STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 13-2002:

AMERICAN FEDERATION OF STATE,	)	Case No. 1157-2002
COUNTY, AND MUNICIPAL EMPLOYEES,	)	
MONTANA STATE COUNCIL NO. 9,	)	
AFL-CIO	)	FINDINGS OF FACT;
Complainant,	)	CONCLUSIONS OF LAW;
	)	AND RECOMMENDED ORDER
vs.	)	
CITY OF LIBBY, MONTANA	)	
Defendant,	)	

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

I. INTRODUCTION

In this matter, the American Federation of State, County, and Municipal Employees (Union) has alleged that management of the City of Libby, Montana (City), committed unfair labor practices against bargaining unit employees of the City. Hearing Officer Gregory L. Hanchett held a hearing in this matter on August 20, 2002. Matthew B. Thiel, Attorney at Law, represented the Union. Daniel D. Johns, Attorney at Law, represented the City. The Union's Exhibits 1 through 13 and City's Exhibits A through R were admitted into evidence by stipulation of the parties.

At the conclusion of the hearing, a specific schedule for post hearing briefs was established with opening briefs being filed on September 30, 2002 and responsive briefs due by October 30, 2002. The parties jointly requested that the deadline for mailing responsive briefs be extended to November 8, 2002. That motion was granted. Each party mailed its responsive brief and those briefs were received in the Hearings Bureau on November 12, 2002.

II. STATEMENT OF ISSUES

1. Did the City commit an unfair labor practice by not initiating performance evaluations and by not implementing a step in grade pay increase for Union employees in fiscal year 2001?

2. Did the City commit an unfair labor practice by not implementing a 3.2% cost of living increase for Union employees?

3. Did the City commit an unfair labor practice by reducing employee Shaun Smook's daily hours of work from 8 hours to 7½ hours on the day following a contract negotiation meeting or in failing to promote Walter Torgeson?

III. STATEMENT OF FACTS

A. Background Facts

This case must be viewed in the context in which it arises in order to understand the nature of the dispute and to make sense of some of the actions of the parties. The background of this case is as follows:

1. Since 1999, the Union has been involved in bargaining unit formation and negotiation with the City to arrive at a first ever collective bargaining agreement for certain employees of the City.

2. In October 2000, the plaintiff Union filed a petition with the Montana Board of Personnel Appeals seeking certification and election for a new unit of employees of the City. The petition sought to create a bargaining unit comprised of all full and part-time City employees, except for supervisors, confidential employees, the Chief of Police, and certain other bargaining units.

3. On January 12, 2001, the Union was certified as the exclusive representative of the employees of the City.

4. The Union's negotiating team consisted of Union representative Magnuson and bargaining unit members Bob Lanman, Mike Voorhies, Howard Pape, Beth Burell, and Walt McLame (phonetic spelling). The City's negotiating team consisted of City mayor Anthony Berget, city council members including Dan Stephens, and the City's legal counsel, Dan Johns.

5. The contract negotiations between the parties began in May 2001. A contract proposal was presented by the Union to the City during the parties' May 2001 bargaining session. That contract was not accepted by the City and was met with the City's counter proposal at the June 2001 meeting of the negotiating teams.

6. A unit clarification proceeding arose from the certification proceeding with respect to whether Union members John Knudson, Marc McGill, Dan Burns, and Scott Meyers, all City foremen in the City's public works department, should or should not be part of the bargaining unit. In August 2001, after an evidentiary hearing, the Board of Personnel Appeals determined that Knudson, McGill, and Burns were not management and should not be removed from the bargaining unit. One basis for the City's position that these foremen should be removed from the bargaining unit was the contention that the foremen's ability to conduct performance appraisals for members of their respective crews was supervisory in nature. The Board found that the ability to conduct the appraisals was inconclusive on the question of whether or not the foremen were supervisors.

7. In August 2001, Pam Magnuson, the present representative, took over the position of Union representation. At the parties' September 20, 2001 bargaining session, Magnuson presented a revised contract proposal. Additional bargaining sessions have continued to occur since that time, including one in October 2001 and one that occurred on November 14, 2001. As of the date of the hearing in this matter, 12 total bargaining sessions had been undertaken by the parties. Unfortunately, no collective bargaining agreement has been reached. In fact, the parties' inability

to reach agreement on a collective bargaining agreement has resulted in the parties turning to a mediator in an effort to reach an agreement.

8. The issue of compensation and benefits has been an item of ongoing negotiation between the Union and the City since negotiations began.

9. The City suffered a net operating income loss of $43,548.00 for the fiscal year ending June 30, 2001. Not surprisingly, the decreased revenue entered prominently into the city council's decision-making with respect to hiring and expectations for job duties. Such considerations as to whether a position should be part-time or full-time or whether vacant positions, such as supervisory positions, should be filled or not filled were understandably tied to the city council's understanding of whether or not the City could financially afford to take some action.

B. Lack of Implementation of Cost of Living Increases and Step and Grade Increases for Union Members in Fiscal Year 2001

10. In 1995, the City commissioned a study by Montana State University to review the City's pay plans and pay structure. As a result of this study, and in order to provide incentive to employees to remain in their employment with the City (Union Exhibit 12), the City implemented a cost of living increase and a "step in grade" pay increase system. The cost of living increase was given annually, in an amount determined by the city council. The step in grade pay increase was given biannually after performance evaluations were completed, provided that an employee did not receive a poor evaluation. The cost of living increase and the step in grade increase were part of an established pay plan for City employees.

11. The evaluations that served as the precursor to the step in grade pay raise were conducted by the employees' immediate supervisors. The evaluations were completed in the spring or early summer so that they could be provided to the city council for inclusion in the City budget before the budget was prepared for the beginning of the City's fiscal year on July 1 of each year.

12. In 1997 and 1999, the City foremen, Knudson, McGill, Burns, and Meyer completed evaluations of the employees whom they supervised. The City foremen were instructed by the City clerk to complete the evaluations so that the evaluations could be submitted in time to be included in the budget request for those respective fiscal years. The evaluations were then reviewed by Dan Thede, the supervisor of City services (a statutory supervisor), who signed off on the evaluations. The evaluations of employees receiving favorable evaluations were then forwarded to the city council so that the step in grade pay increase could be included in the City's annual budget. Those employees favorably evaluated were then granted a step in grade increase.

13. For the fiscal year 2001, the City clerk did not advise the City foremen of the need to complete evaluations despite having done so in 1997 and 1999. Knudson, McGill, Burns, and Meyer did not have the authority to complete evaluations on their own. Thede did not tell the City foremen to complete the evaluations for fiscal year 2001. They did not complete evaluations of the employees they supervised.

14. City management did order that the evaluation of Janet Pendergrass, a member of the bargaining unit, be completed in time to meet the July 1, 2001 deadline. This was because Pendergrass was going to receive an unfavorable evaluation that would preclude any merit increase for her.

15. The 2001 evaluation of John Graham, a City police officer and Union member, was not completed until January 2002 by his supervisor, Chief of Police Clay Coker. The late evaluation of Graham precluded him from obtaining his step in grade increase for fiscal year 2001. Coker, who is not a member of the Union, was not given an evaluation at all in 2001. Nevertheless, he ***did*** receive a step in pay increase for 2001.

16. The City was aware that City policy required that evaluations be undertaken so that step in grade increases could be accomplished. The City was also aware that the biannual step in grade pay increase was an established part of the City's pay plan for all employees. Nonetheless, no efforts were undertaken by the City management to ensure that the evaluations were done so that step and grade increases could be provided to the Union employees for the 2001 fiscal year.

17. On August 6, 2001, the city council adopted salaries and wages for all City employees, effective for the 2001 fiscal year from July 1, 2001 to June 30, 2002. All City employees received a 2% cost of living increase pursuant to the City's pay plan. Non-Union employees, however, received an additional 1.2% cost of living increase and were granted a step in grade pay increase of 2% (for a total increase under the pay plan of 5.2%). No step in grade increase was given to the Union members.

18. The City's sole reason for not granting the step in grade increase to the Union members was the fact that it had not received any evaluations for fiscal year 2001. Thede and/or the city council had the ultimate authority to ensure that the evaluations were completed so as to provide for the step increases in the 2001 budget for those Union employees receiving favorable evaluations. Neither Thede nor anyone on the city council ordered the completion of the evaluations.

19. At the October 15, 2001 negotiation meeting, Magnuson asked the City's negotiating team about the City's failure to implement the evaluations for step in grade increase and the cost of living differential for 2001. Magnuson also informed the City's negotiating team that she felt the City's conduct with respect to the evaluations was an unfair labor practice. In response, the City's spokesperson at the meeting indicated that the City had not wanted to compromise the bargaining unit status of the City foremen after the supervisory hearing and the Board of Personnel Appeal's ruling that the foremen were not supervisors. Nothing was mentioned by the City's representative about the budgeting process having already been completed.

20. At another meeting, the City negotiating team indicated that it was going to hold off on step in grade increases until after a purported city reorganization.

21. During the October 15, 2001 bargaining session, the City and Union agreed that the City would grant an additional 1.5% cost of living increase to the bargaining unit members, effective November 2001.

22. As a result of the City management's failure to implement the evaluation process, the Union employees who otherwise received favorable evaluations were deprived of their 2% step in pay increase for the 2001 fiscal year.

C. Decrease in Shaun Smook's Hours of Work

23. Shaun Smook (pronounced "smoke") worked as a seasonal laborer for the City until September 2001. At that time, a permanent job for a water meter reader and repairman came open with the City. The job position had previously been held by Jason Place. When Place was in the position, he regularly worked eight hours each day.

24. The written job announcement for the meter reader/meter repairman position (Exhibit U-1) did not indicate whether the position was full or part-time. Smook was interviewed for the job by members of the City's personnel committee, which included city council member Dan Stephens, as well as Dan Thede, the supervisor of City services. Smook was told that the job was "part-time."

25. When the city council had discussed the position, the council had intended that the job be classified as a part-time job entailing from 7 to 7½ hours of work each day.

26. When Smook began working in the last week of September 2001, he worked 40 hours per week (eight hours per day, five days each week). He continued to work five days per week at eight hours per day until Monday, November 19, 2001 (as demonstrated by his time card, Exhibit U-3, page 4). Part of his daily work involved reading meters and repairing meters. A good deal of his daily work, however, was also taken up with performing other duties such as driving trucks for the City and conducting inventory for different departments of the City, all duties outside the position of meter reader/meter repairman. When Smook reported to work on November 19, 2001, he was informed by his supervisor, John Knudson, that his hours had been reduced to 7½ hours per day. Dan Thede had informed Knudson at 8:00 a.m. on November 15, 2001, that Smook's hours would be reduced to 7½ hours per day. Thede did not tell Knudson why Smook's hours were being reduced.

27. Neither Smook nor any Union representative was consulted about the reduction in Smook's hours before the reduction was implemented.

28. The city council had always considered the meter reader position to be part-time, even when that position had been filled by Smook's predecessor in the position, Jason Place. The city council had determined the position was a part-time job because the meter reading part of it encompassed only five working days per week. If there was other work available for the meter reader to do, he would be utilized to do that work.

29. Negotiators for both the City and the Union had met in a scheduled negotiation meeting on November 14, 2002 involving the Union's negotiating team and the City's negotiating team. At one point during the meeting, one of the Union representatives, Mike Voorhies, asked a question about the point at which an employee who was hired to work on a part-time basis, but regularly

working full-time, would be considered a full-time employee. He was told by the City's negotiating team that there was no employee that fit into that category.

30. The city council was unaware until the night of the November 14, 2001 meeting that Smook had been working full-time. Upon learning that Smook was working full-time, the city council directed Thede to ensure that his work did not exceed the 7 to 7½ hours that the city council had intended the position to have.

D. Duties of Walt Torgeson

31. Bargaining unit employee Walt Torgeson has worked for the City in the Streets, Parks, and Cemetery Department since 1992. Because of his experience, he eventually became a lead laborer.

32. The position of foreman of that Department was held by Mark McGill until he resigned the position on September 15, 2001. As foreman, McGill directed the day to day activity of all City personnel in the Streets, Parks, and Cemetery Department, setting out and scheduling the projects that the employees were to engage in on any given day or week. He coordinated the projects that were to be accomplished. He purchased and ordered materials and supplies for the Department. He also maintained the records for the Department and he submitted monthly reports to Thede.

33. When McGill was away from his position, Torgeson would fill in for McGill, acting as a lead laborer. He did not receive any increased pay when he acted as lead laborer in McGill's absence, nor was he expected to take many of the additional tasks fulfilled by McGill such as the ordering and submission of reports.

34. After McGill's resignation, his position as supervisor was not filled.

Torgeson is acting as lead laborer. Thede directs Torgeson on a daily basis to coordinate City projects and to direct placement of department personnel on those projects. Thede orders the materials needed by the Streets Department to complete its work. There is no evidence to suggest that Torgeson provides monthly reports to Thede as did McGill.

IV. DISCUSSION

Montana law prohibits public employers from committing unfair labor practices. Among other things, a public employer commits an unfair labor practice by (1) interfering, restraining, or coercing employees in the exercise of union organizing and bargaining rights, (2) discriminating in regard to the hire or tenure of employment in order to encourage or discourage membership in any labor union, (3) discharging or otherwise discriminating against an employee because he has signed or filed an affidavit, petition, or complaint or given information or testimony relating to proceedings under Mont. Code Ann. Title 39, Chapter 31, or (4) refusing to bargain in good faith with an exclusive representative. Mont. Code Ann. § 39-31-401(1), (3), (4), and (5). Public employees are protected in the exercise of the right to form, join or assist any labor organization and to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment. Mont. Code Ann. § 39-31-201.

An unfair labor practice must be demonstrated by a preponderance of the evidence. Mont. Code Ann. § 39-31-406(4).

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* (1979), 183 Mont. 223, 598 P.2d 1117; *Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals* (1981), 195 Mont. 272, 635 P.2d 1310; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

A. The City Committed An Unfair Labor Practice By Failing To Implement Step In Pay Increases For Union Personnel And By Failing To Initiate Employee Evaluations.

An employer violates its duty to bargain in good faith when it makes unilateral changes to wages, hours or terms and conditions of employment during the course of collective bargaining. *NLRB v. Katz* (1962), 369 U.S. 736, 82 S. Ct. 1107, 8 L.Ed. 2d 26; *Daily News of Los Angeles v. Los Angeles Newspaper Guild* (1994), 315 NLRB No. 158. Unilateral conduct is so pernicious to the collective bargaining process that there is no requirement to demonstrate subjective bad faith on the part of the employer in order to find that a violation has occurred. *Id.* at 1237, citing *Katz, supra*. Regardless of an employer's motivation for doing so, a unilateral change in the compensation system during ongoing negotiations constitutes an unfair labor practice. *Rural/Metro Medical Services* (1998), 327 NLRB 49, 50.

The *Los Angeles Daily News* case is particularly instructive in the present matter. There, the editorial department employees of the employer newspaper unionized. *Id.* at 1236. Prior to the time of the union organization, the employer had in place a system where, in conjunction with the employer's annual performance evaluation of an employee, the employee would be considered for a merit increase. *Id.* Though the merit increase was discretionary, a merit increase would be granted to at least 80% of the employees. *Id.* After the formation of the union, the employer continued to evaluate all of its employees annually and continued to grant merit increases to non-union employees. It discontinued granting merit increases to the union employees. *Id.* The employer asserted that it discontinued the merit increase in order to comply with the mandates of *Katz, supra*. *Id.* at 1238.

Notwithstanding the employer's position that it had discontinued the merit increase in order to comply with *Katz,* and not withstanding the fact that the awarding of the merit increase was discretionary, the National Labor Relations Board found that the union had committed an unfair labor practice. In doing so, the Board reiterated the holding of the Fifth Circuit Court of Appeals in *NLRB v. Dothan Eagle* (1970), 434 F. 2d 93, noting:

[W]henever the employer by promises or by a course of conduct has made a particular benefit part of the established wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or for worse during . . . the period of collective bargaining. Both unprecedented parsimony and deviational largess are viewed with a skeptic's eye during . . . bargaining. In those cases where the employer was found guilty of an unfair labor practice for

withholding benefits during . . . the process of collective bargaining, the basis of the charge was a finding that the employer has changed the established structure of compensation.

Id at 1237-38.

In this case, the credible evidence shows that the City had in place a biannual step in grade pay increase that was an established and regularly recurring part of compensation for its employees. It was in place for over five years prior to the organization of the Union. The City required the biannual evaluation of all of its employees and the City knew that the evaluation was the *sine qua non* of the merit increase. The foremen who conducted the evaluations had no authority to initiate the evaluations on their own. That authority had to come from City management and was communicated to the foremen through the City clerk's office.

For fiscal year 2001, while contract negotiations were in full swing, City management broke with established policy and did not ask for the evaluations, knowing full well that without the evaluations no merit increases would be forthcoming. Management initiated this conduct unilaterally. Like the employer newspaper in the *Los Angeles Daily News* case, the City's unilateral conduct resulted in a cessation of an established feature of compensation for City employees. The Union has demonstrated a violation of Mont. Code Ann. § 39-31-401(5).

In addition, under the facts of this case, the City's failure to order the evaluations of the employees demonstrates a violation of Mont. Code Ann. § 39-31-401(1). A violation of Mont. Code Ann. § 39-31-401(1) occurs when an employer has interfered with, restrained, or coerced employees in the exercise of the right to organize. The test for determining whether a violation has occurred is whether an employer's actions had a reasonable tendency to interfere with or coerce employees, not whether the employer intended to interfere. *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307 (7th Cir., 1998).

The City was aware of the need to implement the evaluation process in order to complete the step in grade increases. As Councilman Stephens' testimony indicates, he was aware through his interaction with postal unions in his capacity of Libby Postmaster of the need to maintain the status quo during negotiations. It was the City that had the authority to get the evaluations completed so as to be able to include step in grade increases during the 2001 fiscal year. In past years the impetus to begin the evaluation process had come from the City clerk's office to the foremen.

The City's pay compensation plan required the City to perform evaluations on its employees every two years. The City specifically required and followed up to ensure the completion of the unfavorable evaluation of Janet Pendergrass for fiscal year 2001. The City's witnesses essentially conceded that they had the authority to order that the evaluations be completed. The City historically implemented skip in grade increases through evaluations. Management knew of the pay plan and its method of implementation. No other explanation of the failure to implement evaluations is plausible, except a desire to discourage Union activity. At the very least, not implementing the step in grade increase for fiscal year 2001 when the Union and the City were in the process of negotiating would have had a foreseeable tendency to interfere with the Union employee's exercise of the right to organize, whether or not the City actually intended to interfere

with the employees' right to organize. *See also, Rural/Metro Medical Services*, 327 N.L.R.B. 49, 52 (1998).

B. The Evidence Does Not Show That The Failure to Implement A 3.2 % Cost of Living Increase Was An Unfair Labor Practice.

With respect to the cost of living increase, the facts do not demonstrate a violation of Mont. Code Ann. § 39-31-401(5). This is not a situation where the city council failed to give Union employees a cost of living increase. No evidence was introduced by the Union to show that any specific level of increase was part of the established cost of living increase, nor was there evidence introduced to show that the city council had always implemented the same percentage increase for both management employees and non-management employees. Indeed, it appears that in years past the city council had bickered over whether to grant any cost of living increase for any employees at all as demonstrated by the testimony of Dan Stephens. Without more, the hearing officer is unable to conclude based upon the authority cited by the Union's counsel that by failing to implement the additional 1.2% cost of living increase, the City deviated from an established compensation practice.

Moreover, the preponderance of the evidence does not show that the failure to implement the additional 1.2% cost of living increases for the Union members was motivated by animus toward the Union or its members. The Union has failed to present any authority to show that the mere fact of a difference in percentage increase is alone sufficient to find the commission of an unfair labor practice.

C. The Union Has Not Proven An Unfair Labor Practice In the Reduction Of Smook's Hours Or In Failing To Promote Torgeson.

In this phase of its case, the Union contended that the reduction of Smook's daily hours of work and the failure to promote Torgeson demonstrated animus toward the Union and amounted to a violation of Mont. Code Ann. § 39-31-401(1) and (3). The Union must prove these violations by a preponderance of the evidence. Mont. Code Ann. § 39-31-406.

A violation of Mont. Code Ann. § 39-31-401(1) occurs when an employer has interfered with, restrained, or coerced employees in the exercise of the right to organize. Conduct which has a reasonable tendency to interfere with or coerce employees with respect to their rights to organize is sufficient to demonstrate a violation of this section. *NLRB v. Joy Recovery Technology Corp., supra.*

Mont. Code Ann. § 39-31-401(3) prohibits discrimination in regard to hire or tenure of employment, or any term or condition of employment in order to discourage membership in a labor organization. The plaintiff is required to prove that anti-union animus was a substantial or motivating factor in the employer's decision to make adverse employment decisions. *Wright Line*, 251 NLRB 1083 (1980). *See also, NLRB v. Joy Recovery Technology Corp., supra.* Once the plaintiff establishes union animus as a substantial or motivating factor, the burden shifts to the employer to show that it would have taken the action for legitimate reasons. *Wright Line, supra, Joy Recovery, supra*. In determining whether the plaintiff has sustained its burden of

proof to show that anti-union animus was a substantial or motivating factor in the employer's conduct, the trier of fact may utilize "all of the record evidence" which includes the explanation that the employer presented at the hearing. *Holo-Krome v. NLRB*, 954 F.2d 108, 113 (2nd Cir., 1992).

Contrary to the Union's suggestion, the reduction of Smook's hours under these facts does not show a violation of Mont. Code Ann. § 39-31-401(1). The Union glossed over the fact that Smook himself admitted at the hearing that when he was hired, he was told that the job was a part-time/full-time job. He never inquired into what that meant. The city council created the position with the understanding that it was to be a part-time job. Councilman Stephens' explanation of how the reduction came aboutimmediately after he learned for the first time that Smook was working eight hours per dayis credible in the face of the City's financial condition. The Union's suggestion that the timing of the event "establishes conclusively" anti-union animus is not convincing. Reducing Smook's hours immediately after the council first learned that Smook was working full-time, despite the council's direction that the position should be part-time, points as much to a legitimate basis for the reduction of the hours as it does to any anti-union motive. Unlike the situation in *Joy Recovery Technology, supra*, the fact of the timing of the action in this case is at best equivocal. In light of the facts, the evidence does not preponderantly suggest that reducing Smook's daily work by one-half hour had a reasonable tendency to interfere with or coerce the Union employees.

With respect to Torgeson, the simple fact is that he does not perform the same jobs that his predecessor did. Thede works with Torgeson on a daily basis, directing projects to be completed and the placement of personnel on those projects. In short, Torgeson continues to act as a lead laborer and not as a supervisor as did McGill. The decision not to promote Torgeson is a legitimate business decision, not conduct that had a tendency to interfere with or coerce Union employees.

Furthermore, the Union failed to meet its initial burden to show that anti-union animus was a substantial or motivating factor in the employer's decision to reduce Smook's hours and to keep Torgeson as a lead worker. Smook's hours had expanded without the council's direction or ratification. The decision not to promote Torgeson was purely economic and not at all related to union animus.

D. Remedy For 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 backpay, "as will effectuate the policies of the chapter." *Id.*

With respect to the failure to grant the step in pay increase, the Union has requested that each bargaining unit member, except those who received unfavorable evaluations, be retroactively

awarded the 2% step in grade increase back to July 1, 2001. In light of the City's intentional failure to implement the step in grade increases, and in order to effectuate the policies behind the prohibition against unfair labor practices, such a remedy is appropriate. *Los Angeles Daily News, supra*, 315 NLRB at 1241 (the remedy of a reimbursement order for lost wages is warranted to "prevent the wrongdoer from enjoying the fruits of his unfair labor practices and gaining undue advantage at the bargaining table when he bargains about the benefits which he has already discontinued").

V. 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 has demonstrated by a preponderance of the evidence that the City's failure to implement the step in grade increase for Union employees and failure to implement evaluations violated Mont. Code Ann. § 39-31-401(1) and (5).

3. The Union has failed to demonstrate by a preponderance of the evidence that the City violated Mont. Code Ann. § 39-31-401(1) and (3) in reducing Smook's hours or in failing to promote Torgeson.

4. Imposition of an order to cease and desist from engaging in any further unfair labor practices is appropriate pursuant to Mont. Code Ann. § 39-31-406(4).

5. Imposition of an order awarding back pay is appropriate pursuant to Mont. Code Ann. § 39-31-406(4).

VI. RECOMMENDED ORDER

Based on the foregoing, it is recommended that the Board of Personnel Appeals enter its order:

(1) Directing the City to cease and desist from engaging in any further unfair labor practices;

(2) Directing the City to provide a step in grade increase retroactive to July 1, 2001 to all collective bargaining unit members, except for those members who received unfavorable evaluations for 2001.

(3) Dismissing the Union charge that the City violated Mont. Code Ann. § 39-31-401(1) and (3) in reducing Smook's hours or in failing to promote Torgeson.

DATED this 23rd day of December, 2002.

BOARD OF PERSONNEL APPEALS

By: /s/ GREGORY L. HANCHETT

GREGORY L. HANCHETT
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to Admin. R. Mont. 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. Mont. Code Ann. § 39-31-406(6). Notice of 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