

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

8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10
11 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 8-2012

12
13 SUE THOMAS,)
14)
15 Complainant,) INVESTIGATIVE REPORT
16 -vs-) AND
17) NOTICE OF INTENT TO DISMISS
18 MONTANA PUBLIC EMPLOYEES)
19 ASSOCIATION,)
20)
21 Defendant.)
22)
23)

24
25 * * * * *

26 **I. Introduction**

27
28 On September 12, 2011, Sue Thomas filed an unfair labor practice charge with the
29 Board of Personnel Appeals alleging that the Montana Public Employees Association,
30 hereinafter MPEA or Association, failed to fairly represent her in a layoff situation.
31 Violations of Sections 39-31-402 and 39-31-205 MCA are alleged. Ms. Thomas is
32 represented by Joseph Engel III, attorney at law, of Great Falls, Montana. Mr. Engel
33 filed his last supplemental brief with the investigator on November 11, 2011. MPEA is
34 represented by Carter Picotte, MPEA staff counsel, and has answered the complaint in
35 a timely manner denying that it failed to fairly represent Ms. Thomas.
36

37
38 John Andrew was assigned to investigate the complaint, has reviewed the submissions
39 of the parties and has communicated with the parties in the course of investigating the
40 charge.
41

42 **II. FINDINGS AND DISCUSSION**

43
44 Sue Thomas has been employed at the Montana State University Great Falls College of
45 Technology, hereinafter COT, since August 15, 1989. She has most recently been
46 employed in the position of Administrative Associate II within the Facilities Maintenance
47 Department, a subset of the Finance Division. The majority of union employees in the
48 Facilities Maintenance Department are represented by the International Union of
49
50

1 Operating Engineers, Local 400, not by MPEA. In the case of Ms. Thomas, her position
2 of Administrative Associate II was the only such position within the department.

3
4 Ms. Thomas position is most commonly referred to as events coordinator, a position
5 that schedules campus facilities, including room scheduling and follow through with
6 internal and external customers. All indications are that Ms. Thomas did her job
7 efficiently and adeptly.
8

9
10 Before addressing the merits of the complaint an overview of the duty of fair
11 representation seems in order. In doing so federal precedent will be used since the
12 Montana Supreme Court has approved the practice of the Board of Personnel Appeals
13 in using Federal Court and National Labor Relations Board (NLRB) precedent as
14 guidelines in interpreting the Montana Collective Bargaining for Public Employees Act,
15 State ex rel. Board of Personnel Appeals vs. District Court, 183 Montana 223 598 P.2d
16 1117, 103 LRRM 2297; Teamsters Local No. 45 vs. State ex rel. Board of Personnel
17 Appeals, 185 Montana 272, 635 P.2d 185, 119 LRRM 2682; and AFSCME Local No.
18 2390 vs. City of Billings, Montana 555 P.2d 507, 93 LRRM 2753.
19

20
21 It is not the role of the investigator to determine whether or not there is merit to a
22 grievance. Rather, as set down by the U.S. Supreme Court in Vaca v Sipes 386 U.S.
23 171, 64 LRRM 2369 (1967) and as subsequently followed by the Board of Personnel
24 Appeals in Ford v University of Montana, 183 Mont. 112, 598 P.2d 604 (1979) the role
25 of the Board in an alleged breach of the duty of fair representation is to determine
26 whether the actions of a union, or lack of action, in some way are a product of bad faith,
27 discrimination or arbitrariness. However, since no grievance was ever filed in this
28 matter the investigator will address portions of the bargaining agreement as deemed
29 relevant. Before doing so, however, it is basic that the duty of fair representation does
30 not require that all grievances be taken to arbitration. "Though we accept the
31 proposition that a union may not arbitrarily ignore a meritorious grievance or process it
32 in a perfunctory fashion we do not agree that the individual employee has an absolute
33 right to have his grievance taken to arbitration regardless of the provisions of the
34 applicable collective bargaining contract." The duty does not limit the legitimate right of
35 the union to exercise broad discretion in performing its duties because "union discretion
36 is essential to the proper functioning of the collective bargaining system." See, for
37 instance, International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979).
38
39

40
41 As it relates to grievance processing, the courts have held that to meet its obligations, a
42 "union must conduct some minimal investigation of grievances brought to its attention."
43 Peters v. Burlington N. R. R. Co., 931 F.2d 534, 539 (9th Cir. 1990) (quoting Tenorio v.
44 NLRB, 680 F.2d 598, 601 (9th Cir. 1982) A union breaches its duty of fair representation
45 by handling a grievance "arbitrarily and perfunctorily." Tenorio, 680 F.2d at 602. A
46 union's actions are arbitrary only if, in light of the factual and legal landscape at the time
47 of the union's actions, the union's behavior is so far outside a wide range of
48 reasonableness as to be irrational. Air Line Pilots v. O'Neill, 499 U.S. 65 (1991). A
49 union processes a grievance in a perfunctory manner by treating the "union member's
50 claim so lightly as to suggest an egregious disregard of her rights." Wellman v. Writers
Guild of Am., West, Inc. 146 F.3d, 666, 671 (9th Cir. 1998).

1 When an employee claims that a union breached its duty of fair representation by failing
2 to grieve complaints, courts typically look to determine whether the union's conduct was
3 arbitrary. Clarke v. Commc'ns Workers of America, 318 F.Supp.2d 48, 56 (E.D.N.Y.
4 2004). A union acts arbitrarily when it "ignores or perfunctorily presses a meritorious
5 claim," Samuels v. Air Transport Local 504, 992 F2d 12, 16, 143 LRRM 2177] (2d Cir.
6 1993), but not where it "fails to process a meritless grievance, engages in mere
7 negligent conduct, or fails to process a grievance due to error in evaluating the merits of
8 the grievance," Cruz v. Local Union No. 3 of the Int'l Bhd. of Elec. Workers, 34 F.3d
9 1149, 1154-55, 147 LRRM 2176, (2d Cir. 1994). As part of determining whether a
10 grievance lacks merit the union must "conduct at least a 'minimal investigation' ... [b]ut
11 only an 'egregious disregard for union members' rights constitutes a breach of the
12 union's duty' to investigate." Emmanuel v. Int'l Bhd. of Teamsters, Local Union No. 25,
13 426 F.3d 416, 420, 178 LRRM 2261 (1st Cir. 2005) (quoting Garcia v. Zenith Elec.
14 Corp., 58 F.3d 1171, 1176 , 149 LRRM 2740 (7th Cir. 1995); Castelli v. Douglas Aircraft
15 Co., 752 F.2d 1480, 1483 118 LRRM 2717] (9th Cir. 1985)).
16
17

18 The above framework in mind, as early as November of 2010, there were reorganization
19 discussions at the COT. Further discussions occurred in December of 2010 and
20 continued through the winter of 2011 culminating in a decision by the COT that the
21 positions of Ms. Thomas and Delissa Clampett would be subject to reduction in force.
22 Ms. Clampett was classified as a Program Coordinator I, a position most commonly
23 referred to as learning center coordinator. Formal notice of her layoff was provided to
24 Ms. Thomas on April 19, 2011. The same date was also Ms. Thomas' last day she
25 performed work for the COT or was on the COT on campus.
26
27

28 There is a Memorandum of Understanding – Reduction in Force, between MPEA and
29 COT appended to the collective bargaining agreement. In relevant part that MOU
30 provides:
31

32 In addition to provisions of the current collective bargaining agreement, the following terms and
33 conditions are in place through June 30, 2011:
34

35 • If a layoff is necessary within a budgeted department, management will communicate the
36 necessity of the layoff, and any employee of the budgeted department in the same job title
37 as the position scheduled for elimination may volunteer to take the layoff. Management
38 will consider the volunteer request before deciding whether to grant the request or
39 administer the layoff under the terms of the CBA. In the event the request for voluntary
40 layoff is accepted by management, the layoff will be treated as a non-voluntary layoff for
41 purposes of all applicable benefits and CBA provisions.
42

43 • Management will provide greater than 30 days notice of any layoff whenever reasonably
44 possible, however, in all cases shall provide at least a minimum of 30 days notice.
45

46 • Employees who have received notice of layoff may request paid release from work duties
47 (not charged to annual vacation leave or accrued compensatory time) to conduct a
48 reasonable amount of job search tasks (e.g., an appointment at a job service office, a
49 scheduled job interview, limited amount of work on job applications, etc.) Management
50 will grant the request with consideration of how much release time to grant based on
department needs, employee needs, job type, workload, budget, etc.

1
2 The terms of this MOU were followed by the COT and MPEA; and, in fact, Ms. Thomas
3 remained on the payroll of the COT until June 30, 2011, even though she was not
4 working from April 19 through June 30, 2011.
5

6 The bargaining agreement between the COT and MPEA contains a provision
7 addressing seniority and layoffs. The relevant portions of that part of the bargaining
8 agreement provide:
9

10
11 **Section 1. Seniority Defined**

12 Seniority means a permanent employee's length of continuous service with the employing
13 campus in the bargaining unit. The seniority date for all permanent employees shall typically be
14 the most recent date of hire in a bargaining unit position. However, an employee's seniority date
15 may be adjusted to reflect seniority credits earned prior to a transfer out of the bargaining unit in
16 accordance with Subsection A.

17 **Section 2. Seniority List**

18 Upon request, each campus shall make a seniority list available to the bargaining agent and
19 employees.
20

21 **Section 4. Notice and Selection of Employees for Layoff**

22 A copy of such notice will be provided to the bargaining agent. If qualifications are met, layoffs
23 within the selected job title and budgeted department shall be in reverse order of seniority. The
24 employer shall give at least thirty (30) calendar days notice to employees who are to be laid off.
25

26 **Section 5. Transfer to Avoid Layoff**

27 Employees who are in a laid off status or who are scheduled for layoff may be transferred to a
28 vacant position upon agreement of the employer and the employee and after notification to the
29 union without compliance with this or any other provisions of the agreement.

30 **Section 7. Recall to Former Position**

31 Employees shall be recalled to vacant positions within their former job titles and department in
32 order of seniority. Employees will be eligible for such recall for one (1) year from the date of
33 layoff. Employees who have extended their eligibility for participation in the layoff pool for one
34 (1) additional year in accordance with Section 8 shall be eligible for recall for one (1) additional
35 year. The laid off employee shall be notified by certified mail of any recall of employment. If
36 the employee fails to communicate receipt of a recall to employment or an offer of
37 reemployment within ten (10) working days from the date of receipt of the notice or offer, the
38 employee shall be considered as having forfeited recall rights.
39

40 **Section 8. Layoff Pool**

41 Permanent employees who have been notified of a layoff may submit an application to Human
42 Resources to be placed in a layoff pool for recall purposes. Eligible employees must apply to the
43 layoff pool within thirty (30) days from the date of written notification of layoff or their rights to
44 the layoff pool shall be waived. Applications for the layoff pool will be active for one (1) year
45 and may be extended for one (1) additional year by the employee renewing his/her application.
46 Fixed-term employees are not eligible to be placed in a layoff pool.

47 Employees in the layoff pool may apply for any bargaining unit position for which they qualify.
48 Whenever an employee in the layoff pool applies for a bargaining unit vacancy, hiring
49 authorities must consider only employees in the layoff pool and significantly more senior
50 employees who applied for the position prior to consideration of other applicants. If no

1 significantly more senior employee applies for a bargaining unit vacancy hiring authorities must
2 first consider employees in the layoff pool for open positions in the bargaining unit. Except for
3 good cause, the hiring authority shall select an applicant from the layoff pool. Good cause
4 includes but is not limited to the following: 1) The laid off employee does not have the
5 necessary qualifications to be successful in the new position. In such cases the employee and
6 union will be provided reasons for the non-selection, or 2) Where a significantly more senior
7 employee has equal or better qualifications for the new position, seniority shall prevail.
8 An employee shall be allowed to decline one position and remain in the layoff pool. If an
9 employee is offered a second position at the same or a higher salary as received in the position
10 from which they were laid off and declines the position, the employee forfeits their right to
11 remain in the layoff pool. If an employee who is placed in a position through the layoff pool does
12 not satisfactorily complete a thirty (30) working day trial period, the employee may be returned
13 by the employer to the layoff pool.

14 **Section 9. Reductions in FTE Levels**

15 A reduction in the FTE level of a position is not considered a layoff and the provisions of this
16 agreement concerning layoff do not apply.

17 A temporary reduction in FTE level is a reduction anticipated to last less than three months. An
18 employee's FTE level may be temporarily reduced with the mutual understanding that such a
19 reduction is an inherent condition of employment.

20 Employees in positions which are scheduled to be reduced in FTE level by at least one quarter
21 (.25 FTE) for three months or longer shall be given thirty (30) calendar days advance notice. A
22 copy of such notice will be provided to the bargaining agent.

23 Permanent employees who have been notified that their position will be reduced in FTE level by
24 any amount for three months or longer shall be eligible to elect layoff in lieu of a reduction in
25 FTE level. Such employees must notify the employer of their election for layoff within seven (7)
26 calendar days of the date of written notice of FTE reduction. Employees electing layoff in lieu
27 of FTE reduction are eligible to apply for the layoff pool provided for in Article XI, Section 7,
28 and must do so within thirty (30) days from the date of written notice of FTE reduction or their
29 rights to the layoff pool shall be waived.

30 Ms. Thomas is currently enrolled in the layoff pool and certainly to that extent, the
31 provisions of the seniority and layoff have been followed and although the parties may
32 disagree as to how Ms. Thomas got on the pool, nonetheless she is participating.

33 There is a grievance procedure in the contract between MPEA and the COT. The
34 grievance procedure provides:

35 **Section 1. Grievance Definition**

36 A grievance is any controversy between the parties involving an alleged violation of a provision
37 of this agreement. All grievances shall be resolved in accordance with the procedure set forth in
38 this article.

39 **Section 2. Step 1**

40 Within ten (10) days of the occurrence of the grievance an employee with a grievance shall
41 discuss their grievance with their immediate supervisor. The immediate supervisor shall have
42 five (5) days to respond to the grievance.

43 **Section 3. Step 2**

1 If the grievance is not resolved informally at step 1, a formal grievance shall be presented in
2 writing within five (5) days from receipt of the step 1 response to the personnel office or
3 designated grievance officer. The personnel office or designated grievance officer shall have ten
4 (10) days from receipt of the grievance to respond in writing.
5

6 Subsection H. Written Grievances. Grievances presented in writing shall include the
7 following specific information: complete statement of grievance including all facts on
8 which grievance is based, specific contract provision violated, names of witnesses having
9 knowledge of facts, specific remedy requested, and employee grievant's signature. Copies
10 of relevant documents should be attached to the grievance.
11

12
13 Ms. Thomas indicated to the investigator that she did schedule a meeting with her
14 immediate supervisor to discuss the layoff, but she cancelled that meeting. From that
15 point forward Ms. Thomas never did invoke the grievance process, nor did MPEA.
16

17 Ms. Thomas seems to believe that if the veil were raised, the reorganization done by the
18 COT was nothing but a way to replace senior workers. No substantial evidence is
19 offered to support this assertion. In fact, information gathered in the investigation –
20 investigation first gathered by MPEA as it was aware of the concern - shows to the
21 contrary. There is no substantial evidence that layoffs were done to remove more
22 senior employees. The reorganization done by COT was a bona fide business decision
23 consistent with the management rights of the collective bargaining agreement and
24 Section 39-31-303, MCA.
25

26
27 Although reorganization is a management prerogative it generally impacts mandatory
28 subjects of bargaining. The decision to reorganize is not bargainable (subject to
29 specific contract provisions of course), but the effect of reorganization on mandatory
30 items is generally subject to bargaining. Here, there are provisions in the collective
31 bargaining agreement that address reduction in force and there is even a memorandum
32 of understanding addressing the subject. Management followed the terms of the
33 agreement, including those of the MOU, and nothing offered by Ms. Thomas
34 demonstrates anything to the contrary. There is nothing offered to the investigator that
35 shows Ms. Thomas, because of her seniority or other circumstance, was entitled to any
36 protections under the CBA other than those she received. Nothing indicates that Ms.
37 Thomas position was filled by students; that it was reopened and not offered to her; or
38 that in some other fashion the terms of the CBA were not followed. Very simply, there
39 was only one position like hers in the department, and when it was eliminated, there
40 were no other positions she could have bumped because of her seniority.
41
42

43 It is Ms. Thomas' contention that MPEA field representative Cathy Crego said that she
44 did nothing for Ms. Thomas. Ms. Crego contends that any such representation, if there
45 were one, was in the context that what could be done under the contract for Ms.
46 Thomas was done and there was nothing more to do. Ms. Crego's interpretation of
47 what may have been said is reasonable and is not wholly inconsistent with what Ms.
48 Thomas contends Ms. Crego told her.
49
50

1 Ms. Crego is a seasoned veteran of negotiations and contract administration, both as a
2 management representative and a union representative, and is very familiar with the
3 contents of collective bargaining agreements and the COT agreement specifically. To a
4 large degree, and as contended by Ms. Thomas, Ms. Crego did act as a conduit for
5 management, but only to the extent that management and Ms. Crego were in
6 agreement, not with what had been done, but with the way it was done as required
7 under the bargaining agreement. Such conduct does not constitute a breach of the duty
8 to fairly represent an employee.
9

10
11 Beyond this, and as previously stated, no grievance was ever filed. Somehow Ms.
12 Thomas seems to contend that this is because of whatever Ms. Crego may have said.
13 However, this seems inconsistent with part of the pleadings of Ms. Thomas that she
14 "had been an active union member who brought various issues to the attention of COT's
15 administrators and the union representative at various times". If Ms. Thomas was an
16 active member, and there is no indication to the contrary, she must have known about
17 the grievance process. Moreover, if she were active, why did she not press the issue
18 further with Ms. Crego? Why did she not file a grievance on her own if the union did not
19 do so? For that matter, if management did in some fashion work in concert to the
20 detriment of Ms. Thomas, then why was management not named as well in the
21 complaint?
22

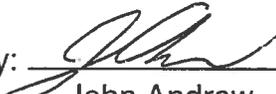
23
24 In consideration of all the above, MPEA did not act in a capricious, arbitrary, or
25 perfunctory manner in handling the layoff of Sue Thomas. There was no discrimination
26 against Ms. Thomas and nothing was demonstrated to show that MPEA had an
27 obligation to grieve her layoff, or for that matter to have carried it forward to arbitration
28 had a grievance been filed.
29
30

31 **III. Recommended Order**

32
33
34 It is recommended that unfair labor practice charge 8-2012 be dismissed as without
35 probable merit.
36

37 DATED this 10th day of January 2012.
38

39 BOARD OF PERSONNEL APPEALS
40

41
42 By: 
43 _____
44 John Andrew
45 Investigator
46
47
48
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50

1
2 NOTICE
3

4 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of
5 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss
6 may be appealed to the Board. The appeal must be in writing and must be made within
7 10 days of the mailing of this Notice, no later than January 23, 2012, The appeal
8 is to be filed with the Board at P.O. Box 201503, Helena, MT 59620-1503. If an appeal
9 is not filed the decision to dismiss becomes a final order of the Board.
10

11
12 CERTIFICATE OF MAILING
13

14 I, Windy Knutson, do hereby certify that a true and
15 correct copy of this document was mailed to the following on the 10th day of January
16 2012 postage paid and addressed as follows:
17

18 JOSEPH ENGLE III
19 ATTORNEY AT LAW
20 PO BOX 3222
21 GREAT FALLS MT 59403
22

23
24 CARTER PICOTTE
25 ATTORNEY AT LAW
26 PO BOX 5600
27 HELENA MT 59604
28

29 QUINTON NYMAN
30 MPEA
31 PO BOX 5600
32 HELENA MT 59604
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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

SUE THOMAS,)	
)	
)	
Petitioner,)	CAUSE NO. ADV-12-321
)	
vs.)	MEMORANDUM AND ORDER
)	AFFIRMING BOARD OF PERSONNEL
MONTANA PUBLIC EMPLOYEES')	APPEALS' DECISION
ASSOCIATION (MPEA),)	
)	
Respondent.)	

Petitioner filed a Petition for Judicial Review on April 27, 2012. The administrative record was filed on May 4, 2012. The case was not brought to the Court's attention until Petitioner's Answer to Court's Notice on February 24, 2015. The Court issued a scheduling order on March 12, 2015. The Petitioner filed her opening brief on April 13, 2015. Respondent filed its response brief on May 11, 2015. Petitioner replied on May 26, 2015. In accordance with Local Rule 7B, a Notice of Issue was filed on June 2, 2015. The matter is ripe for decision.

Having reviewed the administrative record and the parties' briefs, the Court issues the following:

Memorandum

Factual Background. Sue Thomas was a longstanding employee at MSU-COT. She was laid off pursuant to a reduction in force plan. Her position was eliminated, and her department did not have a position which she could perform instead. She was given several months' notice

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of the layoff, and the employer allowed her to leave work immediately instead of forcing her to remain until her last day on the job. Ms. Thomas was a member of the Montana Public Employees' Association, and the union representative met with her, discussed the layoff, and worked with Ms. Thomas so she could leave work early while still getting paid. The union representative informed Ms. Thomas nothing more could be done for her, as the layoff was not grievable. Ms. Thomas claims the union representative failed to meet the duty of fair representation by telling Ms. Thomas nothing more could be done.

Procedural Posture. After making an unfair labor practice complaint, an investigator looked into Ms. Thomas's claims, reviewed the written policies and the collective bargaining agreement, and spoke with several individuals. Ultimately, the investigator determined no violation occurred. Ms. Thomas appealed to the Board of Personnel Appeals, which held a hearing and then concurred with the investigator's findings. Ms. Thomas then filed this petition for judicial review.

After filing the petition for judicial review, the MPEA entered a special appearance and filed a motion to dismiss. Ms. Thomas objected to the motion to dismiss and requested entry of a default judgment. The motion to dismiss has never been formally denied; the Court does so now. Under Mont. R. Civ. P. 12(a)(4)(A), a responsive pleading is due 14 days after the denial of the motion to dismiss. Here, despite a lack of ruling, the MPEA filed a response brief. Ms. Thomas' motion for a default judgment is in error. MPEA did not fail to appear; its answer was justifiably delayed until after the motion to dismiss was ruled upon. Further, Ms. Thomas never requested entry of MPEA's default. Without first entering a default, it is improper to request entry of a default judgment based on a failure to appear. Therefore, the motion for default judgment is denied.

Having resolved the pending motions, the Court turns to the substance of Ms. Thomas's petition for judicial review.

Standard of Review. The Administrative Procedures Act applies to the instant appeal. § 39-31-105, MCA. The Court's review of the Board of Personnel Appeals' final order is confined to the record. § 2-4-704(1), MCA.

The Court may affirm, remand for further proceedings, reverse, or modify the BOPA's final order. § 2-4-704(2), MCA. The Court's power to reverse or modify is limited to situations where the appellant's substantial rights have been prejudiced. *Id.* Prejudice may occur if:

the administrative findings, inferences, conclusions, or decisions are:

- (i) in violation of constitutional or statutory provisions;
- (ii) in excess of the statutory authority of the agency;
- (iii) made upon unlawful procedure;
- (iv) affected by other error of law;
- (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; [or]
- (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion[.]

§ 2-4-704(2)(a), MCA. Prejudice may also occur if "findings of fact, upon issues essential to the decision, were not made although requested." § 2-4-704(2)(b), MCA.

In determining if the BOPA's findings of fact are clearly erroneous, the Court applies a three-part test: (1) the Court reviews the record to determine if the findings are supported by substantial credible evidence; (2) if the Court determines that the findings are supported by substantial credible evidence, then the Court determines whether the agency misapprehended the effect of the evidence; (3) if the Court determines that the agency did not misapprehend the evidence's effect, the Court may still determine that a finding is clearly erroneous if review of the record leaves the Court with a definite and firm conviction that a mistake has been made.

Welsh v. Holcim, Inc., 2014 MT 1, ¶ 19, 373 Mont. 181, 316 P.3d 823 (citing *Benjamin v.*

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Anderson, 2005 MT 123, ¶ 31, 327 Mont. 173, 112 P.3d 1039). Satisfaction of any one of the three parts of the test is sufficient to establish that the findings are clearly erroneous.

If a finding is attacked as not supported by substantial credible evidence, the Court views the evidence in the light most favorable to the prevailing party. *Benjamin*, ¶ 12. The Court may not substitute its judgment for BOPA's judgment as to the weight of the evidence on questions of fact. § 2-4-702(2), MCA. "The findings of the board with respect to questions of fact, if supported by substantial evidence on the record as a whole, shall be conclusive." § 39-31-409(4), MCA.

The Court reviews the BOPA's conclusions of law for correctness. *Benjamin*, ¶ 32.

Discussion. Ms. Thomas alleges the union representative violated the duty of fair representation by informing her the representative could do nothing to help Ms. Thomas when her job was eliminated.

A union's duty of fair representation is a judicially created doctrine first recognized in the context of the Railway Labor Act in *Steele v. Louisville & Nashville Railroad Co.* (1944), 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173. *Steele* required the Union to represent its individual members "without hostile discrimination, fairly, impartially and in good faith." *Id.* at 204, 65 S.Ct. at 232, 89 L.Ed. at 184. The *Steele* principle was later extended to bargaining representations under the National Labor Relations Act (NLRA). *Syres v. Oil Workers International Union, Local 23* (1955), 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785. The NLRB first recognized a breach of the duty of fair representation as an unfair labor practice in *Miranda Fuel Co.* (1962), 140 NLRB 181, 51 LRRM 1584, reasoning the privilege to act as an exclusive bargaining representative granted in Section 9 of the NLRA necessarily gives rise to a corresponding Section 7 right in union constituents to fair representation by the exclusive representative. Although the duty of fair representation arose in the context of racial discrimination, the doctrine has been expanded to include arbitrary conduct by a union toward bargaining unit members. In *Vaca v. Sipes* (1967), 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, the United States Supreme Court stated the controlling test for breach of the union duty of fair representation: "A breach of the statutory duty of fair representation occurs only when a union's conduct . . . is arbitrary, discriminatory, or in bad faith." *Id.* at 190, 87 S.Ct. at 916, 17 L.Ed.2d at 857. Thus it is settled under federal labor law and therefore under Montana labor law that a union may not arbitrarily ignore a

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grievance or process it in a perfunctory manner. *Id.* at 191, 87 S.Ct. at 917, 17 L.Ed. 2d at 858.

Teamsters Local No. 45 v. State, 223 Mont. 89, 95-96, 724 P.2d 189, 193 (1986).

Having reviewed the record, the Court concludes the BOPA correctly determined the duty of fair representation was not violated. Ms. Thomas's job was eliminated pursuant to a reduction in force agreement. There was no other position available to Ms. Thomas in her department. Therefore, her position was eliminated, and she was laid off. The union representative worked with Ms. Thomas before and after her position was eliminated and was unable to provide further assistance to Ms. Thomas because she did not believe a grievance had occurred. The union representative did not ignore a meritorious grievance; the representative worked with Ms. Thomas and also with the university during the reduction in force period, and she concluded Ms. Thomas' loss of position was not a grievance. The investigator and the BOPA reviewed the situation and determined the duty of fair representation was not violated, which was the correct decision to reach.

Having reviewed the record, the Court concludes the BOPA was not clearly erroneous in its factual findings. Ms. Thomas complains that the BOPA, investigator, and union representative failed to investigate Ms. Thomas's claim her layoff under the reduction in force plan was mere pretext for a decision to lay her off based on her age, health issues, or in retaliation for expressing opinions. However, there is no such evidence to uncover. The union representative determined it was due to the reduction in force plan. The investigator spoke with many individuals involved, looked into Ms. Thomas's claims, and determined her layoff was due to the reduction in force plan. The BOPA reviewed the investigator's report and investigation, received argument on the claim, and determined the layoff was due to the reduction in force plan. The Court notes that all the evidence supports the BOPA's decision; Ms. Thomas's claims have

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been and continue to be pure speculation which she insists upon believing notwithstanding all evidence to the contrary. The BOPA was not clearly erroneous in its factual findings, which are supported by substantial evidence. Therefore, the BOPA's factual findings are conclusive.

Conclusion. The BOPA's factual findings are conclusive, as they are supported by substantial evidence. The BOPA's conclusions of law are correct. The BOPA was not arbitrary or capricious or otherwise affected by an error. Therefore, its decision will be affirmed and the appeal dismissed.

Based on the foregoing Memorandum, the Court issues the following:

Order

IT IS HEREBY ORDERED the Board of Personnel Appeals is AFFIRMED, and the petition for judicial review is DISMISSED.

DATED this 15 day of July, 2015.



GREGORY G. PINSKI, DISTRICT COURT JUDGE

cc: Joe Engel
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