

1 Department of Labor and Industry
2 Board of Personnel Appeals
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4 Helena, MT 59620-1503
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8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10 IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 9-2011

11 MONTANA PUBLIC EMPLOYEES)
12 ASSOCIATION,)
13 Complainant,)
14 -vs-)
15 STATE OF MONTANA, MONTANA)
16 DEPARTMENT OF TRANSPORTATION,)
17 Defendant.)
18
19
20
21

INVESTIGATIVE REPORT
AND
FINDING OF PROBABLE MERIT

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23
24 **I. Introduction**

25
26 On September 7, 2010, the Montana Public Employees Association, hereinafter MPEA
27 or Union, filed an unfair labor practice complaint with the Board of Personnel Appeals
28 alleging that the State of Montana, Montana Department of Transportation, hereinafter
29 MDT, violated 39-31-401 (1) by retaliating against union employees for exercising their
30 rights under the collective bargaining agreement. Dick Letang, MPEA Director of Field
31 Services filed the complaint on behalf of the Union. Greg Martin, Labor Relations
32 Specialist with the State Office of Labor Relations, filed a response on behalf of MDT
33 indicating that actions taken by a management representative were rescinded before
34 they actually occurred rendering the complaint substantively deficient. Mr. Martin
35 further requested the complaint be dismissed on that basis.
36

37
38 John Andrew was assigned by the Board to investigate the charge and has reviewed
39 the information submitted by the parties and communicated with them as necessary in
40 the course of the investigation.
41

42 **II. Findings and Discussion**

43
44 This case centers around an e-mail sent by William Fogarty, MDT District 2
45 Construction Supervisor, to the Butte Project Managers. The e-mail was sent at 9:26
46 a.m. on September 2, 2010. Mr. Fogarty's memo was copied to Tom McCormick and
47 Jeff Ebert. The e-mail instructs the Project Managers to apply the following guidelines
48 as construction schedules begin to wind down for the winter:
49
50

1 Crews with staff that declined to work alternate work week schedules during the
2 construction season will not be approved to work alternate work week schedules
3 post construction season.
4

5 All staff assigned to a particular crew will work the same schedule, i.e. alternate
6 work week (4-10s) or regular work week (5-8s).
7

8 Regular and alternate shifts will begin no earlier than 7 AM.
9

10 As soon as they received word of these guidelines adversely affected bargaining unit
11 members immediately notified the MPEA that this e-mail was part of ongoing retaliation
12 on the part of MDT stemming in part from Article B of the Supplemental Agreement
13 between MDT and MPEA. Mr. Letang responded on behalf of the members the same
14 morning. In response to Mr. Letang, Jeff Ebert, District 2 Administrator, sent an e-mail
15 at 5:01 p.m. on September 2, 2010, rescinding the first guideline of Mr. Ebert's e-mail.
16 Mr. Ebert's e-mail was sent to Mr. Fogarty as well as to Project Managers with a copy to
17 Mr. McCormick and Jennifer Jensen.
18

19 According to the crew members in Butte and Anaconda the Fogarty e-mail let the
20 proverbial cat out of the bag as from their perspective this memo was an overt
21 manifestation of disparate treatment leveled at members of the Butte and Anaconda
22 crews who actively asserted their rights under the collective bargaining agreement.
23 According to members of the Butte and Anaconda crews, not only had these two crews
24 been singled out from their statewide counterparts, but individuals within the crews as
25 well had been singled out and retaliated against because they did not always conform to
26 the way management wanted to administer the collective bargaining agreement. To the
27 membership, Mr. Fogarty's e-mail was the tip of the iceberg that verified their beliefs.
28 Moreover, the Union contends that although the e-mail of Mr. Ebert rescinded the
29 perceived retaliatory action even that did not occur immediately as the Anaconda crew
30 was not returned to 10 hour shifts – status quo before the Fogarty e-mail - until a week
31 later when, after a meeting, they were returned to 10 hour shifts. The Union also
32 contends that because of their active enforcement of terms of the collective bargaining
33 agreement Butte members in particular have been assigned such things as split
34 schedules, a negative consequence of exercising their rights.
35

36 The role of the investigator is to determine whether or not there is probable merit to an
37 unfair labor practice complaint. Substantial evidence is the standard utilized by the
38 Board of Personnel Appeals to sustain a finding of probable merit. If there is substantial
39 evidence the investigator directs the case to a contested case hearing. If there is not
40 substantial evidence to warrant a finding of probable merit the investigator is to make
41 such a finding and issue a notice of intent to dismiss the complaint. Here the e-mail
42 from Mr. Fogarty constitutes substantial evidence and, although as offered by the MDT
43 the issue is moot given the e-mail of Mr. Ebert, the fact remains that there is evidence
44 that the action taken by Mr. Fogarty was, arguably, retaliatory in nature. It is not for the
45 investigator to determine whether or not the e-mail from Mr. Ebert remedied what may
46 have been retaliatory conduct by management. Rather, the role of the investigator is to
47 determine whether or not there is probable merit to the complaint. There is, and a
48 hearing is in order to determine, by the preponderance of testimony taken (39-31- 406
49 MCA) whether or not there was an unfair labor practice committed, and if so, the
50 appropriate remedy.

1 **III. Finding of Probable Merit**

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3 Pursuant to the above findings and discussion there is substantial evidence to warrant a
4 finding of probable merit and a notice of hearing will be forthcoming from the Board.
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6

7
8 Dated this 13th day of October 2010.
9

10
11 BOARD OF PERSONNEL APPEALS

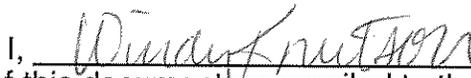
12
13
14 By: 
15 John Andrew
16 Investigator
17

18
19 NOTICE

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21 ARM 24.26.680B (6) provides: As provided for in 39-31-405 (4), MCA, if a
22 finding of probable merit is made, the person or entity against whom the charge is filed
23 shall file an answer to the complaint. The answer shall be filed within ten (10) days with
24 the Board at PO Box 201503, Helena MT 59620-1503.
25
26

27
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29
30
31 *****

32 **CERTIFICATE OF MAILING**

33
34 I, , do hereby certify that a true and correct
35 copy of this document was mailed to the following on the 13th day of October
36 2010, postage paid and addressed as follows:
37

38 GREG MARTIN
39 STATE OFFICE OF LABOR RELATIONS
40 PO BOX 200152
41 HELENA MT 59620 0152
42

43 DICK LETANG
44 MPEA
45 PO BOX 5600
46 HELENA MT 59604
47
48
49
50

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 9-2011:

MONTANA PUBLIC EMPLOYEES)	Case No. 366-2011
ASSOCIATION,)	
)	
Complainant,)	
)	ORDER GRANTING SUMMARY
vs.)	JUDGMENT AND DISMISSING
)	COMPLAINT
STATE OF MONTANA, MONTANA)	
DEPARTMENT OF TRANSPORTATION,)	
)	
Defendant.)	

* * * * *

On February 25, 2011, the State of Montana, Montana Department of Transportation filed a Motion for Summary Judgment arguing: that the complaint was moot; that there is no dispute of material fact and it is entitled to summary judgment as a matter of law; and that there is no legal basis to support a determination that an unfair labor practice occurred.

Pursuant to the hearing officer's February 17, 2011 Order, the respondent was to *file* its response to this motion no later than 5:00 p.m. on March 11, 2011. No response was filed by that date. MPEA filed its response on March 14, 2011. While on this basis the hearing officer could grant the Department's motion, there is little, if any, prejudice to the Department in accepting the untimely response.

A. *The Department's action mooted the complaint.*

A case will become moot for the purpose of an appeal "where by a change of circumstances prior to the appellate decision the case has lost any practical purpose for the parties, for instance where the grievance that gave rise to the case has been eliminated . . ." *In re T.J.F.*, 229 Mont. 473, 475 (Mont. 1987) (citing 5 Am.Jur.2d, Section 762, Appeal and Error (1962)).

This matter revolves around the contents of two emails sent among MDT management that were apparently forwarded to MPEA members or officials. The first email was sent on September 2, 2010 at 9:26 a.m. by Bill Fogarty, MDT District 2 Construction Supervisor to MDT managers telling the recipients that "crews with

staff that declined to work alternate work week schedules during construction season will not be approved to work alternate work week schedules post construction season.” At 5:01 p.m. that same day, Jeff Ebert, Fogarty’s Supervisor, sent an email to the recipients of Fogarty’s earlier email stating “this email rescinds the first guideline as noted in Bill’s email below. All requests for alternate work week schedules will be fairly considered during the post construction season. If you have any questions please contact me.”

The offending email was rescinded in a matter of a few hours and no longer presents an actual controversy. See *Skinner v. Lewis and Clark*, 1999 MT 106, ¶ 12, 294 Mont. 310, ¶P 12, 980 P.2d 1049, ¶ 12. There is no evidence that the policy laid out in Fogarty’s email was implemented and/or affected anyone during the seven hours and thirty-five minutes it was in effect. Therefore, this case will be dismissed because the matter is moot.

This case will also be dismissed because the Department is entitled to summary judgment as a matter of law.

B. *Propriety of Summary Judgment in Administrative Proceedings.*

Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where “the pleadings . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), Mont. R. Civ. P.

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once a party moving for summary judgment has met the initial burden of establishing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law, the burden shifts to the nonmoving party to establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that the moving party is not entitled to judgment as a matter of law. *Meloy v. Speedy Auto Glass, Inc.*, 2008 MT 122, ¶18 (citing *Phelps v. Frampton*, 2007 MT 263, ¶16, 339 Mont. 330, ¶16, 170 P.3d 474, ¶ P16).

Fogarty’s email as cited above is the only factual basis in the record supporting MPEA’s complaint. The Department has admitted that this email was sent and that the followup email was also sent. MPEA argues that whether the facts above

constitute an unfair labor practice is a material fact in dispute. Whether those facts constitute an unfair labor practice is a conclusion of law.

MPEA has responded with only assertions to the Department's Motion for Summary Judgment. Such statements as "the Complainant is informed and believes, and therefore alleges that the 'rescinding email' was merely a smokescreen" are exactly the kind of response that the court in *Meloy* found insufficient to overcome a motion for summary judgment. A party adverse to a motion for summary judgment "by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial." M.R. Civ. P. 56(e). MPEA has failed to offer any affidavits or other evidence to show that there are any disputed facts. MPEA provided a copy of an unsigned, unverified letter written by one of the email's recipients, but even this unacceptable letter relies on unsupported allegations and assertions. MPEA has also had more than six months to develop additional facts to support its charge and provide a basis upon which this hearing officer could find that there are genuine issues of material fact.

On this basis, the Department is entitled to summary judgment.

Although an unfair labor practice may exist even when an employer rescinds the act that led to the complaint, there must be actual impact upon bargaining unit members. See *N.L.R.B. v. Miller*, 341 F.2d 870, 874 (2d Cir. 1965). In *Miller*, the employer posted new work rules that were to go into effect at some point in the future. *Id.* It posted the rules in areas where it customarily posted new regulations and even though the employer removed the postings before they went into effect, the court found that an unfair labor practice had occurred because the employees may well have thought that the rules were effective when posted, and most importantly, the employer made no effort to inform its employees that the rules had been rescinded. *Id.*

In the present matter, the Fogarty email was sent to MDT management and only presumably forwarded to union officials. See Investigative Report and Finding of Probable Merit, October 2010. Those union officials contacted higher authorities at MDT. *Id.* Less than eight hours after Fogarty's email was sent to MDT manager Ebert, he rescinded the email and clearly stated that alternate work week requests would be fairly considered. The fact that Fogarty's email was rescinded so quickly, coupled with the lack of evidence that any MPEA members were affected by it, militates against finding an unfair labor practice occurred. Unlike the employer in *Miller*, MDT timely informed MPEA that it was going to rescind the policy and sent the rescission to the same or a somewhat larger group than had received Fogarty's email. It is logical to assume that MPEA was told verbally that Ebert's email would

be forthcoming and that the policy was disseminated to union members who may have seen the Fogarty email.

Because the Department rescinded Fogarty's email before any adverse action was taken against any union member, and because it informed the union that it would do so, no unfair labor practice has occurred. MDT is therefore entitled to summary judgment on this additional basis.

IT IS THEREFORE ORDERED THAT:

1. Respondent's Motion for Summary Judgment is granted; and
2. Unfair Labor Practice Complaint No. 9-2011 is dismissed with prejudice.

DATED this 17th day of March, 2011.

BOARD OF PERSONNEL APPEALS

By:



DAVID A. SCRIMM

Hearing Officer

* * * * *

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:

Carter Picotte, Attorney
Montana Public Employees Association
P.O. Box 5600
Helena, MT 59604

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

DATED this 17th day of March, 2011.

Sandy Duncan

