STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE:

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| INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL #8, | ) | Case Nos. 1184-2019, 1199-2019, and 1796-2019 |
| MONTANA FEDERATION OF PUBLIC EMPLOYEES, | ) | |
| CITY OF GREAT FALLS CRAFTS COUNCIL: CARPENTERS UNION LOCAL NO. 82 TEAMSTERS LOCAL UNION NO. 2 OPERATING ENGINEERS LOCAL NO. 400 LABORERS UNION LOCAL NO. 1685 MACHINISTS UNION LOCAL NO. 24, | ) | **SUMMARY JUDGMENT ORDER** |
| Complainants, | ) | |
| vs. | ) | |
| THE CITY OF GREAT FALLS, | ) | |
| Defendant. | ) | |

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## I. INTRODUCTION

On February 7, 2019, the International Association of Fire Fighters Local #8 (IAFF) filed an Unfair Labor Practice charge (ULP) against the City of Great Falls (City) with the Board of Personnel Appeals, concerning the City's unilateral adoption and implementation of a revised Alcohol and Controlled Substance Policy that impacted some of IAFF's bargaining unit members who were employees of the City. On February 13, 2019, the Montana Federation of Public Employees (MFPE) filed a ULP against the City on the same issue impacting some of MFPE's bargaining unit members who were employees of the City. On June 6, 2019, the City of Great Falls Crafts Council: Carpenters Union Local No. 82; Teamsters Local Union No. 2; Operating Engineers Local No. 400; Laborers Union Local No. 1685; and Machinists Union Local No. 24 (GFCC) filed a ULP against the City on the same issue impacting some of GFCC's bargaining unit members who were employees of the City.

After a Board of Personnel Appeals investigator completed investigation and made findings, all three ULPs were consolidated, transferred to the Office of Administrative Hearings, and assigned to Hearing Officer David Scrimm for contested case hearings proceedings. After mediation and discovery, each of the three complainants filed a motion for summary judgment against the City and the City filed a motion for summary judgment against the three complainants. The case was submitted upon both agreed-upon facts and contested facts, as well as briefs and other filings, for decisions upon the summary judgment motions.

## II. SUMMARY JUDGMENT STANDARD

An unfair labor practice charge is a contested case. Mont. Code Ann. § 39-31-105. Motions are proper in contested cases before the Board of Personnel Appeals. Admin. R. Mont. 24.26.212. A summary judgment motion is an appropriate method of dispute resolution in administrative proceedings where the usual requisites for summary judgment otherwise exist. *Matter of Peila*, 249 Mont. 272, 281, 815 P.2d 139, 145 (1991).

To eliminate the burden and expense of unnecessary trials, summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Klock v. City of Cascade*, 284 Mont. 167, 173, 943 P. 1262, 1266 (1997); *Peila*, 249 Mont. *at* 281, 815 P.2d *at* 145; M.R. Civ. P. 56(c)(3).

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Once the moving party meets the initial burden of establishing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law, the burden shifts to the nonmoving party to establish with substantial evidence, as opposed to mere denial, speculation or conclusory assertions, that a genuine issue of fact does exist or that the moving party is not entitled to judgment as a matter of law. *Meloy v. Speedy Auto Glass, Inc.*, 2008 MT 122 ¶18, 182 P. 3d 741, 342 Mont. 530 (*citing Phelps v. Frampton*, 2007 MT ¶16, 339 Mont. 330, 170 P.3d 474).

## III. FACTUAL FINDINGS FOR THE SUMMARY JUDGMENT MOTIONS

1. On January 18, 2019, the City sent a letter, with enclosures, to all of its employees, notifying those employees that it had unilaterally revised its Alcohol and Controlled Substance Policy, effective April 1, 2019. The letter and enclosures informed the City's employees that the unilateral revisions required all employees, necessarily including members of the IAFF bargaining unit, members of the MFPE

bargaining unit, and members of the GFCC bargaining unit, to review the new policy and to sign, date, and return an "Awareness and Acknowledgment Form" and at least one other document, together indicating that they had reviewed and understood the new policy, that they agreed to be "tested," that they understood that they may be terminated for violation of the new policy, that they understood and agreed to be bound by the new policy as an "employment contract" with the City, that non-cooperation with testing would result in the same consequences as a positive test result (mandatory removal from the job and possible termination of employment). The revised policy also required all employees covered by the revised policy to acknowledge the City could unilaterally change the policy again at any time.

2. On its face, the revised policy was more comprehensive than any of the prior City employee policies regarding alcohol and controlled substances. For example, a previous policy regarding random, unannounced urine alcohol and controlled substance testing applied only to employees required to have Commercial Driver's Licenses. None of the current City employees who were members of the IAFF bargaining unit, the MFPE bargaining unit, or the GFCC bargaining unit were in positions that required Commercial Driver's Licenses. The only circumstances, under the immediately prior Alcohol and Controlled Substance Policy, that could lead to obtaining unannounced urine alcohol and controlled substance testing regarding a union employee who drove a city vehicle, operated equipment, or supervised or transported minors and life guards, would be a particularized suspicion of that employee's supervisor that the employee was unfit to work because of alcohol or a controlled substance. Under the unilaterally revised policy, employees (union or not) who drove a city vehicle, operated equipment, or supervised or transported minors and life guards were all subject to unannounced urine alcohol and controlled substance testing. This revised policy applied, on its face, to approximately 54 of the 85 positions in the MFPE bargaining unit.

3. None of the three complainants received any notice that afforded them any opportunity to request bargaining or object to the City's implementation of the revisions to its existing alcohol and drug policy prior to February 2019. The City did not provide copies of the revised policy to IAFF, MFPE, and GFCC staffs until after the City sent out its notification letter and materials to its employees. At all times after the City gave notice to all of its employees of the revisions to its alcohol and drugs policy, the City dealt directly with all its employees regarding the revisions to its alcohol and drugs policy and implementation of same, explaining what was required and encouraging employees to sign the required documents.

4. In the past, the City had bargained with unions representing City employees, including IAFF, MFPE, and GFCC, on issues that had arisen over the prior Alcohol and Controlled Substance Policies. In this instance, the evidence is

fairly clear that the City made a decision not to bargain with the unions about the revisions to the Alcohol and Controlled Substance Policy.

5. When the staffers for the IAFF, MFPE, and GFCC learned, from their membership and from City management, of the direct communications between the employer and the member-employees, they immediately saw it as unfair labor practices.[1] The complainants' staffs objected to the unilateral revisions and requested that the City bargain over the revised policy. They presented multiple arguments about the ways the unilateral revision of the Alcohol and Controlled Substance Policy was improper. They objected to the City's unilateral communications with and directions to employees about what employees now had to do to comply with the unilaterally adopted revisions to the policy. They objected to what they asserted were blatant violations of the legal mandate to bargain collectively. *See, e.g.,* Mont. Code Ann. §§ 39-31-305(1) and 305(2). They protested the loss of privacy for their members resulting from the revised policy and otherwise opposed the policy and challenged its legality. The City responded to all three complainants by consistently asserting that the City had the management right to take the actions it had taken and was taking regarding the revised policy. The three complainants, while continuing to protest to the City its actions taken, proceeded to file unfair labor practice charges regarding the revised policy and the City's conduct in giving notice of and implementing the revised policy.

## IV. DISCUSSION

Summary Judgment is Granted in Favor of IAFF, MFPE, and GFCC. Summary Judgment is Denied on the City's Motion.

The purpose of Montana's Collective-Bargaining for Public Employees Act is to "encourage the practice and procedure of collective-bargaining to arrive at friendly adjustment of all disputes between public employers and their employees." Mont. Code Ann. § 39-31-101. There is no mandatory outcome the parties must reach, but the process of collective-bargaining is required. Mont. Code Ann. § 39-31-305(1) and (2). When the City embarked upon its unilateral imposition of its revised alcohol and drug policy, it clearly had already decided there would be no bargaining at all. In the words of the United States Supreme Court, cited and quoted by counsel for MFPE, "The primary purpose of the Act is to promote 'the peaceful settlement' of

[1] The real question here regarding the merits of these ULPs depend upon whether the City had a duty to bargain these changes with the complainants because the February 2019 revisions to its drug and alcohol policy constituted unilateral changes to an existing term or condition of employment which was a mandatory subject of bargaining. If so, the direct communication between the City and the union members regarding the revised Alcohol and Controlled Substance Policy would also be a further unfair labor practice.

disputes, 'by subjecting labor-management controversies to the mediatory influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife.'" *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211. This citation is footnoted as follows: "The Montana Supreme Court has long approved the practice of the Board of Personnel Appeals using federal court and National Labor Relations Board (NLRB) precedents as guides to interpreting the Montana collective-bargaining laws." *State ex rel. Board of Personnel Appeals v. District Court*, 183 Mont. 223, 598 P.2d 1117 (1979); *City of Great Falls v. Young*, 211 Mont. 13, 686 P.2d 185 (1984); *Bonner School District v. Bonner Education Association*, 2008 MT 9 ¶ 18, 341 Mont. 97, 76 P.3d 262.

The complainants were provided no notice or opportunity to bargain prior to the City's announcement to its employees that it had adopted and was implementing the revised alcohol and drug policy. Exhibits 6 & 8. Likewise, when staff for the complainants asked about bargaining regarding this revised policy, the City's spokespersons reiterated that questions would be answered but that the revisions were within the City's exercise of management rights and, in essence, that there would be no bargaining.

Later in 2019, the complainants negotiated with the City a successor collective-bargaining agreement to replace a previous agreement (July 1, 2017 to June 30, 2019). Exhibits 1 & 2. At no time during those negotiations did the City come forward with any proposal related to the revised Alcohol and Controlled Substance Policy or any proposal to require random drug and alcohol testing of bargaining-unit employees. The complainants had no reason to make such a proposal, in the face of the fait accompli the City had already completed. Complainants did not and could not waive their ULP charges by engaging in the subsequent collective-bargaining without attempting to raise the ULP issues, which would have been futile in light of the fait accompli behavior of the City.

Public employers must "bargain in good faith with respect to wages, hours, fringe benefits and other conditions of employment." Mont. Code Ann. § 39-31-305(2). An employer violates its duty to bargain if, without bargaining, it changes unilaterally an existing term or condition of employment which is a mandatory subject of bargaining. *NLRB v, Katz*, 369 U.S. 736 (1962); *NLRB v. McClatchy Newspapers*, 964 F, 1153, 1162 (D.C. Cir. 1992); *Bigfork Area Education Association v. Board of Flathead and Lake County School District No. 38*, ULP #20-78. Mandatory subjects of bargaining are those matters listed in the statute defining the statute defining the duty to bargain. § 39-31-305(2) MCA. "Wages, hours, fringe benefits, and other conditions of employment." *Fibreboard Paper Products Corp. op. cit. at* 210; *NLB v. Wooster Div., of Borg-Warner Corp.*, 356 U.S. 342, 349 (358).

While the parties are mid-contract, if the employment conditions the employer seeks to change are covered specifically by the existing contract, the employer must bargain with and obtain the union's consent before implementing the change. Mont. Code Ann. § 39-31-306(3) (imposing the requirement that a collective-bargaining contract must be "enforced under its terms."). If the parties are mid-contract and the employment conditions the employer seeks to change are not contained in the contract, the employer must provide the union notice and must bargain the issue before it can implement a unilateral change. *International Union (UAW) v. NLRB*, 765 F.2d 175, 179 (D.C. Cir. 1985); *Milwaukee Spring Div.*, 268 NLRB 601, 602 (1984), *aff'd* 765 F.2d 175 (D.C. Cir. 1985); *Communication Workers*, 280 NLRB 78, 82 (1986) *enforced*, 818 F. 29 (4th Cir. 1987); *Chemical Workers*, 228 NLRB 1101 (1977); *Martinsville Nylon Employees Council v. NLRB*, 969 F.2d 1263, 1269-70 (D.C. Cir. 1992); *GTE Automatic Electric*, 240 NLRB 297, 298 (1979) ("It is well established that, during the existence of a collective-bargaining contract, a union has a right to bargain about the implementation of a term and condition of employment, and an employer must bargain about a mandatory subject of bargaining not specifically covered in the contract or unequivocally waived by the union."). During contract negotiations, an employer may not implement any changes unless those changes are embodied in the employer's bargaining proposals and unless the parties have reached bargaining impasse. *Bottom Line Enterprises*, 302 NLRB 373, 374, enforced, 15 F.3d 1087 (9th Cir. 1994). Since the City unilaterally revised and implemented the revisions to the alcohol and drug policy, no issue of bargaining impasse arises in these consolidated cases, and the lengthy footnote defining such impasse is omitted.

Drug testing of employees is a mandatory subject of bargaining over which an employer is required to fully bargain. *Johnson-Bateman Co.*, 295 NLRB 180 (1989) and *Minneapolis Star Tribune*, 295 NLRB 543 (1989). In *Johnson-Bateman*, the employer, a concrete pipe manufacturer, and its unionized production workers had a collective-bargaining agreement which gave the employer the right to discipline an employee for just cause, including for consuming, possessing or being under the influence of alcohol or drugs. *Johnson-Bateman* at 181. Further, all employees had to undergo drug and alcohol testing at the time of their hiring. *Id.* The employer then unilaterally imposed a rule whereby all workplace injuries requiring medical treatment would be accompanied by drug and alcohol testing. *Id.* The NLRB applied the two-part test of *Ford Motor Co. V. NLRB*, 441 U.S. 488 (1979) to determine whether drug and alcohol testing is a mandatory subject of bargaining. It is noteworthy that the Montana Supreme Court relied upon that same two-part test when it determined that transfers were a mandatory subject of bargaining before being implemented unilaterally by the employer. *Bonner, op cit. at* ¶22.

In *Ford*, the U.S. Supreme Court held that a mandatory subject of bargaining is "plainly germane to the working environment" and "not among those 'managerial decisions which lie at the core of the entrepreneurial control.'" The NLRB followed that holding in *Johnson-Bateman at* 182, noting that a drug-testing requirement was obviously "germane to the working environment" because a violation of the policy could result in discharge or discipline. *Id. at* 183. The Board said specifically that a drug-testing requirement "is a condition of employment because it has the potential to affect the continued employment of individuals who become subject to it." *Id.* This holds true in the present cases – the revision and implementation of the City's new alcohol and drug policy had the potential to affect the continued employment of City employees who were members of the complainant bargaining units.

In the second part of the test, the NLRB held that drug-testing of employees "is a change in personnel policy freighted with potentially serious implications for the employees which in no way touches the discretionary core of entrepreneurial control." *Id. at* 184. In the present cases, the unilateral implementation of the City's revised alcohol and drug policy does not concern "the basic scope of the enterprise, and thus does not lie at the core of entrepreneurial control." *Bonner at* ¶ 23. The random alcohol and drug testing mandate does not affect what the City does for its citizens – what services it provides or how much of its budget it commits to which services – instead it "changes the conditions under which its employees were expected to work." *Id. at* 23.

In *Star Tribune*, the employer unilaterally implemented a drug and alcohol policy consisting of pre-employment testing, screening for existing employees, and a disciplinary schedule for offenses. *Star Tribune, Cowles Media Co.*, 295 NLRB 543 (1989). The Board upheld the decision in *Johnson-Bateman* that the unilateral implementation of a drug-testing program for current employees violated Section 8(a)(5) of the NLRA. *Id.*; *see also, Kysor/Cadillac*, 307 N.L.R.B. 598, 603 (1992) (employer committed an unfair labor practice "[b]y unilaterally implementing a policy and practice of requiring certain unit employees to undergo drug testing as a condition of employment, without prior notice to or affording the [u]nion an opportunity to bargain concerning such practice"); *County of Cook v. Licensed Practical Nurses Association of Illinois*, 671 N.E.2d 787, 284 Ill.App.3d 145 Ill. App. 1996) (drug-testing requirement for LPNs returning to work after extended leave of absence was held to be a mandatory subject of bargaining).

The federal law upon which Montana relies in interpreting our state Act (based on the law upon which our Court relied in deciding *Bonner*) is clear. However, the City has argued strenuously that it would increase risk to the public and to the City's public employees to apply our state's Act and require collective-bargaining on the safety decisions the City made and unilaterally implemented in January 2017.

The Hearing Officer recognizes that a government entity has a different standard for doing its work well. In the private sector, having employees with alcohol or controlled substance problems can increase the cost of doing business, damage the good will the business may have cultivated, and divert resources and attention away from the business and towards addressing an immediate problem – there are a variety of worrisome exposures. The City boils down the justifications for a government entity to safety – of the public and of the employees. Both positions have merit. On the other hand, the unions focus instead on the mandate to bargain – not necessarily to surrender to the arguments of the unions, but to engage in negotiation.

The arguments on both sides of this dispute are well crafted, but not always persuasive. The 2017 revision to the City's alcohol and drug policy was not the first time the City had revised that policy. Apparently, previous revisions were adopted rather simply through the collective-bargaining process. For some reason, the City was willing and able to negotiate with the involved unions about those previous revisions. Complainants cited strong Montana Board of Personnel mandatory bargaining case law precedent that drew upon NLRB precedent as well as other Montana case law. The City gathered and cited cases directly dealing with public employers' management rights prevailing over mandatory bargaining, but those cases seemed to have considerably more evidence of and urgency of substance abuse problems and patterns among the public employers' employees such that the safety concerns involving both the workforce and the public have more gravity in those cases than the evidence presents in this case.

On the credible evidence of record, the City more-likely-than-not decided to avoid mandatory bargaining, prepared its revisions to its alcohol and drug policy with that intention, and then implemented its revised alcohol and drug policy accordingly. The City appears willing and able to craft an alcohol and substance control policy that gives credence to safeguarding the public and the City while still giving weight and consideration to the unions' concerns.

## V. CONCLUSIONS OF LAW

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

2. There is no genuine issues of material fact with regard to the complainants' motion, and they are entitled to judgment as a matter of law; the City is not entitled to summary judgment on its motion. *See Peila*, 249 Mont. at 281, 815 P.2d at 145; M.R. Civ. P. 56(c)(3).

3. In February 2019 and thereafter, the City of Great Falls unilaterally revised its alcohol and drug policy and presented that revised policy to its employees. This change was a mandatory subject of collective-bargaining with the three unions representing employees of the City to whom the revised policy applied, thereby committing an unfair labor practice against the three unions representing City employees to whom the revised policy applied.

4. The City of Great Falls imposed its revised alcohol and drug policy in February 2019 and thereafter by dealing directly with its employees to whom the revised policy applied, thereby committing an unfair labor practice against the three unions representing City employees to whom the revised policy applied.

5. In February 2019 and thereafter, the City of Great Falls failed and refused to bargain exclusively with the three unions having members to whom the City's revised alcohol and drug policy applied, instead communicating directly with said union members, for the purpose of establishing and/or changing the terms of employment embodied in the revised alcohol and drug policy, said communications being exclusive of the union.

6. Upon its determination that the unfair labor practices asserted herein have occurred, the Board of Personnel Appeals must issue an order requiring the City to cease and desist from the unfair labor practices. Mont. Code Ann. § 39-31-406(4). The Board must further require the City to take such affirmative action as will effectuate the policies of the chapter.

7. The essential function of a remedy for a breach of the duty to bargain is "to undo the effects of violations of the Act" (*NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)) "where the consequences of . . . [the City's] disregard of its statutory obligation should be borne by . . . [the City], the wrongdoer herein, rather than by the employees." (*Hamilton Elec. Co.*, 203 NLRB 206, 206 (1973)).

## VI. PROPOSED ORDER

The appropriate remedy includes a cease and desist order commanding the City to cease all its direct efforts to impose its revised Alcohol and Controlled Substance Policy on members of the bargaining units represented by IAFF, MFPE, or GFCC. Additionally, the City should be ordered to cease any effort to enforce the provisions of the "Awareness and Acknowledgment Form" which employees were required to sign as part of the implementation of the revised Alcohol and Controlled Substance Policy and to cease and desist from direct dealing with members of the bargaining units represented by IAFF, MFPE, or GFCC. Finally, the City should be ordered to post an appropriate notice as contained in Appendix A at conspicuous

places, including all places where notices to employees are customarily posted, at City owned buildings for a period of 60 days and to take reasonable steps to assure that the notices are not altered, defaced, or covered by any other material. *Glendive Education Association v. Glendive Public Schools*, ULP 10-2014.

DATED this 22nd day of October, 2020.

BOARD OF PERSONNEL APPEALS

By: _____
DAVID A. SCRIMM
Hearing Officer

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

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
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DATED this 22nd day of October, 2020.

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.

We shall cease all its direct efforts to impose its revised Alcohol and Controlled Substance Policy on members of the bargaining units represented by IAFF, MFPE, or GFCC.

We shall cease any effort to enforce the provisions of the "Awareness and Acknowledgment Form."

We shall cease and desist from direct dealing with members of the bargaining units represented by IAFF, MFPE, or GFCC.

DATED this _____ day of _____, 2020.

City of Great Falls

By:_____

_____

Office:_____