

III. FINDINGS OF FACT

1. Anaconda is a public employer, among whose employees are certain law enforcement personnel.

2. APPA is a labor organization that is and has been the exclusive bargaining representative of certain of Anaconda's law enforcement personnel.

3. On May 7, 2007, APPA opened bargaining for a new Collective Bargaining Agreement (CBA), to cover July 2007 through June 2009.

4. On December 5, 2007, both parties gave written tentative approval to a mediator's proposal (Exhibit 5) for the new CBA. The mediator's proposal included four terms pertinent to this dispute:

- No. 2, Anaconda would make health insurance contributions of \$505.00 per APPA employee per year;
- No. 5, Anaconda would provide an employee clothing and equipment allowance of \$1,300.00 allocated in October of each year;
- No. 7, all other contract language except No. 5 would remain the same as the "current" (i.e., *previous*) contract with the dates changed; and
- No. 8, the mediator's proposed two year agreement would supersede all letters of agreement and memorandums of understanding.

5. APPA ratified the mediator's proposal on December 7, 2007.

6. Anaconda reduced the agreement to a written CBA and forwarded it to APPA. APPA responded by pointing out three problems with the CBA, according to its particular interpretations of points from the mediator's proposal:

- No. 2, the previous contract stated that Anaconda would contribute the same amount for the APPA members' insurance as it did for its other employees, instead of specifying a dollar amount;
- No. 5, the parties had agreed that the clothing and equipment allowance would be allocated in December rather than October of each year; and
- No. 8, the mediator's proposed two year agreement would supersede all letters of agreement and memorandums of understanding developed

during the present negotiations but would not supersede letters of agreement and memorandums of understanding that had been reached during the previous agreement and had modified the previous agreement before the current negotiations began.¹

7. Anaconda agreed that the clothing and equipment allowance would be allocated in December rather than October. Guay believed, after meeting with Sather on December 17, 2007, that with that single change the written agreement was acceptable to APPA. Anaconda again reduced the agreement to a written CBA with that change.

8. On December 18, 2007, Anaconda's commissioners ratified the new version of the CBA. Guay signed it and sent it to APPA on December 19, 2007.

9. On January 8, 2008, Sather sent another letter to Guay, citing two problems in the new version of the CBA:

- Again, the previous contract simply stated that Anaconda would contribute the same amount for the APPA members' insurance as it did for its other employees, instead of specifying a dollar amount; and
- Again, the mediator's proposed two year agreement would supersede all letters of agreement and memorandums of understanding developed during the present negotiations but would not supersede letters of agreement and memorandums of understanding that had been reached during the previous agreement and had modified the previous agreement before the current negotiations began.

10. Anaconda filed the present ULP complaint over APPA's continued insistence upon changing the CBA signed by Guay in the two particulars stated in Finding No. 9.

11. On June 4, 2008, 18 days before the scheduled contested case hearing, Sather sent a letter to Guay stating that "the sticking points" over which APPA had refused to sign the CBA were "so minimal" as to be a waste of "not only our time but the counties [sic] as well." The letter indicated that APPA would sign the contract as given to it by Anaconda in December 2007. The letter did not state that APPA

¹ Anaconda has consistently taken the position that No. 8 in the mediator's proposal means that ALL letter agreements and memos of understanding of ANY date are superseded in favor of the contract language of the previous contract.

admitted that it had been frivolous or malicious in raising the “sticking points” in the first place.

12. The evidence adduced at hearing did not establish that APPA raised frivolous or malicious questions about the meaning of mediator’s proposal No. 8.

13. Anaconda refused to withdraw or dismiss its charge, seeking to recover the expenses it incurred in retaining Dr. Klepper to represent it in drafting, filing, and prosecuting this ULP, from inception through the end of May 2008.

14. Dr. Klepper charged Anaconda \$850.00 for 17 hours (\$50.00 per hour) spent in research, and in drafting and filing the ULP charge and related documents during January 11-16, 2008. He charged an additional \$1,600.00 for 32 hours (\$50.00 per hour) spent in research, and in briefing and preparation of exhibits for the contested case hearing during April 27-May 28, 2008. Anaconda has paid his invoices in these amounts.²

IV. DISCUSSION³

The legal issue here is whether BOPA can require a bargaining representative that has allegedly committed an unfair labor practice to pay for the expenses incurred by the complainant for a non-attorney consultant (instead of an attorney) who prosecutes the unfair labor practice claim. Ordinarily, BOPA does not have the power to award attorney fees to the prevailing party in a ULP.

An administrative tribunal, unlike the Montana district courts, is a forum of limited jurisdiction, with only those powers specifically granted to it by the legislature. *Auto Parts of Bozeman v. Emp. Rel. Div. U.E.F.*, ¶ 38, 2001 MT 72, 305 Mont. 40, 23 P.3d 193. Not surprisingly, the “American Rule” (successful litigants cannot recover their professional fees from their opponents) applies to Montana administrative tribunals, which cannot award attorney’s fees to successful parties in the absence of either contractual or specific statutory authorization. *Thornton v. Comm. of Labor & Industry* (1981), 190 Mont. 442, 621 P.2d 1062.

Mont. Code Ann. § 39-31-406(4) does not reference attorney’s fees and thus is not specific statutory authority to award attorney’s fees in an unfair labor practice case. In conformity with *Thornton*, BOPA has declined to award such fees. *See e.g.*,

² Both invoices included charges for other work done by Dr. Klepper, but the stated items and amounts were specifically related to this case.

³ Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Anaconda Pol. Prot. Assoc. v. Anaconda-Deer Lodge County (1993), ULP 2-2001; *McCarvel v. Teamsters Local 45* (1983), ULP 24-77. Whether despite the lack of power to award attorney's fees BOPA can order a union to pay the employer's expenses for a non-attorney consultant who successfully prosecutes the unfair labor is undecided. BOPA should decide that it cannot and will not order such a payment as "make whole" relief for Anaconda in this case, for at least three reasons.

First, the "American Rule," applicable by BOPA in conformity with *Thornton*, precludes the payment of professional fees for prosecuting litigation. There is no rational or pragmatic reason to limit its application solely to recovery of fees charged by attorneys. Dr. Klepper is a professional who contracted to represent Anaconda. It would be absurd to allow Anaconda better recovery rights with a non-attorney professional than with an attorney. The reason for the American rule (that each party bears its own expenses for representation absent a law or contract to the contrary) does not allow for such a distinction.

Second, the equitable exception to the American Rule, under which fees can be recovered by the prevailing party, is narrowly construed and applied to cases in which the party seeking to recover the expense of the action was forced to defend against a frivolous or malicious claim. *Pankratz Farms, Inc. v. Pankratz*, ¶ 91, 2004 MT 180, 322 Mont. 133, 95 P.3d 671. This limitation upon judicial exercises of equity will "in most cases preclude an award of [representative's] fees to a prevailing party who commences the litigation," *El Dorado Heights HOA v. DeWitt*, ¶ 27, 2008 MT 199, 344 Mont. 77, ___ P.3d ___. Anaconda filed this ULP charge, and thus ordinarily would be ineligible to obtain an equitable award for the fees charged, whether by a lawyer or by Dr. Klepper.

It is true that in *El Dorado* the Supreme Court approved an equitable award of fees to a plaintiff because the fees involved were incurred after the plaintiff obtained a stipulated court order in its favor. After the court issued the order, the defendant had second thoughts and the plaintiff had to incur substantial additional fees and costs defending that order against the defendant's subsequent effort to set the order aside. The basis for this unusual equitable award of representative's fees to the party who started the litigation was clearly explained in *El Dorado* at ¶¶ 29-30 (emphasis added):

Notably, the court rejected as meritless Boles' [the party against whom fees were awarded] many arguments for vacating the stipulation. *See* ¶ 13. Moreover, it is significant that the attorney's fees awarded by the District Court were charged for services occurring after August 31, 2006, which was the date upon which Boles filed her motion seeking rescission of the stipulation. *See* ¶ 8. Therefore, all of the fees charged

by the HOA stemmed directly from Boles' meritless attempts to avoid compliance with the stipulation, and not from any of the time expended by counsel between the time the suit was filed by the HOA and the date upon which an ostensible settlement was reached between the parties.

Accordingly, we conclude that because the HOA was forced to defend against Boles' frivolous attempts to avoid the consequences of her own promise, and because the fees imposed flowed from its defense against those frivolous actions, the District Court did not abuse its discretion in imposing an award of attorney's fees

Anaconda argued, in essence, that APPA likewise engaged in a frivolous refusal to honor its agreement to the mediator's proposals and that all the fees incurred with Dr. Klepper flowed from APPA's behavior. To prove such an argument, Anaconda had to do more than simply prove the ULP. If proving the ULP sufficed to establish a right to fees under the exception to the American Rule, the exception would, for this kind of labor dispute, swallow the rule, which is clearly not proper. However, APPA, unlike Boles in *El Dorado*, was never the aggressor in this case and Anaconda did not prove frivolous or malicious conduct stretching so far beyond the ordinary garden-variety ULP that it could potentially justify an equitable award of fees.

Indeed, Anaconda presented no clear evidence to establish a "mere" unfair labor practice. The best evidence presented of an actual ULP was Guay's testimony that she believed after meeting with Sather on December 17, 2007 that the written agreement was now acceptable to APPA. There is no evidence of what Sather said or did to give her that impression. There is also no evidence that APPA ever agreed to Anaconda's interpretation of mediator's proposal No. 8. There is likewise no basis upon which to find that Anaconda's interpretation of that proposal is the only reasonable one. Anaconda's evidence fell far short of establishing that this was a situation comparable on the merits to *El Dorado*.

The third and most important reason why BOPA should deny Anaconda's request for an award of fees and dismiss the complaint is that administrative tribunals do not have the broad equity powers of courts. Anaconda has presented no authority at all for its argument that when the conduct of the losing party is frivolous or malicious, an administrative tribunal should act as if it has the broad equitable powers of a judicial tribunal and award fees without statutory or contractual authority.

Therefore, despite the able arguments presented by Anaconda, the Hearing Officer recommends that BOPA refuse to award the only relief requested—recovery of Dr. Klepper's fees for preparation, presentation, and prosecution of the ULP.

V. CONCLUSIONS OF LAW

1. BOPA has jurisdiction over this complaint of an unfair labor practice. Mont. Code Ann. §§ 39-31-405 and 39-31-406.

2. Once APPA agreed to sign the CBA and Anaconda only sought recovery of the costs of professional fees charged by Dr. Klepper, there was no longer any relief that BOPA could provide to Anaconda. Therefore, dismissal of the ULP charge upon receipt of confirmation that APPA has actually signed the CBA is appropriate.

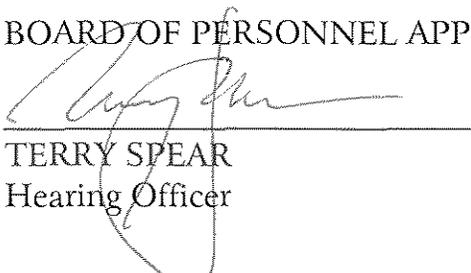
VI. RECOMMENDED ORDER

The Board of Personnel Appeals hereby dismisses Unfair Labor Practice Charge No. 12-2008, by Anaconda-Deer Lodge County against the Anaconda Police Protective Association, as resolved on its merits between the parties, leaving no relief within BOPA's power available for the complainant, effective upon Board receipt of confirmation that APPA has signed the CBA.

DATED this 2nd day of July, 2008.

BOARD OF PERSONNEL APPEALS

By:


TERRY SPEAR
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to Admin. R. Mont. 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this 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 proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

Dr. Don Klepper
P.O. Box 4152
Missoula, MT 59806

Sgt. Bill Sather
Anaconda Police Protective Association
Anaconda-Deer Lodge County Courthouse
800 South Main
Anaconda, MT 59711

DATED this 2nd day of July, 2008.

Sandy Duncan