STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 23-99 and 31-99:

KALISPELL POLICE ASSOCIATION,	)	**Charge No. 23-99 and 31-99**
Complainant,	)	
	)	**FINDINGS OF FACT;**
vs.	)	**CONCLUSIONS OF LAW;**
	)	**AND RECOMMENDED ORDER**
CITY OF KALISPELL,	)	
Defendant.	)	

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I. INTRODUCTION

On March 4, 1999, the Kalispell Police Association (KPA) filed an unfair labor practice charge, Case No. 23-99, with the Board of Personnel Appeals, alleging that the City of Kalispell violated § 39-31-401, MCA. On March 29, 1999, KPA filed an amendment to the original charge, alleging that the City of Kalispell was also in violation of § 39-31-201, MCA. The City of Kalispell denied any violations of the above laws.

On May 3, 1999 members of the KPA filed another unfair labor practice charge, No. 31-99, with the Board alleging that the City of Kalispell violated § 39-31-401, MCA, by instituting unilateral changes in overtime computation without notice, by coercing and restraining the KPA's members in the exercise of their rights under § 39-31-201, MCA and by bargaining in bad faith. The KPA linked the second charge to the previously filed No. 23-99 as stemming out of the same situation. The City denied any violation of law. The Board investigator determined that if the facts alleged by the KPA were proven, an unfair labor practice charge was supported, and that the facts stated by one party did not agree with those offered by the other.

The matter was investigated by the Board, and its investigator issued an investigative report and determination on June 18, 1999. The investigative report and determination set forth six issues presented by the KPA in alleging violations of §§ 39-31-201 and 39-31-401, MCA. The issues as framed by the investigator for the Board were set forth as follows:

1) Did the City deprive members of the KPA of legal holidays outlined in §§ 1-1-216 and 2-18-603, MCA in violation of either § 39-31-201, or § 39-31-401, MCA;

2) Did the City bargain to impasse over 32 hours of unpaid training required under a former collective bargaining agreement in violation of either § 39-31-201, or § 39-31-401, MCA;

3) Did the City bargain to impasse illegally over an election of remedies clause contained in the new grievance procedure that requires the KPA members to waive statutory rights in violation of either § 39-31-201, or § 39-31-401, MCA;

4) Did the City introduce new issues during the bargaining in an effort to frustrate the collective bargaining process in violation of either § 39-31-201, or § 39-31-401, MCA;

5) Did the City institute unilateral changes in bargaining unit working conditions without first bargaining in violation of either § 39-31-201, or § 39-31-401, MCA; and

6) Did the City use a bargaining agent who did not have full and proper authority from the City to bargain on the City's behalf in violation of §§ 39-31-201, 39-31-305 or 39-31-401, MCA?

Following the investigation, the investigator issued a determination concluding that if the facts alleged by the KPA were proven, an unfair labor practice charge was supported, and that the facts stated by one party did not agree with those offered by the other.

For all times relevant to this dispute the KPA and the City of Kalispell were signatories to a collective bargaining agreement, the terms and conditions of which specified training time and holiday entitlement. On March 15, 1999, members of the KPA filed a wage claim with the Department of Labor and Industry Wage and Hour Unit, alleging that the officers were not compensated for training time. KPA amended the initial complaint to include allegations that members of the KPA were not compensated properly for holidays as specified in § 2-18-603, MCA. The parties to the wage and hour dispute stipulated to have both complaints training and holiday pay reviewed by the Wage and Hour Unit in a consolidated determination.

The determination issued by the Wage and Hour Unit found that the case was subject to the FLSA and that members of the KPA were entitled to wages for all time they spent in training related to their employment. The determination further found that the officers were not entitled to compensation pertaining to their claim for holiday pay. Neither party appealed from the wage and hour determination. On August 30, 1999, the City of Kalispell issued checks to members of the KPA for uncompensated training time in accordance with the wage and hour determination. At the hearing, parties stipulated that all issues concerning wages for the training time had been resolved and, therefore, that the issue should be dismissed in charges related to the unfair labor practice complaints.

On October 1, 1999, the City of Kalispell filed a motion to dismiss the unfair labor practice charges on the basis that the subject matter of all issues presented in the respective unfair labor practice complaints had been rendered moot through negotiation, ratification and signing of a collective bargaining agreement between the City and the KPA on July 28, 1999. The hearing officer reserved ruling on that motion prior to hearing the merits of the case.

The City also filed a motion contending that the ruling by the Wage and Hour Unit operated as a bar to further proceedings by the Board of Personnel Appeals under the doctrines of res judicata or collateral estoppel. The City contended that the wage and hour determination was not appealed by either party and remained in effect. Therefore, any allegation of an unfair labor

practice based upon holidays should be dismissed by the Board. The hearing officer denied the motion on the grounds that the Wage and Hour Unit's determination did not constitute adjudication of the holiday issue. Rather, the Wage and Hour unit issued a determination based on an investigative review conducted by a compliance specialist.

The City also filed a motion in limine requesting that the KPA be prohibited from proffering testimony or introducing exhibits related to holiday compensation, agency training compensation, any Federal law or State law other than those contained in Title 39, Chapter 31, Part 4, MCA, and any events occurring subsequent to May 3, 1999. The hearing officer reserved ruling prior to the hearing and denied the motion at hearing, to determine the relevant evidence in the decision.

Hearing officer Michael T. Furlong conducted the hearing in this matter on October 27, 28, and 29, 1999, in Kalispell, Montana. Benjamin W. Hilley, Attorney at Law, represented the KPA. Glen Neier, City Attorney for the City of Kalispell, represented the city. Troy Holt, Scott Warnell, Roger Nasset, and Joneva McCann appeared as witnesses for the KPA. Everit Sliter (CPA), Rick D'Hooge, Marti Hensley, and Joneva McCann (adverse witness) appeared as witnesses for the City.

The following exhibits were admitted into evidence at the hearing:

Claimant Exhibits Admitted

2 through 13

14 (duplicates Respondent's NNN)

15 through 66

68 through 72

73 (duplicates Respondent's KKKK)

74 & 75

No exhibit 1 or 67

Respondent Exhibits Admitted

A, B, E, I through P, S through Z

AA through ZZ

AAA through VVV

CCCC through IIII

KKKK through QQQQ

On November 24, 1999, the hearing officer granted the City's motion that the unfair labor practice charges had been rendered moot by the signing of the collective bargaining agreement and dismissed the charges. On December 14, 1999, the KPA filed exceptions to the Hearing Officer's Findings of Fact, Conclusion of Law, and Recommended Order. On April 27, 2000, following the submission of briefs, the parties presented oral argument to the Board on the exceptions.

On May 25, 2000, the Board issued an Order of Remand affirming the hearing officer's findings of fact but reversing his conclusion of law that the charges should be dismissed as moot. The Board remanded the case to the hearing officer with directions that he determine whether the City bargained to impasse over illegal subjects, specifically with respect to holiday time off and the election of remedies clause.

II. ISSUE

Whether the City of Kalispell committed unfair labor practices in violation of §§ 39-31-401, 39-31-201, and 39-31-305, MCA.

III. FINDINGS OF FACT

1. The Kalispell Police Association (KPA), is the exclusive bargaining representative for police officers employed by the City of Kalispell.

2. KPA and the City have been parties to a series of collective bargaining agreements. The last agreement was for the years commencing July 1, 1995, through June 30, 1998. The City and the KPA have a history of hard bargaining during contract negotiations which on at least one previous occasion led to a strike by the KPA.

3. On June 10, 1998, bargaining began between the parties for a new agreement. The parties met and bargained in approximately 14 sessions until January 18, 1999. The parties explored numerous grounds and proposals with little or no movement toward a settlement. Counsel for the KPA indicated on several occasions that the parties had reached impasse, including a letter to the Board on January 18, 1999.

4. During negotiations beginning June 10, 1998, the City appointed a committee comprised of the City Attorney, City Payroll manager, and a private negotiator to represent it in bargaining sessions with the KPA. The City gave the negotiating team some parameters within which to negotiate. The committee was free to negotiate over terms in the contract as long as the payroll did not exceed the previous budget by 2.5%. The negotiating team was not authorized to negotiate the overtime provisions proposed in the City's last, best, and final offer, or to negotiate the changes in officers' schedules.

5. The parties agreed to proceed with mediation before the Board of Personnel Appeals. On February 18 and 19, 1999, the parties participated in mediation with a Board mediator. Mediation was unsuccessful.

6. When the negotiations continued to have little or no progress, the City presented a last, best, and final offer to the KPA on March 2, 1999. The City implied it would implement the offer effective March 1999. The contract offer contained language re-defining overtime calculations and grievance procedures as follows:

Article V. Hours of Work and Overtime

Section 1. Starting Times and Work Schedules

Change first paragraph to red "the Starting times and work schedules will be as determined by the Chief of Police,"

Delete 2nd paragraph

Delete 3rd paragraph

4th paragraph delete 1st sentence

Section 4. Change to read "Overtime shall consist of any hours worked by the employee at the direction of the City in excess of 120 hours in a 21 calendar day work period. Before working any overtime, the employee must be directed to work the overtime by the authorized supervisor. Overtime pay shall be paid at the rate of one and one half (1 and ½) times the employee's regular hourly rate of pay. By mutual agreement between the City and the employee, before the overtime is worked, the employee may earn compensatory time at one and one half hours for each hour of overtime worked as prescribed by the Fair Labor Standards Act (FLSA).

Section 5. Current contract

Section 6. Delete last sentence.

Article XIV. Grievance Procedure

Add: D. Election of remedies

The association and/or the employee instituting any action, proceeding, or complaint in a federal or state court or before an administrative tribunal, federal agency, state agency, or seeking relief through any statutory process for which relief may be granted, the subject matter of which may constitute a grievance under this agreement, shall immediately thereupon waive any and all rights to pursue a grievance under this agreement. Upon instituting any proceedings in another form [sic] as outlined herein, the employee and/or the association shall waive his/her or their right to initiate a grievance pursuant to this agreement, or of a grievance pending in the grievance procedure, the right to pursue the grievance further shall be immediately waived. This section

does not apply to actions compelling arbitration as provided under this agreement to enforce the award of the arbiter.

7. The last, best and final offer included changes from the former method for calculation of overtime pay and changes in the officers' work schedules, which resulted in some officers receiving decreases in the amount of overtime pay received following its implementation in March 1999.

8. Under Article V, Sections 1 and 4 of the previous collective bargaining agreements were controlling for overtime compensation and work schedules. KPA members had worked a 4 days on, 3 days off, 4 days on, and 4 days off, schedule with 10 hour minimum shifts and overtime paid in excess of 10 consecutive hours, hours worked during regularly scheduled days off, or work over 80 hours in a 15 day work period. Sick leave, annual leave, and scheduled compensatory time off (time in a pay status) were, by practice, counted toward overtime accumulations.

9. Following implementation of the last, best, and final offer on March 2, 1999, the Chief of Police determined work schedules for the officers and overtime calculations were based on time worked in excess of 120 hours in a 21 calendar day period. Members of the KPA were affected by the changes in the calculation of overtime pay involving the application of sick leave, annual leave, and compensatory leave. One KPA member used sick leave (annual leave) to attend a funeral for his father, and lost overtime pay that he would otherwise have received under the former provisions of the contract. Another officer covered extra shifts at the City's request, used sick leave to assist his wife's recovery from giving birth, and received no overtime compensation. Still another officer sustained an injury on the job arresting a suspect. Due to the fact that the officer was on workers' compensation leave for a period of time, under the new provisions he did not receive overtime pay once he returned to work. Another officer had to use or lose accrued annual leave that did not count toward overtime calculations.

10. Under the last best and final offer the base pay of the officers was adjusted to include holiday pay. As such, an officer who did not work a holiday had his base pay adjusted to account for the holiday. Officers who worked on a holiday received pay for that day, at an inflated rate because of the holiday roll-in, as well as having benefit of the roll-in as compensation for the eight hours of holiday pay. The City's past and current method of compensating Association members for holidays fully compensated officers for holidays whether the officers worked the holiday or not. The inflated compensation for holidays was included within the officers overtime compensation, resulting in inflated overtime expense. The holiday roll-in had effectively been increased at a compound rate of 3.5% since 1989. Officers were paid in advance for holidays because the value of holidays was rolled into the base rather than waiting for a holiday to occur.

11. The provision for holiday pay in the City's last, best, and final offer was a provision carried forward from the 1995-1998 contract. During negotiations, the KPA sought to restore holidays as days off. Under the KPA's proposal, officers who worked holidays would receive premium pay (time and one-half). The City was unwilling to agree to this proposal unless the holiday pay was rolled back out of the base.

12. On March 15, 1999, members of the KPA filed wage claims with the department alleging that they had not been properly compensated for training time and legal holidays. The wage and hour unit conducted an investigation and issued a determination which found that the training time was compensable, but determined that there was not a violation of law concerning holiday pay.

13. The KPA engaged in a strike from July 9, 1999, until July 13, 1999. On July 13, 1999, the City and the KPA reached a tentative agreement on all outstanding issues with the assistance of a mediator from the Board of Personnel Appeals. KPA ratified the tentative agreement on July 13, 1999. The City Council ratified the agreement on July 14, 1999. Representatives of both the City and the Association executed the collective bargaining agreement on July 29, 1999. The final agreement retained the language on holidays but did not include the disputed language on election of remedies.

IV. DISCUSSION

Montana requires a public employer to bargain collectively in good faith with labor organizations representing their employees, on issues of wages, hours, fringe benefits, and other conditions of employment. § 39-31-301(5), MCA. The failure to bargain collectively in good faith is a violation of §39-31-401(5), MCA.

The hearing officer initially held that the KPA's unfair labor practice claims were rendered moot by the settlement of the contract. The Board disagreed and remanded the case to the hearing officer with specific directions that the hearing officer determine whether the City bargained to impasse over illegal subjects: (1) holiday time off; and (2) the election of remedies clause.

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using federal court and National Labor Relations Board (NLRB) precedent as guidance in interpreting the Montana Collective Bargaining for Public Employees Act. State ex rel. Board of Personnel Appeals v. District Court, 183 Mont. 223, 598 P.2d 1117, (1979); Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals, 195 Mont. 272, 635 P.2d 1310 (1981); City of Great Falls v. Young (Young III), 211 Mont. 13, 686 P.2d 185 (1984).

It is a longstanding principle of labor law that an employer in labor negotiations may bargain to impasse over mandatory subjects of bargaining, and may implement its final offer if impasse has occurred. However, bargaining to impasse over permissive or illegal subjects is an unfair labor practice. NLRB v. Borg-Warner Corp., Wooster Div., 356 U.S. 342 (1958).

The KPA and the City engaged in numerous and exhaustive negotiation meetings from June 1998 to March 1999 with little or no movement toward the ratification of a work contract. During that period, they also participated in mediation processes before the Board of Personnel Appeals, to no avail. Due to the lack of movement, the KPA suggested through counsel that the parties were at impasse. Due to the frustrated bargaining progress, the City presented its last, best and final contract offer and presented it to the KPA on March 2, 1999. The parties did not dispute they were at impasse when the city implemented its last, best, and final offer, and the

association went on strike. The issue is whether the parties had bargained in good faith on the subjects of holidays and the election of remedies clause in reaching that impasse.

Holiday Pay
Issue Preclusion

At the outset, the City argues that res judicata or collateral estoppel bar any consideration of the holiday issue. Its contention is based on the fact that members of the KPA filed wage claims alleging that they had not been properly compensated for holidays worked under the prior contract. The Wage and Hour Unit issued an investigative determination in favor of the City, which the KPA did not appeal.

For res judicata or collateral estoppel to apply, there must be an actual prior adjudication of the issue in question, and the issue in the prior adjudication must be identical to the issue in the present litigation. Bragg v. McLaughlin, 297 Mont. 282, 285, 993 P.2d 662, 665 (1999) and Rafenelli v. Dale, 292 Mont. 277, 279-80, 971 P.2d 371, 373-74 (1999). This case does not meet either of these elements necessary to establish res judicata or collateral estoppel.

A decision issued after investigation without hearing is not an adjudication. The City cites Nasi v. State Department of Highways, 231 Mont. 395, 753 P.2d 327 (1988) for the proposition that res judicata can attach to the decisions of administrative agencies. However, the Nasi case involved an administrative decision following contested case hearing. As the Supreme Court stated noted:

Res judicata applies when administrative proceedings possess a judicial character: "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." United States v. Utah Construction and Mining Co., 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed. 642, 661.

An administrative agency is not acting in a judicial capacity when it conducts an investigation. An investigation does not provide the same opportunity to litigate issues as a contested case hearing, and the application of res judicata/collateral estoppel is not appropriate under the circumstances. Fetherston v. ASARCO, Inc., 635 F.Supp. 1443, 1446-47 (D. Mont. 1986).

Even if the holiday issue had been litigated in a contested case, the issues are not identical. The issue before the Wage and Hour Unit was whether the City owed the employees overtime compensation for holidays worked. The issue in the current case is whether the subject of holiday pay is an illegal subject of bargaining for purposes of determining whether the City committed an unfair labor practice when it bargained to impasse over the subject. Although there is some overlap between the issues, they are not identical. The Supreme Court has held that, "For res judicata to bar a subsequent action, there must be a precise identity of issues." Berlin v. Boedecker, 268 Mont. 444, 451, 887 P.2d 1180, 1184 (1994), citing In re Marriage of Stout, 216 Mont. 342, 701 P.2d 729 (1985). See also Niles v. Carl Weissman & Sons, Inc., 241 Mont. 230, 786 P.2d 662 (1990) and Majerus v. Skaggs Alpha Beta, 245 Mon. 58, 799 P.2d 1053 (1990). The Supreme Court has also applied the rule concerning identity of issues to the doctrine of

collateral estoppel. HKM Assoc. v. Northwest Pipe Fittings, 272 Mont. 187, 192, 900 P.2d 302 (1995).

Bargaining Concerning Holiday Time Off

Terms and conditions of employment, such as compensation, scheduling, and other conditions of employment are mandatory subjects of bargaining. Following bargaining to impasse on a mandatory subject, an employer can implement its last, best and final offer. Holidays and holiday time off are conditions of employment and would normally be considered mandatory subjects of collective bargaining. In this case, however, the KPA contends that holidays and holiday time off are set by statute and that the statutory scheme cannot be altered by collective bargaining. Accordingly, the KPA contends that the subject is an illegal subject and that bargaining to impasse is therefore an unfair labor practice.

The KPA relies on §§ 1-1-216 and 2-18-601, MCA and several Attorney General opinions which hold that vacation and sick leave benefits established by statute are not subject to variation through collective bargaining. "[W]hen a particular employment condition for public employees has been legislatively set, it may not be modified through collective bargaining without statutory authorization." 46 Mont. Op. Atty. Gen. No. 2 (1995). See also 38 Mont. Op. Atty. Gen. No. 20 (1979) and 38 Mont. Op. Atty. Gen.

No. 116 (1980).

Section 1-1-216, MCA, is in a chapter of the code entitled "General Definitions of Terms Used in Code." The section has a list of legal holidays, including each Sunday. It has no substantive provisions concerning the effect of a day being a legal holiday. The substantive provisions are contained in other statutes. For example, § 2-16-117, MCA, provides for state executive branch offices to be open each day except for Saturday, Sunday, and holidays, and several other statutes provide what effect the designation of a day as a holiday has. Similarly, § 2-18-601(6), MCA, which was added to the chapter of the code concerning public employee leave time by amendment in 1991, is a definition. It states:

For purposes of [Title 2, chapter 18, part 6, MCA] . . ., the following definitions apply: . . .

(6) "Holiday" means a scheduled day off with pay to observe a legal holiday, as specified in 1-1-216 or 20-1-305, except Sundays.

A definition section has no effect except to the extent it is used in other substantive provisions of the law. The substantive provision concerning holidays for public employees is § 2-18-603, MCA, which provides:

A full-time employee who is scheduled for a day off on a day that is observed as a legal holiday, except Sundays, is entitled to receive a day off with pay either on the day preceding the holiday or on another day following the holiday in the same pay period or as scheduled by the employee and the employee's supervisor, whichever allows a day off in addition to the employee's regularly scheduled work days off. . . .

Although this section implies that a holiday is a scheduled day off with pay, it addresses only the situation arising when an employee is normally scheduled to be off without pay on a holiday. The statute never expressly states that public employees are entitled to be off with pay on holidays. Further, the statute allows employees and their supervisors to mutually agree as to the time to be taken off in lieu of a holiday on which the employee is scheduled off.

Another Attorney General opinion issued in 1979 provides that an employee may be required to work on a holiday, and must then be either compensated for the lost holiday or be given the opportunity to take a paid day off at a later time. 38 Mont. Op. Atty. Gen. No. 16 (1979). The opinion stated:

That section is facially ambiguous and has been the subject of several prior Attorney General opinions. . . . In the first instance, it is dependent upon other statutory provisions for a definition of holidays. . . . Secondly, the section does not expressly state that public employees are entitled to days off on holidays but prior Attorney General opinions have found such entitlement implicit in the section. "If the legislature mandates a day off for state employees when a legal holiday happens to fall on a weekend, surely the same is true when a holiday falls during the week." . . .

The plain and obvious purpose of section 2-18-603 is to give public employees paid days off on specified holidays or days in lieu of those holidays. It is equally obvious, however, that not every public employee can be given his or her day off on every holiday or its complement under section 2-18-603. Most public offices may be closed to accommodate a holiday or its complement . . . but essential governmental operations, such as law enforcement and hospital services, must continue notwithstanding the holiday. It would be an asburd and unreasonable construction of section 2-18-603 to interpret it as requiring that all governmental services be suspended on holidays so that all public employees can have the same day off. Section 2-18-603 therefore does not forbid a governmental body from requiring employees to work on holidays or holiday complements. However, if an employee is required to work a holiday or its complement, he must be either compensated for the lost holiday or given an opportunity to take a paid compensatory day off at some other time. This requirement follows from the overall purpose of section 2-18-603, to give public employees a specific number of paid days off each year which correspond to specific holidays.

Whether the employee receives additional compensation for a working holiday or is given a different day off is in the sound discretion of the employing governmental body. However, the employee may not unilaterally determine which of the two alternatives his employer must pursue. If the employing governmental body directs the employee to take a different day off in lieu of the holiday and the employee refuses, the governmental body is not required to compensate the employee for the lost holiday. If, however, the employing governmental body agrees to allow the employee to work without taking a compensatory day off, it must pay him for that additional day.

38 Mont. Op. Atty. Gen. 56, 58 - 60 (1979) (citations omitted).

The KPA contends that this opinion was not valid after the 1991 amendment to the statute which added the definition of "holiday." The KPA asserts, therefore, that the 1991 change in the law set

holiday time off as a benefit for public employees, which like sick and annual leave benefits, is not subject to modification through collective bargaining. Following this reasoning, the subject would be an illegal subject, and bargaining to impasse over it would constitute an unfair labor practice.

The legislature did not substantively change the law in 1991. It merely added a definition of the term "holiday" to be used in construing § 2-18-603, MCA. It eliminated some ambiguity by clarifying that either § 1-1-216 or § 20-1-305, MCA, could determine which days were legal holidays. It did nothing to address any of the other ambiguities identified in the Attorney General opinion. Thus, because the law was not substantively amended, the legislature did not set a "particular employment condition for public employees." 38 Mont. Op. Atty. Gen. No. 16 remains good law for determining how holidays and holiday time off are addressed.

The Attorney General opinion recognizes that public employers can require employees to work on legal holidays, and that employers and individual employees can negotiate about the treatment of holidays worked. If employers can negotiate with individual employees on this subject, it is reasonable to conclude that they can do so with employee unions on bargaining also. Because it affects a term or condition of employment, it is a mandatory subject. Therefore, it is not an unfair labor practice for an employer to bargain to impasse over the subject of holidays and holiday time off.

Bargaining Concerning the Election of Remedies Clause

The KPA also contends that the election of remedies clause incorporated in the City's last, best, and final offer was a permissive or illegal subject, and that bargaining to impasse was therefore a violation. The City contends that the subject is mandatory, and bargaining to impasse was not a violation. The clause would have required an employee or the KPA to waive the right to pursue a grievance under the contract if the employee or the KPA filed an action or other proceeding in any other forum concerning the subject of the grievance.

In Kolman/Athey Division, 303 NLRB 92 (1991), the NLRB held that insistence to impasse on a similar provision was a violation. The NLRB did not decide whether the clause was a permissive or illegal subject of bargaining. In a concurring opinion, Chairman Stephens noted that the NLRB has held that in some cases that certain aspects of grievance and arbitration procedures are mandatory subjects. However, only the "essential components of the grievance arbitration process [which] govern the way it is to function" are mandatory. He found that an election of remedies clause is not such a component. 303 NLRB at 93. The opinion of Chairman Stephens is persuasive on this subject. See also Communications Workers of America, 280 NLRB 78, 81-82 (1986) holding that the types of grievance process components which are mandatory subjects include the method of selecting arbitrators, restrictions on legal actions to enforce arbitration awards, the scope of arbitration, plant access by union officials handling arbitration, time limits for filing grievances, the form for submitting grievances, and procedures for preparation of transcripts of grievance hearings.

The City contends that the clause it proposed is more narrow than that contained in Kolman/Athey Division, relying on language from the concurring opinion which referenced the breadth of the clause at issue in that case as a reason for the conclusion that it was not a mandatory subject. The election provision in Kolman/Athey Division would have precluded the union in a case from pursuing a grievance over a matter if any employee elected to pursue a claim in another forum, for example. The City contends that its proposal would not have had a similar effect. However, the proposed language, and in particular the use of the term "and/or", would have had the same effect.

In addition, the City points to language in Montana law which provides that a collective bargaining agreement to which no school is a party may contain a grievance procedure culminating in binding arbitration. § 39-31-306(2), MCA. The law further requires agreements to which a school is a party to include a grievance procedure culminating in binding arbitration, and requiring the grievant to elect between the arbitration process and any other action or complaint that seeks the same remedy. § 39-31-306(5), MCA. Although the employer is not a school, it draws an analogy to this statute to support a contention that an election of remedies provision must be allowable. At best, the City's argument that such a clause "may" be included establishes that an election of remedies provision is permissive.

Further, an election of remedies clause which requires waiver of rights in order to pursue a grievance process may violate other substantive laws. In EEOC v. Board of Governors of State Colleges and Universities, 957 F.2d 424 (7th Cir. 1991), cert. denied 506 U.S. 906 (1992), the court held that similar language in a collective bargaining agreement, as applied to an employee who filed an charge with the Equal Employment Opportunity Commission, violated the retaliation provisions of the Age Discrimination in Employment Act. A similar analysis would apply to all statutory claims which contain retaliation provisions, such as Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act, and the Fair Labor Standards Act. Thus, the election of remedies clause is illegal to the extent that it deprives employees who elect to pursue certain statutory rights of the right to a grievance procedure under the collective bargaining agreement.

Summary

1. The doctrines of res judicata or collateral estoppel do not bar the Board from considering the issue of holidays and time off for holidays in this case.

2. A proposed contract provision addressing the issue of holidays and time off for holidays is a mandatory subject of collective bargaining. The City did not commit an unfair labor practice by insisting to impasse on a contract provision addressing this issue.

3. A proposed contract provision requiring election of remedies is not a mandatory subject of collective bargaining. The City committed an unfair labor practice by insisting to impasse on a contract provision addressing this issue.

ULP 31-99

Two cases, ULP No. 23-99 and ULP No. 31-99, were consolidated for hearing. In the initial decision in this case, the Hearing Officer recommended the dismissal of both cases on the ground of mootness. The Board held that the cases were not moot and remanded for consideration of two specific issues, holiday time off and election of remedies. These issues were the subject of ULP No. 23-99, not ULP No. 31-99. ULP No. 31-99 alleged unilateral changes in the area of overtime pay. The Board rejected the recommended order of dismissal in ULP No. 31-99 but gave no direction to the Hearing Officer on its disposition. In the absence of such direction, ULP No. 31-99 should be dismissed.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this matter pursuant to § 39-31-405, MCA.

2. The City of Kalispell did not violate § 39-31-201 or § 39-31-401(5), MCA by insisting to impasse on a contract provision concerning holidays and time off for holidays.

3. The City of Kalispell violated §§ 39-31-201 and 39-31-401(5), MCA by insisting to impasse on a contract provision requiring waiver of the grievance arbitration process when an employee or the Kalispell Police Association pursued other legal remedies.

VI. RECOMMENDED ORDER

1. The City of Kalispell is hereby ordered:

a. To cease the practice of unilaterally changing wages, hours, and terms and conditions of employment in the absence of a valid bargaining impasse.

b. To restore the rights to grievance arbitration under the collective bargaining agreement to any employee who was denied the process under the proposal implemented by the City.

c. To reinstate all leave taken by police officers to participate in these proceedings;

d. To post copies of the notice contained in Appendix A at conspicuous places, including all places where notices to employees are customarily posted in the City of Kalispell, including City Hall and all police stations, for a period of 60 days, and to take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material.

2. ULP 31-99 is dismissed.

DATED this 21st day of September, 2001.

BOARD OF PERSONNEL APPEALS

By: /s/
Michael T. Furlong
Hearing Officer

NOTICE: This decision is being automatically forwarded to the Board of Personnel Appeals for review. You may participate in the review by filing exceptions to these Findings of Fact, Conclusions of Law and Recommended Order pursuant to ARM 24.26.215 within 20 days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

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