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Montana Legislative Services Division

Legal Services Office

June 14, 2011

John Andrew, Board Agent
Board of Personnel Appeals
P.O. Box 201503
Helena, MT 59620-1503

RE: MEA/MFT, et al. v. State of Montana
Unfair Labor Practice Charge No. 23-2011 (2030-2011)

Dear Mr. Andrew:

I represent the Montana Legislature and Speaker of the House Mike Milburn. This letter is the Legislature's formal response to the unfair labor practice charge brought before the Montana Board of Personnel Appeals by the MEA/MFT, Montana Public Employees Association, and the American Federation of State, County, and Municipal Employees, Montana Council No. 9, on May 25, 2011. The Montana Legislature urges that you recommend to the Board that the unfair labor practice charge (hereinafter "Complaint") is without merit and that the Complaint be dismissed for the reasons provided below.

The initial Complaint named Speaker of the House Mike Milburn as a defendant. However, the more recent *Amended Summons to Show Correct Defendant* names the State of Montana as the defendant. It appears from the *Amended Summons*, therefore, that Speaker Milburn is no longer a named defendant to the unfair labor charge and as such no response on his behalf is necessary. Should this assumption be incorrect please contact me at your earliest convenience and I will amend this response accordingly.

The Complaint should be dismissed on the grounds that it fails to meet the requirements for bringing an unfair labor practice charge before this Board. ARM 24.26.680(3)(c) requires that the complaining party provide "a statement of the portion or portions of the law or rules alleged to have been violated." The complainants have not alleged that any law or rule was violated by the Legislature. The Complaint fails to meet the fundamental requirement of ARM 24.26.680(3)(c) and, therefore, should be dismissed.

Nonetheless, should the Board determine that the complainants have met their initial burden of providing a statement of the law or rule that has been violated, the Compliant should still be dismissed. "If the board determines that the facts alleged in the complaint do not constitute an unfair labor practice under section 39-31-401 or 39-31-402, MCA, it shall dismiss the charge." ARM 24.26.680(4)(c). The facts alleged in the Complaint do not rise to the level of an unfair labor charge. Accordingly, the Board must dismiss the Complaint.

The complainants allege that they are harmed by the House Appropriations Committee's delay in acting on the 2013 Biennium pay plan (in the form of House Bill 13), only to table the bill when it did finally act. *Complaint*, ¶ E. However, the complainants do not cite any law or rule that the House Appropriations Committee violated by waiting to act on HB 13. Complainants argue that the Legislature failed to follow previous legislatures' tradition of considering and approving the pay plan. A break in tradition does not rise to the level of a violation of law or rule.

Complainants second argument is that even if the House had approved HB 13, the House's extraordinary delay of HB 13 would have required the Senate to suspend its operating rules to act on the bill, requiring a supermajority vote. *Complaint*, ¶ F. This argument is immaterial, since the complainants fail to allege how the House's inaction resulted in a violation of a labor practice under Title 39, chapter 31, part 4.

Finally, the complainants contend that the state's strengthening fiscal condition supports an increase in pay for public employees. *Complaint*, ¶ F. However, even if the Board accepts the argument that the state has the money to fund the pay plan, the complainants fail to cite to any statute or rule requiring the Legislature to adopt the pay plan if public funds are available.

The complainants argue that the Legislature failed to bargain in good faith. However, the complainants also concede that they have no legal basis for the argument that the Legislature engaged in a violation:

> While the Complainants acknowledge the authority of the legislature to approve or disapprove the negotiated pay plan and while the Complainants acknowledge too that the duty to bargain in good faith does not compel either party to agree to a proposal or to make a concession, the duty to bargain in good faith requires that all parties involved in the process deal with each other with an open and fair mind through a legitimate process and sincerely endeavor to overcome obstacles or difficulties.

Complaint, ¶ G.

As indicated by the complainants, it is the Governor and the unions who engage in collective bargaining to reach agreement on the pay plan, not the Legislature. If the Legislature has a duty to bargain, the Legislature accomplished this obligation by fully considering and debating HB 13 during the 2011 Legislative Session. No more is required. Guaranteeing passage of the pay plan because it was negotiated between the Governor and the unions would result in a violation of the Legislature's powers under Article V of the Montana Constitution and would be an unconstitutional delegation of power from the Legislature to the Governor in violation of Article III, section 1 of the Montana Constitution.

HB 13 was debated twice before the House Appropriations Committee and twice on the

House floor. Any interested party was given the opportunity to provide testimony in support of the bill and to discuss the merits of the bill with legislators. The Legislature's duties were met despite HB 13's failure to receive a majority vote in the House.

Section 39-31-401(1) prescribes that it is an unfair labor practice for a public employer to: "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201". The complainants have not alleged that the Legislature interfered with the employees' right to bargain collectively.

Section 39-31-402, MCA, describes, in part, when an unfair labor practice occurs:

> It is an unfair labor practice for a labor organization or its agents to:
>
> * * *
>
> (2) refuse to bargain collectively in good faith with a public employer if it has been designated as the exclusive representative of employees; . . .

The complainants allege that the Legislature has a specific duty to collectively bargain but cite no legal support of this allegation, other than to argue that the Legislature is a "public employer". Even if the Board accepts the complainants' argument that the Legislature has a duty to collectively bargain, the complainants do not argue that the Legislature failed to bargain in good faith. A review of the legislative process for HB 13 in fact reveals that the Legislature fully considered the pay plan in good faith. That HB 13 did not pass was an unfortunate circumstance of the legislative process, a fate that a majority of bills meet in any given session.

Pursuant to ARM 24.26.680(4)(c), the Board must dismiss a complaint if the facts alleged in the complaint do not constitute an unfair labor practice. It is clear here that the complainants have failed to meet this initial burden. Therefore, for the reasons set forth above, the Montana Legislature urges that you recommend to the Board of Personnel Appeals that the Complaint be dismissed on the ground that the charge is without probable merit.

Sincerely,

Daniel J. Whyte
Staff Attorney

c Paula Stoll, Department of Administration
Eric Feaver, MEA/MFT
Sen. Jim Peterson
Rep. Mike Milburn

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