

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.

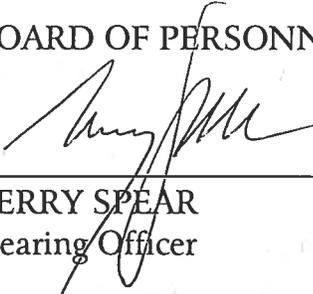
3. Recommended Order

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

* * * * *

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):

KARL ENGLUND
ATTORNEY AT LAW
P.O. BOX 8358
MISSOULA, MT 59807-8358

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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LEGISLATIVE SERVICES DIVISION
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HELENA, MT 59620-1706

DATED this 28th day of September, 2011.

Sandy Duncan

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

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

MEA-MFT, Montana Public Employees
Association, American Federation of State,
County and Municipal Employees,
Council No. 9,

Complainants,

- vs -

STATE OF MONTANA,

Respondent.

ORDER OF REMAND

INTRODUCTION

On May 25, 2011, MEA-MFT, Montana Public Employees Association, American Federation of State, County and Municipal Employees, Council No. 9, (Unions) filed an unfair labor practice charge against the State of Montana. The matter proceeded to hearing before the Department of Labor and Industry's Hearings Bureau. At these proceedings, the "State of Montana" responded through the Paula Stoll, Chief of the Department of Administration's State of Office of Labor Relations (hereafter referred to as Executive). Staff Attorney, Daniel J. Whyte, Legal Services Office, Montana Legislative Services Division, responded on behalf of the Montana Legislature (hereafter referred to as Legislature).

On August 29, 2011, the Legislature filed a motion for summary judgment seeking to dismiss the complaint on the grounds that the unfair labor practice charge was "beyond the reach of the collective bargaining provisions of Title 39, chapter 31, MCA." *Legislature Motion and Brief for Summary Judgment at 6*. The parties briefed the motion and on September 28, 2011, the hearing officer issued an Order Recommending Dismissal on Summary Judgment (hereafter referred to as Recommended Order).

The Unions filed exceptions with the Board of Personnel Appeals (Board) and the Board considered the matter on December 15, 2011. Attorney, Karl England, appeared on behalf of the Unions and attorney, Daniel Whyte, appeared on behalf of the Legislature. The Executive did not participate.

DISCUSSION

In the Recommended Order, the hearing officer determined that given the language of the collective bargaining statutes, specifically Section 39-31-305(3), MCA, coupled with Section 39-31-102, MCA, the State of Montana met its duty of bargaining in "good faith" once the State submitted the negotiated settlement to the legislature and once this "good faith" was established through the submission of the negotiated settlement, the Board is basically precluded from looking at actions of the State after submission. *Recommended Order at 5.*

However, the Board finds the hearing officer's conclusion premature. In the beginning of the Recommended Order's Discussion, the hearing officer correctly noted that the Union's unfair labor practice charge does not assert that any part of state government except the Legislature committed an 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." *Hearing Officer's Recommended Order at 4.* The Board agrees. But, instead of answering the question of whether the Legislature does in fact have this duty, the Recommended Order passes over this and determines that good faith was established by the State by the submission of the negotiated settlement.

From this, it is unclear to the Board whether there has been an implicit conclusion that the Board does not have the authority to review the actions of the Legislature. By statute, when an unfair labor practice charge is made, the Board is obligated to review the actions of the parties to ascertain whether they have operated in good faith. *Mont. Code Ann. 39-31-401.* But, before the Board can make a determination regarding whether a party has met its duty to bargain in good faith, the Board has to determine if it has proper authority over the named Defendant.

Therefore, the Board remands this matter to the Hearing Officer for the purpose of answering the threshold question raised by the recommended order's analysis: whether the Legislature has a duty to bargain collectively in good faith? By statute, only the public employer (and exclusive representatives) have the duty to bargain in good faith under Section 39-31-305(1), MCA, so the question that needs to be definitively answered is whether the Legislature is a "public employer"?

ORDER

1. Pursuant to Admin. R. Mont. 24.26.224(4), the Board remands the matter to the hearing officer for further consideration for the purpose of determining whether the Legislature is a public employer under Title 39, chapter 31, and therefore had a duty to bargain in good faith pursuant to Section 39-31-401, MCA?

DATED this 21st day of December, 2011

BOARD OF PERSONNEL APPEALS

By: *Jack Holstrom*
Jack Holstrom, Presiding Officer

Board members Reardon, Stanton and Johnson concurred.

NOTICE: You MAY BE 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, *Wendy Knutson*, do hereby certify that a true and correct copy of this document was mailed to the following on the 21st day of December 2011:

KARL ENGLAND
ATTORNEY AT LAW
PO BOX 8358
MISSOULA MT 59807

MARJORIE THOMAS
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HELENA MT 59620-1706

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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,)	
)	PROPOSED ORDER ON REMAND
Complainants,)	
)	
vs.)	
)	
STATE OF MONTANA,)	
)	
Defendant.)	

* * * * *

On December 21, 2011, the Board of Personnel Appeals issued its “Order of Remand” herein, determining that the Hearing Officer’s Recommended Decision herein was “premature,” because the Hearing Officer should first have decided “whether the Legislature has a duty to bargain collectively in good faith,” elaborating in the very next sentence that “By statute, only the public employer (and exclusive representatives) have the duty to bargain in good faith under Section 39-31-305(1), MCA, so the question that needs to be definitively answered is whether the Legislature is a ‘public employer’.”

In compliance with BOPA’s directions, this proposed order addresses both forms of the question posed, also explicating their relationship with the issue addressed in the original proposed order.

1. Does the Legislature Have a Duty to Bargain Collectively in Good Faith – i.e., Is the Legislature a “Public Employer”?

Throughout this case, the Unions have consistently asserted that the Montana Legislature is a public employer under the collective bargaining law the Legislature adopted. Clearly, the definition of “public employer” includes “the state of Montana.” Mont. Code Ann. § 39-31-103(1).

From this starting point for the analysis, the Unions assert that “the Legislature is part of the management structure of the ‘state of Montana’ because . . . the appropriations power of the state lies exclusively with the legislature.” “Complainants’ Brief on Remand,” p. 4. At pp. 4-5 of that brief, the Unions go on to argue that:

[B]y the plain language of the Act, the State is a ‘public employer’ and it is an unfair labor practice for a ‘public employer’ (including by definition the ‘state of Montana’) to ‘refuse to bargain collectively in good faith’ with the employees’ exclusive representatives. Section 39-31-401(5). By the plain meaning of the Constitution, the Legislature is a necessary part of the management of the State. This simple and obvious analysis means that the Legislature has included itself in the concept of the duty to bargain in good faith and that it meant what it said when it committed the State (and not just the executive) to a policy encouraging ‘the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees.’ Section 39-31-101 MCA.

The Unions urge that BOPA’s analysis of the “narrow issue” before this Hearing Officer ends at this point. However, the construction and interpretation of an ambiguous statute require harmonizing statutes related to the same subject to give effect to each of them. *Mt. Contractors Ass’n v. Dept. of Highways*, 220 Mont. 392, 715 P.2d 1056, 1058 (1986). Montana public employee bargaining law “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” (Mont. Code Ann. § 39-31-102). Thus, application of the definition of “public employer” to the Montana Legislature, when it is exercising its legislative appropriation power, is fraught with ambiguity.

The facts of this case provide a perfect illustration of the problem with the Unions’ interpretation of the definition of “public employer.” Did the Legislature’s definition of “public employer” authorize a quasi-judicial administrative body in the Executive Branch of Montana state government to inquire into and sit in judgment of how an appropriations bill, presented to the Legislature by the Executive, was considered during a legislative session? Did the Legislature intend for BOPA to consider whether the bill received sufficient formal consideration? Did it intend to empower BOPA to decide if the legislative process moved forward far enough, if the decision-making (or lack of decision-making) was justified? Is there any indication that the Legislature intended BOPA to hear evidence and argument about whether

the Legislature's fiscal projections were reasonable? Does the law support an interpretation that the Legislature was appointing BOPA to consider whether the House kept the bill out of committee deliberations and readings for too long to permit the exclusive representatives and the Executive from negotiating other pay plan options? How can such legislative intentions be read into a law which says it does not limit the authority of the Legislature to make decisions about appropriations for salary and wages, hours, fringe benefits and other conditions of employment? Mont. Code Ann. § 39-31-102.

In addition, how can BOPA conclude that the Legislature's manifest intent, consistent with and giving effect to all relevant provisions of Montana public employee collective bargaining law, was to subject itself to BOPA's review of the legislative handling of a collective bargaining agreement between the Executive and the employees' exclusive representatives after the submission of that negotiated settlement to the Legislature in the executive budget, or by bill or joint resolution? Mont. Code Ann. § 39-31-305(3) expressly provides that submission of a negotiated settlement to the Legislature, by inclusion in the executive budget or by bill or joint resolution, meets the requirement for negotiating in good faith. How then can anything the Legislature may thereafter do in its legislative appropriations function be retroactively applicable to the duty, already satisfied, of negotiating in good faith?

Indeed, the negotiated agreement itself included the statement that it was "contingent upon legislative funding and approval," recognizing that it was (once the parties actually agreed to it) going to be subject to the legislative appropriations process for ultimate implementation.

Without regard to the New Hampshire case¹, once a negotiated settlement is submitted to the Legislature in any of the three modes specified in the statute, the Legislature is not thereafter a "public employer" for purposes of Montana collective bargaining law. Montana collective bargaining law for public employees does not impose any duty to bargain in good faith upon the Legislature, in its handling of such a negotiated settlement once it has been submitted in any of the three modes specified in the statute. Since the conduct of the Legislature after submission of the negotiated settlement between the Unions and the Executive is the sole subject of the complaints herein, BOPA should dismiss those complaints.

¹ However similar to Montana statutes the New Hampshire statutes may have been in *Appeal of the House Legislative Facilities Subcommittee*, 685 A.2d 910 (N.H. 1996), the issue in that case was whether permanent, full-time employees of the New Hampshire House of Representatives were "public employees" under the public employee collective bargaining laws of that state. The issue is remote from the issues in the present case.

2. If the Legislature Has a Duty to Bargain in Good Faith (i.e., is a “Public Employer”), Would that Duty Have Been Satisfied by Submission of the Negotiated Settlement?

In the alternative, even if the law could somehow be read to mean that the Legislature is generally within the definition of “public employer,” the provisions of Mont. Code Ann. § 39-31-305(3) and the express provisions of the negotiated settlement itself establish that the duty to bargain collectively in good faith was satisfied when the negotiated settlement was submitted to the Legislature, as it was. This, ultimately, was at the heart of the first proposed decision submitted to BOPA. With the express contingency upon legislative funding and approval in this agreement, and with the submission of this negotiated settlement to the Legislature by bill, the state’s duty to negotiate in good faith was satisfied whether or not the Legislature, until that point was reached, had a duty to bargain in good faith (whatever that might mean for a legislative body not involved in those negotiations).

The Legislature did not intend Montana public employee collective bargaining law to guarantee particular legislative outcomes or processes once a negotiated settlement between the Executive and the exclusive bargaining representatives of state employees reached the legislative stage of the process. The Legislature certainly did not appoint BOPA to review and to pass judgment upon the appropriations process regarding negotiated agreements between exclusive bargaining representatives and the state. Even if the Legislature had intended to apply to itself the initial duty to bargain in good faith, once the negotiated settlement, with its provision acknowledging an express contingency upon legislative funding and approval, was properly presented to the Legislature, any duty of the state to bargain in good faith (no matter how broad the definition of “public employer” might be) was satisfied, for all of the reasons set forth in the original proposed order.

The legislative process is often complicated and confusing, and is far from transparent. Its turns and twists can frustrate and befuddle, and its outcomes often satisfy nobody. It has little to recommend it, except that it works far better than any of the myriad alternatives to democracy with which humanity has been saddled across recorded history. What democracy does not do is guarantee that its processes will always result in an outcome agreed upon by some of the participants before the rest of the necessary participants address the question. The Unions and the Executive reached an agreement. The Legislature did not adopt it.

The appropriate forum in which to challenge the 2011 Legislature's failure to adopt the pay plan agreed upon by the Executive and the Unions is the public forum, in upcoming elections.

On this basis also, BOPA should dismiss these complaints.

DATED: March 9, 2012.

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. 24.26.222 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 201503
Helena, MT 59620-1503

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:

Karl Englund
Attorney at Law
P.O. Box 8358
Missoula, MT 59807-8358

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 means of the State of Montana's Interdepartmental mail service.

Marjorie Thomas,
Special Assistant Attorney General
Department of Administration
P.O. Box 200127
Helena, MT 59620

Daniel Whyte, Attorney
Legislative Services Division
P.O. Box 201706
Helena, MT 59620-1706

DATED this 9th day of March, 2012.

Sandy Duncan

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

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

MEA-MFT, MONTANA PUBLIC EMPLOYEES)
ASSOCIATION, AMERICAN FEDERATION)
OF STATE, COUNTY AND MUNICIPAL)
EMPLOYEES, COUNCIL NO. 9,)

Complainants,

- vs -

STATE OF MONTANA,

Respondent.)

FINAL ORDER

INTRODUCTION

On May 25, 2011, MEA-MFT, Montana Public Employees Association, American Federation of State, County and Municipal Employees, Council No. 9, (Unions) filed an unfair labor practice charge against the State of Montana. The matter proceeded to a contested case proceeding before the Department of Labor and Industry's Hearings Bureau. At these proceedings, the "State of Montana" responded through Paula Stoll, Chief of the Department of Administration's State Office of Labor Relations (Executive). Staff Attorney, Daniel J. Whyte, Legal Services Office, Montana Legislative Services Division, responded on behalf of the Montana Legislature (Legislature).

On August 29, 2011, the Legislature filed a motion for summary judgment seeking to dismiss the complaint on the ground that the unfair labor practice charge was "beyond the reach of the collective bargaining provisions of Title 39, chapter 31, MCA." *Legislature Motion and Brief for Summary Judgment at 6.* The parties briefed the motion. On September 28, 2011, the hearing officer issued an Order Recommending Dismissal on Summary Judgment. (Recommended Order)

The Unions filed exceptions with the Board of Personnel Appeals (Board) and the Board considered the matter on December 15, 2011. Karl England, attorney at law, appeared on behalf of the Unions and Daniel Whyte, attorney at law, appeared on behalf of the Legislature. There was no appearance by the Executive. The Board remanded the matter to the hearing officer for further consideration for the purpose of determining whether the Legislature is a public employer under Title 39, chapter 31, which therefore had a duty to bargain in good faith pursuant to Montana's collective bargaining law.

The Unions and the Legislature briefed the question on remand. On March 9, 2012, the hearing officer issued a Proposed Order on Remand (Proposed Order) concluding that "the Legislature is not ... a 'public employer' for the purposes of Montana collective bargaining law" and therefore does not have a duty to bargain in good faith. *Proposed Order on Remand at 3.*

The Unions again filed exceptions with the Board. The Board considered the matter on May 17, 2012. Karl England again appeared on behalf of the Unions and Daniel Whyte, appeared on behalf of the Legislature to offer briefs and oral argument. Again, there was no appearance by the Executive. The Board consisted of Presiding Officer Anne L. MacIntyre, permanent members Steve Johnson, Jay Reardon and Karla Stanton, as well as alternate member Max Halfrisch.

DISCUSSION

In the Recommended Order, the hearing officer determined that given the language of the collective bargaining statutes, specifically § 39-31-305(3), MCA, and § 39-31-102, MCA, the State of Montana met its duty of bargaining in "good faith" once the Executive submitted the negotiated settlement to the Legislature. *Recommended Order at 5.* Once this "good faith" is established through the submission of the negotiated settlement, the Board is precluded from considering subsequent actions by the Legislature. *Id.*

Although the central issue is whether to grant the Legislature's motion for summary judgment, the Board sent back to the hearing officer a preliminary question of whether the Legislature is a public employee and therefore bound by the duty of good faith bargaining. In answering this question on remand, the hearing officer concluded that the Legislature is not a public employer and the Board has no authority to review the legislative process as a means of determining whether the Legislature bargained in good faith. *Proposed Order at 3.* A review of the legislative process by the Board would directly contradict the plain language of § 39-31-102, MCA. *Id.* "Montana collective bargaining law for public employees does not impose any duty to bargain in good faith upon the Legislature, in its handling of such a negotiated settlement once it has been submitted" to the Legislature. *Id.*

Upon consideration of the parties' briefs and oral arguments, the Board finds the hearing officer's above-cited conclusions to be correct applications of the law. § 39-31-102, MCA excludes the Legislature from any duty to bargain in good faith pursuant to § 39-31-305(3), MCA. The duty to bargain in good faith is met by the State of Montana once the Executive has submitted a negotiated settlement to the Legislature for consideration. However, the Board notes that § 39-31-102, MCA is interpreted narrowly and applies only to the Legislature. The exception set forth in § 39-31-102, MCA does not apply to other political subdivisions. The hearing officer reached a similar conclusion regarding the scope of this exception. *Recommended Order at 5 and 6.*

The Board concludes that it is the Executive's duty to bargain in good faith, and that duty does not extend to the Legislature, therefore, the Board adopts, in full, both the hearing officer's Recommended Order and the Proposed Order.

ORDER

Pursuant to Admin. R. Mont. 24.26.224(3), the Board adopts the hearing officer's Order Recommending Dismissal on Summary Judgment and Proposed Order on Remand. Thus, the Complainants' unfair labor practice charge is hereby dismissed.

DATED this 19th day of June, 2012.

BOARD OF PERSONNEL APPEALS

By: *Anne L. MacIntyre*
Anne L. MacIntyre, Presiding Officer

Board members Johnson and Stanton concurred.

NOTICE: You may be 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, *Windy Kneeton*, do hereby certify that a true and correct copy of this document was mailed to the following on the 19th day of June, 2012:

KARL ENGLAND
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1 **BACKGROUND**

2 The Unions are the three largest exclusive collective bargaining
3 representatives for employees of the State of Montana. The Unions brought this action
4 before the Board pursuant to the provisions of the Montana Collective Bargaining for
5 Public Employees Act (the Act), Montana Code Annotated § 39-31-101, et seq.. The
6 policy of the Act is to promote and “encourage the procedure of collective bargaining
7 to arrive at friendly adjustment of all disputes between public employers and their
8 employees.” Mont. Code Ann. § 39-31-101. The Act specifically exempts and places
9 no limit on legislative authority stating, “[t]his chapter does not limit the authority of
10 the legislature, any political subdivision, or the governing body relative to
11 appropriations for salary and wages, hours, fringe benefits, and other conditions of
12 employment.” Mont. Code Ann. § 39-31-102.

13 The unfair labor practice charge (complaint) filed by the Unions is dated
14 May 24, 2011. The complaint explains that the state employee pay freeze began in the
15 previous 2011 biennium when the Unions and the State of Montana/Governor’s office
16 agreed to a two-year pay freeze for state employees earning more than \$45,000
17 annually, and a one-time-only payment of \$450 for those earning less than that amount.
18 (Admin. R., Ex. 1, at 4.) The plan also called for increases in the state’s contribution
19 for state employee health insurance premiums. (Id.)

20 The difference between the 2011 biennium pay freeze and the continuing
21 pay freeze resulting in the 2013 biennium, is that the legislature approved the Union
22 and Governor’s negotiated agreement during the 2011 biennium, but did not do so in
23 the 2013 biennium. The complaint explains that for the 2013 biennium, beginning in
24 February 2010 and ending in November 2010, the Unions and the Governor’s office
25 negotiated a 1 percent increase in state employee pay for the first year of the biennium,

1 and a 3 percent increase in the second year of the biennium and “no one-time-only
2 payments and no increase in the employer’s contribution to health insurance.” (Id.; see
3 also, Def. State of Mt. Leg. Branch’s Br. Opp’n Petr’s Opening Br., Ex. 1.)

4 It is also important to note that the agreement between the State of
5 Montana, as negotiated by the Governor’s Office and the Unions, dated November 10,
6 2010, contains this language: “This proposal is contingent on legislative funding and
7 approval.” (Def. State of Mt. Leg. Branch’s Br. Opp’n Petr’s Opening Br., Ex. 1.)

8 In December 2010, the 2013 biennium pay plan was submitted to the
9 legislature under House Bill 13 (HB 13) and referred to the House Appropriations
10 Committee. (Admin. R., Ex. 1, at 4.) While the Unions aver the committee “took no
11 action on HB 13 until March 23 when it tabled the bill,” they later acknowledge the
12 committee eventually passed HB 13 out of the committee “but not until within ten days
13 of the end of the legislative session,” which allegedly did not allow proper time to
14 renegotiate the bill. HB 13 failed to pass the full House of Representatives on two
15 separate votes. (Petr’s Opening Br. at 4.)

16 Because of the delay in handling the bill, the Unions aver that “even if
17 the House had approved the pay plan, the Senate would have been required to suspend
18 their operating rules to receive the bill so late in the session,” which takes a
19 “super-majority of legislators.” (Id. at 5.) As a result of the failure to pass HB 13,
20 state employees’ base pay rates were frozen for two additional years, making a total of
21 four years without a pay increase. (Id.)

22 Counsel for the legislature pointed out in its reply brief to the petition for
23 judicial review that HB 13 was actually debated by the House Appropriations
24 Committee on January 21, 2011, tabled on March 23, 2011, reconsidered on
25 April 18, 2011, debated a second time, and passed by the committee. (Def. State of

1 Mt. Leg. Branch's Br. Opp'n Petr's Opening Br. at 5, citing Ex. 4.) Further, on second
2 reading, the bill was debated by the House on April 20, 2011 but failed on a 42-58
3 vote. (Id.) Finally a motion to reconsider and place the bill on second reading
4 failed on April 27, 2011 by a 39-58 vote. (Id.)

5 The Unions argue that the State, through its legislature, failed to
6 negotiate the bill in "good faith." It should be noted however, that the bill was
7 negotiated between the Unions and the Governor — not the Unions and the legislature.
8 The Unions argue that evidence of the legislature's failure to negotiate in good faith
9 includes the legislature's delay in handling the bill, the fact that the legislature
10 convened on April 28, 2011 with a "projected ending fund balance of \$179 million,"
11 that at the beginning of May 2011, the State had "over \$300 million [in] unencumbered
12 cash in the bank," and that HB 13 would have only cost "approximately \$15 million
13 over the biennium in state funds" if passed. (Id.) The aforementioned manner in
14 which the bill was handled shows an alleged intent by the legislature to negotiate in
15 bad faith. (Id. at 6.)

16 In response to the unfair labor practice claim, both the executive and
17 legislative branches of state government filed responses to the Board. On
18 June 13, 2011, Paula Stoll, chief of the State Office of Labor Relations, replied on
19 behalf of the State of Montana and the Governor's office, explaining that the
20 Governor's office negotiated in good faith and the State of Montana therefore fulfilled
21 its duties and obligations when it submitted the negotiated settlement between the
22 Governor's office and the Unions to the legislature "in the executive budget and by HB
23 13" under Montana Code Annotated § 39-31-305(3).

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1 On June 22, 2011, the Board's investigator, John Andrew, determined
2 that there was probable merit in the complaint requiring a hearing. (Admin. R., Ex. 8.)
3 In Andrew's eight-page investigative report and finding of probable merit he found
4 that since the State of Montana is a "public employer" pursuant to Montana Code
5 Annotated § 39-31-103(1), the executive and legislative branches are a single entity for
6 the purpose of collective bargaining. Therefore, the failure of the legislature to adopt
7 the agreement between the executive branch and the Unions sends an "inconsistent,
8 mixed message" that is tantamount to bad faith. (Id.) Andrews failed to apply the
9 statutory exemption for the legislature set forth in Montana Code Annotated
10 § 39-31-102.

11 Because the Board's agent found probable merit, the case was set for
12 hearing under Montana Code Annotated § 39-31-405(3) and was transferred to the
13 Department of Labor and Industry's Hearings Bureau. (Admin. R., Ex. 9.)

14 On September 28, 2011, hearing officer Terry Spear recommended
15 dismissal because the Unions did not assert that any part of state government, other
16 than the legislature committed an unfair labor practice. According to Spear, since the
17 legislature had no duty to bargain collectively in good faith, the case must be
18 dismissed. (Admin. R., Ex. 33, at 4.)

19 Spear cited Montana Code Annotated § 39-31-305(3), which states, in
20 pertinent part, "[f]or purposes of state government only, the requirement of negotiating
21 in good faith may be met by the submission of a negotiated settlement to the legislature
22 in the executive budget or by bill or joint resolutions. . . ." Spear concluded there is
23 "no possible interpretation of the statute which leaves open the possibility of illegal
24 refusal to bargain collectively in good faith AFTER the negotiated settlement is
25 submitted to the Legislature." (Id., at 5.) He further found that it is "beyond cavil"

1 that "submission of a negotiated settlement to the Legislature satisfies the State's
2 obligation to negotiate in good faith with an exclusive representative." (Id.)

3 Spear, reading Montana Code Annotated §§ 39-31-102 and -305(3)
4 together, concluded that the legislature has no duty bargain in good faith. (Id., at 6.)
5 Therefore, BOPA lacks "any statutory authority to consider what happened to HB 13 in
6 the legislature, since the good faith of the state was established by the introduction of
7 HB 13, containing the substance of the agreement between the Unions and the State, at
8 the beginning of the session, no matter what happened thereafter." (Id. at 7.) In fact,
9 the agreement between the State and the Unions expressly provided it was contingent
10 on legislative approval. (Id.)

11 Thereafter, BOPA issued its final order concluding that "Section
12 39-31-102, MCA, excludes the Legislature from any duty to bargain in good faith
13 pursuant to Section 39-31-305(3), MCA." (Admin. R., Ex. 53, at 2; *see also* Pet. Jud.
14 Rev., Ex. A.) Only the executive branch has the duty to bargain in good faith, and that
15 duty is met once the executive has submitted the negotiated settlement to the
16 legislature. (Id., at 2-3.)

17 STANDARD OF REVIEW

18 A district court's review of a decision of the Board of Personnel Appeals
19 is governed by the Montana Administrative Procedure Act (MAPA). Under MAPA,
20 the appropriate standard of review is codified in Montana Code Annotated
21 § 2-4-704(2), which provides:

22 (2) The court may not substitute its judgment for that of the
23 agency as to the weight of the evidence on questions of fact. The court
24 may affirm the decision of the agency or remand the case for further
25 proceedings. The court may reverse or modify the decision if substantial
rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or
decisions are:

- 1 (i) in violation of constitutional or statutory provisions;
2 (ii) in excess of the statutory authority of the agency;
3 (iii) made upon unlawful procedure;
4 (iv) affected by other error of law;
5 (v) clearly erroneous in view of the reliable, probative, and
substantial evidence on the whole record;
6 (vi) arbitrary or capricious or characterized by abuse of discretion
or clearly unwarranted exercise of discretion; or
7 (b) findings of fact, upon issues essential to the decision, were not
8 made although requested.
9

7 The present action involves a question of law which is to be reviewed by
8 this Court to determine whether the agency's interpretation of the law is correct. *Steer,*
9 *Inc. v. Dep't of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).

10 DISCUSSION

11 The Unions argue on appeal that Montana Code Annotated
12 § 39-31-305(3) allows a permissive determination as to whether the good faith
13 standard was met as "[t]he requirement of good faith **may** be met by the submission of
14 a negotiated settlement to the legislature in the executive budget or by bill or joint
15 resolution." (Emphasis added.) Had the Unions presented any evidence or argument
16 showing bad faith that argument might stand. For example, if the executive branch had
17 lobbied against its good faith agreement with the Unions, an argument could be made
18 that the statute should be interpreted permissively. Unfortunately, no such facts or
19 authority was presented in this case.

20 The legislature's counsel also pointed out that of the 2,246 bills that were
21 requested, 1,067 were never introduced, and only 419 passed. (Def. State of Mt. Leg.
22 Branch's Br. Opp'n Petrs' Opening Br. at 5, citing Ex. 4.) The bill at issue was
23 debated on at least two occasions and ultimately passed the House Appropriations
24 Committee. The proposal finally failed on April 27, 2011. The fact that the bill was

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1 introduced for review is enough, even if legislators had no intention whatsoever to pass
2 the bill.

3 This discussion is based upon a reading of Montana Code Annotated
4 §§ 39-31-102 and -305(3). However, the basic structure of our government supports
5 this conclusion. For example, Article III, section 1 of the Montana Constitution
6 provides:

7 The power of the government of this state is divided into three
8 distinct branches - legislative, executive, and judicial. No person or
9 persons charged with the exercise of power properly belonging to one
branch shall exercise any power properly belonging to either of the
others, except as in this constitution expressly directed or permitted.

10 The separation of powers provision supports this Court's conclusion. For example,
11 adopting the Unions' position would suggest that the legislature had no say in whether
12 or not to accept an agreement negotiated between the Governor and the Unions.
13 Certainly that cannot be the case.

14 Finally, it is clear the collective bargaining statutes require involvement
15 of both the executive and legislative branches, but only the executive branch is held to
16 the good faith standard under Montana Code Annotated §§ 39-31-102 and -305(3). It
17 is not the purview of the Board or the courts to determine how much debate a bill
18 should be afforded, when a bill must be acted on, or whether a bill should be passed or
19 approved. The Court is bound to respect the power of the legislature expressly
20 delegated to it by the constitution and the statutes set forth above. Otherwise, we
21 would create a quagmire from which there is no escape.

22 Ultimately, it is up to the electorate to decide whether they agree or
23 disagree with the legislature's state employee pay freeze, and it is beyond the authority
24 of this Court to rule otherwise based on the record presented.

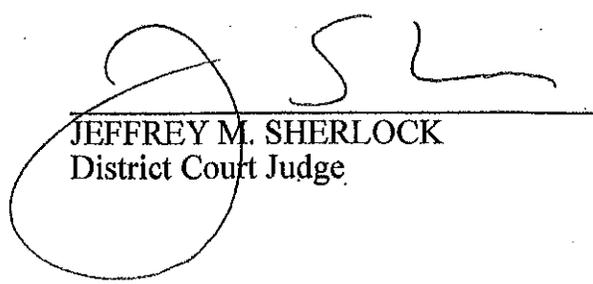
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CONCLUSION

Based on the above, the Unions' petition for judicial review is DENIED.

DATED this 2 day of May 2013.



JEFFREY M. SHERLOCK
District Court Judge

pc: Karl J. Englund
Daniel J. Whyte
Marjorie L. Thomas/Michael P. Manion
Timothy Little

T/JMS/mea mft v state ord pet j review.wpd