

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. 27-2012

12
13 CARMELITA CLEMENS, et al.,)
14 Complainant,)
15 -vs-) INVESTIGATIVE REPORT
16) AND
17 CITY OF WOLF POINT,) NOTICE OF INTENT TO DISMISS
18 Defendant.)
19)
20)
21)

22
23 **I. Introduction**

24
25 On June 1, 2012, Carmelita Clemens filed a charge with the Board of Personnel
26 Appeals (Board) alleging that the City of Wolf Point (City) had committed an unfair labor
27 practice by failing to bargain in good faith with employees of the City of Wolf Point. The
28 Board requested Ms. Clemens supply more specifics on the nature of the complaint with
29 the same being supplied on June 25, 2012. The complaint was then served on the City
30 of Wolf Point through its Mayor, Dewayne Jager. Mayor Jager responded on behalf of
31 the City, denying that the City had committed an unfair labor practice.
32

33
34 John Andrew was assigned by the Board to investigate the charge and has reviewed
35 the information submitted by the parties and communicated with them as necessary in
36 the course of the investigation.
37

38 **II. Findings and Discussion**

39
40 Several things are apparent in this case. Carmelita Clemens, and whom, or whatever
41 number of employees might be associated with her in a work related capacity, or
42 representative capacity, is/are neither an employer recognized, or Board certified,
43 bargaining unit. There is no existing collective bargaining agreement between the City
44 of Wolf Point and Carmelita Clemens nor is there any between the City of Wolf Point
45 and/or any of the City departments referenced in this complaint. No proof of interest
46 cards have ever been submitted to the Board for purposes of conducting a unit
47 determination proceeding under ARM, 24.26.601 et seq. Further, ARM 24.26.603
48 provides:
49
50

1 24.26.603 FILING OF LABOR ORGANIZATION'S BYLAWS

2 (1) Any employee organization seeking certification from the board as exclusive
3 representative of a group of employees must first file with the board a copy of the labor
4 organization's written bylaws. If revisions or changes are made, the bylaws must be
5 refiled.

6 (2) The bylaws must provide for and guarantee that:

7 (a) provisions are made for democratic organization and procedures;

8 (b) elections are held pursuant to adequate standards and safeguards;

9 (c) controls are provided for the regulation of officers and agents having fiduciary
10 responsibility; and

11 (d) sound accounting, fiscal control, and annual audit requirements exist.

12
13
14 Nothing resembling any of the above has ever been filed with the Board by Carmelita
15 Clemens and/or any employee or group of employees claiming to be a labor
16 organization during the time period covered by this complaint. Moreover, no individual,
17 group of individuals, or labor organization has ever represented itself to the Board as
18 the exclusive bargaining agent for employees of the City of Wolf Point or any of its
19 departments.
20

21
22 The City of Wolf Point has not knowingly recognized any employee, group of
23 employees, or labor organization as the exclusive bargaining agent for purposes of
24 collective bargaining during the time period covered in this complaint.
25

26 Prior to, and subsequent to the filing of the instant bad faith bargaining charge, no
27 employee or group of employees of the City of Wolf Point has ever filed a complaint with
28 the Board alleging the City of Wolf Point engaged in activities contrary to the public
29 policy considerations of the Collective Bargaining for Public Employees Act, Sections
30 39-31-101 et seq., MCA.
31

32 Section 39-31-202, MCA charges the Board with determining appropriate bargaining
33 units. The investigator notes that the Wolf Point police department is one of three
34 departments involved with the wage issues at the heart of this charge. Under Montana
35 law, Section 39-31-501 et seq., MCA, police officers who are represented by an
36 exclusive bargaining agent have final and binding interest arbitration as a means to
37 resolve bargaining issues. If the Board were to determine that the employees in three
38 departments, inclusive of the police department, constitute a bargaining unit, and
39 fundamentally that is what is being requested, the Board would essentially be placing
40 police officers in a bargaining unit with other employees who do not have the same
41 statutory rights, and do not necessarily enjoy a community of interest with fellow City
42 workers. Although that does not bear directly in the complaint itself, it is something the
43 Board is mindful of in considering this case.
44
45

46
47 Addressing the complaint itself, the matter currently before the Board finds its roots in a
48 decision made by the City in September of 2011. At that time, the City Council
49 increased the pay of the incumbent Water/Wastewater Operator by 7.53%. At the time
50 this occurred, the City had been operating under a pay matrix and associated job

1 descriptions since January of 1998. The increase granted to the employee in question
2 was within the salary ranges set in the City classification and pay grade structure.
3 Under a policy adopted by the City, if two or more employees have a common or similar
4 complaint/grievance the City is to select employees to represent those aggrieved by the
5 action of the City. Pay very arguably fits within this broad definition of a grievance.
6 Thus, when the City received complaints about its actions related to the
7 Water/Wastewater Operator position, the City selected three people to represent
8 workers in the departments of administration, police and maintenance. From that have
9 come the allegations of change in grievance policy, a unilateral change in wages, failure
10 to notify employee representatives of meetings, inadequate notice, and the general
11 allegation that actions, including those just mentioned, constitute bad faith bargaining,
12 the gravamen of this complaint. To be certain, some, if not all of the above, if proven,
13 could constitute an unfair labor practice by the City if it were dealing with an exclusive
14 bargaining agent – one question at the core of this dispute.
15
16

17 Since there is no Board certified, or employer recognized “union” or exclusive
18 bargaining agent involved in this case the most apparent question is “Why is the Board
19 of Personnel Appeals involved in this situation?” Like its federal counterpart, the
20 National Labor Relations Board, the Board of Personnel Appeals administers a law
21 addressing collective bargaining. The Montana law is similar to the federal law. The
22 Montana Supreme Court has recognized that both laws have similar purposes and has
23 also recognized that the federal law should be looked to for guidance in administration
24 of the Montana act. State ex rel. Board of Personnel Appeals vs. District Court, 183
25 Montana 223 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 vs. State ex rel.
26 Board of Personnel Appeals, 185 Montana 272, 635 P.2d 185, 119 LRRM 2682; and
27 AFSCME Local No. 2390 vs. City of Billings, Montana 555 P.2d 507, 93 LRRM 2753.
28

29 Since its inception in 1935 the Labor Management Relations Act, 29 USC 141, has had
30 as a primary concern the rights of employees, individually and collectively.
31

32 It is hereby declared to be the policy of the United States . . . [to protect] the
33 exercise by workers of full freedom of association, self-organization, and
34 designation of representatives of their own choosing, for the purpose or
35 negotiating the terms and conditions of their employment or other mutual aid and
36 protection. Section 151.
37

38 Section 7 of the federal act then goes on to provide that in addition to the right of self-
39 organization workers are guaranteed the right to engage in “other concerted activities
40 for the purpose of collective bargaining and other mutual aid or protection.” In doing so
41 the federal act then makes it an unfair labor practice for an employer to “interfere with,
42 restrain or coerce employees” in the exercise of their guaranteed rights.
43

44 Montana law provides similar protections. Section 39-31-201, MCA provides:
45

46 Public employees protected in right of self-organization. Public employees shall
47 have and shall be protected in the exercise of the right of self-organization, to
48 form, join, or assist any labor organization, to bargain collectively through
49 representatives of their own choosing on questions of wages, hours, fringe
50 benefits, and other conditions of employment, and to engage in other concerted

1 activities for the purpose of collective bargaining or other mutual aid or protection
2 free from interference, restraint, or coercion.

3
4 Montana law further addresses unfair labor practices with Section 39-31-401, MCA,
5 providing that it is an unfair labor practice for an employer to:
6

7 (1) interfere with, restrain, or coerce employees in the exercise of the rights
8 guaranteed in 39-31-201;

9 (2) dominate, interfere, or assist in the formation or administration of any labor
10 organization. However, subject to rules adopted by the board under 39-31-104,
11 an employer is not prohibited from permitting employees to confer with the
12 employer during working hours without loss of time or pay.

13 (3) discriminate in regard to hire or tenure of employment or any term or
14 condition of employment in order to encourage or discourage membership in any
15 labor organization. However, nothing in this chapter or in any other statute of this
16 state precludes a public employer from making an agreement with an exclusive
17 representative to require, as a condition of employment, that an employee who is
18 not or does not become a union member must have an amount equal to the
19 union initiation fee and monthly dues deducted from the employee's wages in the
20 same manner as checkoff of union dues.

21 (4) discharge or otherwise discriminate against an employee because the
22 employee has signed or filed an affidavit, petition, or complaint or given any
23 information or testimony under this chapter; or

24 (5) refuse to bargain collectively in good faith with an exclusive representative.
25

26 The only allegation made by the complainant in this matter is a violation of Section 39-
27 31-401(1) – bad faith bargaining. None of the other portions of Section 401 are alleged
28 to have been violated. Nonetheless, because other possible violations might be present
29 by implication the investigator specifically finds that at the point this recommendation is
30 issued he has seen no substantial evidence that the City has interfered with, coerced, or
31 restrained employees of the City in any of the concerted activities protected by Montana
32 law. Moreover, since part of the bad faith bargaining complaint concerns an allegation
33 that the existing grievance procedure was changed by the City, in fact, no change was
34 actually made. It has been discussed, but not actually made. Thus, assuming
35 arguendo, that there had been a collective bargaining agreement in effect, and further
36 assuming there was an exclusive bargaining agent representing the employees of the
37 City, there has been no unilateral change made to the established grievance procedure.
38 Similarly, and again assuming there were a contract in place, the wage increase
39 granted to the one employee was, quite arguably, within the parameters of the salary
40 schedule and thus not a unilateral change in wages. In both instances, what occurred
41 would not be an unfair labor practice or evidence of bad faith bargaining.
42

43 All of the above leads the investigator to believe that the process set up by the City to
44 address concerns of employees, although well intended, in some ways contributed to
45 the perception that a group of employees – more than two at least – in some way
46 created a bargaining situation. That does not appear to have been the intent of the City,
47 nor for that matter does it appear that the employees who were chosen to “represent”
48 the interests of the three departments consider themselves in some fashion to be a
49 labor organization. At best, it could be said that collectively, many City employees
50 believed they were not being paid wages commensurate with their duties. So, under

1 City policy they "grieved" that belief. The City responded within the parameters of the
2 rather imprecise mechanism it created to address these concerns. Communications
3 addressing that process may or may not have been the best, but nonetheless there
4 simply is insufficient evidence to demonstrate the City created an obligation to bargain
5 collectively with its employees. Further, the City did not violate any individual or
6 collective rights guaranteed the employees of the City of Wolf Point under the
7 bargaining laws of Montana. There simply is no substantial evidence to demonstrate
8 otherwise.
9

10 The investigator would further note that this situation began at a point in time when,
11 certainly through its actions at the least, the City recognized that there was a process in
12 policy to address the concerns of the employees. The employees invoked that process.
13 Although it is not for the Board to compel the City to maintain the status quo since no
14 violation of law is found in this recommended order, it would behoove the City to
15 consider maintaining the status quo in its grievance procedure, with whatever remedies
16 it arguably contains, until this "grievance" runs its course.
17

18 **III. Recommended Order**

19
20 There being no substantial evidence to sustain a finding of probable merit, it is hereby
21 recommended that Unfair Labor Practice Charge 27-2012 be dismissed.
22

23 DATED this 17th day of August 2012.
24
25
26
27
28

29 BOARD OF PERSONNEL APPEALS
30

31
32 By: _____
33


34 John Andrew
35 Investigator
36
37
38
39

40 NOTICE

41 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of
42 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss
43 may be appealed to the Board. The appeal must be in writing and must be made within
44 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the
45 Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to
46 dismiss becomes a final order of the Board.
47
48
49
50

CERTIFICATE OF MAILING

I, Windy Krutson, do hereby certify that a true and correct copy of this document was mailed to the following on the 17th day of August 2012, postage paid and addressed as follows:

CARMELITA CLEMENS
6988 MARY STREET
WOLF POINT MT 59201

MAYOR DEWAYNE JAGER
CITY OF WOLF POINT
201 4TH AVENUE SOUTH
WOLF POINT MT 59201

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50