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Administrative Agencies—Department of Public Welfare—Discrimination against Welfare Recipients because of Source of Unemployment

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RECENT MONTANA DECISIONS

ADMINISTRATIVE AGENCIES—DEPARTMENT OF PUBLIC WELFARE—DISCRIMINATION AGAINST WELFARE RECIPIENTS BECAUSE OF SOURCE OF UNEMPLOYMENT—In August, 1959, a strike closed down the copper industry in Montana. Thereupon the State Department of Public Welfare issued a general order concerning welfare payments "to meet the needs of people who apply for general assistance as a result of the strike that now exists in the copper industry." This order, as later modified, provided that "all families qualifying for general relief as a result of the strike in the copper industry shall receive public assistance at a rate not to exceed fifty percent (50%) of the standard budget as established by the State Department of Public Welfare." The order also provided that no assistance would be allowed single men in the same circumstances. The District Court for Silver Bow County issued a peremptory writ of mandate requiring the State Welfare Board to rescind its order and to authorize the granting of relief to all qualifying applicants upon an equal basis. On appeal to the Supreme Court of Montana, *held* affirmed. The orders of the State Welfare Board discriminating against the applicants for relief because of the source of their unemployment and need are contrary to the provisions of the Welfare Act. *State ex rel. International Union of Mine Workers v. Montana State Department of Public Welfare,* 347 P.2d 727 (Mont. 1959) (Justice Angstman specially concurring, and Chief Justice Harrison and Justice Castles dissenting).

This decision has been widely publicized and often misconstrued. Press accounts indicated that under the decision strikers, *per se,* were entitled to welfare allowances. Criticism was voiced that the Montana Supreme Court had converted welfare funds into strike funds. Neither of these propositions is correct. The issue whether or not members of a striking union were eligible for welfare allowances was not before the court, for the orders issued by the State Department of Public Welfare concerning the people affected by the copper strike did not dispute the eligibility of these people for welfare assistance. In fact, the orders impliedly recognized that many such people would be eligible for aid.[1] If welfare funds were in fact used as strike funds, therefore, it was the result of the determination of the Welfare Board that strikers were eligible for general assistance, a determination not in question in this lawsuit.

The real question involved in this decision was whether, after determining that strikers were entitled to relief, the Welfare Board had the power

[1]Mr. Justice Angstman, in his concurring opinion, points out that the existence of a union strike fund is a matter to be considered by the boards in their determination of eligibility. Instant case at 739.

REVISED CODES OF MONTANA, 1947, § 71-303 reads: *"Eligibility for relief—Investigation of resources.* An applicant for assistanee including medical care and hospitalization shall be eligible to receive assistance only after investigation by the county department reveals that the income and resources are insufficient to provide the necessities of life, and assistance shall be provided to meet a minimum subsistence compatible with decency and health."

to grant strikers with families less assistance than nonstrikers equally situated, and to exclude single strikers from any benefit while other single men received aid. The majority opinions go on further than to hold that under the Montana Welfare Act, which requires equal consideration of applicants,[2] the board may not so discriminate. This holding did not order the board to give welfare assistance to strikers at all, though the court seems to imply that the board acted correctly in so doing. It merely required the board to give assistance to all eligible applicants on an equal basis. The dissenting opinion of Mr. Justice Castles goes to great lengths in an attempt to impeach the validity of the majority holding. However, the seemingly valid objections to the result are explained away quite readily in the special concurring opinion of Mr. Justice Angstman.

The board urged also that a severe lack of funds necessitated the reduction of allowances to strikers and thereby made the orders valid. No evidence was introduced to substantiate this contention. However, even if such were the case the discriminatory orders would still be invalid. The Welfare Department has power to prorate or reduce payments in order to stretch out its funds over a longer period,[3] but under the statutory mandate that all applicants receive equal consideration, any proration should be applied to all recipients.

The point was made and accepted in both dissenting opinions that it was necessary for the relators to allege the availability of funds to carry out the court's order. It is true that in a proceeding to compel the payment of money, it must be made to appear that there are funds from which the payment can be made.[4] However, the instant proceedings were not to compel the payment of money, but rather to require the Welfare Board to cease discriminating against needy strikers.

The propriety of the use of the writ of mandate in this proceeding was also challenged. Mr. Justice Castles in his opinion stated that the "relators are attempting to prohibit the Board from enforcing their order of September 22nd,"[5] and went on to intimate that prohibition might have been the proper remedy. It seems clear, however, that the petitioner was seeking mandamus on eminently proper grounds. He sought to compel the board to act in accord with its statutory duty—to grant welfare aid on an equal basis to all persons eligible for that aid, regardless of the cause of their need.[6] To call this attempting to prohibit the board from enforcing their prior order is to obscure the issue.

Before any drastic changes are made in the Montana Welfare Act to exclude strikers from assistance, serious consideration should be given to the policy behind the act. Article X, section 5, of the Montana Constitution provides: "The several counties of the state shall provide as may be

[2]REVISED CODES OF MONTANA, 1947, § 71-305 reads: "*Equal consideration.* Persons eligible for and in need of relief shall be, whether employable or unemployable, given equal consideration for public assistance as those persons eligible for assistance under other parts of this act."
[3]State *ex rel.* Dean v. Brandjord, 108 Mont. 447, 92 P.2d 273 (1939).
[4]State *ex rel.* Blenkner v. Stillwater County, 102 Mont. 130, 56 P.2d 1085 (1936).
[5]Instant case at 742.
[6]*Id.* at 731.

prescribed by law for those inhabitants, who, by reason of age, infirmity or misfortune, may have claims upon the sympathy and aid of society." It is argued, with merit, that people who voluntarily leave their employment are not beset with a misfortune which gives them a claim upon the sympathy of society. But what about the families of such people? Certainly the family of a man who is simply shiftless should not be and is not denied aid or granted only one-half of the assistance necessary to meet a minimum subsistence compatible with decency and health. The family of a man participating in an ill-timed or prolonged strike is enduring as much misfortune as anyone else if there is not amply food for the table.

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CRIMINAL LAW—MOTION FOR MISTRIAL—EXCLUSIVE CHARACTER OF CRIMINAL CODE—Defendant was convicted of assault in the third degree. During the course of the trial, on four different occasions, the court denied defendant's motions to direct a mistrial on grounds of improper questions by the prosecuting attorney and of allegedly prejudicial testimony of a witness. On appeal to the Montana Supreme Court, *held,* affirmed. The denial of the motions for mistrial was not error where the prejudicial effect of the testimony and questions was cured by the trial judge's admonitions to the jury. *State v. Straight,* 347 P.2d 482 (Mont. 1959).

Implied in the decision of the instant case is a recognition of the permissibility of a motion for mistrial, a motion not provided for by statute. The court said, in passing, "Regarding the propriety of a motion for mistrial, see *Hayward v. Richardson Construction Company.*"[1]

Dictum in the *Hayward case,*[2] decided at the same time, expressly approved the motion for mistrial in civil cases and overruled an earlier case which had held that "there is no authority in this state for making such a motion, based on such grounds, nor any for a trial to make such an order, on such grounds."[3] Justice Angstman in the *Hayward* case declared the earlier decision to be contrary to the rule recognized throughout the country, and announced the correct rule to be as follows:[4]

> Whenever it appears that there has been such misconduct in a trial, or prejudicial matter has been allowed to go to the jury, without opportunity to object in advance, the effect of which cannot be removed by an admonition on the part of the court, the aggrieved party may move the court to declare a mistrial. Failing in that, he will be deemed to have taken his chances with the jury.

In contrast, Justice Bottomly dissented from the majority statement of the rule on the ground that there is no statutory provision in this state

[1]Instant case at 487.
[2]347 P.2d 475 (Mont. 1959).
[3]Robinson v. F. W. Woolworth Co., 80 Mont. 431, 443, 261 Pac. 253, (1927).
[4]*Supra* note 2 at 480.