

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 23-2011:

MEA-MFT, MONTANA PUBLIC)	Case No. 2030-2011
EMPLOYEES ASSOCIATION, THE)	
AMERICAN FEDERATION OF)	
STATE, COUNTY AND)	
MUNICIPAL EMPLOYEES,)	
COUNCIL NO. 9,)	ORDER RECOMMENDING
)	DISMISSAL ON SUMMARY
Complainants,)	JUDGMENT
)	
vs.)	
)	
STATE OF MONTANA,)	
)	
Defendant.)	

* * * * *

1. Background

The three complainants, MEA-MFT, the Montana Public Employees Association, and the American Federation of State, County and Municipal Employees, Council No. 9 (the Unions), are each statewide labor unions with local affiliates that are “exclusive representatives” (under Mont. Code Ann. §39-31-103(4) of bargaining units of “public employees” (under Mont. Code Ann. §39-31-103(9) that have been parties to a series of Collective Bargaining Agreements (“CBAs”) with various entities within the Executive branch of Montana state government. The Unions provide representation for the vast majority of state employees who have collective bargaining units. The defendant State of Montana (the State) employs those public employees, among others.

In its essence, the complaint in this case is that the Unions’ bargaining teams reached an agreement with the bargaining team for the State (as designated by the Governor’s Office) for the wage and insurance contribution provisions to apply to existing collective bargaining units in state government represented by the Unions. Typically, state employees who are not in such collective bargaining units would have their wage and insurance contribution adjusted to coincide with the provisions of the agreement between the Unions and the State. This agreement came after long and hard negotiation. It included an express provision that it was contingent upon legislative funding and approval. On January 1, 2011, House Bill 13 (HB13), which incorporated the provisions of the agreement, was introduced in the Montana House of Representatives by Representative Cynthia Hiner.

On January 31, 2011, HB13 was debated before the House Appropriations Committee. On March 23, 2011, the House Appropriations Committee tabled HB13. On April 14, 2011, in the House Appropriations Committee, HB13 was taken from the table. On April 19, 2011, the Committee passed HB13 as amended. On April 20, 2011, and again on April 27, 2011, House of Representatives failed to pass HB13, once as amended by committee, and the second time as amended by the House. Had it passed, at that late time in the session, it would have been difficult, to say the least, for the Senate to take the necessary steps to consider it.

Because HB13 “died” so near the end of the session, the negotiating teams for the Unions and the State had no time even to try to respond with any other agreement for a pay plan before the session ended.

The Unions’ Unfair Labor Practice complaint named the State as the only defendant, providing the names and contact information of both the Speaker of the House (Representative Mike Milburn) and the Montana Attorney General (Steve Bullock) as the “address and phone number” of the State. Issuing a summons upon the complaint, the Department of Labor and Industry added the Montana House of Representatives, and the Speaker and the Attorney General (each by name), to the State of Montana, all together designated as a single defendant. An amended summons restored the original denomination of the “State of Montana” as the sole defendant, with the Speaker and the A.G. appearing as two of the three persons to whom the summons was directed. The third was Paula Stoll, Chief of the Department of Administration’s State Office of Labor Relations.

The Unions’ complaint charged, in substance, that the Legislature’s delay of the Bill in the House until after the transmission deadline and the subsequent failure of the Bill in the House, together with the Legislature’s refusal to agree with the Governor’s Office that there was plenty of money to fund the wage and insurance contribution package agreed upon by the Unions and the State, amounted to “bargaining schizophrenia” that necessarily constituted an unfair labor practice by the State, since the Unions were bound by the agreement, at least until the Legislature passed or killed the Bill. The specific allegation was that the manner in which the Legislature handled HB13 failed to meet the standard for bargaining in good faith.

Stoll responded to the Unfair Labor Practice Charge of the unions “on behalf of the defendant, State of Montana” and “not . . . on behalf of the Legislature.” Her response stated that the Governor or his designee had the authority to represent all Executive branch agencies for purposes of collective bargaining with public employee unions, and that the Governor had designated her as that representative. Her response asserted that the State, represented by the Office of Labor Relations, negotiating in good faith with the unions, had reached an agreement that the Governor had presented in the executive budget, and that the provisions of that

agreement were incorporated into HB13, and the introduction of HB13 fulfilled the State's duty of negotiating in good faith under Mont. Code Ann., §39-31-305(3).

Staff Attorney Daniel J. Whyte, Legal Services Office, Montana Legislative Services Division, responded on behalf of "the Montana Legislature and Speaker of the House Mike Milburn." He noted that the amended summons only identified the State as the defendant. From this change, he concluded that Speaker Milburn was not a named defendant and was not required to respond, asking to be notified if this was not correct. The balance of his response asserted that the complaint should be dismissed, for a series of enumerated reasons:

(a) Failure of the Unions to cite any law or rules alleged to have been violated;

(b) Failure of the Unions to state facts constituting an unfair labor practice and to cite any law or rule either that the House Appropriations Committee violated by waiting to act on HB13 or that the Legislature violated by failing to follow the pattern of prior sessions that had passed Bills containing pay plans agreed upon by the Executive Branch of the State and the Unions;

(c) Failure of the Unions to cite any law or rule violated by the Legislature's failure to pass HB13, even if the State had the money to fund the pay plan;

(d) Failure of the Unions to cite any legal authority in support of their allegation that the Legislature had a duty to bargain collectively; and

(e) Failure of the Unions to allege or to cite any legal authority to establish that the Legislature failed to bargain collectively in good faith (without admitting any such obligation to bargain collectively at all).

In substance, Whyte, without admitting that the Legislature had any obligation of any kind to bargain with the Unions in any way, asserted that the Unions had failed to allege or to cite any authority that the Legislature was obligated to do anything more than consider HB13 through the normal legislative process. Whyte asserted that by that process, the Legislature had satisfied its obligations to the State and its citizens, under constitution, law and rule.

BOPA's Investigator issued an investigative report that found probable merit in the unfair labor practice charge, noting in that report that except for the provisions of Mont. Code Ann., §39-31-305(3), "nothing distinguishes the state of Montana from any other public employee," with a second difference being that "because of the diversity and number of bargaining units and unions representing its employees, the state of Montana has bifurcated its bargaining so that unlike other public employers

and their unions, the fundamental issues of base pay and insurance contribution are bargained on their own.” “Investigative Report and Finding of Probable Merit” (June 22, 2011), p. 5.

The Investigator also noted that “even in the area of appropriations the state and its legislative body are viewed in the same light as the remainder of public sector employers.”¹ *Id.* He commented that as long ago as 1986, counsel for the Legislature had written that the provisions of Title 39, Chapter 31 “recognize the Legislature’s authority over the appropriation of funds. They also remove the Legislature from the bargaining process. No provision is made for what is to occur if the Legislature does not fund the negotiated settlement submitted by the bargaining parties.” *Id.*, pp. 5-6.

On June 23, 2011, this case was transferred to the Hearings Bureau. The Bureau issued and served by mail its Notice of Hearing on June 24, 2011. The present contested case proceedings followed.

Counsel for the Legislature initially filed and served a motion to sever, arguing that the Legislature and the Executive should be treated as separate defendants. This Hearing Officer denied the motion.

Counsel for the Legislature then filed and served the current motion for summary judgment, on the grounds that there were no genuine issues of material fact and that it was entitled to summary judgment as a matter of law. The motion has been fully briefed and argued. This Hearing Officer now issues this recommended order, for the consideration of the Board of Personnel Appeals.

2. Discussion

The Unions do not assert that any part of State government except the Legislature committed any unfair labor practice. Thus, unless the Legislature had a duty to bargain collectively in good faith, and breached that duty, the entirety of this complaint should be dismissed.

Summary judgment is no longer expressly contemplated by BOPA’s procedural rules. The previous rule, Admin. R. Mont. 24.26.213, was repealed, effective December 10, 2010 (2010 Mont. Admin. R., p. 2481). Admin. R. Mont. 24.26.212 still provides for motions, with affidavits, responses and oral argument and/or testimony available at the discretion of BOPA or the presiding agent. BOPA had a recent opportunity to clarify whether its current rules permit summary judgment. It did not address the question. *MPEA v. Montana Dept. of Transportation* (6/30/11),

¹ The Investigator cited Mont. Code Ann. §39-31-102, which reads, in its entirety, “This chapter does not limit the authority of the legislature, any political subdivision, or the governing body relative to appropriations for salary and wages, hours, fringe benefits, and other conditions of employment.”

“Order,” Unit Determination Charge No. 9-2011, Hrgs Bureau Case No. 366-2011. In the absence of clear authority from BOPA, and in light of *In re License of Pella* (1991), 249 Mont. 272, 815 P.2d 139, 145, this Hearing Officer, applying the standard for summary judgment applicable in district court cases, has concluded that it would ill serve the parties and the public to delay this recommended ruling until after a full hearing. The time and expense of further proceedings would be wasteful, because there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See, e.g.*, “Summary Judgment Standard of Review,” in “Defendant State of Montana Legislative Branch’s Motion and Brief for Summary Judgment and Request for Oral Argument” (8/26/11), pp. 5-6.

The authority of this Hearing Officer is limited to recommending a decision to BOPA itself, which means only matters within BOPA’s jurisdiction can be considered in making that recommendation. This case involves an unfair labor charge against the State, a public employer. BOPA has the statutory authority to remedy violations of Mont. Code Ann. §39-31-401 by a public employer. The only violation alleged here is an illegal refusal to bargain collectively in good faith with an exclusive representative. Mont. Code Ann. §39-31-401(5).

The language of Mont. Code Ann. §39-31-305(3) could not be much clearer:

For purposes of state government only, the requirement of negotiating in good faith may be met by the submission of a negotiated settlement to the legislature in the executive budget or by bill or joint resolution. The failure to reach a negotiated settlement for submission is not, by itself, prima facie evidence of a failure to negotiate in good faith.

There is no possible interpretation of this statute which leaves open the possibility of illegal refusal to bargain collectively in good faith AFTER the negotiated settlement is submitted to the Legislature. The first sentence of 305(3) can only mean that when the Governor or the Governor’s designee and an exclusive representative reach a negotiated settlement for submission to the Legislature, and the negotiated settlement is submitted to the Legislature, the requirement of negotiating in good faith has been met. There are other ways that requirement can be met, and a failure to reach a negotiated settlement for submission does not, by itself, show a failure to negotiate in good faith, but beyond cavil, submission of a negotiated settlement to the Legislature satisfies the State’s obligation to negotiate in good faith with an exclusive representative. No matter what the Legislature may do to or with the negotiated settlement submitted to it, the State has completed its task of negotiating in good faith.

Mont. Code Ann. §39-31-102 provides, in its entirety: “This chapter does not limit the authority of the legislature, any political subdivision, or the governing body relative to appropriations for salary and wages, hours, fringe benefits, and other

conditions of employment.” Reading 102 and 305(3) together, there is only one conclusion possible – the Montana Legislature has the power to carry out its job of appropriating public money, when it considers a negotiated settlement between the Executive and one or more exclusive bargaining representatives of public employees of the State, without being bound in any particular by the specifics of the negotiated settlement.

Given the limited application of 305(3) to state government only, the same statement may not be entirely true for subdivisions of Montana’s state government or for the governing bodies of other public employers in Montana. The Legislature is presumed not to engage in idle acts, Mont. Code Ann. §1-3-223, so if possible, laws are interpreted to give effect to all provisions therein. Mont. Code Ann. §1-2-101.

Counsel for the Unions has ably argued that the handling of HB13 looks as if it was designed to make absolutely certain that it would die without departing the House of Representatives. However, what happened to HB13 after it was introduced at the beginning of the session has no bearing at all upon whether the State bargained in good faith with the exclusive representatives. No matter what the Legislature did with HB13, the State had already satisfied its duty to bargain in good faith.

The tribunal to which dissatisfaction with the Legislature’s performance must be taken is the electorate. The plain meaning of the applicable statutes make that clear. The same result has occurred in a number of other jurisdictions. Then Associate Professor Stephen F. Befort summarized the state of American labor law regarding the tension between legislative appropriations power and collective bargaining, in “Public Sector Bargaining: Fiscal Crisis and Unilateral Change,” 69 Minn. L. Rev. 1221, 1243 (1985)(footnotes omitted):

Virtually every state constitution contains a provision that vests exclusive authority over appropriations in the state legislature. State bargaining laws, however, usually define the “employer” of public employees in a manner that excludes the legislature. This diffusion of authority at the state level creates the potential for unilateral change if the legislature fails to appropriate all of the funds necessary to implement a contract negotiated by the executive branch. As of 1982, twenty of the thirty states with bargaining laws applicable to state employees contained language subjecting the monetary terms of bargaining agreements to the appropriations process of the legislature. In those states with bargaining laws that are silent or unclear on this issue, courts consistently have refused to enforce the financial provisions of state employee agreements in the absence of an express legislative appropriation.

While the dissatisfaction of the Unions with how HB13 was treated in the Legislature may be entirely understandable, BOPA lacks any statutory authority to

consider what happened to HB13 in the Legislature, since the good faith of the State was established by the introduction of HB13, containing the substance of the agreement between the Unions and the State, at the beginning of the session, no matter what happened thereafter.

It is also worth reiterating that, as noted on page 1 of this recommendation, the agreement between the Unions and the State included an express provision that it was contingent upon legislative funding and approval.

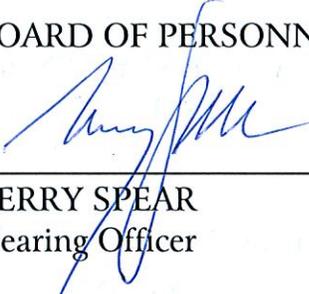
3. Recommended Order

The Hearing Officer recommends that BOPA grant summary judgment as requested by the Legislature and dismiss the Unions' Unfair Labor Practice charge.

DATED: September 28, 2011.

BOARD OF PERSONNEL APPEALS

By:



TERRY SPEAR
Hearing Officer

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NOTICE: Exceptions to this Order Recommending Dismissal on Summary Judgment Recommended Order may be filed under Admin. R. Mont. 24.26.222 within twenty (20) days after the day this Order of the Hearing Officer is mailed and emailed, as set forth in the certificate of service below. If no exceptions are timely filed, the above "Recommended Order" shall become the Final Order of the Board of Personnel Appeals. Mont. Code Ann. § 39-31-406(6). Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the "Recommended Order" and the issues raised by the exceptions, mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 201503
Helena, MT 59620-1503

CERTIFICATE OF MAILING

True and correct copies today served by deposit in the U.S. Mail, postage prepaid, and emailed to the email address(es) of record for the following person(s):

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True and correct copies today served by deposit in the State of Montana's Interdepartmental mail service, and also emailed to the email address(es) of record for the following person(s):

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DATED this 28th day of September, 2011.

Sandy Duncan