

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 31-99:

MONTANA PUBLIC EMPLOYEES ASSOCIATION
& FISH, WILDLIFE & PARKS GAME WARDENS
BARGAINING UNIT,

Complainants,

vs.

MONTANA DEPARTMENT OF FISH, WILDLIFE
& PARKS,

Defendant.

FINAL ORDER

The above-captioned matter came before the Board of Personnel Appeals on August 26, 1999. The Investigation Report and Notice of Intent to Dismiss was issued by Michael Bentley, Investigator, on May 14, 1999. A Rejection of Notice of Intent to Dismiss was filed by Melvin Wojcik on behalf of the Complainant on May 21, 1999

Appearing before the Board were Carter Picotte, staff attorney for the Montana Public Employees Association and Vivian V. Hammill, Special Assistant Attorney General for the Department of Administration. Both parties appeared in person.

After review of the record and consideration of the arguments by the parties, the Board concludes and orders as follows:

1. **IT IS HEREBY ORDERED** that the Rejection of Notice of Intent to Dismiss is denied.

2. **IT IS FURTHER ORDERED that** the Investigation Report and Notice of Intent to Dismiss is affirmed and this unfair labor practice charge is hereby dismissed.

DATED this 25 day of October, 1999.

BOARD OF PERSONNEL APPEALS

By 
James R. Rice, Jr.
Presiding Officer

Board members Rice, Vagner, Talcott and Perkins concur.
Alternate member Dwyer dissents.

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NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

CERTIFICATE OF MAILING

I, Jennifer Jackson, do hereby certify that a true and correct copy of this document was mailed to the following on the 26th day of October, 1999:

CARTER PICOTTE
STAFF ATTORNEY
MONTANA PUBLIC EMPLOYEES ASSOCIATION
PO BOX 5600
HELENA MT 59604-5600

VIVIAN V. HAMMILL
SPECIAL ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF ADMINISTRATION
ROOM 155 - MITCHELL BLDG
HELENA MT 59620

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 31-99
(PREVIOUSLY SERVED AS NO. 24-99)

MONTANA PUBLIC EMPLOYEES)	
ASSOCIATION and FISH, WILDLIFE)	
& PARKS GAME WARDENS)	
BARGAINING UNIT)	
Complainant,)	
)	
-vs-)	INVESTIGATION REPORT
)	AND
MONTANA DEPARTMENT OF FISH,)	NOTICE OF INTENT TO DISMISS
WILDLIFE & PARKS)	
)	
Defendant.)	

* * * * *

I. INTRODUCTION

On March 8, 1999, the Montana Public Employees Association and Fish and Game Wardens bargaining unit (Complainant) filed an unfair labor practice charge with this Board alleging that the Montana Department of Fish, Wildlife & Parks (Defendant) has violated and continues to violate Section 39-31-401 (1), (2), (3) & (5), MCA. Defendant denied any violation of the above-cited law.

II. ISSUES

An investigation was conducted which included contact with the Parties involved. Complainant represents all full time Fish and Game Wardens, Grade 13, employed by Defendant. Conservation Specialists, Grade 12, are the positions in question (sham

positions) in the instant case. Complainant makes a four point argument in its charge, the essence of which is that Defendant: created sham positions that encompass its bargaining unit's work; classified the positions at a grade lower than the bargaining unit positions; prevented the positions in question from belonging to the bargaining unit; and interfered with and restrained the bargaining unit from exercising its rights under Section 39-31-201, MCA and refused to bargain in good faith with the exclusive representative.

In contrast, Defendant not only denies all aspects of Complainant's charge, but as well, challenges the bases for Complainant's arguments. It first points out that the sham positions referred to in the charge are not identified by name. Defendant then notes a lack of factual specificity in the complainant, and suggests that a more appropriate avenue for Complainant to take would be that of a unit clarification. Finally, it observes that a contractual recognition clause is not a mandatory subject of collective bargaining and in consideration of the above-mentioned factors the instant charge should be dismissed.

III. DISCUSSION

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using Federal Court and National Labor Relations Board (NLRB) precedents as guidelines in interpreting the Montana Collective Bargaining for Public Employees Act as the state act is so similar to the Federal Labor Management Relations Act, State ex rel. Board of Personnel Appeals vs. District Court., 183 Montana 223, 598 P.2d 1117, 103 LRRM 2297; Teamster Local No. 45 v. State ex rel. Board of Personnel Appeals, 1985 Montana 272, 635 P.2d 1310, 110 LRRM 2012; City of Great Falls v. Young (III), 683

P.2d 185, 119 LRRM 2682, 21 Montana 13.

A key element of this case is that of a bargaining charge being leveled by Complainant absent any request to bargain having been made first by Complainant. Essentially, Complainant is making a prospective argument, i.e., it is charging Defendant with a failure and refusal to bargain without first having demanded bargaining. Both Parties admitted, during the investigation, that, indeed, Complainant has yet to make either a formal or informal request to bargain over the inclusion of the Conservation Specialists positions in the Fish and Game Wardens bargaining unit. This Board, the NLRB and the Courts have dismissed numerous bargaining charges where no demand or request to bargain was made by the complaining party. See Jordan Education Association, MEA, NEA vs. Jordan Unified School District, ULP Charge No. 34-98; NLRB v. Oklahoma Fixture Co., 151 LRRM 2919 (CA 10 1996); Gateway Freight Services Inc. and Transportation Communications Union, Allied Services Division, 145 LRRM 1046 (1993); Grandee Beer Distributors Inc., 102 LRRM 1332 (1979); and PBM Industries Inc. Professional Building Maintenance Div., 88 LRRM 1549 (1975).

There is agreement between the Parties that Complainant does not now represent the Conservation Specialists. Therefore, there exists, at this point in time, no bargaining relationship between the Parties concerning these positions. Additionally, Complainant was unable to produce any substantive or even minimal evidence of a hint of violations of Section 39-31-401 (1), (2), (3), & (5) by Defendant in regard to the Fish and Game Warden bargaining unit it does represent. Both Parties agree, again, that the first bargaining session between them has been set for May 17, 1999. However, the fact remains that Complainant

does not now represent the positions in question, thereby giving it no standing to bring charges regarding issues relating to the positions.

If Complainant wishes to include the Conservation Specialists positions in its bargaining unit, or wishes to protect the scope of bargaining unit work, there are other avenues and forums available to do so. That notwithstanding, not only were no bargaining requests made prior to Complainant filing charges, but there was no demonstration of violations of law by Defendant in regard to positions either represented or not represented by Complainant.

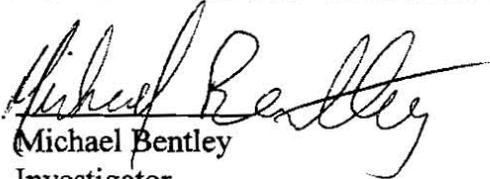
IV. DETERMINATION

Based on the foregoing, the record does not support a finding of probable merit to the charge and therefore this matter must be dismissed.

DATED this 14th day of May, 1999.

BOARD OF PERSONNEL APPEALS

By:


Michael Bentley
Investigator

NOTICE

ARM 24.26.680B (6) provides: As provided for in 39-31-405 (2), MCA, if a finding of no probable merit is made, the parties have ten (10) days to accept or reject the Notice of Intent to Dismiss. Written notice of acceptance or rejection is to be sent to the attention of the Investigator at P.O. Box 6518, Helena, MT 59604-6518. The dismissal becomes a final order of the board unless either party requests a review of the decision to dismiss the complaint.

* * * * *

CERTIFICATE OF MAILING

I, Jennifer Jordan do hereby certify that a true and correct copy of this document

was mailed to the following on the 18th day of May, 1999:

MELVIN WOJCIK FIELD ASSISTANT
MPEA
PO BOX 5600
HELENA MT 59604

KEVIN MCRAE LABOR RELATIONS SPECIALIST
LABOR & EMPLOYMENT RELATIONS BUREAU
PO BOX 200127
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