

**VOLUME NO. 36**

**Opinion No. 102**

**PUBLIC EMPLOYEES — Collective bargaining; MONTANA STATE MERIT SYSTEM COUNCIL — Powers; LABOR — Montana State Merit System Council; Title 59, Ch. 16, Revised Codes of Montana 1947.**

**HELD:** 1. The Montana State Merit System Council is not empowered to act on behalf of an employee who has refused to abide by the conditions of a negotiated, ratified contract and issue an order that the employee not be discharged for failure to contribute to the expenses of his elected bargaining representative.

**2. The Montana State Merit System Council does not have the power to order immediate reinstatement of an employee discharged for failure to contribute to the costs of representation in collective bargaining.**

September 30, 1976

Father Joseph S. Harrington  
Merit System Council  
Room 612, Power Block  
Helena, MT 59601

Dear Father Harrington:

You have requested my opinion on the following questions regarding the powers of the Montana State Merit System Council:

1. May the Montana State Merit System Council act on behalf of an employee who has refused to abide by the conditions of a negotiated, ratified contract and issue an order that the employee not be discharged for failure to contribute to the expenses of his elected bargaining representative?
2. May the Montana State Merit System Council order immediate reinstatement of an employee discharged for failure to contribute to the costs of representation in collective bargaining?

These issues arise from the following circumstances. The Montana Public Employee's Association, within the framework of the act relating to collective bargaining for public employees, Title 59, Ch. 16, R.C.M. 1947 has negotiated a master contract with the following merit system agencies:

1. Department of Social and Rehabilitation Services.
2. Department of Health and Environmental Sciences.
3. Employment Security Division, Department of Labor and Industry.

Article III of this contract, which is now in effect, provides in pertinent part:

Article III. Security.

Employees covered by the terms of this agreement shall not be required to become members of the Association but must, as a term and condition of employment, pay an amount equal to the dues of the Association to the Association.

...All employees covered by the terms of this agreement shall within thirty (30) days of the signing of this agreement, pay dues or an amount equal to the dues to the Association. New employees hired after the signing of this agreement shall as a term and condition of employment, pay dues or an equal amount to the dues to the Association. Employees who fail to comply within this requirement shall be discharged by the Employer within thirty (30) days after receipt of written notice by the Association.

Several permanent status Merit System employees are refusing to join the Montana Public Employee's Association, or in the alternative, to pay an amount equal to dues to the association.

The question to be resolved is whether the Merit System Council has the power to prevent dismissal of public employees who fail or refuse to help defray the expenses of the labor organization duly elected as their exclusive bargaining agent. It is a basic rule of law that the powers of an administrative agency, such as the Merit System Council, must be delegated expressly by the legislature. **City of Polson v. Public Service Commission**, 155 Mont. 464, 473 P.2d 508 (1970). Administrative agencies are creatures of legislation without inherent or common law powers, and only those powers conferred expressly or by necessary implication are granted them. This rule is usually strictly applied against the exercise of powers claimed by administrative agencies. 3 Sutherland Statutory Construction, 4th Ed. §65.02.

There is no express statutory authority from the legislature empowering the council to prevent the discharge of an employee who has failed to share the costs of representation. Similarly, no power has been conferred upon the council enabling it to order reinstatement after the employee has been terminated.

The Merit System was established in 1940 by state agencies to meet requirements for the receipt of federal funds and operates for those agencies under policies and procedures established by the council. MAC 2-3.34(38)(2)-S34290. Regulations promulgated by the council cannot grant powers to the council that have not been delegated by the legislature. However, not even the council's regulations contemplate the powers at issue in this opinion. An examination of the purpose of the council, as set forth in its administrative regulations, reveals that it is not within the scope of the Merit System's duties to protect employees who refuse to contribute to the expenses of representation.

The stated purpose of the Merit System, as found in MAC 2-3.34(38)-S34300, is to assure fair treatment, in personnel actions, to all state employees and to prevent discrimination because of political, religious, racial, nationality, sex, age or other non merit factors. Subsection (4) provides:

**(4) Employee-Management Relations. Employees covered by the Montana State Merit System shall have the right to organize and join or refrain from joining an organization for purposes of representation.** The matters on which such employees may negotiate and in which management agrees to meet and confer will be designated, along with other employee rights and obligations and management rights and obligations. Means should be established for the resolution of impasses. The maintenance of a system of personnel administration based on the merit principles as outlined in these rules must be assured. (Emphasis supplied)

This regulation does not grant employees the right to refuse to pay a share of the expenses incurred by a labor organization in the representation of a bargaining unit. What it does, and the only thing it does, is recognize that

employees have the right to refrain from actual membership in the association. Hence, not even the regulations promulgated by the Merit System condemn compulsory reimbursement of representation expenses.

Further, the legislature by statute has specifically recognized that the labor organization is to function as the bargaining agent of all employees, and that these employees may be required to help defray their representatives expenses as a condition of employment. Section 59-1603(3), R.C.M. 1947 provides:

(3) Labor organizations designated in accordance with the provisions of this act **are responsible for representing the interest of all employees in the exclusive bargaining unit** without discrimination for the purposes of collective bargaining with respect to rates of pay, hours, fringe benefits, and other conditions of employment. (Emphasis supplied)

Section 59-1605 provides in part:

**Unfair labor practices of employer or labor organization.**

(1) It is an unfair labor practice for a public employer to:

...(c) discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; **however, nothing in this act or in any other statute of this state precludes a public employer from making an agreement with an exclusive representative to require that an employee who is not or does not become a union member shall be required as a condition of employment to have an amount equal to the union initiation fee and monthly dues deducted from his wages in the same manner as checkoff of union dues.** (Emphasis supplied)

The above provision gives legislative approval to agency shop agreements in labor contracts with public employees. An agency shop agreement, as we have here, requires all employees of a bargaining unit to pay a fixed amount monthly, equivalent to union dues, as a condition of employment to help defray the union's expenses as bargaining agent. 8 Kheel, Labor Laws, §40, 01 [1] Agency Shop agreements have only been found illegal in states with right-to-work laws. 8 Kheel, supra §42.02[3] [b].

It should be noted that the legislature has provided an exception to the agency shop provision, for members of religious groups whose religious tenets oppose membership in, or financial support of, labor organizations. Section 59-1603(5), R.C.M. 1947 provides a procedure whereby such employees, may in lieu of paying association dues make contributions to charity.

With the enactment of Title 59, Ch. 16, R.C.M. 1947 the legislature has made it explicitly clear that public employees cannot avoid the cost of representation incurred on their behalf. In the face of the legislature's express approval of the agency shop clause it is apparent that the Merit System Council does not have the power to intervene on behalf of employees who fail to contribute to the bargaining expenses of their elected representative.

**THEREFORE, IT IS MY OPINION:**

1. The Montana State Merit System Council is not empowered to act on behalf of an employee who has refused to abide by the conditions of a negotiated, ratified contract and issue an order that the employee not be discharged for failure to contribute to the expenses of his elected bargaining representative.
2. The Montana State Merit System Council does not have the power to order immediate reinstatement of an employee discharged for failure to contribute to the costs of representation in collective bargaining.

Very truly yours,

**ROBERT L. WOODAHL**  
Attorney General