STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 10-98:

MONTANA DISTRICT COUNCIL OF LABORERS LOCAL NO. 1334, Complainant, vs. FLATHEAD COUNTY, FLATHEAD COUNTY ANIMAL CONTROL, FLATHEAD BOARD OF COUNTY COMMISSIONERS, Defendant.	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**

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I. INTRODUCTION

On September 24, 1997, the Montana District Council of Laborers Local No. 1334 filed an unfair labor practice charge against the Defendant alleging violation of Joe Fedorchak's (Fedorchak) Weingarten rights and for discharging him because of antiunion animus in violation of § 39-31-401, MCA. Hearing Officer Gordon D. Bruce conducted an in-person hearing on March 30 and 31, 1999, in Kalispell, Montana. Fedorchak was represented by John L. Pratt, Attorney at Law. The Defendant was represented Daniel D. Johns, Attorney at Law.

Animal Control Department employees Rachel Johnson, Cory Cowley, Carl Talsma, and Richard Stockdale, Peter Leander, Attorney at Law, Earl Bennett,

Administrative Assistant to Flathead County Commissioners, Susan Wortman, representative for Montana District Council of Laborers Local No. 1334, Bonnie Olson, Office Manager for the County Attorney's Office, Frank Foot, County employee, Deputy County Attorney Jonathan Smith, and Joe Fedorchek gave sworn testimony.

The parties stipulated that the hearing record would be complete with the filing of post-hearing findings and briefs, and the Hearing Officer received final submissions on May 13, 1999.

II. ISSUES

1. Whether antiunion animus contributed to the Defendant's decision to discharge Fedorchak.

2. Whether Defendant violated Fedorchak's Weingarten rights.

III. FINDINGS OF FACT

1. The Montana District Council of Laborers Local Union No. 1334 (Laborers) is the certified bargaining representative of employees of Flathead County Animal Control Department (Animal Control).

2. Flathead County is a political subdivision of the State of Montana. It operates an Animal Control that is responsible for the licensing, policing, and sheltering of domestic animals.

3. Fedorchak was hired by Animal Control in September 1994 as a Warden. He was discharged on September 2, 1997. At all times during Fedorchak's employment, Richard Stockdale (Stockdale) was his supervisor and acted as Director of Animal Control. Stockdale was hired in September 1992.

4. Animal Control also employs two full-time animal control wardens, a receptionist/dispatcher, and a part-time animal control warden/kennel attendant.

5. The working relationship between Stockdale and Fedorchak was initially productive, although Fedorchak was often assigned the most difficult and "high profile" type complaints throughout his employment. In the fall of 1995, Fedorchak lodged complaints with administrative agencies about the handling of drugs and workplace safety at Animal Control. These matters were resolved with minor adjustments and no formal citations were issued. Thereafter, however, Fedorchak's previous good relationship with Stockdale deteriorated to the point where their personal and work relationship was even stormy at times.

6. Stockdale's issues concerning Fedorchak's job performance were first reduced to a written reprimand on April 19, 1996, as the result of Fedorchak "borrowing" Stockdale's key to a locked cabinet, having a duplicate made and using the duplicate to access the cabinet, which contained restricted drugs and employee personnel files. Nothing in the record shows Fedorchak appealed the written reprimand.

7. During the latter part of 1996 and in January 1997, the Animal Control employees were actively discussing whether they needed to unionize because of problems they perceived as being the fault of management. Fedorchak was actively involved in organizational meetings promoting unionization among his co-workers. During one of those discussions about formal organization, Stockdale was present and commented that they should weigh whether the benefits justified the individual financial commitment. Talsma recalled that Stockdale didn't say much, "only about fees, not much said." Cowley recalled in his testimony that once, after the notice of organization was posted, Stockdale commented that they should be aware of the union dues. Cowley was emphatic when he said, "that's it," that was the extent of Stockdale's comment.

8. Talsma was the employee member representative for the employees at Animal Control negotiating the initial collective bargaining agreement between Defendant and the Laborers, which had been certified in April 1997 as the exclusive representative of the employees at Animal Control.

9. On April 19, 1997, about the time union certification was in progress, Stockdale again formally disciplined Fedorchak for poor job performance relating to a complaint regarding a stray, wolf hybrid dog and overstaying his lunch period. Fedorchak, who was represented by Attorney Peter Leander (Leander), filed a grievance in this matter. The County Commissioners affirmed the reprimand.

10. Flathead County Attorney Tom Esch wrote a letter on July 24, 1997, to Stockdale criticizing Fedorchak's poor investigations on two "high profile" cases his department was prosecuting. Esch stated that due to Fedorchak's poor job performance, conviction in one case was impossible and seriously jeopardized in the other. Esch was prompted to write the letter because of information he received from Ed Corrigan, Deputy County Attorney, and Bonnie Olson, Office Manager. Stockdale again formally reprimanded Fedorchak as a result of the County Attorney's action by his letter of August 8, 1997. Nothing in the record shows this action was appealed by Fedorchak.

11. Two more work-related incidents occurred in August 1997 which eventually resulted in Fedorchak's termination. The first was related to a complaint Rachel Johnson (Johnson), Dispatcher, received by telephone on August 5, 1997, regarding two dogs attacking each other. The complaint was not dispatched directly to a warden, but Fedorchak was told of it by Warden Richard Cowley approximately mid-afternoon. Rather than responding to the call or telephoning Animal Control for specifics, Fedorchak told Cowley "let Richard [Stockdale] do it."

12. The final incident began on Friday, August 15, 1997, when Stockdale verbally instructed Fedorchak to take his pickup to the County's shop on Tuesday, August 19, for maintenance. Fedorchak was scheduled off work the following day, therefore, the work could be done without interrupting his work duties. For whatever

reasons, Fedorchak thought Stockdale told him to take the vehicle in for service on August 18, which he did, and then discussed the servicing matter with Talsma, acting supervisor. They agreed to spend the work day patrolling together, although there was a policy in force since September 1995 which forbid wardens from riding together "for routine complaints or animal pick-ups." Fedorchak was aware of this departmental policy.

13. Stockdale had discussed his concerns about Fedorchak with Jonathan Smith, Deputy County Attorney (Smith) , and ultimately met with Smith following the August 18 incident to seek legal advice and to discuss his frustrations with Fedorchak's continuing unacceptable job performance and behavior. Smith told Stockdale the decision to retain or fire Fedorchak was his to make, but considering the overall record, Smith concurred with Stockdale that Fedorchak should be terminated from his warden position. Smith prepared a Notice of Intent to Discharge Fedorchak from his employment due to his poor job performance and failure to follow the direct orders of his supervisor. The notice was given to Fedorchak on Friday, August 29, 1997, and a meeting was scheduled in Stockdale's office at 10:00 a.m., Tuesday, September 2, 1997, following the Labor Day weekend. Fedorchak was informed he could give his response to the notice at that meeting.

14. The notice of intent to discharge contained three reasons for termination: (1) Insubordination for failing to obey an order from Stockdale; (2) A

violation of departmental policy; and (3) Inefficiency in the performance of his duties and dishonesty in dealing with Stockdale about performance of those duties. These were the charges against Fedorchak for the incidents occurring on August 5 and 15, 1997.

15. Both Flathead County policy and the notice of intent to discharge itself give Joe Fedorchak 48 hours in which to prepare his side of the case. Fedorchak attempted unsuccessfully to contact the business representative of the Laborers, Susan Wortman, who worked out of the union's Missoula office. He left messages at her office prior to the hearing day and also tried her cell telephone number, which was not turned on. Her unavailability was due to personal reasons.

16. On September 2, 1997, Attorney Leander appeared with Joe Fedorchak at the appointed time and place for the hearing. Warden Talsma was also present at the hearing, but was not acting as a representative for the Laborers, or for Fedorchak. Leander addressed Stockdale and told him that his sole purpose for attending was to obtain a continuance so that union representation could be obtained. He requested that the hearing be continued to protect Joe's rights to have a union representative present. Leander was totally unfamiliar with the issues at hand and believed he was unable to adequately represent Joe Fedorchak. Stockdale recessed to call for legal advice and was told by Smith to go forward with the hearing.

17. The hearing was held over the objection of both Joe Fedorchak and his counsel. Stockdale permitted Leander and Fedorchak an opportunity to present a response without imposing any restrictions. Leander tape recorded the meeting. After the meeting, Stockdale presented Fedorchak with an Order of Discharge, which terminated his employment.

IV. DISCUSSION

Unfair Labor Practice

The Montana Public Employee Collective Bargaining Act (§ 39-31-101 et seq., MCA) declares that it will be an unfair labor practice for a public employer to do the following:

> [D]iscriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in any labor organization . . . . § 39-31-410(3), MCA. (Emphasis added)

This prohibition mimics Section 8(a)(3) of the National Labor Relations Act, which reads in part as follows:

> It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization . . . . Section 29 U.S.C. 158 (a).

Under the Montana statute, § 39-31-406, MCA, the charging party must prove that he was discriminated against or that he was treated differently than other employees and that Flathead County's motive for the discrimination was to

discourage employees from becoming members of Laborers Local 1334. See Board of Trustees of Billings School District No. 2 of Yellowstone County v. State (1979), 185 Mont. 89, 96, 604 P.2d 770, 774. Joe Fedorchak has not carried his burden of proof in this case.

When considering discrimination and efforts to discourage union membership, the NLRB and courts consider the employer's overall behavior and attitude toward unions. They recognize, however, that employer may still expect employees to perform their job and observe reasonable rules. The Ninth Circuit Court of Appeals has stated that "[g]enerally, unless restricted by the collective bargaining agreement, an employer may discharge an employee for good cause, bad cause or no cause at all without violating the National Labor Relations Act as long as the motivation is not to punish protected union activity." Local Union No. 2812, Lumber Production and Industrial Workers v. Missoula White Pine Sash Company (1984), 734 F.2d 1384, cert. denied (1985) 470 U.S. 1085.

Numerous cases have looked to the employer's conduct toward employees who are exercising their right to organize in order to determine whether the decision to discharge an employee was motivated by its animus toward unions. Examples of factors that have supported a conclusion that the employer's attitude was anti-union included timing of the discipline and the employer's anti-union campaign (e.g. threats, discipline, removal of privileges, etc.). Electronic Data Systems Corp. v.

NLRB (Fifth Circuit, 1993), 985 F.2d 801, acts of interference as part of anti-union campaign; Hudson Neckwear, Inc. (1991), 302 NLRB No. 15, employer's threats and broad work rule changes designed to defeat union; Bay Metal Cabinets, Inc. (1991), 302 NLRB No. 24, threats, questioning and interrogation; Williamette Industries, Inc. (1992), 306 NLRB No. 207, confiscating union literature and surveillance; Nova Health Systems & Fairfax Health Systems, Inc. (1993) 310 NLRB No. 39, and Guille Steel Products Co., Inc. (1991), 303 NLRB No. 87), threats and coercive remarks; Electronic Data Systems Corp., Security Couriers, Inc. (1991), 305 NLRB No. 26, enfd. in part, remnd. in part (Fifth Circuit, 1993), 985 F.2d 801.

The charging party has failed to establish any union animus on the part of Defendant. It accepted the organizational petition and did not mount an anti-union campaign. In the end, employees selected the union as their exclusive bargaining representative in March 1997. Negotiations commenced in July 1997 and were successfully concluded in January 1998.

Fedorchak's termination on September 2, 1997 occurred after both the election and the onset of contract negotiations, but before the contract was finalized in 1998. There is nothing in the record showing that the firing of Fedorchak in any way impeded the negotiating process between Laborers and Defendant, which concluded in the short span of seven months. Further, Fedorchak failed to present substantial evidence that his termination was motivated by union activity by

establishing that this employer harbored any union animus and that he was fired "in order to . . . discourage membership in any labor organization," as required by § 39-31-401(3), MCA.

Indeed, Richard Stockdale did make an innocuous statement to the effect that employees should seriously consider whether the benefits of unionizing outweighed the cost to them in the way of dues. The record does not show that any other comments made by Stockdale were in any way related to union organization, or that any Animal Control employee, with perhaps the exception of Fedorchak, felt intimidated or threatened by that statement. The NLRB has long recognized the employer's right to assert its views with respect to unionization provided they are not cloaked with threats of reprisal or filled with intimidation. TRW Electronic Component Division, TRW, Inc. (1968) 169 NLRB 21.

The NLRB and courts have often considered cases that included allegations of unlawful discharge and a defense that the termination was due to legitimate, non-discriminatory reasons. These are generally referred to as "dual motive" cases.

The standard for evaluating such cases was announced by the U. S. Supreme Court in Mt. Healthy City Board of Education v. Doyle (1977), 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568, and adopted by the Montana Supreme Court in Board of Trustees of Billings School District No. 2 of Yellowstone County, supra, at 777.

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally

> protected, and that this conduct was a 'substantial factor' in the Board's decision not to rehire him. Respondent, having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

The Mt. Healthy case involved a teacher not being re-employed for having exercised his First Amendment rights and the same test was adopted by NLRB with respect to NLRA cases in Wright Line, a Division of Wright Line, Inc. (1980) 251 NLRB No. 150, and by the U. S. Supreme Court in NLRB v. Transportation Management Corp. (1983), 462 U.S. 393, 76 L.Ed.2d 667, 103 S.Ct. 2469.

In Wright Line the NLRB stated that "initially, the employee must establish that the protected conduct was a 'substantial' or 'motivating' factor for the discharge. Once this is accomplished, the burden shifts to the employer to demonstrate that it would have reached the same decision absent the protected conduct." Here, Defendant was not motivated to discharge Fedorchak because he supported a union that was in the process of negotiating a labor agreement. The overall record shows that it would have reached its decision to terminate Fedorchak absent the presence of the union.

The record clearly shows that Stockdale and Fedorchak did not get along for several years prior to Fedorchak's termination. Fedorchak's attitude toward his supervisor involved questioning Stockdale's management practices in the fall of 1995.

That matter was resolved without any formal citations, complaints or consequences to Flathead County. Further, until the August 1997 incidents, Fedorchak did not appeal reprimands meted out to him except in one incident and that action was affirmed by an appeal board.

Further noted are Stockdale's actions following the incidents of August 1997. He did not take lightly the decision he had to make concerning future action against Fedorchak. Although obviously upset by what he considered unacceptable job performance and behavior by Fedorchak, Stockdale did not make a unilateral and arbitrary decision, but contacted legal counsel. He consulted with Deputy County Attorney Smith regarding Fedorchak's employment record. After listening to the history (as well as having a working knowledge of past difficulties and discipline), Smith supported a decision to terminate Fedorchak's employment. Smith was convinced that the reasons for the termination were job related.

As the Ninth Circuit stated in Missoula White Pine Sash Company, supra, it is permissible to discharge an employee for a good reason, bad reason, or no reason at all. The issue here is not one of "just cause," rather it is whether this employee was fired for union activity and to discourage other employees from becoming members of the Laborer's Union. The fact an employee may sympathize and even participate in organizational activity does not shield him from the reasonable, work-related

expectations of his employer. That employee may still be disciplined provided it is not for a proscribed reason.

Here, the record shows that Stockdale and Fedorchak had a strained working relationship. Fedorchak challenged or ignored departmental policies, which frustrated Stockdale's leadership role, resulting in disciplinary action against Fedorchak a number of times over the last two years of his employment. It appears he harbored bad feelings about Stockdale's management practices, and had major personality conflicts with Stockdale. Fedorchak's continued failure to perform assigned job duties pursuant to rule and policy eventually cost him his job. Fedorchak was terminated for non-discriminatory reasons.

Weingarten rights

Laborers also argue that the September 2 meeting violated Fedorchak's "right" to union representation. That right, known as the Weingarten right, arose as the result of a decision of the U. S. Supreme Court in NLRB v. J. Weingarten, Inc. (1975), 420 U.S. 251, 43 L.Ed.2d 171, 95 S. Ct. 959. The Court held that an employee may request the presence of a union representative at an investigatory interview when the risk of discipline is a reasonable outcome. Cases subsequent to Weingarten have clarified the rule and established that the right to the presence of a specific representative is not what the Supreme Court contemplated.

In Coca Cola Bottling Co. of Los Angeles (1977), 227 NLRB 1276, the NLRB addressed a situation where an employee was called into a supervisor's office and questioned about his continuing bad attitude and misconduct. The employee requested the presence of his shop steward, who was on vacation and would not return for another three days. His request was denied and the interview proceeded. The Board concluded that the employee's Weingarten rights were not violated.

In another case, Crown Zellerbach, Inc. (1978), 239 NLRB 1124, the NLRB considered a situation where an employee requested a union representative (who was 60 miles away) under circumstances where the union had won the representation election but had not negotiated a contract and had not designated shop stewards. The employer refused, although a fellow employee did attend along with the one being interviewed. The Board concluded that Weingarten was not violated, noting that the Supreme Court did not define any special characteristics that the representative must possess, and in some instances he may be no more than a witness. The Board reiterated that an employer need not postpone interviews because a particular representative is not available.

Here, however, Fedorchak received a Notice of Intent to Discharge on Friday, August 29, 1997, setting the following Tuesday, September 2, as the time when he would have an opportunity to furnish reasons why he should not be terminated. This was not merely a discipline proceeding, but a more serious situation, as

Defendant intended to discharge Fedorchak. Under these circumstances, the Defendant's argument that because there was a union member present and Fedorchak's attorney, it had the right to proceed without delay is not convincing in this case. The record shows that Talsma was actually with Fedorchak at the hearing, but he was not a shop steward and was not there to represent Fedorchak. Fedorchak's lawyer was present, but admittedly not familiar with the matters at hand. He reported that his presence was to request a continuance and to formally assert Fedorchak's Weingarten rights.

Susan Wortman was the sole and exclusive representative of the District Council of Laborers Local No. 1334. Fedorchak had made request for her appearance, yet the hearing was held without her ability to be there because of the short notice, considering the three day Labor Day weekend. The record shows Fedorchak tried desperately, yet unsuccessfully, to contact Wortman, who was away from her Missoula office.

Defendant reasonably could have continued the hearing for a few days and should have done so, given the fact it intended to discharge Fedorchak-- the ultimate punishment-- because of his performance record. Based on the overall hearing record, Fedorchak was not adequately represented within the meaning of Weingarten.

Remedy

In early cases decided after Weingarten, the NLRB imposed remedies of reinstatement and backpay; however, it reconsidered this position and announced in Taracorp Industries, a Division of Taracorp, Inc. (1984), 273 NLRB 221, "when an employee is discharged or disciplined for cause, that employee will not be entitled to reinstatement and backpay simply because his or her Weingarten rights were violated. . . . Nor should our remedies serve as a windfall to employees or employers." The NLRB further noted in Tanrcorp "the only violation committed by the Respondent was a Weingarten violation," and that, "It is also clear that the reason for his discharge was not, itself, an unfair labor practice."

The overall record shows that Fedorchak was terminated for unprotected activities; therefore, the remedy of reinstatement and backpay is not appropriate in this case. Those remedies should be limited to instances where the discharge itself is an unfair labor practice.

V. CONCLUSIONS OF LAW

1. Flathead County is a "public employer" within the meaning of § 39-31-103(10), MCA.

2. The Montana District Council of Laborers Local Union No. 1334 is a "labor organization" within the meaning of § 39-31-103(6), MCA.

3. The Montana Department of Labor and Industry has jurisdiction over the parties pursuant to § 39-31-101 et seq., MCA, and this case is properly before it for consideration.

4. Pursuant to § 39-31-401(3), MCA, it is an unfair labor practice for a public employer to "discriminate in regard to hire or tenure of employment of any term or condition of employment in order to encourage or discourage membership in a labor organization . . . ."

5. Defendant's response to the effort of employees of its Animal Control to organize into a bargaining unit did not include an antiunion campaign or display any animosity toward the employees' effort. Fedorchak's termination was for reasons related to his job performance and behavior and was not due to his supporting or participating in the organizational activity. Defendant did not violate § 39-31-401(3), MCA.

6. Defendant was required to delay the hearing held on September 2, 1997, due to the unavailability of the union's business representative. Failing to meet that obligation, Defendant violated Fedorchak's Weingarten rights.

VI. RECOMMENDED ORDER

It is hereby Ordered that Flathead County, its officers, agents, and representatives shall Cease and Desist from violating the Weingarten rights of all affected employees.

Further Ordered that Defendant shall post in conspicuous places in county offices copies of the notice attached to and incorporated herein. The posting will remain in effect for one year from the date of this Order.

DATED this 17th day of June, 1999.

BOARD OF PERSONNEL APPEALS

By: Gordon D. Bruce

GORDON D. BRUCE
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to ARM 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. § 39-31-406(6), MCA. 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