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NANCY SWERDEY  
CLERK DISTRICT COURT

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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

MEA-MFT, Montana Public  
Employees' Association, American  
Federation of State, County and  
Municipal Employees, Council 9,

Petitioners,

v.

STATE OF MONTANA,  
DEPARTMENT OF LABOR AND  
INDUSTRY, BOARD OF  
PERSONNEL APPEALS,

Respondent.

Cause No. BDV-2012-554

**ORDER ON PETITION FOR  
JUDICIAL REVIEW**

Before the Court is a July 11, 2012 petition for judicial review of the final decision and order entered by the Montana Board of Personnel Appeals (Board) on June 19, 2012. Petitioners MEA-MFT, Montana Public Employees' Association, and American Federation of State, County and Municipal Employees, Council No. 9 (the Unions), petition for judicial review of the Board's decision.

Oral argument was held on February 20, 2013, and the motion is ready for decision.

LEGISLATIVE COUNCIL  
May 16, 2013  
**Exhibit 20**

**BACKGROUND**

1  
2           The Unions are the three largest exclusive collective bargaining  
3 representatives for employees of the State of Montana. The Unions brought this action  
4 before the Board pursuant to the provisions of the Montana Collective Bargaining for  
5 Public Employees Act (the Act), Montana Code Annotated § 39-31-101, et seq.. The  
6 policy of the Act is to promote and “encourage the procedure of collective bargaining  
7 to arrive at friendly adjustment of all disputes between public employers and their  
8 employees.” Mont. Code Ann. § 39-31-101. The Act specifically exempts and places  
9 no limit on legislative authority stating, “[t]his chapter does not limit the authority of  
10 the legislature, any political subdivision, or the governing body relative to  
11 appropriations for salary and wages, hours, fringe benefits, and other conditions of  
12 employment.” Mont. Code Ann. § 39-31-102.

13           The unfair labor practice charge (complaint) filed by the Unions is dated  
14 May 24, 2011. The complaint explains that the state employee pay freeze began in the  
15 previous 2011 biennium when the Unions and the State of Montana/Governor’s office  
16 agreed to a two-year pay freeze for state employees earning more than \$45,000  
17 annually, and a one-time-only payment of \$450 for those earning less than that amount.  
18 (Admin. R., Ex. 1, at 4.) The plan also called for increases in the state’s contribution  
19 for state employee health insurance premiums. (Id.)

20           The difference between the 2011 biennium pay freeze and the continuing  
21 pay freeze resulting in the 2013 biennium, is that the legislature approved the Union  
22 and Governor’s negotiated agreement during the 2011 biennium, but did not do so in  
23 the 2013 biennium. The complaint explains that for the 2013 biennium, beginning in  
24 February 2010 and ending in November 2010, the Unions and the Governor’s office  
25 negotiated a 1 percent increase in state employee pay for the first year of the biennium,

1 and a 3 percent increase in the second year of the biennium and "no one-time-only  
2 payments and no increase in the employer's contribution to health insurance." (Id.; see  
3 also, Def. State of Mt. Leg. Branch's Br. Opp'n Petr's Opening Br., Ex. 1.)

4 It is also important to note that the agreement between the State of  
5 Montana, as negotiated by the Governor's Office and the Unions, dated November 10,  
6 2010, contains this language: "This proposal is contingent on legislative funding and  
7 approval." (Def. State of Mt. Leg. Branch's Br. Opp'n Petr's Opening Br., Ex. 1.)

8 In December 2010, the 2013 biennium pay plan was submitted to the  
9 legislature under House Bill 13 (HB 13) and referred to the House Appropriations  
10 Committee. (Admin. R., Ex. 1, at 4.) While the Unions aver the committee "took no  
11 action on HB 13 until March 23 when it tabled the bill," they later acknowledge the  
12 committee eventually passed HB 13 out of the committee "but not until within ten days  
13 of the end of the legislative session," which allegedly did not allow proper time to  
14 renegotiate the bill. HB 13 failed to pass the full House of Representatives on two  
15 separate votes. (Petr's Opening Br. at 4.)

16 Because of the delay in handling the bill, the Unions aver that "even if  
17 the House had approved the pay plan, the Senate would have been required to suspend  
18 their operating rules to receive the bill so late in the session," which takes a  
19 "super-majority of legislators." (Id. at 5.) As a result of the failure to pass HB 13,  
20 state employees' base pay rates were frozen for two additional years, making a total of  
21 four years without a pay increase. (Id.)

22 Counsel for the legislature pointed out in its reply brief to the petition for  
23 judicial review that HB 13 was actually debated by the House Appropriations  
24 Committee on January 21, 2011, tabled on March 23, 2011, reconsidered on  
25 April 18, 2011, debated a second time, and passed by the committee. (Def. State of

1 Mt. Leg. Branch's Br. Opp'n Petr's Opening Br. at 5, citing Ex. 4.) Further, on second  
2 reading, the bill was debated by the House on April 20, 2011 but failed on a 42-58  
3 vote. (Id.) Finally a motion to reconsider and place the bill on second reading  
4 failed on April 27, 2011 by a 39-58 vote. (Id.)

5           The Unions argue that the State, through its legislature, failed to  
6 negotiate the bill in "good faith." It should be noted however, that the bill was  
7 negotiated between the Unions and the Governor — not the Unions and the legislature.  
8 The Unions argue that evidence of the legislature's failure to negotiate in good faith  
9 includes the legislature's delay in handling the bill, the fact that the legislature  
10 convened on April 28, 2011 with a "projected ending fund balance of \$179 million,"  
11 that at the beginning of May 2011, the State had "over \$300 million [in] unencumbered  
12 cash in the bank," and that HB 13 would have only cost "approximately \$15 million  
13 over the biennium in state funds" if passed. (Id.) The aforementioned manner in  
14 which the bill was handled shows an alleged intent by the legislature to negotiate in  
15 bad faith. (Id. at 6.)

16           In response to the unfair labor practice claim, both the executive and  
17 legislative branches of state government filed responses to the Board. On  
18 June 13, 2011, Paula Stoll, chief of the State Office of Labor Relations, replied on  
19 behalf of the State of Montana and the Governor's office, explaining that the  
20 Governor's office negotiated in good faith and the State of Montana therefore fulfilled  
21 its duties and obligations when it submitted the negotiated settlement between the  
22 Governor's office and the Unions to the legislature "in the executive budget and by HB  
23 13" under Montana Code Annotated § 39-31-305(3).

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1                   On June 22, 2011, the Board's investigator, John Andrew, determined  
2 that there was probable merit in the complaint requiring a hearing. (Admin. R., Ex. 8.)  
3 In Andrew's eight-page investigative report and finding of probable merit he found  
4 that since the State of Montana is a "public employer" pursuant to Montana Code  
5 Annotated § 39-31-103(1), the executive and legislative branches are a single entity for  
6 the purpose of collective bargaining. Therefore, the failure of the legislature to adopt  
7 the agreement between the executive branch and the Unions sends an "inconsistent,  
8 mixed message" that is tantamount to bad faith. (Id.) Andrews failed to apply the  
9 statutory exemption for the legislature set forth in Montana Code Annotated  
10 § 39-31-102.

11                   Because the Board's agent found probable merit, the case was set for  
12 hearing under Montana Code Annotated § 39-31-405(3) and was transferred to the  
13 Department of Labor and Industry's Hearings Bureau. (Admin. R., Ex. 9.)

14                   On September 28, 2011, hearing officer Terry Spear recommended  
15 dismissal because the Unions did not assert that any part of state government, other  
16 than the legislature committed an unfair labor practice. According to Spear, since the  
17 legislature had no duty to bargain collectively in good faith, the case must be  
18 dismissed. (Admin. R., Ex. 33, at 4.)

19                   Spear cited Montana Code Annotated § 39-31-305(3), which states, in  
20 pertinent part, "[f]or purposes of state government only, the requirement of negotiating  
21 in good faith may be met by the submission of a negotiated settlement to the legislature  
22 in the executive budget or by bill or joint resolutions. . . ." Spear concluded there is  
23 "no possible interpretation of the statute which leaves open the possibility of illegal  
24 refusal to bargain collectively in good faith AFTER the negotiated settlement is  
25 submitted to the Legislature." (Id., at 5.) He further found that it is "beyond cavil"

1 that "submission of a negotiated settlement to the Legislature satisfies the State's  
2 obligation to negotiate in good faith with an exclusive representative." (Id.)

3 Spear, reading Montana Code Annotated §§ 39-31-102 and -305(3)  
4 together, concluded that the legislature has no duty bargain in good faith. (Id., at 6.)  
5 Therefore, BOPA lacks "any statutory authority to consider what happened to HB 13 in  
6 the legislature, since the good faith of the state was established by the introduction of  
7 HB 13, containing the substance of the agreement between the Unions and the State, at  
8 the beginning of the session, no matter what happened thereafter." (Id. at 7.) In fact,  
9 the agreement between the State and the Unions expressly provided it was contingent  
10 on legislative approval. (Id.)

11 Thereafter, BOPA issued its final order concluding that "Section  
12 39-31-102, MCA, excludes the Legislature from any duty to bargain in good faith  
13 pursuant to Section 39-31-305(3), MCA." (Admin. R., Ex. 53, at 2; *see also* Pet. Jud.  
14 Rev., Ex. A.) Only the executive branch has the duty to bargain in good faith, and that  
15 duty is met once the executive has submitted the negotiated settlement to the  
16 legislature. (Id., at 2-3.)

### 17 STANDARD OF REVIEW

18 A district court's review of a decision of the Board of Personnel Appeals  
19 is governed by the Montana Administrative Procedure Act (MAPA). Under MAPA,  
20 the appropriate standard of review is codified in Montana Code Annotated  
21 § 2-4-704(2), which provides:

22 (2) The court may not substitute its judgment for that of the  
23 agency as to the weight of the evidence on questions of fact. The court  
24 may affirm the decision of the agency or remand the case for further  
25 proceedings. The court may reverse or modify the decision if substantial  
rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or  
25 decisions are:

- 1 (i) in violation of constitutional or statutory provisions;  
2 (ii) in excess of the statutory authority of the agency;  
3 (iii) made upon unlawful procedure;  
4 (iv) affected by other error of law;  
5 (v) clearly erroneous in view of the reliable, probative, and  
substantial evidence on the whole record;  
6 (vi) arbitrary or capricious or characterized by abuse of discretion  
or clearly unwarranted exercise of discretion; or  
7 (b) findings of fact, upon issues essential to the decision, were not  
8 made although requested.

9 The present action involves a question of law which is to be reviewed by  
10 this Court to determine whether the agency's interpretation of the law is correct. *Steer,*  
11 *Inc. v. Dep't of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).

#### 12 DISCUSSION

13 The Unions argue on appeal that Montana Code Annotated  
14 § 39-31-305(3) allows a permissive determination as to whether the good faith  
15 standard was met as "[t]he requirement of good faith may be met by the submission of  
16 a negotiated settlement to the legislature in the executive budget or by bill or joint  
17 resolution." (Emphasis added.) Had the Unions presented any evidence or argument  
18 showing bad faith that argument might stand. For example, if the executive branch had  
19 lobbied against its good faith agreement with the Unions, an argument could be made  
20 that the statute should be interpreted permissively. Unfortunately, no such facts or  
21 authority was presented in this case.

22 The legislature's counsel also pointed out that of the 2,246 bills that were  
23 requested, 1,067 were never introduced, and only 419 passed. (Def. State of Mt. Leg.  
24 Branch's Br. Opp'n Petrs' Opening Br. at 5, citing Ex. 4.) The bill at issue was  
25 debated on at least two occasions and ultimately passed the House Appropriations  
Committee. The proposal finally failed on April 27, 2011. The fact that the bill was

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1 introduced for review is enough, even if legislators had no intention whatsoever to pass  
2 the bill.

3 This discussion is based upon a reading of Montana Code Annotated  
4 §§ 39-31-102 and -305(3). However, the basic structure of our government supports  
5 this conclusion. For example, Article III, section 1 of the Montana Constitution  
6 provides:

7 The power of the government of this state is divided into three  
8 distinct branches - legislative, executive, and judicial. No person or  
9 persons charged with the exercise of power properly belonging to one  
branch shall exercise any power properly belonging to either of the  
others, except as in this constitution expressly directed or permitted.

10 The separation of powers provision supports this Court's conclusion. For example,  
11 adopting the Unions' position would suggest that the legislature had no say in whether  
12 or not to accept an agreement negotiated between the Governor and the Unions.  
13 Certainly that cannot be the case.

14 Finally, it is clear the collective bargaining statutes require involvement  
15 of both the executive and legislative branches, but only the executive branch is held to  
16 the good faith standard under Montana Code Annotated §§ 39-31-102 and -305(3). It  
17 is not the purview of the Board or the courts to determine how much debate a bill  
18 should be afforded, when a bill must be acted on, or whether a bill should be passed or  
19 approved. The Court is bound to respect the power of the legislature expressly  
20 delegated to it by the constitution and the statutes set forth above. Otherwise, we  
21 would create a quagmire from which there is no escape.

22 Ultimately, it is up to the electorate to decide whether they agree or  
23 disagree with the legislature's state employee pay freeze, and it is beyond the authority  
24 of this Court to rule otherwise based on the record presented.

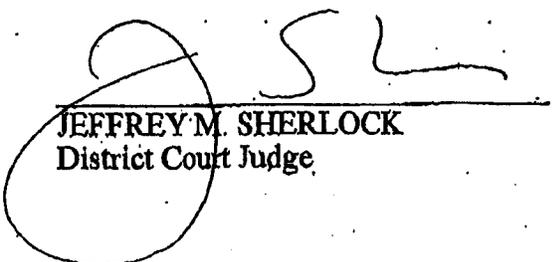
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**CONCLUSION**

Based on the above, the Unions' petition for judicial review is **DENIED**.

DATED this 2 day of May 2013.

  
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JEFFREY M. SHERLOCK  
District Court Judge

pc: Karl J. Englund  
Daniel J. Whyte  
Marjorie L. Thomas/Michael P. Manion  
Timothy Little

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