STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 34-2004:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 233, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Complainant,	Case No. 2529-2004
vs.	
CITY OF HELENA, Defendant.	

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

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I. INTRODUCTION

On May 21, 2004, International Brotherhood of Electrical Workers, Local 233 (Local 233) filed a charge with the Board alleging that the City of Helena had unilaterally changed how operators were to be paid if they worked on a Sunday callout. On June 1, 2004, the City filed a response to the charge denying that its actions constituted an unfair labor practice.

On August 6, 2004, an investigator for the Board issued a finding that the charges had probable merit and transferred the case to the Hearings Bureau for a hearing on the charges.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on October 19, 2004. J.C. Weingartner represented Local 233. David L. Nielsen represented the City. Keith Allen and Harry "Salty" Payne testified as witnesses in the case. Exhibits J-2 through J-3 were admitted into evidence, pursuant to the stipulation of the parties. Exhibits 1, 2, 4, 5, 6, 7, 8, A, and B were also admitted. Complainant made an offer of proof that, if he were allowed to testify to his opinion, Keith Allen would testify that the City changed its Sunday callout pay policy in retaliation to the union organizing of its employees.

The parties filed post-hearing briefs on November 17, 2004. At that time, the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether the City of Helena committed unfair labor practices in violation of Mont. Code Ann. § 39-31-401, as alleged in the charge filed by Local 233.

III. FINDINGS OF FACT

1. Local 233 is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6).

2. The City of Helena is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10).

3. From January 6, 2003 until at least May 21, 2004, the City of Helena voluntarily recognized Local 233 as the exclusive bargaining representative of the employees at the water treatment plant.

4. From January 6, 2003, until May 21, 2004, the City of Helena and Local 233 were engaged in negotiations for a collective bargaining agreement.

5. Prior to March 8, 2004, the City of Helena paid employees at the water treatment plant double time if they worked a Sunday callout.

6. Effective March 8, 2004, the City changed its policy so that employees would not receive double time for working Sunday callouts unless a collective bargaining agreement specifically required it.

7. The City did not notify Local 233 of the proposed change in policy prior to its adoption. The City did notify Local 233 of several other proposed changes in its employment policies during the negotiations.

8. Doug Hahn, an employee of the water treatment plant, was called out to work on Sunday, March 21, 2004. The City paid him $58.32 or 1½ times his hourly rate for his work instead of double time. Had he been paid double time, he would have been paid $77.76.

9. Collective bargaining agreements between the City and some other unions provide for employees to receive double time when working on a Sunday callout.

10. The City negotiated with these unions to change the language of the agreements.

IV. DISCUSSION[1]

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

Local 233 contends that the City committed unfair labor practices when it unilaterally changed its policy on Sunday callout pay during negotiations for an initial collective bargaining agreement. Local 233 also contends that the change in policy was motivated by retaliation for forming a union.

The City denies committing any unfair labor practice. It contends the policy change was necessary to minimize the risk of committing discrimination based on religion, that the City is not required to bargain over policy changes when negotiating an initial collective bargaining agreement, and that there was no "past practice" that the City was obligated to maintain.

Montana law requires public employers and labor organizations representing their employees to bargain in good faith on issues of wages, hours, fringe benefits, and other conditions of employment. Mont. Code Ann. § 39-31-301(5). Failure to bargain collectively in good faith is a violation of Mont. Code Ann. § 39-31-401(5). The Board of Personnel Appeals can properly use federal court and National Labor Relations Board (NLRB) precedent as guidance in interpreting the Montana collective bargaining laws. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

The basic, fundamental purpose of labor relations is the good faith negotiation of the mandatory subjects of bargaining--wages, hours, and other terms and conditions of employment. For an employer to make unilateral changes during the course of a collective bargaining relationship concerning mandatory subjects of bargaining is considered a violation of the requirement of good faith bargaining. *NLRB v. Katz* (1962), 369 U.S. 736.

The City acknowledges the applicability of *Katz*, ***supra***, for the proposition that an employer may not, as a general rule, change terms and conditions of employment during bargaining.[2] The City maintains an exception to this rule when the condition of employment is unlawful, however, and contends that the policy of paying double time for Sunday callout violates laws that prohibit discrimination on the basis of religion.

In *Katz*, ***supra***, the U.S. Supreme Court stated: "While we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, no such case is presented here." 369 U.S. at 747-48. This language has led to an inference of an exception based on necessity. ***E.g.***, *Visiting Nurse Services of Western Massachusetts, Inc. v. NLRB* (1999), 177 F.3d 52, 56 (economic exigencies or business emergencies); ***see also*** *Peerless Publications, Inc.* (1987), 283 NLRB 334 (protection of the core purposes of the enterprise); Hardin, *The Developing Labor Law* 598 (3d ed., BNA 1992).

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[2]An issue raised in the pre-hearing order was whether the Sunday callout pay policy was a "past practice" that would preclude a change without bargaining. The City provided persuasive authority in its post-hearing brief that the policy was not a "past practice" that would affect its bargaining obligation and Local 233 did not address the issue. However, on a review of the legal authorities in this case, the hearing officer finds that the question of whether the policy constituted a "past practice" is irrelevant to the case. The issue in the case is whether the City could change terms and conditions of employment without bargaining, and the City's Sunday callout pay policy was clearly a term or condition of employment.

None of these cases actually found justification for a unilateral change based on necessity found; they merely recognized the availability of the doctrine. The City cited cases from several state courts recognizing an exception to the requirement of bargaining changes in terms and conditions of employment when specific statutory provisions left no room for negotiation. *Bd of Ed. of City Sch. Dst. v. N.Y.S. P.E.R. Bd.* (1990), 75 N.Y.2d 660, 554 N.E.2d 1247, 555 N.Y.S.2d 659; *Plainfield Township Policemen's Ass'n v. Penn. L.R.B.* (Pa. Commw. Ct.), 695 A.2d 984, ***appeal den.*** (1997), 549 Pa. 730, 702 A.2d 1062. Further, in a case decided in reliance following *Bd. of Ed.*, ***supra***, the New York Court of Appeals stated:

> It is settled that the Taylor Law (*Civil Service Law § 200 et seq.*) generally requires bargaining between public employers and employees regarding terms and conditions of employment (*see, Matter of Board of Educ. v. New York State Pub. Empl. Relations Bd.*, 75 NY2d 660, 667, quoting *Matter of Cohoes City School Dist. v Cohoes Teachers Assn.*, 40 NY2d 774, 778). The policy of such bargaining in this State is "strong" and "sweeping" (*id.*). Even that policy, however, is negated under special circumstances. It is unquestioned that the bargaining mandate may be circumscribed by "plain" and "clear" legislative intent or by statutory provisions indicating the Legislature's "inescapably implicit" design to do so.

In the Matter of Schenectady Police Benevolent Ass'n v. N.Y.S. P.E.R. Bd. (1995), 85 N.Y.2d 480, 650 N.E.2d 373, 626 N.Y.S.2d 715 (holding that specific state statutes authorized the City to require, without bargaining, a police officer who had been injured in the line of duty to return to light duty work or have surgery).

The problem with the application of these cases to the City's action is that it cannot show its Sunday callout policy to be unlawful. There is no "plain" and "clear" legislative intent or statutory provision indicating the legislature's "inescapably implicit" design to prohibit Sunday callout pay under either state or federal law. The City contends that its policy was unlawful under the religious discrimination provisions of Title VII of the Civil Rights Act of 1964, as amended, and the comparable provisions of state law. In its post-hearing brief, the City states:

> In the present case, the prior policy allowed double-time for Sunday, regardless of previous hours worked in the week. This meant that employees who gave up their Sunday Sabbath were rewarded at double-time pay for that day, whereas an employee who worked a Sabbath on Saturday would either get regular time pay or time-and-a-half if that employee had over 40 hours of work in the workweek. This policy discriminates on its face against employees, depending upon religious belief on which day is the Sabbath.
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> . . . .
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> The Complainant seeks a remedy here that makes it impossible for the City to offer a good-faith accommodation on a complaint based upon religious discrimination in employment. Under the now repealed policy, the City could not reasonably accommodate an employee who wanted additional compensation for working on that employee's Sabbath, which is a day other than Sunday.

The City's analysis reveals a fundamental misunderstanding of the laws prohibiting discrimination on the basis of religion. Title VII makes it unlawful for an employer "to discriminate against any individual . . . because of such individual's . . . religion[.]" 42 U.S.C. § 2000e-2(a)(1). "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j); ***see also*** *Lawson v. Washington* (9th Cir. 2002), 296 F.3d 799, 804; *Tiano v. Dillard Dep't Stores, Inc.* (9th Cir. 1998), 139 F.3d 679. The analysis of a religious discrimination claim under the Montana Human Rights Act is the same as under Title VII.

A claim for religious discrimination under Title VII can arise under several different theories, the most applicable being disparate treatment and failure to accommodate. ***See*** *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004), 358 F.3d 599, 602-603; *Chalmers v. Tulon Co. of Richmond* (4th Cir. 1996), 101 F.3d 1012, 1017-18; *Mann v. Frank* (8th Cir. 1993), 7 F.3d 1365, 1368-70. An individual claiming discrimination over the City's policy of paying Sunday callout pay cannot prevail on either theory.

The policy is neutral on its face, and applies equally to all employees who are called out to work on Sunday, regardless of religion. The fact that some employees may consider Sunday their Sabbath while others do not is irrelevant to a disparate treatment analysis. A disparate treatment claim might also be based on a theory that persons of one religion receive accommodation whereas others do not (***see e.g.***, *Cloutier v. Costco Wholesale* (D.Mass), 311 F.Supp.2d 190, 196, ***aff'd*** (1st Cir. 2004), 390 F.3d 396). However, such a claim also fails because premium pay is not an "accommodation" for those who object to working on the Sabbath.

An accommodation for a person with sincere religious objections to working on the Sabbath is granting leave to that person, if possible without undue hardship on the employer. A worker who accepts double pay for working Sunday can hardly sincerely believe it wrong to work on that day. Double pay is not an accommodation.

Having failed to establish that its policy regarding Sunday callout pay was unlawful, the City was obligated to bargain with Local 233 prior to changing this condition of employment. It is not sufficient that the City believed in good faith that its policy was illegal; unless it was in fact illegal, the City was obligated to bargain about the change in the terms and conditions of employment.

Local 233 also contended that the City changed the policy in retaliation for the formation by the employees of a union. Local 233 presented no admissible evidence to support this contention.[3] However, the unilateral change in a term or condition of employment is a *per se* violation of Mont. Code Ann. § 39-31-401(5). It is not necessary to show subjective bad faith.

[3]The hearing officer sustained the City's objection to the proposed opinion testimony of Keith Allen that the change was motivated by retaliation. Local 233 made an offer of proof on this question.

Therefore, the fact that Local 233 failed to prove a retaliatory motive does not change the outcome of this case.

Mont. Code Ann. § 39-31-406(4) provides that when the Board finds that an employer has engaged in an unfair labor practice, the Board shall order the employer to cease and desist from the unfair labor practice, and to take such affirmative action as will effectuate the policies of the Collective Bargaining Act. Thus the appropriate remedy for the City's failure to bargain in good faith is an injunction against making unilateral changes in terms and conditions of employment, a return to the *status quo ante*, an order to make Local 233 and its members whole for their losses resulting from the unfair labor practice, and a posting requirement.

A return to the *status quo ante* requires that the City reinstate its Sunday callout pay policy for purposes of this bargaining unit until it has addressed the issue with Local 233 through bargaining. In order to make the Union and the employees whole, the City must pay Doug Hahn and any other employees who worked a Sunday callout on or after March 8, 2004, the difference between what they were paid and what they would have been paid under the old policy.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this case. Mont. Code Ann. § 39-31-207.

2. A public employer may not refuse to bargain collectively in good faith on questions of wages, hours, fringe benefits, and other conditions of employment with an exclusive representative of its employees. Mont. Code Ann. §§ 39-31-305 and 39-31-401(5). An employer that makes unilateral changes during the course of a collective bargaining relationship concerning wages, hours, fringe benefits, and other conditions of employment has refused to bargain in good faith. *NLRB v. Katz* (1962), 369 U.S. 736.

3. A policy providing for double pay for employees who are called out to work on a Sunday is a condition of employment.

4. A policy providing for double pay for employees who are called out to work on a Sunday is not, on its face, a clear violation of the provisions of Title VII of the Civil Rights Act of 1964, as amended, or the Montana Human Rights Act prohibiting employment discrimination on the basis of religion.

5. By unilaterally changing the Sunday callout pay policy for employees who are members of the bargaining unit represented by International Brotherhood of Electrical Workers, Local 233, the City of Helena committed an unfair labor practice in violation of Mont. Code Ann. § 39-31-401(5).

6. By unilaterally changing the Sunday callout pay policy, the City of Helena did not unlawfully retaliate against International Brotherhood of Electrical Workers, Local 233 for the formation of a union.

7. As a result of the unfair labor practice committed by the City of Helena, International Brotherhood of Electrical Workers, Local 233 is entitled to cease and desist orders, a return to the *status quo ante*, an order to make Local 233 and its members whole for their losses resulting from the unfair labor practice, and an order to post and publish the notice set forth in Appendix A.

VI. **RECOMMENDED ORDER**

The City of Helena is hereby **ORDERED**:

1. To immediately cease the practice of unilaterally altering terms and conditions of employment without bargaining with International Brotherhood of Electrical Workers, Local 233; and

2. Within 30 days of this order:

a. To reinstate, for members of the collective bargaining unit, Personnel Policies Section 80-3, as it existed prior to its amendment on March 8, 2004, and to maintain the policy until it has addressed the issue with International Brotherhood of Electrical Workers, Local 233 through bargaining;

b. To pay Doug Hahn the sum of $19.44 representing the difference between what he was paid for his Sunday callout work on March 21, 2004, and what he would have been paid under the previous policy;

c. To calculate and pay to members of International Brotherhood of Electrical Workers, Local 233 any other Sunday callout pay differential between March 8, 2004, and the date this order becomes final; and

d. To post copies of the notice contained in Appendix A at conspicuous places, including all places where notices to employees are customarily posted, at the City 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.

DATED this 8th day of March, 2005.

BOARD OF PERSONNEL APPEALS

By: /s/ ANNE L. MACINTYRE
Anne L. MacIntyre, Chief
Hearings Bureau
Department of Labor and Industry

NOTICE OF APPEAL RIGHTS

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 March 31, 2005. 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. Notice of appeal must be mailed to:

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

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

David E. Nielsen/City Attorney
City of Helena
City County Building
316 North Park Avenue
Helena, MT 59623

J.C. Weingartner
Attorney at Law
222 Broadway
Helena, MT 59601

DATED this 8th day of March, 2005.

/s/ SANDY DUNCAN

CITY OF HELENA.FOF.AMD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE STATE OF MONTANA
BOARD OF PERSONNEL APPEALS

The Montana Board of Personnel Appeals has found that we violated the Montana Collective Bargaining for Public Employees Act and has ordered us to post and abide by this notice.

We will not fail to bargain in good faith with International Brotherhood of Electrical Workers, Local 233;

We will not unilaterally change the terms and conditions of employment of employees who are members of the collective bargaining represented by International Brotherhood of Electrical Workers, Local 233;

We will reinstate, for members of the collective bargaining unit, Personnel Policies Section 80-3, as it existed prior to its amendment on March 8, 2004, and to maintain the policy until it has addressed the issue with International Brotherhood of Electrical Workers, Local 233 through bargaining; and

We will make Local 233 and its members whole for their losses resulting from the unfair labor practice by paying the difference between what employees would have been paid under the old policy and what they were paid for any Sunday callout work on or after March 8, 2004.

DATED this _____ day of April, 2005.

CITY OF HELENA

By:_____

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