

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE

Missoula Police Officer Association
Claimant,
and
City of Missoula
Respondent.

Case No.: 2023DRS00025
INVESTIGATIVE REPORT
AND
FINDING OF NO MERIT

Introduction

On August 11, 2022, the Missoula Police Officer Association (MPOA) filed an Unfair Labor Practice complaint with the Board of Personnel Appeals (Board) against the City of Missoula (City) pursuant to Mont. Code Ann. (MCA) Title 39 Chapter 31 Part 401(3) and (5) (unfair labor practices). The charge alleges that the Chief of Police, Chief White, failed to notify employees regarding promotion policy changes that now prevent officers below the rank of Lieutenant from applying for Captain positions; therefore, the employer has violated § 39-31-305, MCA, duty to bargain collectively in good faith,

Angela Simonson, Chief HR Officer for the City of Missoula filed a timely response on August 19, 2022, denying an unfair labor practice has been committed.

Wendy Jackson was assigned by the Board of Personnel Appeals to investigate the charge and has reviewed the information submitted by the parties and communicated with them as necessary.

II. Findings and Discussion

On July 20, 2022, Missoula Police Chief, Jaeson White, issued a policy change for the qualifications of the Captain positions without notifying employees in the bargaining unit represented by the Missoula Police Officer Association. The bargaining unit is subject to a Collective Bargaining Agreement (CBA) that is effective for fiscal year 2020 through fiscal year 2023. The policy change disqualifies officers below the rank of Lieutenant for Captain positions. This charge alleges that this is a change to years of policy, and the employer's failure to notify employees of the policy change constitutes violations of § 39-31-305, MCA, duty to collectively bargain in good faith, and § 39-31-401(3) and (5), MCA, (Unfair labor practices).

Section 39-31-305, MCA. Duty to bargain collectively – good faith.

(1) The public employer and the exclusive representative, through appropriate officials or their representatives, have the authority and the duty to bargain collectively. This duty extends to the obligation to bargain collectively in good faith as set forth in subsection (2).

(2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or the public employer's 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 other conditions of employment or

the negotiation of an agreement or any question arising under an agreement and the execution of a written contract incorporating any agreement reached. The obligation does not compel either party to agree to a proposal or require the making of a concession.

(3) For purposes of state government only, the requirement of negotiating in good faith may be met by the submission of a negotiated settlement to the legislature in the executive budget or by bill or joint resolution. The failure to reach a negotiated settlement for submission is not, by itself, *prima facie* evidence of a failure to negotiate in good faith.

Section 39-31-401, MCA. Unfair labor practices of public employer.

It is an unfair labor practice for a public employer to: (1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201;

(2) dominate, interfere, or assist in the formation or administration of any labor organization. However, subject to rules adopted by the board under 39-31-104, an employer is not prohibited from permitting employees to confer with the employer during working hours without loss of time or pay.

(3) discriminate 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;

(4) discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter; or

(5) refuse to bargain collectively in good faith with an exclusive representative.

Ms. Simonson filed a timely response on behalf of on City of Missoula, denying an unfair labor practice has been committed. The City points out the position of Captain is a non-union position and not subject to collective bargaining.

The City argues that matters of hiring and changing Job Descriptions both rest with management rights. Per Department policy, the Chief of Police is allowed to make changes to both policy and job descriptions.

Missoula Police Department Policy Manual:

II. Policy These policies of the Missoula City Police Department have been approved through the Chief of Police. These policies may be amended, deleted, or changed by the Chief of Police as needed and those changes will then be provided to department personnel.

The City notes, management is also afforded the right to hire or promote employees under § 39-31-303, MCA:

Section 39-31-303, MCA. Management Rights Of Public Employers

Management rights of public employers. Public employees and their representatives shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to: (1) direct employees; (2) hire, promote, transfer, assign, and retain employees; (3) relieve employees from duties because of lack of work or funds or under conditions where continuation of such work be inefficient and nonproductive; (4) maintain the efficiency of government operations; (5) determine the methods, means, job classifications, and personnel by which government operations are to be conducted; (6) take whatever actions may be necessary to carry out the missions of the agency in situations of emergency; (7) establish the methods and processes by which work is performed

These same rights of management regarding hiring and promotions are clearly defined in the current CBA between the City and the Missoula Police Officer Association Collective Bargaining Agreement:

ARTICLE 5 Management Rights

The Association recognizes the prerogative of the Employer to operate its affairs in all respects in accordance with its responsibilities to the citizens of Missoula, and the powers or authority which Employer has not officially delegated, limited, or modified by this Agreement are retained by the City, and in such areas as, but not limited to: 1) Directing employees; 2) Hiring, promoting, transferring, assigning, and retaining employees;

Revisions made to the policy requirements for applicants for the Captain position involved; (1) removal of the bachelor's degree requirement, (2) reduced number of years of Lieutenant experience required, (3) Only applicants with experience as Lieutenants will be considered. This final change is a deviation from prior policy which also allowed those with Sergeant experience to apply for the position of Captain.

The City asserts changes made to the requirements for the Captain's positions do not meet the threshold for a ULP. MCA 39-31-401 (3) states an employer commits a ULP if they "discriminate 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". The City argues that the changes in question neither encouraged nor discouraged union membership. It merely changed the requirements so those with only Sergeant's experience cannot apply for the position of Captain.

The City maintains the changes were not an attempt to honor non-union staff over union staff. An argument supported by the fact that both Sergeants and Lieutenants are bargaining unit members.

The City notes all qualified staff who applied were reviewed in an objective manner, based on merit. The City enhanced efforts to maintain the objectivity of the selection process by including outside experts and a Human Resources Representative to ensure no favoritism or other subjective criteria were used for selection.

The City concludes no ULP was committed as the changes made to the policy governing requirements for the captain position are well within the management rights afforded to the police chief in policy, Statute, and the CBA.

The Montana Supreme Court has held that it is appropriate for the Board's Agent "to consider NLRB precedents in interpreting and administering the Public Employees Collective Bargaining Act." *State ex rel. Bd. of Pers. Appeals v. Dist. Court*, 183 Mont. 223, 226, 598 P.2d 1117, 1118 (1979). The NLRB has held that promotions of employees to positions outside the bargaining unit is not a mandatory subject of bargaining. *Health Care and Retirement Corp*, 317 N.L.R.B. 1005, 49 L.R.R.M. 1227 (1995); *Pittsburgh Metal Processing Co.*, 286 N.L.R.B. 734, 128 L.R.R.M. 1094 (1987).

Because the CBA, MCA, and NLRB guidance clearly outline the right to hiring and promotion outside the bargaining unit to the employer, changes to the requirements for a non-union supervisory position are within the employer's management rights, and the requirements of the Captain's position are not subject to bargaining. As such, this investigator concludes that in this case, changes made to the job description requirements for the position of Captain, without any notification or bargaining with the Union, do not constitute an unfair labor practice.

III. Recommended Order

It is hereby recommended this Unfair Labor Practice charge be dismissed without merit.

Dated this 14th day of October 2022

Board of Personnel Appeals

By: Wendy Jackson
Wendy Jackson
Investigator

IV. Supporting Documents

1. Unfair Labor Practice Charge
2. City of Missoula ULP Response
3. Collective Bargaining Agreement

CERTIFICATE OF SERVICE

The undersigned does certify a true and correct copy of this document was served upon the following on the 14th day of October 2022, addressed as follows:

CITY OF MISSOULA
Angela Simonson
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MISSOULA POLICE OFFICER ASSOCIATION
rludemann276@gmail.com

Wendy Jackson