947. That section provides in part:

> "It is an unfair labor practice for a public employer to:
>
> "(a) interfere with, restrain, or coerce employees in the exercise of the rights

guaranteed in section 59-1603 of this act;"

Section 59-1603(1) provides:

"Public employees shall have * * * the right * * * to bargain collectively * * *."

The phrase "to bargain collectively" is defined in section 59-1605(3) as:

> " * * * the performance of the mutual obligation of the public employer * * * and the representatives of the exclusive representative to * * * negotiate in good faith with respect to * * * conditions of employment, or the negotiation of an agreement, or any question arising thereunder, * * *" (Emphasis added.)

Thus, by statute, the duty to bargain "in good faith" continues during the entire course of the contract.

The Supreme Court has held that "Collective bargaining is a continuing process. Among other things it involves * * * protection of employee rights already secured by contract." Conley v. Gibson, 355 U.S. 41, 2 L Ed 2d 80, 85, 78 S.Ct. 99 (1957). The processing of grievances in grievance hearings is collective bargaining. Timkin Roller Bearing Co. v. National Labor Rel. Bd., 161 F.2d 949, 954 (6th Cir. 1947). In Ostrofsky v. United Steelworkers of America, 171 F.Supp. 782, 790 (D. Md. 1959), aff'd., 273 F.2d 614 (4th Cir. 1960), cert. den., 363 U.S. 849, 4 L Ed 2d 1732, 80 S.Ct. 1628, (1960), the court stated: " * * * the employer had the same duty to bargain collectively over grievances as over the terms of the agreement."

Under Montana's Collective Bargaining Act for Public Employees a failure to hold a grievance hearing as provided in the contract is an unfair labor practice for failure to bargain in good faith.

Paragraph X., the discharge provision previously quoted, clearly requires that an employee with seniority, such as appellant Dyer, be given a "hearing" before he is discharged. In Grant v. Michaels, 96 Mont. 452, 461, 23 P.2d 266 (1933), this Court

defined "hearing" as being " * * * synonymous with 'trial' and includes the reception of evidence and arguments thereon * * *." In Bd. of Trustees, Etc. v. Super. of Pub. Inst., ____Mont. ____, 557 P.2d 1048, 1050 (1976), this Court, in declaring a dismissal of a teacher to be improper, stated:

> * * * * where dismissal must be for good cause and regulated by statute, that one is entitled, in common justice, to an opportunity to meet the charges before being dismissed. (Citing cases.)
>
> "The opportunity to meet the charges before being dismissed under them necessarily includes notice of the charges against him, for without such notice the opportunity would be meaningless. The notice need not meet the formal requirements of a criminal indictment, however, it must be sufficiently detailed to inform the teacher of the charges against him, so he is reasonably able to formulate a defense."

In this case, the grievance which Dyer brought related solely to his reduction to one-half time status. At the grievance committee meeting, which he did not attend, evidence was produced and conclusions made which related to his dismissal, which, ostensibly, was not even in issue. The record does not contain any evidence whatsoever that Dyer was ever given any notice of an intent to discharge him until he received his notice of termination on July 1, 1974.

Respondent City of Livingston presents three arguments for upholding the District Court's decision that a dismissal hearing was unnecessary. None of these arguments is convincing. It is not, as respondent contends, indisputable that appellant must be discharged due to his failure to pass the water operator's test. Bulletin 31, issued after the second "half-time status" meeting (at which appellant was not present) stated only that appellant's failure to pass the test would preclude him from being placed on full-time, permanent status. This was not one of the enumerated conditions of employment, the breach of which would cause appellant Dyer's immediate termination of employment with the city.

The city also argues that petitioner Kenneth Dyer had a long history of incompetence and discipline problems on the job, and that ample facts justifying Dyer's discharge were adduced by the grievance committee at the two previous meetings concerning Dyer's half-time status. Respondent states that there is nothing for the grievance committee to consider at a discharge hearing except the same data it received before. Because "The law neither does nor requires idle acts", section 49-124, R.C.M. 1947, respondent argues that it should not be required to hold a dismissal hearing. The provision in the collective bargaining agreement requiring a "hearing" prior to dismissal was obviously contemplated by the parties to insure that an employee would not be discharged without due process. Observance of due process standards in a hearing has never been declared by this Court to be an "idle act". "'While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process.'" Goldberg v. Kelly, 397 U.S. 254, 25 L Ed 2d 287, 295 , 90 S.Ct. 1011 (1970), quoting Kelly v. Wyman, 294 F.Supp. 893, 901 (1968).

The city's final argument is that "the traditional judicial definition of a hearing cannot and should not be imposed on a group of laymen acting as such a [grievance] committee." This is undoubtedly true. Due process does not always mandate a judicial trial with lawyers and court reporters, but merely requires a hearing appropriate to the nature of the case and the interests of the parties involved. Mont. St. University v. Ransier, 167 Mont. 149, 536 P.2d 187. "Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 33 L Ed 2d 484, 494, 92 S.Ct. 2593 (1972). At a minimum, however, a grievance committee must give to an employee with seniority notice of the dismissal hearing and an opportunity to be heard, so that he may defend against the charges. See Goss v. Lopez, 419 U.S. 565, 42 L Ed 2d 725, 737, 95 S.Ct. 729 (1975);

In this case, the two committee meetings were officially conducted solely to discuss the matter of Dyer's reduction to half-time status. Dyer received no notice and could therefore prepare no defense to the matter of his discharge. The discharge bulletin was issued from the second meeting, a committee meeting at which Dyer was not even present to present his side of the case. For the term "hearing" in the collective bargaining agreement to have any meaning, this employee must at least have notice of the alleged work violations, an opportunity to appear and present evidence in his own behalf, a right to cross-examine adverse witnesses, and a written report of the conclusions and rationale of the grievance committee. These procedures are mandated by the collective bargaining agreement which requires a hearing, as well as by "common justice". Board of Trustees v. Superintendent of Public Instruction, supra.

The decision of the District Court is reversed and the order of the Board of Personnel Appeals, finding that the city committed an unfair labor practice by not granting appellant Dyer a dismissal hearing, is affirmed.

Chief Justice

We concur:

Justices

AUG 3 0 1976

BOARD OF PERSONNEL APPEALS

IN THE DISTRICT COURT

OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF MONTANA

IN AND FOR THE COUNTY OF PARK

* * * * *

| | |
|---|---|
| THE CITY OF LIVINGSTON, a municipal corporation, and EDMOND CARRELL JR., Petitioners, vs. MONTANA COUNCIL NO. 9, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, THE BOARD OF PERSONNEL APPEALS OF THE STATE OF MONTANA, and KENNETH S. DYER, Respondents. | No. 14415 |

ULP-2-1975

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND
FINAL ORDER

WHEREAS the City of Livingston and Edmond Carrell Jr., petitioners, filed a verified petition herein on or about September 11, 1975, through their counsel, Byron L. Robb, of Livingston, Montana, requesting this court to review the transcript and proceedings of a matter theretofore presented to and heard by the Board of Personnel Appeals of the State of Montana concerning the termination of employment by said City of one Kenneth S. Dyer;

And the respondent Board of Personnel Appeals of the State of Montana having appeared herein by and through its counsel, Neil E. Ugrin, of Alexander, Buenning, Miller and Ugrin, of Great Falls, Montana, and counsel for petitioners and said respondent Board having presented briefs and oral argument on said matter, and the court having reviewed the transcript of said proceeding and accompanying pleadings, exhibits, findings, exceptions, proposed findings, con-

clusions and final order of said Board;

And the court being fully advised and informed herein;

NOW THEREFORE, the court hereby finds and determines as follows:

1. That the preponderance of testimony and evidence presented at the hearing before said Board did not establish a failure by petitioners to bargain collectively nor the commission of an unfair labor practice, but to the contrary showed by clear and convincing evidence that petitioners had substantially complied with the labor agreement then existing between the parties.

2. That the written exceptions filed by petitioners to the findings of fact and conclusions of law proposed by the hearings examiner and ultimately adopted by the Board of Personnel Appeals were well taken, and that the proposed findings and conclusions presented to the Board by Petitioners, which are attached hereto marked "Court's Exhibit A", should have been and now are adopted as the proper findings and conclusions to be entered in adjudicating said matter.

3. That the Board of Personnel Appeals of the State of Montana erred in its order entered August 19, 1975, which confirmed the findings, conclusions and order proposed by its hearing examiner, and that such administrative findings, conclusions and decision should be reversed because they prejudice substantial rights of the petitioners, The City of Livingston and Edmond Carrell Jr., as follows:

a. That refusal to grant the motion of petitioners to dismiss the complaint of the American Federation of State, County and Municipal Employees on the grounds of failure of proof, made after presentation of said complainant's case, was in violation of the statutory provisions contained in

section 59-1607, Revised Codes of Montana, 1947, as amended, and of the rules of evidence, requiring complainant to establish its case by a preponderance of the evidence.

b. That the said findings, conclusions and order of the examiner of said Board of Personnel Appeals are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record of said proceeding.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the administrative findings, conclusions and order of said Board of Personnel Appeals and its examiner are reversed, and that the said complaint dated January 14, 1975, of the American Federation of State, County and Municipal Employees against the City of Livingston, Montana, and Edmond Carrell Jr., is hereby dismissed.

DATED this 24th day of August, 1976.

/s/ Jack D. Shanstrom
District Judge

BEFORE THE BOARD OF PERSONNEL APPEALS

OF THE STATE OF MONTANA

| | | |
|---|---|---|
| AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, | ) | ULP-2-1975 |
| Complainant, | ) | |
| -vs.- | ) | ORDER |
| CITY OF LIVINGSTON and EDMOND CARRELL JR., | ) | |
| Respondents. | ) | |

* * * * * * * * * * * * * * * * * * * * * * * * * *

In the above entitled matter, the Board of Personnel Appeals, in a meeting duly assembled and quorum being present, considered the following matters submitted to the full Board by the respondent, City of Livingston and Edmond Carrell Jr.:

1. Motion to Disqualify Warren W. Harper, a member of the Board
2. Motion for Transcript of Proceedings held in the above entitled matter on March 7, 1975, before the Hearing Examiner.
3. Respondent's exceptions to the findings and conclusions of the Examiner and Respondent's proposed findings and conclusions in which after review of all documents and motions,

IT IS O R D E R E D:

1. At the meeting held on August 7, 1975, Warren W. Harper was absent and therefore took no part in any of the proceedings considered by the Board. Decision having been reached by the quorum of the Board without the presence of Warren Harper the motion to disqualify Mr. Harper is deemed moot.

2. It appearing that a transcript of all proceedings has heretofore been forwarded to respondents the motion for production of the same is likewise deemed moot.

3. The Board having carefully considered the exceptions of the City of Livingston and Edward Carrell Jr., as well as the Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order, hereby adopts the decision of the Hearing Examiner as the Findings of Fact, Conclusions of Law and Final Order of the Board and therefore rejects respondent's proposed findings.

Dated this 14th day of August, 1975.

BOARD OF PERSONNEL APPEALS

BY [signature]
Patrick F. Hooks, Chairman

BEFORE THE BOARD OF PERSONNEL APPEALS

ULP-2-1975

| | |
|---|---|
| AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, Complainant, v. CITY OF LIVINGSTON AND EDMOND CAMPBELL, JR., MAYOR, Respondent. | FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AS RECOMMENDED TO THE BOARD OF PERSONNEL APPEALS |

The American Federation of State, County, and Municipal Employees (hereafter Union or AFSCME) filed an unfair labor practice complaint with the Board of Personnel Appeals on January 15, 1975.[1] The Union contends that the City of Livingston (hereafter City) committed an unfair labor practice by violating section 5(a)(1) of the Montana Public Employees Collective Bargaining Act [section 59-1605(1)(a), R.C.M. 1947].[2]

A hearing was held before me, as the duly appointed hearing examiner of the Board of Personnel Appeals, on March 7, 1975 in Livingston, Montana. At the hearing, Byron L. Robb, attorney at law, Livingston, Montana, appeared on behalf of the City; Stanley W. Gerke, AFSCME field representative, Helena, Montana, appeared on behalf of the Union.

Upon the entire record in this matter, and upon substantial, reliable evidence, I make the following

FINDINGS OF FACT

1. AFSCME contends that the City violated section 5, part 1(a) of the Public Employees Collective Bargaining Act by discharging Kenneth S. Dyer, a city employee who had attained seniority, without granting him a grievance hearing, which, they also contend, was required by Article X of a collective bargaining contract entered into between City maintenance

---

[1] The unfair labor practice complaint filed with the Board was signed by Stanley W. Gerke, Field Representative, AFSCME, AFL-CIO on behalf of G.L. Hammond on stationary with AFSCME's letterhead.

[2] AFSCME actually cited "section 5, part (1)(2) of the Collective Bargaining Act for Public Employees" and then quoted language of that Act. It is apparent from the quotation that they were referring to section 5, part 1(a) of the Act, that is, section 59-1605(1)(a), R.C.M. 1947.

employees and the City. Such action, AFSCME claims, interferes with the right of city employees to bargain collectively.

2. A collective bargaining contract, entered into between City maintenance employees and the City, was in effect through all of 1973 and 1974 and was in effect at the time of the unfair labor practice hearing in the above-captioned matter. Pertinent portions of that contract provide as follows:

> X. DISCHARGE OR SUSPENSION
>
> 1. After an employee has attained seniority he will not be disciplined or discharged without first being given a hearing by the employer and the Local Committee.
>
> 2. Insubordination, immoral, quarrelsome, vicious, inability, dishonesty, drunkenness and/or recklessness resulting in accident or endangering life or property of others is sufficient ground for dismissal.
>
> 3. In case of a dispute that cannot be resolved concerning interpretation of the agreement and/or discharge or suspension the dispute will be submitted to a grievance committee consisting of two (2) members of the Employer and two (2) members of the Local Committee.
>
> 4. In event the committee is unable to arrive at an agreement it shall select a fifth (5) member, agreeable to both parties, and a binding agreement by majority rule will prevail.
>
> 5. If it is found that the employee has been unjustly suspended or discharged such employee shall be re-instated with seniority rights and compensated for wages lost.
>
> 6. All disputes will be submitted by the employees local in behalf of the employee, in writing to the employer.

3. Kenneth Dyer, a maintenance employee of the City with seniority and a member of AFSCME Local 2711, was discharged by the City effective July 15, 1974 because he had failed to pass an examination for a water treatment and distribution license. Jack Bates, the secretary of Local 2711, submitted a grievance concerning the discharge of Dyer and requested that a grievance hearing, as set out in Article X of the collective bargaining contract, be provided Dyer. The City refused to provide the hearing on grounds that the City had met all terms of the collective bargaining contract, and that various hearings had been provided Dyer.

4. In September of 1973, Tom Sharpe, the city superintendent, limited Dyer, then a meter reader-laborer, to working strictly as a meter reader and reduced his work load from full-months to half-months. Sharpe's action was effective October 1, 1973. As a result of Sharpe's action, the Union delegates to the grievance committee[3] requested a hearing for Dyer. A hearing was held in October of 1973 but there is no evidence that any findings were issued by the committee. After the hearing, Dyer remained on half-month work status. Therefore, Dyer requested another hearing and a second hearing, which according to committee members was a continuation of the first hearing, was held on February 4, 1974. The grievance committee did not issue written findings.[4] However, testimony of three members of the grievance committee show that the committee agreed that Dyer should be reinstated to a full-time position and should be required to pass the examination for the water treatment and distribution license. Their testimony also established that if Dyer did not pass the examination, he was to be discharged from the City's employ.

5. The City contends that the grievance hearings they provided Dyer in October of 1973 and February of 1974 met the requirement of Article X of the collective bargaining contract. However, the record conclusively shows that the two grievance hearings provided Dyer by the City related to his being limited to working half-months, not to his being discharged. Richard Howard, a Union delegate to the grievance committee testified that he was not aware of any grievance hearing that dealt with Dyer's July 15, 1974 discharge, and that the grievance hearings held in October and February did not relate to Dyer's discharge but rather to Dyer's half-month employment. Steven Shulins, a Union delegate to the grievance committee, and William Gilbert, a City delegate to the grievance committee and the chairman of the committee, also testified that the grievance hearings held in October and February

---

[3] Although the collective bargaining contract provides for a four member grievance committee, this committee, apparently by mutual assent, consisted of six members—three representing the City and three representing the local Union.

[4] This conclusion is explored further in paragraph number six below.

related to Dyer being placed on half-month employment.

6. After the February 4th hearing, Sharpe issued a bulletin which was delivered to Dyer. In this bulletin, Sharpe stated that, as reported to him, Dyer was reinstated to full-month employment subject to six conditions. The fifth of these conditions read as follows:

> 5. Before being placed full time, permanent with the Water Depart., he will become licensed by the Montana State Board of Certification for Water Operators, treatment and distribution.

The bulletin provided further in capitalized print that

> ANY VIOLATION OF ANY CONDITION SET FORTH WILL BE CAUSE FOR IMMEDIATE TERMINATION OF CITY EMPLOYMENT.

Sharpe had attended part of the February 4th hearing, had met with the grievance committee after the hearing, and had examined the minutes of the hearing before he wrote the bulletin. And although the City alleges that this bulletin constitutes the findings of the grievance committee, there is no evidence to show that any member of the committee authorized or instructed Sharpe to issue the bulletin. The grievance chairman, however, testified that the bulletin did reflect the committee's findings.

7. Dyer was apprised of his discharge by another bulletin issued by Sharpe. This bulletin, as well as the testimony of Sharpe and other witnesses, shows that Dyer was terminated because he had failed to meet the requirements of the above-mentioned fifth condition.

DISCUSSION

It is undisputed that Dyer was discharged effective July 15, 1974 by the City; that a request on behalf of Dyer for a grievance hearing relating to Dyer's discharge was submitted to the City; and that the City refused to grant that request. The City contends that they had no obligation to provide Dyer with a grievance hearing because they had already provided him with two hearings which satisfied the requirements of the collective bargaining contract. I do not agree. The record clearly establishes that the two grievance hearings provided Dyer by the City related to the placement of Dyer on half-month employment—<u>not to his discharge</u>. Indeed neither of the hearings

---

could have related to Dyer's discharge. The hearings were held in October of 1973 and February 4, 1974. Dyer was not even discharged by the City until July 15, 1975. Plainly, the City should have provided Dyer with a grievance hearing and addressed his discharge.

The issue to be resolved here then is whether or not the City's refusal to grant Dyer a grievance hearing is an unfair labor practice.

Section 59-1605(1)(a), R.C.M. 1947 provides as follows:

> (1) It is an unfair labor practice for a public employer to:
>
> (a) interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 3 of this act;

And pertinent portions of section 3 [section 59-1603, R.C.M. 1947] provide that

> Public employees shall have and shall be protected in the exercise of, the right of self-organization, to form, join or assist any labor organization, <u>to bargain collectively</u> through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion. (Emphasis supplied.)

"To bargain collectively" is defined in section 59-1605(3) as follows:

> For the purpose of this act, to bargain collectively is the performance of the mutual obligation of the public employer or his designated representatives, and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and <u>other conditions of employment</u>, or the negotiation of an agreement, or <u>any question arising thereunder</u>, and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

The City contends that "It is difficult, if not impossible, to find any violation on the respondents' [City] part in the context of the above definition [section 59-1605(3)]. . ."; that it would require a straining or stretching of the facts to conclude that such a violation occurred. The City misapprehends the nature of collective bargaining.

The duty to collectively bargain does not end with the negotiation of a contract. Sometimes bargaining can and must occur during the term of an existing collective bargaining contract. The United States Supreme Court

has held that "Collective bargaining is a continuing process" involving among other things day-to-day adjustment in the contract and working rules, resolution of problems not covered by existing agreements, and protection of rights already secured by contract.[5] It is a well established principle of labor law that bargaining during the term of a collective bargaining contract is carried on within the "framework" of the contract, i.e. the grievance and arbitration machinery provided in the collective bargaining contract.[6]

Here we have a grievance that related to the continued employment or unemployment of a former City employee. Therefore, this grievance will necessarily focus on Article X, paragraph 2, a paragraph which provides the grounds for discharge. The City's refusal to grant Dyer a grievance hearing is then, in effect, a refusal by the City to bargain over conditions of employment—which Article X, paragraph 2 certainly is—and questions arising under the present collective bargaining contract.[7]

Therefore, I can only conclude that the City has, by its refusal to grant Dyer a grievance hearing, refused to bargain collectively with AFSCME and has thereby interfered with their right to bargain collectively.

CONCLUSION OF LAW

By refusing, and continuing to refuse to bargain collectively with the Union through the use of the contractual grievance procedure, the City of Livingston did engage and is engaging in an unfair labor practice within the meaning of section 59-1605(1)(a), R.C.M. 1947.

RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to section 59-1607,

---

[5] Conley v. Gibson, 355 US 332, 4 LRRM 530 (1939). Since the Public Employee's Collective Bargaining Act is closely modeled after the federal Labor Management Relations Act, as amended, the Board of Personnel Appeals has looked to federal precedents for guidance, as I have here.

[6] NLRB v. Highland Park Mfg. Co., 110 F2d 21, 50 LRRM 2535 (1940); Timken Roller Bearing Co. v. NLRB, 161 F2d 949, 20 LRRM 2204 (1947).

[7] I do not mean to imply by this paragraph that the grievance will focus entirely on Article X, paragraph 2. For example, there is a substantial question as to what the precise findings of the grievance committee were after the February 4th hearing, as paragraph six of the findings of fact, above, shows.

R.C.M. 1947, it is hereby ordered that the City of Livingston, its officers, agents, and representatives shall:

1. Cease and desist from refusing to bargain collectively with the American Federation of State, County, and Municipal Employees through the contract grievance procedure.

2. Take the following affirmative action which will effectuate the provisions of the Public Employees Collective Bargaining Act:

(a) Convene the grievance committee, as set out in Article X, paragraph B of the collective bargaining contract between the City of Livingston and the maintenance employees of Livingston, within ten days of the date of this order, in order to resolve the grievance which relates to Kenneth Dyer's discharge from the City of Livingston's employ.

(b) Notify the Board of Personnel Appeals, in writing, as to the grievance committee's findings with regard to the grievance in question.

Dated this 13th day of June, 1975.

Peter G. Maltese
Hearing Examiner