

1 Department of Labor and Industry  
2 Board of Personnel Appeals  
3 PO Box 201503  
4 Helena, MT 59620-1503  
5 (406) 444-2718  
6  
7

8 STATE OF MONTANA  
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10  
11 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 28-2010

12  
13 SHERRI ROBERTS, )  
14 Complainant, )  
15 -vs- ) INVESTIGATIVE REPORT  
16 ) AND  
17 LAME DEER SCHOOL BOARD ) RECOMMENDED ORDER OF  
18 DISTRICT #6, ) DEFERRAL  
19 Defendant, )  
20

---

21  
22 **I. Introduction**

23  
24 On February 18, 2010, Sherri Roberts filed an unfair labor practice charge with the  
25 Board of Personnel Appeals alleging that the Lame Deer School Board District #6,  
26 hereinafter the District, violated 39-31-401 (1), (2) and (5) MCA as well as ARM 24.11-  
27 461(f). Ms. Roberts is appearing pro se in this matter, although she is represented by  
28 Richard Harkins, attorney at law, on related proceedings. On February 26, 2010,  
29 Jeffrey Weldon, attorney at law, filed his notice of appearance with the Board of  
30 Personnel Appeals. Pursuant to a time extension granted by the investigator Mr.  
31 Weldon filed the District answer to the charge on March 15, 2010, denying that the  
32 District had committed an unfair labor practice.  
33

34  
35 On April 7, 2010, Ms. Roberts, continuing to appear pro se, filed an amended complaint  
36 with the Board of Personnel Appeals. This complaint alleged that in addition to the  
37 allegations that the District violated 39-31- 401 (1), (2) and (5) the District additionally  
38 violated 39-31-401 (3) and (4) MCA. The District responded to the amended complaint  
39 in a timely manner on April 30, 2010, and denied that any unfair labor practices were  
40 committed.  
41

42  
43 John Andrew was assigned by the Board to investigate the charge and has reviewed  
44 the information submitted by the parties and communicated with them as necessary in  
45 the course of the investigation.  
46  
47  
48  
49  
50

1 **II. Findings and Discussion**  
2

3 Sherri Roberts contends that the Lame Deer School Board terminated her in violation of  
4 the collective bargaining agreement between the District and the Lame Deer Education  
5 Association. She further contends that the District committed an unfair labor practice by  
6 refusing to process her grievance. Specifically, she contends the District has failed to  
7 strike arbitrators and proceed to final and binding arbitration.  
8

9  
10 At the onset, notice is taken by the investigator that Ms. Roberts currently has a pending  
11 claim for unemployment compensation. In her unfair labor practice complaint Ms.  
12 Roberts contends that the District is in violation of ARM 24.11.461(f), and administrative  
13 rule of the Unemployment Insurance Division of the Department of Labor and Industry.  
14 The purpose of this recommended order is not to interpret ARM 24.11.461(f). That is  
15 the purview of Unemployment Insurance Division, its contested case process for  
16 unemployment benefits, and the Board of Labor Appeals, not the Board of Personnel  
17 Appeals. Certainly, if relevant, and should it opt to do so, the Board of Labor Appeals  
18 could take notice of this report should it deem that appropriate in its deliberations on  
19 unemployment eligibility. In short, this report will center on the allegations of the initial  
20 complaint, namely that 39-31-401 (1), (2), and (5) MCA were violated by the District. It  
21 will also address the amended complaint and the allegations that subsections (3) and  
22 (4) of 39-31-401 MCA were violated as well.  
23

24  
25 It is further noted that Sherri Roberts is not represented in this matter by her exclusive  
26 bargaining representative the Lame Deer Education Association, MEA-MFT, NEA.  
27 Rather she is pursuing her rights individually under the collective bargaining agreement,  
28 an agreement that does contain final and binding arbitration.  
29

30 On November 16, 2008, the District Trustees convened a special meeting and accepted  
31 the recommendation of Superintendent Dan Lantis that Sherri Roberts be terminated  
32 pursuant to 20-4-207 MCA. Ms. Roberts was in attendance at this meeting with her  
33 counsel, Mr. Harkins. The decision of the Trustees was confirmed by letter of November  
34 17, 2009. The termination was effective November 16, 2009.  
35

36  
37 Prior to her termination Ms. Roberts also had a 5015 (a section of District policy)  
38 complaint alleging harassment, bullying and retaliation pending against Superintendent  
39 Lantis.  
40

41 On November 18, 2009, Mr. Harkins appealed the termination and 5015 complaint to  
42 the Board of Trustees and invoked the arbitration procedure as set out in 20-4-204 MCA  
43 and as contained in the collective bargaining agreement. It is noted that as described in  
44 a letter from Mr. Harkins, apparently quoting Mr. Weldon in part, the 5015 complaint is  
45 part and parcel to the issue of the termination of Ms. Roberts.  
46

47  
48 In a letter of November 19, 2009, from Mr. Weldon to Mr. Harkins, Mr. Weldon  
49 concurred that arbitration was appropriate. Mr. Weldon wrote, "I will call you early next  
50 week to get the process started". The letter goes on to address an ancillary matter

1 between Ms. Roberts and the District and the progress, or lack thereof, in settlement  
2 discussions.  
3

4 On December 1, 2009, Mr. Harkins wrote to the Board of Personnel Appeals, with a  
5 copy to Mr. Weldon, requesting a list of arbitrators to hear the Roberts grievance. The  
6 request was pursuant to the collective bargaining agreement, providing in pertinent part:  
7

8  
9 Upon submission of a grievance to arbitration under the terms of this procedure,  
10 the parties shall, within five (5) days after the request to arbitrate, attempt to  
11 agree upon the selection of an arbitrator. If no agreement on the arbitrator is  
12 reached after five (5) days, either party may request the Board of Personnel  
13 Appeals to submit, within ten (10) days to the parties a list of five names. Within  
14 five (5) days of receipt of the list, the parties shall select an arbitrator by striking  
15 two names, one at a time from the list in alternate order. The striker of the first  
16 name shall be determined by a flip of a coin, and the name so remaining shall be  
17 the arbitrator. Failure to request an arbitration list from the Board of Personnel  
18 Appeals within the time periods provided herein shall constitute a waiver of the  
19 grievance.  
20

21  
22 On December 2, 2009, Mr. Weldon wrote to Mr. Harkins expressing his belief that the  
23 December 1, 2009, request was premature in that the two of them had not  
24 communicated the previous week, perhaps in part due to the Thanksgiving holiday. The  
25 letter went on to offer that in addition to the list to be provided by the Board of Personnel  
26 Appeals perhaps he and Mr. Harkins could consider finding a local arbitrator in hopes of  
27 reducing costs to the parties.  
28

29 On December 4, 2009, the Board of Personnel Appeals supplied a list of five arbitrators  
30 to Mr. Weldon and Mr. Harkins. The list included three out of state arbitrators and two  
31 from Montana.  
32

33 On December 8, 2009, Mr. Harkins e-mailed Mr. Weldon pointing out that he believed  
34 all the arbitrators would be from Montana, but they were not. He went on to say he  
35 would be asking Ms. Roberts what she wanted to do. Mr. Weldon responded indicating  
36 an interest in finding someone in Billings to hear the case. The point in all this being  
37 that the attorneys had a mutual interest in holding down costs by obtaining a local  
38 arbitrator to hear the case.  
39  
40

41 Mr. Weldon was unable to locate an arbitrator with subject matter knowledge in the  
42 Billings area so he looked to other names on the Board of Personnel Appeals website  
43 and tried, with no success, to get an arbitrator from Bozeman to consider a possible  
44 appointment if acceptable to Ms. Roberts. That arbitrator declined on December 16,  
45 2009, citing the press of other business.  
46

47  
48 The next communication between the attorneys was on December 29, 2009, when Mr.  
49 Weldon wrote to Mr. Harkins concerning a matter involving Ms. Roberts but not a part of  
50 the termination issue. This was followed by an e-mail response from Mr. Harkins dated

1 December 30, 2009, wherein Mr. Harkins suggested that since he had not heard from  
2 Mr. Weldon on a possible local arbitrator the parties should either get together for a coin  
3 flip (to strike names); mutually agree upon a name from the Montana arbitrators on the  
4 Board or Personnel Appeals list; or, the District strike the first name and they proceed  
5 from there.  
6

7  
8 The next communication between Mr. Weldon and Mr. Harkins was on February 24,  
9 2010, although Mr. Weldon indicates that in January 12, 2010, he left a message with  
10 Mr. Harkins concerning several matters, including the arbitration. Apparently no  
11 response was received by Mr. Weldon. This is not to say that there were not ongoing  
12 legal disputes between Ms. Roberts and the District as on January 6, 2010, Mr. Weldon  
13 filed a response to a suit brought by Ms. Roberts, pro se, in the Sixteenth Judicial  
14 District Court part of which concerned whether or not Ms. Roberts' termination was  
15 proper.  
16

17 The above then leads to an article in the Independent Press, a local Rosebud County  
18 publication, wherein Ms. Roberts is quoted in early February as stating that the District  
19 was "flatly refusing" arbitration. This prompted a letter from Mr. Weldon to Mr. Harkins  
20 stating Mr. Weldon's surprise at the article and reiterating the search for a local  
21 arbitrator, but most importantly stating the District "can certainly strike from the list [the  
22 Board of Personnel Appeals list] provided". Ms. Roberts then filed the unfair labor  
23 practice charge with the Board of Personnel Appeals on February 18, 2010.  
24  
25

26 After Mr. Weldon was informed of the charge being served on the District Mr. Weldon  
27 wrote to Mr. Harkins on February 25, 2010, advising that he remained prepared to strike  
28 from the list.  
29

30 On March 1, 2010, Mr. Harkins e-mailed Mr. Weldon advising Mr. Weldon that he, Mr.  
31 Harkins, "have visited with Sherri and she feels that there was ULP so she will proceed  
32 through that matter". The e-mail went on to state, "Although I contacted you only a few  
33 times the fact that no answer was received indicates to me that the school simply was  
34 trying to ignore this matter".  
35  
36

37 In a letter of March 2, 2010, Mr. Weldon wrote Mr. Harkins taking issue with Mr. Harkins'  
38 characterization of communication between the two. Mr. Weldon went on to suggest a  
39 manner for beginning the striking process and for confirmation from Mr. Harkins as to  
40 which matters he was representing Ms. Roberts in as there were various issues pending  
41 between Ms. Roberts and the District.  
42

43 On March 4, 2010, Mr. Harkins responded by e-mail advising that he believed earlier  
44 silence on the part of Mr. Weldon constituted a refusal to arbitrate on the part of the  
45 District and he believed, in consultation with Ms. Roberts, that the unfair labor practice  
46 charge was appropriate. Mr. Weldon responded the same day again indicating a  
47 willingness on the part of the District to either strike or select the arbitrator from Butte to  
48 do the arbitration. Clarification was again sought as to in which matters Mr. Harkins was  
49  
50

1 representing Ms. Roberts. A similar communication from Mr. Weldon went forth on  
2 March 12, 2010.  
3

4 With the above background in mind, the District first offers that the pending charge  
5 should be dismissed as Ms. Roberts lacks standing to file the complaint, the reasoning  
6 being that under ARM 24.26.680(1) Ms. Roberts was fired in November of 2009 and  
7 thus, since she was not an employee at the time the charge was filed. While it is correct  
8 that she was no longer employed in February of 2010, the fact remains that the  
9 grievance procedure began in a timely manner and had proceeded to the point of  
10 selecting an arbitrator. The allegations that arose when the complaint was filed in  
11 February of 2010 were a continuation of the grievance process and the charge is  
12 appropriately filed. Ms. Roberts cause of action did not arise until her belief was that  
13 the arbitration process was not being followed by the District. If the position of the  
14 District were to hold, any employee, or group of employees who were ever terminated  
15 by their employer would lack standing to file a complaint, regardless of how egregious  
16 the actions of the employer might be. Processing the grievance is part and parcel to the  
17 ongoing obligation to bargain in good faith and statutory timelines – 39-31-404 MCA -  
18 have been followed by Ms. Roberts. The Board of Personnel Appeals does have  
19 jurisdiction over this matter.  
20  
21  
22

23 The above issue disposed of, Ms. Roberts offers that the “Districts interference with the  
24 use of the Lame Deer School District’s contract grievance/arbitration procedure is a  
25 renunciation of the entire collective bargaining process and constitutes grounds for  
26 denial of prearbitral deferral.” While it is true that an arbitrator perhaps could have been  
27 selected more quickly, it is not true that the District was not cooperative in attempting to  
28 select an arbitrator.  
29

30 In fact, there is a clear chain of evidence showing that the District has never refused to  
31 process the grievance up to and including arbitration. There was interest on the part of  
32 Ms. Roberts in selecting someone more local to hear her complaint. It is not the case  
33 that Ms. Roberts did not acquiesce to such a search, but rather her discontent is with  
34 how long that took. She cannot be held to be free from some responsibility, nor can it  
35 be overlooked that some of the delay in selecting an arbitrator is attributable to the  
36 holiday season, with this being particularly true in the instance of a school district.  
37 Further, some confusion on the part of Mr. Weldon as to which matters Mr. Harkins was  
38 representing Ms. Roberts in may well have contributed to some delay. All things  
39 considered, and the extensive submissions by the parties being considered, there  
40 simply is no demonstrated refusal to arbitrate on the part of the District and thus no  
41 demonstrated violation of bad faith bargaining [39-31-401(5)] and or interference in the  
42 exercise of the protected rights of 39-31-201 MCA, a violation of 39-31-401(1) MCA.  
43 Moreover there is no demonstrated violation of 39-31-401(2), domination or interference  
44 in formation or administration of a labor organization. In fact, the labor organization has  
45 stepped away from the termination question and has filed no charges with the Board of  
46 Personnel Appeals alleging any such actions by the District.  
47  
48  
49  
50

1 In ULP 43-81, William Converse v Anaconda Deer Lodge County and ULP 44-81 James  
2 Forsman v Anaconda Deer Lodge County, August 13, 1982, the Board of Personnel  
3 Appeals adopted National Labor Relations Board precedent set forth in Collyer Insulated  
4 Wire, 192 NLRB 387, 77 LRRM 1931, deferring certain unfair labor practice proceedings  
5 to an existing negotiated grievance/arbitration procedure. Also see, for instance, ULP 19  
6 and 38-88, Teamsters Local Union #190 v. City of Billings for a discussion of the need for  
7 deferral as opposed to the Board of Personnel Appeals inserting itself into an established  
8 grievance mechanism containing final and binding arbitration.  
9

10  
11 In addressing the additional allegations of Ms. Roberts in the amended complaint and  
12 while still considering the allegations of the original complaint, seldom, and perhaps never,  
13 has the Board seen a complaint alleging that all five subsections of 39-31-401 MCA have  
14 been violated. It is probably even more rare that in a list of requested remedies the first  
15 one requested by a grievant is that the matter not be deferred to arbitration. This is not to  
16 say that some cases should not be deferred by the Board of Personnel Appeals nor is it to  
17 say that an employer could not violate all subsections of 39-31-401 MCA. However, in  
18 the context of considering why any given case should not be deferred to the grievance  
19 mechanism there must be more flesh on the bones, some compelling reason, why the  
20 Board of Personnel Appeals should substitute itself for the arbitration process. There is a  
21 significant burden placed on Ms. Roberts to show why the Board of Personnel Appeals  
22 should hear this case when arbitration would get to the heart of her complaint - whether or  
23 not she was properly terminated. Other than an abundance of information, much, if not all  
24 of which could be considered by an arbitrator as easily as by the Board of Personnel  
25 Appeals, Ms. Roberts has failed to show why her case should not be deferred. As with the  
26 other sections of law Ms. Roberts contends were violated, she simply has not offered  
27 substantial evidence to demonstrate that the District violated 39-31-401 (3) and (4). In the  
28 absence of some compelling reason to the contrary there is no sound, public policy  
29 consideration for why this matter should not be deferred.  
30  
31

### 32 **III. Recommended Order**

33  
34  
35 It is hereby recommended that the above matter be deferred to arbitration. To eliminate  
36 the risk of prejudice to any party the Board of Personnel Appeals retains jurisdiction over  
37 this matter for the purpose of entertaining an appropriate and timely motion for further  
38 consideration upon a proper showing that either the dispute has not, within a reasonable  
39 time, been resolved pursuant to the parties' negotiated grievance/arbitration procedure; or  
40 the grievance/arbitration proceedings have not been fair and regular or have reached a  
41 result which is repugnant to the Montana Collective Bargaining for Public Employees Act.  
42

43 DATED this 11<sup>th</sup> day of May 2010.  
44

45 BOARD OF PERSONNEL APPEALS

46  
47  
48 By: \_\_\_\_\_  
49 John Andrew, Investigator  
50

