

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 9-2009 AND
DECERTIFICATION PETITION NO. 1-2009:

TEAMSTERS LOCAL UNION #2,)	Case Nos. 685-2009 and 725-2009
)	
Complainant,)	
)	
vs.)	
)	
SANDERS COUNTY SHERIFF)	
DEPARTMENT, SANDERS COUNTY,)	
)	HEARING OFFICER'S
Defendant,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
and)	AND RECOMMENDED
)	BOARD ORDER
MARTIN D. SPRING,)	
)	
Petitioner,)	
)	
vs.)	
)	
TEAMSTERS LOCAL UNION #2,)	
)	
Respondent/Cross Petitioner.)	

* * * * *

I. INTRODUCTION

An agent acting for the Board of Personnel Appeals consolidated a petition to decertify Teamsters Local #2 as the representative of certain public employees of Sanders County, Montana, with the union's subsequent unfair labor practice charge against the county alleging it had improperly aided and participated in the petition process. The two consolidated cases were sent to the Hearings Bureau for contested case proceedings.

Hearing Officer Terry Spear held the contested case hearing on March 19, 2009 in Thompson Falls, Montana. D. Patrick McKittrick represented the union. Michael W. Dahlem represented the county. Martin D. Spring, the member of the unit who petitioned for decertification of the union, participated on his own behalf. Exhibits 1, 2, and 6 were admitted by stipulation. Spring, Gene Arnold, Daniel Doogan, Chad Cantrell, Doug Dryden, and Rube Wrightsman testified under oath. The Hearings Bureau received the last briefs on May 4, 2009, and the matter was submitted for decision.

II. ISSUE

The Hearing Officer states the issues in these consolidated cases as follows:

1. Did the county illegally aid and participate in the decertification petition process?
2. If the county engaged in the alleged conduct, is the decertification election blocked as a result?
3. If the county did not engage in the alleged conduct, was the decertification petition timely filed, so that the decertification election should be ordered?

III. FINDINGS OF FACT

1. Sanders County Sheriff's Department, Sanders County ("county") is a "public employer" as defined by Mont. Code Ann. § 39-31-103(10).

2. Teamsters Local #2 ("union") is a "labor organization" as defined in Mont. Code Ann. § 39-31-103(6).

3. The union is and has been the Board of Personnel Appeals ("BOPA") certified exclusive bargaining unit representative of an appropriate unit of certain employees of the county, including members of the Sheriff's Department, as defined by Mont. Code Ann. § 39-31-103(4) and (6).

4. Martin D. Spring is a Sanders County Deputy Sheriff and a member of the bargaining unit.

5. The county was the employer and the union was the exclusive bargaining representative of the unit pursuant to a Collective Bargaining Agreement ("CBA") that was effective from July 1, 2006 through June 30, 2008 ("old CBA").

6. On March 12, 2008, a member of the unit ("grievant"), a 12-year veteran with the Sheriff's Department, was involved in an off-duty incident, as a result of which he was suspended with pay pending investigation. The grievant's conduct during the incident allegedly included pointing a department weapon at and threatening to kill Spring.

7. The Department of Justice, Division of Criminal Investigation (DCI) conducted a criminal investigation into the March 12, 2008 incident and delivered its report to the Sheriff's Department in April 2008.

8. The county conducted its own misconduct investigation regarding the March 12, 2008 incident to decide whether to take disciplinary action against the grievant, including whether to reinstate him.

9. During the county's misconduct investigation, several members of the bargaining unit, including Spring, told the county (Sheriff Gene Arnold and Undersheriff Rube Wrightsman) that they opposed reinstatement of the grievant. Some members told the county that they would resign if the grievant was reinstated.

10. On or about April 25, 2008, union business agent Daniel Doogan, acting for the union as exclusive bargaining representative of the unit, timely served written notice to the county of proposed changes to the old CBA, to commence collective bargaining for a new CBA.

11. On June 11, 2008, the county's misconduct investigation concluded and Sheriff Gene Arnold discharged the grievant for alleged gross inefficiency in the performance of official duties, pursuant to Mont. Code Ann. § 7-32-107(f).

12. On June 23, 2008, the union grieved the discharge on behalf of the grievant, pursuant to the old CBA.

13. The union and the county exchanged written proposals and engaged in at least five extensive collective bargaining sessions. During the bargaining, which extended beyond June 30, 2008, the union and the county agreed informally that they would continue to abide by the terms and conditions of the old CBA until a new CBA was established.

14. Spring and other members of the bargaining unit voiced strong objections, to Doogan, about the union's efforts to obtain reinstatement for the grievant.

15. Spring demanded that Doogan not proceed with the grievance. Doogan told Spring that the union would proceed to represent the grievant, meeting its obligations as certified exclusive bargaining unit representative under the old CBA.

16. Spring and other members of the bargaining unit continued to tell the county that they did not want the grievant back on the job. Some of the same members reiterated their threats of resignation if the grievant was reinstated.

17. While the grievance was pending, Spring asked Undersheriff Wrightsman about the procedure to follow to decertify the union as the employees' bargaining agent. The Undersheriff provided Spring with the name and phone number of a BOPA agent who could explain the decertification process.

18. Some bargaining unit members had engaged in informal discussions about decertification of the union prior to the March 18, 2008 incident.

19. Subsequently, Spring began circulating a decertification petition among the bargaining unit members. He both circulated the petition and obtained signatures upon it at work. He advised the Sheriff and the Undersheriff about what he was doing. He also advised them of the progress he was making with the petition, including information about who had signed the petition.

20. Neither the Sheriff nor the Undersheriff provided any assistance, initiated any conversation, or expressed any opinion to any bargaining unit member regarding decertification. Both stated repeatedly that they were obligated to remain neutral in the matter.

21. Neither the Sheriff nor the Undersheriff approved, or knew of, any circulation or collection of signatures on the petition during work time. Employees are permitted to engage in personal business at work during non-work time.

22. On or about August 6, 2008, Doogan met with Undersheriff Wrightsman and Spring and discussed the grievance filed by the union. Wrightsman, "tongue and cheek," first asked how much money the grievant was willing to pay the county to settle this matter. Wrightsman may also have told Doogan that further investigation into the March 12, 2008 incident was still possible, and might result in evidence supporting charges against the grievant.

23. Doogan concluded that Wrightsman was threatening to continue the investigation and perhaps find evidence to support criminal charges against the grievant unless the grievance was dropped. However, he did not view this “threat” as an unfair labor practice at the time. No complaint, charge, unfair labor practice claim, or report of the alleged threat was made at that time to anyone by Doogan or the grievant.

24. On August 29, 2008, the Undersheriff received new information about possible criminal wrongdoing by the grievant on March 12, 2008, which was then provided to the Sanders County Attorney. Sheriff Arnold told Spring about the new information, because Spring had been recipient of some of the grievant’s alleged threats and threatening conduct on March 12, 2008.

25. On September 4, 2008, in a meeting attended by Sheriff Gene Arnold as well as the Undersheriff and Doogan, the Undersheriff told Doogan that additional evidence, potentially supporting criminal charges against the grievant, had been obtained about the grievant’s conduct on March 12, 2008. The Undersheriff told Doogan that legally the information had to be provided to the County Attorney.

26. Doogan directly asked whether the county was threatening the grievant. Both the Sheriff and the Undersheriff denied that they intended to threaten the grievant. Doogan requested that the union be provided with the new information, and the county refused to provide it at that time, because it was part of a potential criminal investigation.

27. The new evidence was turned over to an outside law enforcement agency (the Lake County Sheriff’s Office) at the request of the Sanders County Attorney. The new evidence was shared with the union prior to the arbitration hearing on the grievance (*see* Finding 33).

28. The union and the county reached an understanding about a new CBA in September 2008.

29. On October 21, 2008, Spring filed a petition to decertify the union with BOPA’s agent. The petition stated that because of the union’s pursuit of the grievance to reinstate the grievant to his position and rank, without disciplinary action, the union no longer represented the majority of the unit.

30. On October 22, 2008, the county received copies of the decertification petition and posted them in three places in the Sheriff’s Office.

31. On October 28, 2008, the union filed an unfair labor practice charge with BOPA’s agent (at DLI) and designated it as a blocking charge. Doogan had not viewed the alleged threat against the grievant to constitute an unfair labor practice until after receiving a copy of the decertification petition.

32. The new collective bargaining agreement between the union and the county was reduced to writing, which the parties signed on February 10, 2009. The new CBA specified its effective term as commencing (retroactively) on July 1, 2008 and applying through June 30, 2010.

33. The grievance pertinent to these consolidated cases was arbitrated on November 24-25, 2008. No decision had issued by the date of the hearing in these consolidated cases.¹

34. By the date of hearing in this case, no criminal charges had been filed against the grievant.

IV. DISCUSSION²

Montana law gives public employees the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted self-organizing activities. Mont. Code Ann. § 39-31-201. The unfair labor practice complaint charging violation of those rights, and the decertification petition asserting that the union no longer should serve as the bargaining agent for those rights, will be treated separately in this discussion.

¹ It is irrelevant to this case, but reportedly the arbitrator issued a decision denying the grievance in April 2009.

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

1. No unfair labor practice was committed.

Mont. Code Ann. § 39-31-401 provides:

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 . . . ;
- (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 he 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.

In applying Mont. Code Ann. § 39-31-401, both BOPA and the Montana Supreme Court have used federal court and NLRB precedent. *Brinkman v. State* (1986), 224 Mont. 238, 729 P.2d 1301; *City of Great Falls v. Young* (1984), 211 Mont. 13, 686 P.2d 185; *Teamsters Local No. 45 v. State ex rel. BOPA* (1981), 195 Mont. 272, 635 P.2d 1310; *State ex rel. BOPA v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117.

The union has the burden of proving that the county committed an unfair labor practice. *Silver Bow S.E. Local No. 375 v. Butte-Silver Bow Government*, ULP No. 30-93; *Wright Line, Division of Wright Line, Inc.* (1980), 251 NLRB 1083, **enfd**, 662 F.2d 899 (1st Cir., 1981), **cert. den.**, 455 U.S. 989 (1982). This burden cannot be met by mere conjecture and speculation, but requires substantial evidence establishing an unlawful motive. **E.g.**, *AFSME v. Kukowski*, ULP No. 24-87; **and** *NLRB v. I. V. Sutphin, Co.-Atlanta, Inc.* (5th Cir. 1967), 373 F.2d 890.

An employer may not solicit, support, or assist the initiation, signing, or filing of an employee decertification petition. *Placke Toyota, Inc.* (1974), 215 NLRB 395; *Dayton Blueprint Co.* (1971), 193 NLRB 1100. An employer may have some other peripheral involvement in the petition process. *Eastern States Optical Co.* (1985), 275 NLRB 371. Employer conduct that is “mere ministerial aid” is not prohibited. *Consolidated Rebuilders, Inc.* (1968), 171 NLRB 1415, 1417. Assisting employees in implementing their independently arrived at decision or in expressing their predetermined objectives is not prohibited. *Washington Street B&I Foundry* (1983), 268 NLRB 338, 339 (1983); *Eastern States Opt.* **at** 373; *Poly Ultra Plastics* (1977), 231 NLRB 787, 790.

The underlying distinction is whether the specific conduct has “the tendency . . . to interfere with the free exercise of the rights guaranteed to employees under the Act.” *Washington Street B&I Foundry* **at** 339, **quoting** *The Red Rock Co.* (1949), 84 NLRB 521, 525 (1949), **enf. as mod.**, 187 F.2d 76 (5th Cir. 1951), **cert. den.** 341 U.S. 950 (1951). Acts which

have no impact upon employees' willingness to sign a decertification petition do not have such a tendency. Also, an employer has the right to provide factual information to its employees about the decertification process as long as it does not make any threat or promise or materially assist the employees in their efforts. *Lee Lumber and Building Material Corporation* (1992), 306 NLRB 408 (1992); *Indiana Cabinet Co.* (1985), 275 NLRB 1209.

On the other hand, employer assistance in the decertification process has the foreseeable result of obstructing the bargaining process, and thus maintenance of employer neutrality is essential. *Wahoo Packing Co.* (1966), 161 NLRB 174; *W.R. Hall Distribution* (1963), 144 NLRB 1285, *enf.* 341 F.2d 359 (10th Cir. 1965).

Some of the cited federal authority is, to say the least, disturbingly narrow. Nonetheless, there can be little doubt that Undersheriff Wrightsman properly provided Spring with the contact information of a BOPA agent who could explain the decertification process. Neither Sheriff Arnold nor the Undersheriff authorized employees to collect signatures or encouraged anyone to sign the petition. Spring told them about his progress, but both, on behalf of the county, made their neutrality clear throughout this process. They were told repeatedly that various deputies opposed reinstatement of the grievant and would quit rather than work with him, but there is no credible evidence that they bargained with the disgruntled deputies about it, or encouraged any deputies to sign the decertification petition.

Sharing with Spring, no earlier than late August, new information received regarding the March 12, 2008 incident, when Spring had been the alleged target of some of the grievant's conduct that day, was justifiable and was not soliciting, supporting, or assisting in the decertification petition. Given the nature of the allegations about the grievant's conduct, sharing the new information with Spring was reasonable out of a concern for his safety, rather than related in any fashion to his employment or membership in the unit. Proof that the Sheriff provided such information to Spring did not establish an unfair labor practice.

Regarding Doogan's early August meeting with the Undersheriff and Spring, had Wrightsman threatened to seek information for a criminal prosecution of the grievant if he did not withdraw his grievance, it could have been a violation of Mont. Code Ann. § 39-31-401, albeit one unrelated to the decertification petition. *Saint Gobain Abrasives, Inc.* (2004), 342 NLRB No. 39; *Master Slack Corp.* (1984), 271 NLRB 78. However, Doogan, whose testimony was the only evidence of the threat, testified that he neither complained about nor discussed the conversation with anyone other than the grievant. Doogan admitted that he did not conclude that an unfair labor practice had been committed until after receiving a copy of the decertification petition. Doogan's testimony about threats on August 6, 2008 was not credible. If Wrightsman made the threatening statements, it seems more likely than not that Doogan would have immediately filed an unfair labor charge or reported the threat to the Sheriff, the Sanders County Attorney, the Attorney General, or some other authority.

In addition, the Sheriff's internal personnel investigation was completed by June 11, 2008. The Undersheriff did not obtain additional evidence of possible criminal wrongdoing by the grievant until later in August 2008. These facts make it extremely unlikely that he threatened the grievant in early August 2008 either with nonexistent new information or with a criminal investigation that would not, in any event, be undertaken by Sanders County against a former deputy (DCI and Lake County undertook the criminal investigations involved).

During the early September meeting with Doogan, the Sheriff and the Undersheriff were clear in denying that they were making any threats against the grievant. Threats of criminal prosecution would in any event have been hollow, since law enforcement could not file a felony charge against the grievant. Under a legal duty to report evidence of a serious crime to the County Attorney, the law enforcement officers had no legal authority to file charges.

Ultimately, the Hearing Officer finds it inherently incredible that two sworn peace officers would attempt to frustrate and prevent a grievant from exercising his right to grieve his discharge with threats to enlarge or to resume investigation of possible criminal conduct if he proceeded, and with implied or actual offers to refrain from further investigation if he dropped his grievance.

The union failed to carry its burden of proof regarding the unfair labor practice, which renders the second of the three issues in this case moot. To the extent that the union extended its unfair labor practice claim to charges that the county not only illegally supported the decertification process, but also illegally impeded the grievant's grievance process, the union failed to carry its burden of proof on any such charge. Therefore, the second of the three issues, regarding appropriate relief to remedy the unfair labor practice, is moot.

2. Spring's petition was not timely.

After investigation, if BOPA or its agent has reasonable cause to believe that a question of representation exists, it shall hold a hearing upon a petition filed in accordance with BOPA rules asserting that the certified exclusive bargaining representative no longer represents the majority of the employees in the unit. Mont. Code Ann. § 39-31-207(1)(a)(ii).

The applicable BOPA rule, cited by both the union and the county, appears in Admin. R. Mont. 24.26.643(1) and (2) and reads as follows:

- (1) A petition for decertification of an exclusive representative shall be filed by an employee, a group of employees, or a labor organization, provided that 12 months have elapsed since the last election.
- (2) The petition must be filed during the 30 day window period which starts on the 90th day and ends on the 60th day prior to the termination date of the collective bargaining agreement, or upon the terminal date thereof.

A further inapplicable provision follows, as Admin. R. Mont. 24.26.643(3), which applies only to bargaining units in public schools (including universities and community colleges):

- (3) A petition seeking decertification of a bargaining unit comprised of employees of school districts, units of the Montana university system, or of a community college may only be filed during January of the year the existing collective bargaining agreement is scheduled to terminate, or after the termination of the existing collective bargaining agreement.

The language of the applicable rule could hardly be clearer. Except for bargaining units comprised of public school employees, there are two windows for filing decertification petitions: from the 90th through the 60th day before termination of the existing CBA or on the date of

termination of the existing CBA. Since the next subsection of the rule provides two different filing windows for bargaining units comprised of public school employees, the second of which specifies that a decertification petition may be filed after termination of the existing CBA, BOPA obviously intended “terminal date” to mean exactly that—the day upon which the existing CBA terminates. *See, e.g., Cascade County C./D. Off. Assoc. v. Teamsters Union L. No. 2*, DC No. 1-2005. Spring did not file his petition within the 90 to 60 day window and did not file his petition on the terminal date (June 30, 2008) of the old CBA. Since the bargaining unit is not comprised of public school employees, the larger window that begins after termination of the old CBA simply was not available.

The Hearing Officer recognizes that there are good and sufficient public policy considerations for restricting decertification petitions to particular windows, to protect the collective bargaining process. However, as this case demonstrates, the narrowness of the one day window involved in this case, in conjunction with the typical bargaining process that commences before the termination date of a CBA, can make it a challenge to file a decertification petition in a timely manner.

In this case, the grievance that prompted the decertification petition was filed on June 23, 2008, after expiration of the 90 to 60 day window to file such a petition. The one day “terminal date” window came less than three weeks later. The employees had to file their petition on the terminal date. They could not be assisted by the employer and would not be assisted by the union they sought to decertify.

Because of the fairly typical course of the collective bargaining between the union and the county for the new CBA, alternative meanings of “terminal date” may exist. Depending upon varying interpretations of the language of the old and the new CBAs between the union and the county, Spring’s petition still was either too early or too late. If the old CBA terminated either on the date of the union’s request to open it for negotiations (in April) or in accord with its original terminal date at the end of June, the petition was too late. If the retroactivity provision of the new CBA determined the old CBA’s terminal date, then the decertification petition was still too late for either filing window. If the date upon which the union and the county reached an understanding about a new CBA was the terminal date of the old CBA (sometime in September 2008), the petition was still too late for either window. If the date upon which the union and the county fully executed the new CBA (February 10, 2009) determined the old CBA’s terminal date, then the petition was filed more than 90 days before the terminal date, and was too early for either window.

It seems absurd to give employees who seek to exercise their right to disavow a representative either a terrifically short time or an entirely uncertain time to file their petition. Nonetheless, BOPA’s rule is entirely clear about the one day window. The correct application of that rule to this case may be quite a puzzle, but there is simply no interpretation of the rule that renders this petition timely.

In commenting critically about the problems involved with the “terminal date” language of the rule, the Hearing Officer is not endorsing the decertification petition. The union’s pursuit of the grievance was required, in discharge of its responsibility as the bargaining representative. It was the union’s pursuit of the grievance, not the conduct of the county, that prompted unit members to sign the petition. The Hearing Officer expresses no opinion about

whether that is good or bad. Either way, the end result here is that an otherwise facially valid decertification petition will be dismissed because of the technical filing requirements.

V. CONCLUSIONS OF LAW

1. The union has failed to prove that the county solicited, supported, or assisted in the initiation, signing, or filing of the employee decertification petition involved, or otherwise interfered with, restrained, or coerced the grievant or any other member of the bargaining unit in the exercise of their rights of self-organization under Montana law. Therefore, the union has failed to prove an unfair labor practice in violation of Montana Code Annotated § 39-31-401.

2. The decertification petition in this case was not timely filed and therefore should be denied. Mont. Code Ann. § 39-31-207; Admin. R. Mont. 24.26.643(2).

VI. PROPOSED BOARD ORDER

1. Unfair Labor Practice Complaint No. 9-2009 was not proved and is therefore dismissed.

2. Decertification Petition No. 1-2009 was not timely filed and is therefore dismissed.

DATED this 5th day of June, 2009.

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR
Terry Spear
Hearing Officer

NOTICE OF RIGHT TO FILE WRITTEN EXCEPTIONS

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than June 29, 2009. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. The original notice of appeal must be mailed to the following address, with a certification that copies were mailed that same day to counsel for represented parties and to self-represented parties:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518