

1 Department of Labor and Industry  
2 Board of Personnel Appeals  
3 PO Box 6518  
4 Helena, MT 59604-6518  
5 (406) 444-2718  
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9 STATE OF MONTANA  
10 BEFORE THE BOARD OF PERSONNEL APPEALS

11  
12 IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 5-2009  
13

14 AMERICAN FEDERATION OF STATE )	
15 COUNTY AND MUNICIPAL )	
16 EMPLOYEES MONTANA COUNCIL 9, )	INVESTIGATIVE REPORT AND NOTICE
17 RED LODGE PUBLIC WORKS )	OF INTENT TO DISMISS
18 Petitioner )	
19 )	
20 -vs- )	
21 )	
22 CITY OF RED LODGE, )	
23 Respondent. )	

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25  
26 **I. INTRODUCTION**  
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28 On September 26, 2008, James Bushnell, Local President and Shop Steward for  
29 Montana AFSCME Council 9, Red Lodge Public Works, hereafter Union, filed an unfair  
30 labor practice charge with the Board of Personnel Appeals alleging that the City of Red  
31 Lodge, hereafter City, violated MCA 39-31-402(5)(sic). Sam Painter, Red Lodge City  
32 Attorney, responded to the charge on October 10, 2008, and denied that the City had  
33 committed an unfair labor practice.  
34

35 John Andrew was assigned to investigate the charge, has reviewed the submissions of  
36 the parties and has communicated with the parties in the course of investigating the  
37 charge. Follow up by the investigator confirmed that the intent of Jim Bushnell was to  
38 allege a violation of MCA 39-31-401(5), not 402(5), a non-existent statute. The  
39 complaint is hereby amended to conform to the applicable statute.  
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42 **II. FINDINGS AND DISCUSSION**  
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44 The City and the Union have been engaged in negotiations for a successor agreement  
45 to a contract that expired on June 30, 2008. Numerous proposals over various issues,  
46 some permissive and some mandatory, have been made and tentative agreements  
47 seemingly reached on several items. There have been the usual scheduling difficulties  
48 associated with getting negotiating teams together, but there has never been a refusal  
49 to meet and bargain on the part of either the Union or the City. In fact, the parties met  
50

1 most recently on October 3, 2008. Further, Mr. Bushnell and Mr. Painter have both  
2 confirmed to the investigator that they remain willing to schedule additional meetings in  
3 hopes of resolving the contract. To date, mediation assistance has not been requested.  
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5 The basis of the complaint of the Union centers on language offered by the City in  
6 response to a Union proposal. That language cited by the Union provides:  
7

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9 "Upon receipt of the salary survey and conferring with Union representatives, the  
10 City commits to adopting a pay matrix acceptable to both parties that takes into  
11 consideration base salaries of comparable jurisdictions and benefits, the grade  
12 levels of the predominant duty of each employee, and such factors as revenue  
13 sources and amounts."  
14

15 The salary survey was a contracted service performed by Local Government  
16 Associates, Inc., hereafter LGA. LGA submitted an initial work product to the City and  
17 two subsequent revisions have been submitted as well. All three LGA work products  
18 have been forwarded to the Union for review and have been discussed in negotiations.  
19 Although there is some disagreement on the timing of the last exchange of the LGA  
20 work product, there is no disagreement that the City supplied the most recent draft to  
21 the Union.  
22

23  
24 During the negotiations the parties have been stymied over the content of job  
25 descriptions that are integral to adopting a pay matrix. Job descriptions in the public  
26 works arena may be particularly problematic due to seasonal considerations as well as  
27 the variety and frequency of various duties performed in public works. According to the  
28 Union, old job descriptions, not previously known to the Union, have been utilized by the  
29 City during negotiations. The Union contends there are more accurate, current job  
30 descriptions. The Union further contends that these job descriptions are the ones that  
31 should be used in order to correct pay "inequities" in the bargaining unit. It is noted that  
32 the Union has discussed and offered other options as has the City.  
33

34  
35 The October 3, 2008, bargaining notes of the Union reflect:  
36

37 "Discussed our proposal. City did not accept the third pay matrix because they  
38 said it causes to (*sic*) much pay inequities in other departments and that were  
39 (*sic*) the only ones that got to use new descriptions."  
40

41 The bargaining notes conclude with:  
42

43 "Did not get anything accomplished and the mayor walked out."  
44

45  
46 The Union contends that what they offered at the table in the way of job descriptions –  
47 the ones collaboratively put together by bargaining unit members and supervisors - is  
48 what the City had agreed would be accepted in terms of adopting the pay matrix. The  
49 City contends otherwise, but as previously found, remains open to further discussion  
50 and negotiation, even after the October 3, 2008, meeting.

1 The fundamental allegation of the Union is that the City violated the law by “refusing to  
2 meet with us to discuss the third draft of the pay matrix and to bargain as they stated to  
3 ‘adopt a pay matrix acceptable to both parties’”.

4  
5 Section 39-31-305 MCA provides that “to bargain collectively is the performance of the  
6 mutual obligation of the public employer or his designated representatives and the  
7 representatives of the exclusive representative to meet at reasonable times and  
8 negotiate in good faith with respect to wages, hours, fringe benefits, and other  
9 conditions of employment or the negotiation of an agreement or any question arising  
10 thereunder and the execution of a written contract incorporating any agreement  
11 reached. Such obligation does not compel either party to agree to a proposal or require  
12 the making of a concession”. See for instance Consolidated ULP 19 and 30-88,  
13 Teamsters Local Union No. 190 v City of Billings.

14  
15  
16 Nothing presented to the investigator by the Union demonstrates that the City agreed to  
17 do any more than commit to “adopting a pay matrix acceptable to **both** parties”  
18 (emphasis added). To be sure, the City may well have said “no”, or taken firm positions  
19 on proposals offered by the Union, including those addressing position descriptions and  
20 the third pay matrix. However, hard bargaining, and even insistently saying “no” to any  
21 given proposal or portion thereof is not, in and of itself, an unfair labor practice. See for  
22 instance, ULP 7-89, International Brotherhood of Teamsters and International Union of  
23 Operating Engineers v Flathead County.

24  
25  
26 The City has not refused to meet or refused to discuss any proposal offered by the  
27 Union. The City just disagrees with the Union on the content of some, not all, job  
28 descriptions, offered by the Union. The language referred to by the Union is not  
29 evidence of a refusal to bargain, nor is it evidence of a refusal by the City to abide by  
30 some agreement the Union believes exists. Moreover, there is no specific incident or  
31 event pointed out to the investigator that constitutes a refusal to bargain on the part of  
32 the City. Similarly, in reviewing the all the information offered to the investigator by both  
33 parties there is no substantial evidence that the overall totality of conduct by the City  
34 constitutes bad faith bargaining or a refusal to meet and negotiate over mandatory  
35 subjects of bargaining.

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38 **III. RECOMMENDED ORDER**

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40 It is hereby recommended that Unfair Labor Practice Charge 5-2009 be dismissed for  
41 lack of merit.

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44 DATED this 29<sup>th</sup> day of October, 2008.

BOARD OF PERSONNEL APPEALS

By:   
John Andrew  
Investigator

NOTICE

Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss may be appealed to the Board. The appeal must be in writing and must be made within 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the Board at P.O. Box 6518, Helena, MT 59604-6518. If an appeal is not filed the decision to dismiss becomes a final order of the Board.

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CERTIFICATE OF MAILING

I, Windy Knutson, do hereby certify that a true and correct copy of this document was mailed to the following on the 29th day of October, 2008 postage paid and addressed as follows:

JIM BUSHNELL  
AFSCME LOCAL #9  
6801 SOUTH HWY 212  
RED LODGE MT 59068

SAM PAINTER  
RED LODGE CITY ATTORNEY  
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RED LODGE MT 59103 0928