

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 11-2016 AND 12-2016:

TEAMSTERS UNION LOCAL NO. 2,)	Case Nos. 678-2016 and 679-2016
)	
Complainant,)	
)	
vs.)	
)	
ANACONDA-DEER LODGE COUNTY,)	
)	
Defendant.)	

ORDER ON SUMMARY JUDGMENT

I. INTRODUCTION

On October 13, 2015, the Teamsters Union Local No. 2 (Union) filed an Unfair Labor Practice Charge (ULP No. 11-2016) with the Board of Personnel Appeals (BOPA) against Anaconda-Deer Lodge County (ADLC). Thereafter, a second charge (ULP No. 12-2016) was filed and subsequently amended. The final amended version of ULP No. 12-2016 is dated November 3, 2015.

The charges alleged that the ADLC: 1) failed to bargain Detention Center's schedule due to the filing of ULP No. 9-2016 with respect to the installation of four new surveillance cameras with audio and video capability; 2) made threats to privatize the Detention Center in retaliation for union activity; 3) reduced and changed the shift schedule for union member John Stewart in retaliation for union activity; and 4) included deficient marks in retaliation for union activity in the annual evaluation of union member John Stewart.

On November 23, 2015, the ADLC timely responded to ULP Nos. 11-2016 and 12-2016 and denied that the ADLC had engaged in unfair labor practice, either in the first charge, the second charge, or any of the amendments.

On February 3, 2016, BOPA's investigator issued an Investigative Report and Finding of Probable Merit. Thereafter, the Office of Administrative Hearings issued a Notice of Hearing on behalf of BOPA, appointing the undersigned Hearing Officer,

who issued a Scheduling Order after a telephone conference with counsel for the parties, and ADLC filed its Answer to the Charge in compliance with that order.

On August 30, 2016, the Union filed a Motion for Summary Judgment on the grounds that there are no genuine issues of material fact that ADLC unilaterally changed working conditions, refused to bargain over a mandatory subject, and interfered with, restrained, coerced, and threatened employees in violation of Mont. Code Ann. § 39-31-401(1) and (5).

On September 1, 2016, ADLC filed its own Motion for Summary Judgment on the grounds that there are no genuine issues as to any material facts regarding the Union's unfair labor practice charges and ADLC is entitled to a judgment as a matter of law.

On September 16, 2016, pursuant to an agreement of the parties, the Hearing Officer entered an order that the matter would be decided based on the parties' cross motions for summary judgment and all relevant documents in the record. Having considered the facts, exhibits, affidavits, and argument of the parties contained in their respective motions, the following findings of fact, conclusions of law, and recommended order are made.

II. FACTS FROM DOCUMENTS IN RECORD

1. Anaconda-Deer Lodge County (ADLC) is a public employer as defined by Section 39-31-103(10), MCA. ADLC has the contractual and statutory right to manage the county's affairs, and to determine methods, means, job classifications, and personnel by which government operations are to be conducted pursuant to Section 39-31-303.

2. Teamsters Union Local No. 2 (Union) is the exclusive representative for the Detention Officers employed by ADLC as defined by Section 39-31-103(4), MCA.

3. The Union and ADLC entered into a collective bargaining agreement (CBA) with the Detention unit of ADLC covering the period of July 1, 2013 through June 30, 2015. A successor agreement is now in effect until June 30, 2017.

4. The Management Rights clause of the parties' 2013-2015 CBA provides, in pertinent part:

ARTICLE V: MANAGEMENT RIGHTS

A. Subject to the laws of the State of Montana, the Employer reserves the right to hire, layoff, promote, transfer, discharge for cause, maintain discipline, require observation of the Employer's rules and regulations, and maintain efficiency of employees, is the sole responsibility of the Employer, provided that Detention Union members shall not be discriminated against as such, and the Employer shall not exercise these rights in violation of the provisions of this Agreement. In addition, the Employer has the exclusive duty and right to manage its affairs, direct the working forces, schedule the work, and all of the rights granted to the Employer under State Law. Neither the Detention Union nor the Employer shall discriminate against its employees or applicants for employment on the basis of Detention Union affiliation. The foregoing enumeration of the Employer's Management Rights shall not be deemed to exclude other functions not specifically set forth.

5. Article VI, Section G of the 2013-2015 CBA states as follows:

1. For full-time employees, the work week shall consist of work days of either eight (8) or ten (10) hour days. The total number of hours in a week shall vary in accordance with the work schedule which will be completed by the Assistant Chief/Jail Supervisor. The work year shall total two thousand eighty (2080) hours. Full time employees shall work five (5) consecutive eight (8) hour days followed by two (2) consecutive days off, or four (4) consecutive ten (10) hour days followed by three (3) consecutive days off. There shall be no split days off. The number of hours scheduled within a workday may be modified by the Supervisor, but may not be less than eight (8).

6. At the time the ULP was filed regarding the schedule change, the parties had not yet negotiated the 2015-2017 CBA. The 2015-2017 CBA includes the same language that allows for either an eight or 10-hour work day schedule to be determined by the supervisor.

7. Currently, the Detention Officers' work day is scheduled in eight-hour shifts. Prior to November 24, 2013, the Officers worked 10-hour shifts. Because of the overlap between shifts on 10-hour days, conflict arose between the day shift and afternoon/swing shift.

8. The issues between the afternoon shift and the day shift revolved around the fact that the day shift was not doing its job and would engage in immature and sophomoric pranks. As a result of the day shift's shenanigans, the afternoon shift would be responsible for the fallout of those shenanigans. For example, the afternoon shift would do inmate laundry and separate clothes into the correct piles so that the clothes for each inmate would be in each separate pile. The day shift would then switch some clothing items from one pile to another so that an inmate, instead of getting a 3XL top, would get a medium top. When that happened, and the afternoon shift came on the next day, the inmate would complain that the clothes were messed up. Some of the problems that were being created was that the day shift would not give inmates their required dietary menu such as pats of butter, cinnamon rolls, and ice cream. The mop bucket would be moved by the day shift so the afternoon shift couldn't find it. There were problems with the towel rack. The day shift would glue or bolt the phone down so it couldn't be used or moved.

9. The eight-hour shifts were then implemented by Detention Center management to help minimize the conflict.

10. On or about October 1, 2015, Detention Center Officer and Union Steward Robert Hungate met with Chief Tim Barkell and Assistant Chief Bill Sather about changing the Detention Officers' schedules back to four 10-hour shifts. Barkell told Hungate that before the parties could even discuss a schedule change the Detention Officers would have to make some effort to get along with each other for at least six months. Sather estimates that Hungate asked him over 100 times about changing back to 10-hour shifts. (Affidavit of Bill Sather, dated January 20, 2016, County Exhibit D).

11. At the October 1, 2015 meeting, Hungate asked for an additional meeting to discuss "ground rules." This meeting was set for October 6, 2015. At this meeting Hungate was again told that a shift change would not be considered until the Officers could show that they could get along.

12. On or about June 19, 2015, Erin Foley, the business agent for the Union, stopped by the office of Connie Ternes-Daniels, the Chief Executive Officer of Anaconda-Deer Lodge County, to pick up a grievance letter. Notes from Foley indicated that during this brief meeting Ternes-Daniels asked if the "Teamsters" were "going to keep up this behavior" and Ternes-Daniels needed to know if the Union was "100% on board with continuing this route and if so she had other options and she will continue to look into them." Foley responded that it was Ternes-Daniels' right to look into other options and that the Union would continue to file grievances if contract violations occur. (Notes of Erin Foley, dated June 19, 2015, County Summary Judgment Motion Exhibit E).

13. On July 16, 2015, Bill Rowe, Secretary/Treasurer of the Union, called Ternes-Daniels regarding an issue concerning the pay due and owing to Detention Officer Bryan Trainor in settlement of a grievance. Rowe recalls Ternes-Daniels asking him why there were so many grievances with Detention Officers, that she was sick and tired of them acting like a bunch of children and that “I do have other options regarding the management of the detention center, management is looking to privatize with CCCS. I have a city to run and can free up more of my time by not having to deal with it.” (Affidavit of Bill Rowe, dated January 4, 2016, Exhibit G of ADLC’s Motion for Summary Judgment).

14. Ternes-Daniels does not recall making threats to privatize the ADLC Detention facility. The authority to privatize ultimately rests with the ADLC Council of Commissioners and is subject to an open bid process.

15. On March 17, 2015, Barkell stated in response to a letter from Perry Johnson, Executive Director of the Montana POST Council, about allegations about a relationship between Detention Officer Bryan Trainor and a former inmate that:

“Our county CEO has even threatened to cut all of their jobs and outsource the entire detention [sic] to CCCS which has the Start program, the Watch program, and the RYO in our county.”

(Union Motion for Summary Judgment, Exhibit 8).

16. On or about October 7, 2015, Ternes-Daniels met with Mike Thatcher, a representative of CCCS, to generally discuss costs associated with running ADLC’s Detention facility. Barkell and Sather attended this meeting where ADLC’s Detention Center was generally discussed and the possibility of ADLC issuing a request for proposal regarding Detention services, but no further action was taken.

17. On October 20, 2015, part-time Detention Officer John Stewart publicly commented at the regularly scheduled County Commissioner’s meeting. Specifically, Stewart made comments about the Detention Center supervisor, the location of the surveillance cameras, about a cutback in his hours, and that the cutback would result in him no longer being eligible for health insurance. Stewart was also “concerned that Mr. Thatcher will take over the Detention Facility and will not hire local residents to fill the positions.” The County Commissioners did not respond to Stewart’s comments. (County Commission Meeting Minutes, dated October 20, 2015).

18. As a part-time Detention Officer, Stewart could only work a maximum of 20 hours due to budgetary constraints in the ADLC fiscal year 2015-2016 budget.

Normally, as a part-time employee, Stewart worked two eight-hour shifts a week, Sunday and Monday. Stewart could gain extra hours for callouts but of the 64 opportunities for callout shifts in the Detention unit during his employment, Stewart did not sign up for any of the 64 shifts. On June 22, 2015, Stewart waived medical coverage from ADLC.

19. The CBA gives Detention Supervisor Mark Austin the authority to set the Detention Officers' schedules. The schedules are sometimes reviewed by Chief Barkell. When Austin prepared the schedule for the week of October 20, 2015 in late September 2015, he originally scheduled Stewart for two extra shifts to cover another Officer's vacation. However, when reviewing the schedule for the week of October 26th on October 22nd, Chief Barkell noticed that Stewart's hours were above the budgeted maximum for his part-time position. That same day, Austin called Stewart and informed him his schedule had changed.

20. On October 27, 2015, Sather conducted Stewart's annual performance evaluation. Sather found Stewart at a deficient level in 1) his professional communication skills with co-workers/supervisors; 2) his ability to work as a team member; 3) his willingness to take on additional responsibilities; 4) his failure in complying with ADLC policies and procedures; 5) his effective problem solving skills; and 6) his deficiencies in asking questions and seeking guidance as needed. (ADLC Motion for Summary Judgment, Exhibit M).

21. Sather also found, among other things, that Stewart was "constantly badmouthing other detention staff, police officers, supervisors, and [was] totally unethical." Sather also noted that Stewart was "constantly complaining about other shifts, wrote 54 complaints against dayshift officers and asked [the] chief to give nightshifts extra duties, was told no, filed a hostile work environment." (ADLC Motion for Summary Judgment, Exhibit M).

22. The Grievance Procedure clause of the parties' CBA provides, in pertinent part:

ARTICLE XII: GRIEVANCE PROCEDURE

A. Before filing a written grievance, the employee and/or the union shall discuss the problem with the supervisor and/or the employer within fourteen (14) days of first knowledge that a grievance exists. Any grievance or misunderstanding which cannot be settled between the Employer and the employee must be taken up with the Employer by the Business Representative of the Union, or anyone designated by the Union within thirty (30) days of the alleged infraction.

23. ADLC performance evaluations and instructions required employees to submit a written statement within 10 days of the evaluation should that employee disagree with the performance evaluation.

24. Stewart did not challenge this performance evaluation by Sather by submitting a written statement within 10 days of the evaluation, per ADLC policy.

25. Stewart voluntarily resigned his position with ADLC on April 15, 2016.

III. PROPRIETY OF SUMMARY JUDGMENT IN AN UNFAIR LABOR PRACTICE PROCEEDING

Motions may be made within contested case proceedings before the Board of Personnel Appeals. Admin. R. Mont. 24.26.212. The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials. *Klock v. City of Cascade*, (1997), 284 Mont. 167, 173, 943 P.2d 1262, 1266. Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where “the pleadings . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Peila*, supra.

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once a party moving for summary judgment has met 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 material 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 (citing *Phelps v. Frampton*, 2007 MT 263, ¶16, 339 Mont. 330, ¶16, 170 P.3d 474, ¶ P16).

IV. DISCUSSION¹

Montana law gives public employees the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. Mont. Code Ann. § 39-31-201. The

¹ Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

purpose of the Montana statutory provisions regarding collective bargaining for public employees is to address recognized sources of labor strife and unrest by encouraging “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; *Bonner School District No. 14 v. Bonner Ed. Assoc.*, 2008 MT 9, ¶32, 341 Mont. 97, 176 P.2d 262. Public employers are obligated “to bargain in good faith with respect to wages, hours, fringe benefits and other conditions of employment.” Mont. Code Ann. § 39-31-305(2).

By statute, public employees are protected in the exercise of concerted activities for the purpose of collective bargaining. Mont. Code Ann. § 39-31-201. A public employer commits an unfair labor practice by interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Montana Code Annotated § 39-31-201. Mont. Code Ann. § 39-31-401(1). Under Mont. Code Ann. § 39-31-401(5), a public employer commits an unfair labor practice if it refuses to bargain in good faith.

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals of using federal court and National Labor Relations Board (NLRB) precedents as guidance in interpreting the Montana collective bargaining laws. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

An employer violates Mont. Code Ann. § 39-31-401(5) by making a unilateral change to any employment term or condition subject to mandatory bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962); *Bigfork Area Ed. Assoc. v. Flathead & Lake Cty S.D. No. 38, ULP #20-78*; *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”).²

When a collective bargaining agreement is in place, an employer must obtain the union’s consent before implementing any change to the agreement. Where a mandatory subject of bargaining is not covered by the collective bargaining agreement, an employer must bargain the issue to impasse before it can implement a

² A violation of Mont. Code Ann. § 39-31-401(5) necessarily includes a derivative violation of Mont. Code Ann. § 39-31-401(1). See e. g. *Teamsters Local No. 2 v. City of Missoula*, ULP #6-86; *Standard Oil Company of California v. NLRB*, 399 F.2d 639, 642 (9th Cir. 1968).

unilateral change. *International Union (UAW) v. NLRB*, 765 F.2d 175, 179 (D.C. Cir. 1985).

Proof of discriminatory animus toward the union or union activity is not necessary in order to prove a violation of Mont. Code Ann. § 39-31-401(1). Proof of discriminatory animus is necessary in order to prove a violation of Mont. Code Ann. § 39-31-401(5). *Young v. City of Great Falls* (1982), 198 Mont. 349, 355, 646 P.2d 512, 515.

The Union contends that the ADLC has violated Mont. Code Ann. § 39-31-401(1) and Mont. Code Ann. § 39-31-401(5) because the ADLC not only threatened reprisal for filing grievances and ULP charges, but ADLC carried out those threats by changing shifts, refusing to bargain, cutting hours of work, and changing schedules. The Union alleges ADLC committed those acts because the Detention Officers were exercising their rights under Mont. Code Ann. § 39-31-201. ADLC argues that the Union has not carried its burden to establish that violations of Sections 39-31-401(1) or (5) occurred and in fact some of the allegations have been time-barred and waived by the Union.

A. ULP No. 11-2016 is not time barred.

ADLC argues that because Mont. Code Ann. § 39-31-404 provides that an unfair labor practice charge must be filed with BOPA within six months of the alleged unfair labor practice, ULP No. 11-2016 should be dismissed.

ADLC's argument is without merit. The issue here is not ADLC's decision to shift from 10-hour shifts to eight-hour shifts, but rather its refusal to bargain over returning to the 10-hour shifts in retaliation for the Union filing ULP No. 9-2016.

ULP No. 11-2016 was filed on October 13, 2015, seven days after the meeting between Hungate, Sather, and Barkell where Hungate was told by Barkell and Sather at their pre-arranged meeting that a shift change would not be considered until the Detention Center Officers could show that they could get along. As such, the ULP was well within the six-month window for filing the ULP complaint.

B. The Union did not prove that ADLC's refusal to bargain over the shift schedule was an unfair labor practice as set forth in ULP No. 11-2016.

The Union asserts a ULP against ADLC because ADLC refused to change to a 10-hour shift schedule at the Detention Center in retaliation for the Union filing ULP No. 9-2016, over the use of cameras in the Detention Center. The Union

believes that Barkell and Sather were willing to discuss a change back to 10-hour shifts, but the discussion was tabled after ULP No. 9-2016 was filed.

ADLC argues it did not bargain in bad faith and the schedule was changed for legitimate business reasons, specifically because the shifts could not get along. Further, ADLC contends that the terms of both the 2013-2015 CBA and the successor 2015-2017 already allowed for eight or 10-hour shifts. Therefore, ADLC argues that the undisputed facts show that ADLC did not refuse to bargain in good faith with respect to the change of work schedule in violation of Mont. Code Ann. § 39-31-401(5).

A union has the statutory right to bargain over wages, hours, and other terms and conditions of employment, 29 U.S.C.S. § 158(d), and an employer may not alter unilaterally a condition of employment which is the subject of mandatory bargaining. Employee work schedules, the length of the work day, and the length and the scheduling of employees' lunch breaks are all mandatory subjects for collective bargaining. E.g., *Meat Cutters Locals v. Jewel Tea Co*, 381 U.S. 679, 691 (1965); *Weston & Booker Co.*, 154 NLRB 747 (1965), *enf'd*, 373 F.2d 741 (4th Cir. 1967). Breaks are mandatory subjects of bargaining. *Atlas Microfilming*, 267 NLRB 682 (1982), *enf'd*, 753 F. 2d 313 (3rd Cir. 1985).

The public employer and the exclusive representative of the union have the authority and the duty to meet at a reasonable time to bargain collectively. Mont. Code Ann. § 39-31-305.

There is no question the subject of length of shifts is a condition of employment and is therefore subject to mandatory bargaining. ADLC does not dispute this point.

The language of the 2013-2015 CBA governing work shifts and work schedules is clear and unambiguous. As the U.S. Court of Appeals stated in *NLRB v. USPS*, 8 F.3d 832, (D.C. Cir. 1993):

“When employer and union bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules governing their future relations. Unless the parties agree otherwise, there is no continuous duty to bargain during the term of an agreement with respect to a matter covered by the contract. See, e.g., *United Auto Workers v. NLRB*, 246 U.S. App. D.C. 306, 765 F.2d 175, 179-80 (D.C. Cir. 1985); *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 683 (2d Cir. 1952). Thus, neither the Board nor the courts may abrogate a lawful agreement merely because one of the bargaining parties is unhappy with a term of

the contract and would prefer to negotiate a better arrangement. Quite the contrary, the courts are bound to enforce lawful labor agreements as written, see, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 454-55, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957).” USPS at 837.

The 2013-2015 CBA states that ADLC has the right to use eight or 10-hour shifts and that management has the exclusive right to schedule work. The Union does not dispute this language. Therefore, according to the CBA, ADLC had the right to set the work schedules for the Detention Center.

Therefore, just because Hungate was unhappy with the eight-hour shifts and was hoping to negotiate a better arrangement for his Officers does not mean a ULP occurred. Hungate’s continual requests of Barkell and Sather about changing back to 10-hour shifts was not bargaining. In fact, the record does not show that Hungate even had the sole authority to bargain on behalf of the Union. A meeting to set ground rules does not comport with § 39-31-305. Should Hungate have wished to raise the issue with respect to the 10-hour shift, the appropriate procedure would have been to set a reasonable time and place to bargain, with the respective representatives for each side. There is no evidence from the record that this was the case. Hungate was not bargaining a successor agreement with ADLC.

ADLC also argues that it had legitimate business reasons not to change the shift schedule from eight hours to 10 hours. The Union argues that ADLC was motivated by anti-union animus by not agreeing to bargain with Hungate over changing back to 10-hour shifts because of the ULP filed over the surveillance cameras.

To establish an independent violation of Mont. Code Ann § 39-31-401(1), the Union must show (1) that employees are engaged in protected activities; (2) that the employer’s conduct tends to interfere with, restrain, or coerce employees in those activities; and (3) that the employer’s conduct is not justified by a legitimate and substantial business reason. *Missoula County High School Dist. v. Board of Personnel Appeals of the State of Mont.*, 224 Mont. 50, 60, 727 P.2d 132, 1334-1335 (1986), citing *Fun v. Striders Inc., v. N.L.R.B.*, 686 F.2d 659 (1981).

Anti-union motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. *Missoula County High Sch. Dist. v. Board of Personnel Appeals*, 224 Mont. 50, 727 P.2d 1327 (Mont. 1986) citing *Metropolitan Edison Co. v. NLRB* (1983), 460 U.S. 693, 700-701, 103 S.Ct. 1467, 1473.

ADLC has met its burden to show its actions were for legitimate business reasons. In fact, the evidence provided illustrates that the decision to change to eight-

hour shifts was carried out, not because ADLC was acting with anti-union intent, but because it simply had to get control of its Detention Center Officers.

The evidence provided by the Union in the form of unsworn affidavits does not contradict ADLC's position. The Union does not dispute the fact that conflict existed between the day shift and afternoon shift Detention Officers as described in Finding of Fact #8. Pranks and foolishness ruled, and this child-like behavior between the Officers led to ADLC management taking the step of changing shift hours. The uncontradicted evidence shows that this was done in order to reduce the hostility between the shifts so that Officers could focus on their jobs, and not on each other.

Therefore, the Hearing Officer concludes that the preponderance of the evidence does not support ULP No. 11-2016 that ADLC retaliated by refusing to bargain because the Detention Center Officers engaged in protected union activity.

C. ADLC's threat to privatize the Detention Center pursuant to ULP No. 12-2016 constitutes an unfair labor practice under Montana Code Annotated § 39-31-401(1).

The Union contends that ADLC committed a ULP when CEO Ternes-Daniels threatened to outsource the ADLC Detention facility to a private company because the Officers were exercising their statutory protected rights under Section 39-31-401(1). ADLC argues that the Board is not being asked to decide whether a threat to privatize the Detention Center, if made or not, is discriminatory and a violation of Section 39-31-403(3). Instead, ADLC maintains that the issue before the Board is whether the Union can establish ADLC's action in allegedly making such a threat interfered with, restrained, or coerced employees in those activities in violation of Section 39-31-401(1).

The Union points to the affidavits of Erin Foley and Bill Rowe to establish that Ternes-Daniels threatened to outsource the entire Detention Center to a private contractor. Additionally, the Union relies on a statement from Chief Barkell in a letter dated March 17, 2015, which states that Ternes-Daniels did in fact threaten to outsource the Detention Center. The Union argues that these are "hallmark violations" and as such constitute a ULP.

Hallmark violations include such employer misbehavior as the closing of a plant or threats of plant closure, or loss of employment. *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, (2d Cir. 1980). In such cases, the seriousness of the conduct, coupled with the fact that often it represents complete action as distinguished from mere statements, interrogations or promises, justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the

work force. They are complete acts which may reasonably be calculated to have a coercive effect on employees and to remain in their memories for a long time. *Id.* As for a threat of plant closure, it may not be completed action but it “is the one serious threat of economic disadvantage which is wholly beyond the influence of the union or the control of the employees.” *General Stencils*, *supra*, 195 N.L.R.B. at 1113 (Chairman Miller dissenting).

In arguing that no unfair labor practice occurred, ADLC contends that it has the right to close the Detention Center for any reason it pleases as long as the decision to close is motivated by other than discriminatory reasons. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 85 S. Ct. 994, 13 L. Ed. 2d 827, (U.S. 1965).

The preponderance of the evidence shows that Ternes-Daniels’ actions and the letter of Chief Barkell were, in fact, motivated by anti-union animus. It was when Foley called upon Ternes-Daniels in her office to pick up a grievance letter that the comments by Ternes-Daniels were made. Ternes-Daniels expressed her frustration at the “Teamsters” as a whole and their filing of grievances. She then threatened to close the Detention Center in response to the union activity of filing such grievances. This finding of anti-union animus is further bolstered by the fact that Ternes-Daniels met with Mike Thatcher, Barkell, and Sather to generally discuss costs associated with running ADLC’s Detention facility and the possibility of ADLC issuing a request for a proposal of services to privatize the facility.

Additionally, Chief Barkell’s March 17th letter expressed frustration with respect to union activity and specifically stated that the “County CEO has even threatened to cut all of their jobs”

These comments by ADLC management were made on more than one occasion to union members and their representatives. While the actual closing of the facility did not occur, taken as a whole, the comments show a coercive intent and it is understandable that the Detention Officers would fear for their jobs and is evident by Stewart’s comments at the County Commission meeting on October 20, 2015.

In light of the coercive nature of the comments by Ternes-Daniels and Barkell, the argument by ADLC that it has the right to close the Detention Center for legitimate business purposes is unpersuasive. The ADLC has provided no supporting evidence to contradict the conclusion that the comments were made for reasons other than to interfere, restrain, or coerce the Detention Center Officers in the exercise of their rights. The evidence does not support such a conclusion.

D. The Union has not proven that the change made to Detention Center Officer John Stewart's schedule was retaliatory. See ULP No. 12-2016.

As previously indicated, to prove a violation of Montana Code Annotated § 39-31-401(1) and (5), the union must prove that management's conduct was motivated by anti-union animus. The union must first show that the protected activity is a substantial or motivating factor in the determination to take action against the employee. If the union can do this, the burden then shifts to the employer to show that it would have carried out the decision even without the employee having engaged in the protected activity. *Chauffeurs, Teamsters and Helpers, Local 190 v. City of Billings*, (1982), 199 Mont. 302, 313-14, 648 P.2d 1169, 1175.

The Union maintains that Stewart's hours were cut because Stewart "brought to the County Commissioners' attention the threat made by the CEO of privatizing the detention facility." (Union's Motion for Summary Judgment, p. 11). However, because of the timing of Stewart's comments, the action cannot be considered to have been taken in retaliation for any protected conduct.

ADLC's budget for Stewart's position allowed for a maximum of 20 hours per week. Stewart normally worked 16 hours a week, with his work days being Sundays and Mondays. Stewart's schedule for October was initially prepared on September 25, 2015 by Jail Supervisor Mark Austin, well before the October 20, 2015 County Commission meeting. In September, Austin erroneously scheduled Stewart for 32 hours the week of October 25th as he was trying to account for other Officers' vacation time. This was an oversight on Austin's part. On October 22, 2015, two days after the County Commission meeting, Barkell noticed that Stewart had been scheduled for more than the budgeted 20 hours per week. As such, Barkell directed Austin to contact Stewart and adjust his schedule accordingly.

The Union has presented no evidence to contradict ADLC's argument that its actions in reducing Stewart's hours was for budgetary reasons, and not union animus. Stewart himself acknowledged at the County Commission meeting on October 20, 2015 that his hours had been cut due to budgetary reasons. While the timing of it all certainly can be considered unfortunate, the schedule for Stewart was made far in advance and was made in error. ADLC corrected the error to comply with the Detention Center budget. No violation of Mont. Code Ann. § 39-31-401(1) has been proven.

E. The Union has not proven that Detention Center Officer John Stewart's performance evaluation was retaliatory. See ULP No. 12-2016.

In ULP No. 12-2016, the Union alleges that ADLC retaliated against Stewart by giving him a poor performance review on October 27, 2015. ADLC contends that the deficient marks given to Stewart by Sather were simply because of Stewart's poor work performance and bad attitude. Additionally, ADLC contends Stewart waived his ability to rebut his performance evaluation by failing to submit written comments within 10 days pursuant to ADLC procedure. ADLC is correct with regard to Stewart, but the ULP was filed by the Union arguing that ADLC's evaluation of Stewart was done in retaliation for expressing his concerns about the operation of the Detention Center. The Union had six months to file the unfair labor practice complaint and did so within that time period.

The Union has failed to show that Sather's review of Stewart's work performance arose out of anti-union animus. It could be argued that the timing of Stewart's performance review created some concern. However, the evidence presented by the Union does not support the ULP.

While it is true that Stewart did not agree with the performance evaluation as evident by the fact that he did not sign it, neither Stewart nor the Union have challenged ADLC's contentions that it had a legitimate business reason for giving Stewart a deficient review. Sather gave Stewart an explanation as to his reasoning for each deficiency, including, but not limited to, Stewart's bad mouthing of fellow Officers, the filing of 54 complaints against the day shift, and the filing of a hostile work environment claim because he was denied extra night shifts. The deficiencies noted by Sather were consistent with the turmoil, conflict, and lack of morale at the Detention Center. Therefore, the performance evaluation by Sather was driven by reality, not anti-union animus. No evidence has been presented otherwise.

V. REMEDY FOR THE UNFAIR LABOR PRACTICE

Upon determining by a preponderance of the evidence that an unfair labor practice has occurred, the Board of Personnel Appeals shall issue and serve an order requiring the entity named in the complaint to cease and desist from the unfair labor practice. Mont. Code Ann. § 39-31-406(4). The Board shall further require the offending entity to take such affirmative action, which may include restoration to the status quo ante, "as will effectuate the policies of the chapter." *Id.* See also, *Keeler Die Cast* (1999), 327 NLRB 585, 590-91; *Los Angeles Daily News* (1994), 315 NLRB 1236, 1241.

Because ADLC committed an unfair labor practice pursuant to ULP No. 12-2016 for threatening to close the Detention Center, the proper remedy here is to order ADLC to restore the status quo ante by refraining from threatening to outsource the Detention Center and post written notice in conspicuous places setting forth the results and remedies of this unfair labor practice charge.

VI. CONCLUSIONS OF LAW

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

2. The Union and ADLC had a full and fair opportunity to address the issues raised in this matter.

3. The Union failed to prove by a preponderance of the evidence that ADLC committed an unfair labor practice as described in ULP No. 11-2016. Mont. Code Ann. § 39-31-406.

4. The Union proved that ADLC committed an unfair labor practice when it threatened to privatize the Detention Center and is entitled to judgment as a matter of law. Mont. Code Ann. § 39-31-406.

5. The Union failed to prove that ADLC committed an unfair labor practice when it cut Detention Center Officer John Stewart's hours in October 2015. Mont. Code Ann. § 39-31-406.

6. The Union failed to prove that ADLC committed an unfair labor practice when it gave Detention Center Officer John Stewart deficient marks on his 2015 performance review. Mont. Code Ann. § 39-31-406.

VII. ORDER

1. The Union's Motion for Summary Judgment with respect to ULP No. 11-2016 is DENIED.

2. ADLC's Motion for Summary Judgment with respect to ULP No. 11-2016 is GRANTED.

3. The Union's Motion for Summary Judgment regarding ULP No. 12-2016 is GRANTED only with respect to the issue of whether ADLC's threat to privatize the Detention Center was an unfair labor practice.

4. ADLC's Motion for Summary Judgment with respect to ULP No. 12-2016 is GRANTED only with respect to the issues of whether it committed an unfair labor practice with regard to Detention Officer Stewart's schedule and performance evaluation.

DATED this 17th day of October, 2016.

BOARD OF PERSONNEL APPEALS

By: /s/ DAVID W. EVANS
DAVID W. EVANS
Hearing Officer