

1 BOARD OF PERSONNEL APPEALS  
2 PO BOX 201503  
3 HELENA MT 59620-1503  
4 (406) 444-2718  
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7 STATE OF MONTANA  
8 BEFORE THE BOARD OF PERSONNEL APPEALS  
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11 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO: 15-2013  
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13 POPLAR EDUCATION SUPPORT STAFF ) Case No.: 1166-2013
14 ORGANIZATION, MEA-MFT, NEA AFT )
15 Complainant, )
16 vs. ) INVESTIGATIVE REPORT
17 ) AND
18 POPLAR SCHOOL DISTRICT 9 AND 9B ) NOTICE OF INTENT TO DISMISS
19 BOARD OF TRUSTEES JAMES RICKLEY )
20 SUPERINTENDANT )
21 Defendant )

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23 \* \* \* \* \*

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25 **I. INTRODUCTION**  
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28 On February 4, 2013, the Complainant, Poplar Education Support Staff Organization, MEA-  
29 MFT, NEA AFT (PESSO) filed an unfair labor practice charge with this Board alleging that  
30 the Defendant, Poplar School District 9 and 9B Board of Trustees and its Superintendent  
31 James Rickley was violating the Montana Public Employee Collective Bargaining Act § 39-  
32 31-101 et seq, MCA (The Act), specifically § 39-31-401 MCA when it failed and/or refused  
33 to bargain in good faith. The undersigned was assigned to investigate the charge pursuant  
34 to § 39-31-405 MCA. The Defendant filed a timely response in which it challenged the  
35 Complainant's allegations and denied any violation of the Act. On March 4, 2013 the  
36 Investigator received the Complainant's rebuttal to the Defendant's February 19, 2013  
37 response.  
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1                   **II.     BACKGROUND**  
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4     The Defendant is a K-12 school district in Roosevelt County.   The Complainant, a labor  
5     organization, is the exclusive representative for a bargaining unit of custodial staff employed  
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7     by the Defendant.  
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12     The Complainant and Defendant are negotiating a successor agreement to a Collective  
13     Bargaining Agreement which expired June 30, 2012.  
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18     There is a dispute as to when discussions, information sharing, and data exchanges began  
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20     in preparation for the ongoing negotiations.  
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23     The Complainant requested bargaining dates in letters and/or e-mails dated February 22,  
24     2012, March 12, 2012, April 10, 2012 and April 17, 2012.  
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29     The first formal bargaining session occurred May 30, 2012. MEA-MFT Field Consultant  
30     Copeland represented the Complainant during the May 30 meeting. The Complainant  
31     presented its initial written proposal. The Defendant was without professional  
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33     representation.  
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39     The Defendant's Superintendent (Chief Executive Officer) resigned in June. James Rickley  
40     became District Superintendent on August 1, 2012.  
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44     In a post script to an September 18, 2012 e-mail addressing another issue, the  
45     Complainant's Field Consultant questioned the Defendant's clerk as to whether contract  
46     negotiations had concluded, and suggested, if not, bargaining should resume. From the  
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48     tenor of the e-mail one could assume Field Consultant Copeland believed negotiations  
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1 would continue and conclude over the summer. Apparently she was unaware bargaining  
2 recessed.  
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7 Negotiations resumed November 15, 2012 when the parties conducted their second  
8 bargaining session. The participants, including the recently hired superintendent, spent  
9 most of the meeting reviewing the May 30, 2012 meeting and the Complainant's May 30  
10 proposal. The Complainant withdrew its first (May 30) proposal and promised to bring a  
11 new proposal to the next meeting. A subsequent meeting was scheduled for the following  
12 week. Neither party was represented by a professional negotiator.  
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20 A third bargaining session did not occur the next week (Thanksgiving week) as scheduled.  
21 However, the parties met the following week, on November 27, 2012. Again, without  
22 professional representation. The Defendant presented the employer's first written proposal.  
23 The Defendant addressed issues raised in the Complainant's May 30 proposal and included  
24 the following:  
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29           Table is open to any new items and/or subjects of bargaining until parties agree to  
30 close the table.  
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34 During the fourth negotiation meeting on December 4, 2012 the Complainant presented a  
35 revised proposal, objected to the open table language in the Defendant's November 27  
36 proposal and threatened appropriate action. The new Superintendent asked the  
37 Complainant's negotiators to respond to the Defendant's November 27, 2012 proposal. After  
38 some discussion the Defendant's negotiators promised to bring a new proposal to the next  
39 bargaining session scheduled for December 13  
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48 The December 13, 2012 meeting was rescheduled to January 16, 2013 when the parties  
49 conducted their fifth bargaining session during which the Defendant presented and  
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1 explained a revised proposal which contained the protested open table proviso. One could  
2 infer from the material contained in the original charge, the Defendant's answer and the  
3 Complainant's rebuttal, the parties may be close to agreement on union security language.  
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5 Neither side was represented by a professional negotiator at this meeting. A sixth  
6 bargaining session was scheduled for January 22, 2013.  
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12 On January 18, 2013 the Complainant's Treasurer provided the Defendant's Superintendent  
13 a hand written note advising him of the impending Unfair Labor Practice Charge. The note  
14 also directed the Superintendent to schedule future bargaining dates with the Complainant's  
15 Field Consultant, Maggie Copeland. The scheduled January 22 meeting did not occur.  
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17 Material submitted with the Defendant's response leads to a reasonable inference the  
18 Defendant's negotiators assembled at the scheduled place and time. The Complainant's  
19 representatives did not.  
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27 Ms. Copeland will be the Complainant's consultant and/or spokesperson during future  
28 bargaining sessions. The Defendant contracted with Rick D'Hooge to be its consultant  
29 and/or spokesperson during future bargaining sessions. To date, Consultants D'Hooge and  
30 Copeland have not scheduled a sixth negotiations meeting.  
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37 Mediation services have been requested from the Board of Personnel Appeals.  
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41 On February 4, 2013 the Complainant filed the Unfair Labor Practice at hand which was  
42 processed by the Board of Personnel Appeals on February 7, 2013.  
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46 From what can be determined from the original charge and the Complainant's rebuttal to the  
47 Defendant's answer the Complainant is alleging the Defendant violated its duty to  
48 bargain with the following:  
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1. Change in Bargaining representative
2. Rejection of tentative agreements
3. Pursuing a permissive subject, namely; Negotiations Ground Rules preserving an open table, allowing new subjects and/or proposals, until mutual agreement to close the table.
4. Advancing new subjects and/or proposals in later stages of bargaining
5. Refusing to meet

### III. DISCUSSION

The preamble of the Act delineates the law's objective as follows:

**39-31-101. Policy.** In order to promote public business by removing certain recognized sources of strife and unrest, it is the policy of the state of Montana to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees.<sup>1</sup>

The Act at §39-31-401 provides:

**39-31-401. Unfair labor practices of public employer.** It is an unfair labor practice for a public employer to:

- (1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201;
- (2) dominate, interfere, or assist in the formation or administration of any labor organization. However, subject to rules adopted by the board under 39-31-104, an employer is not prohibited from permitting employees to confer with the employer during working hours without loss of time or pay.
- (3) discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in any labor organization. However, nothing in this chapter or in any other statute of this state precludes a public employer from making an agreement with an exclusive representative to require, as a condition of employment, that an employee who is not or does not become a union member must have an amount equal to the union initiation fee and monthly dues deducted from the employee's wages in the same manner as checkoff of union dues.

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<sup>1</sup> Section 39-31-101 contains language similar to that found in the last paragraph of Section 1 of the National Labor Relations Act.

- 1 (4) discharge or otherwise discriminate against an employee because the  
2 employee has signed or filed an affidavit, petition, or complaint or given any  
3 information or testimony under this chapter; or  
4 (5) refuse to bargain collectively in good faith with an exclusive representative.  
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8 Rules promulgated by the Board of Personnel Appeals at ARM 24.26.680 (3) (c) and

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10 24.26.680B (2) establish criteria for unfair labor practice charges:  
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12 ARM 24.26 .680(3) provides:  
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15 A complaint shall contain the following:

- 16 (a) the name, address and telephone number of the complainant;  
17 (b) the name, address and telephone number of the party against whom the charge  
18 is made; and  
19 (c) a clear and concise statement of facts constituting the alleged violation, including  
20 the time and place of occurrence of the particular acts and a statement of the portion  
21 or portions of the law or rules alleged to have been violated.  
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25 ARM 24.26.680B (2) provides:  
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28 As provided for in 39-31-405(1), MCA, after receipt of the response, the board shall  
29 appoint an investigator to investigate the alleged unfair labor practice. In making a  
30 determination of probable merit, the investigator must determine whether there is  
31 substantial evidence to support the allegation(s). In reaching this decision, the  
32 board's agent shall rely on the type of evidence on which responsible persons are  
33 accustomed to rely in the conduct of serious affairs. Substantial evidence is  
34 something more than a scintilla of evidence but may be less than a preponderance  
35 of the evidence.  
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39 The Montana Supreme court has approved the practice of the Board of Personnel Appeals  
40 in using federal court and National Labor Relations Board (NLRB) precedents as guidelines  
41 in interpreting the Montana Collective Bargaining for Public Employees Act as the state Act  
42 is similar to the Federal Labor Management Relations Act, *Bonner School District No. 14 v.*  
43 *Bonner Education Association*, 183 LRRM 2673, 176 P.3d 262, 341 Mont. 97 (2008); *City*  
44 *of Great Falls v. Young (Young III)*, 686 P.2d 185, 119 LRRM 2682 (1984); *Teamsters Local*  
45 *No. 45 v. State ex rel. Board of Personnel Appeals*, 195 Mont. 272, 635 P.2d 1310, 110  
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1 LRRM 2012 (1981); *State ex rel. Board of Personnel Appeals v. District Court*, 183 Mont.  
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3 223, 598 P.2d 1117, 103 LRRM 2297 (1979); *AFSCME Local No. 2390 vs. City of Billings*,  
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5 Montana, 555 P.2d 507, 1976, 93 LRRM 2753 (1976). To the extent cited in this decision,  
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7 federal precedent is considered for guidance and to supplement state law when applicable.  
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11 Section 39-31-305 MCA imposes an identical burden on labor and management.

12 **39-31-305. Duty to bargain collectively -- good faith.** (1) The public employer and  
13 the exclusive representative, through appropriate officials or their representatives,  
14 have the authority and the duty to bargain collectively. This duty extends to the  
15 obligation to bargain collectively in good faith as set forth in subsection (2).  
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17 (2) For the purpose of this chapter, to bargain collectively is the performance  
18 of the mutual obligation of the public employer or the public employer's designated  
19 representatives and the representatives of the exclusive representative to meet at  
20 reasonable times and negotiate in good faith with respect to wages, hours, fringe  
21 benefits, and other conditions of employment or the negotiation of an agreement or  
22 any question arising under an agreement and the execution of a written contract  
23 incorporating any agreement reached. The obligation does not compel either party to  
24 agree to a proposal or require the making of a concession.  
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29 In the charge at hand, the Complainant alleges the Defendant has failed its duty to  
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31 “negotiate in good faith” as required by the Act in § 39-31-305(2) MCA. In the opening  
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33 paragraph of chapter 13, “The Duty to Bargain”<sup>2</sup>, the editors of *The Developing Labor Law*  
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35 explain:

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37 The reciprocal duty of an employer and the representative of its employees to  
38 bargain “in good faith” is among the most unruly of the obligations imposed by the  
39 ...Act. What constitutes “good faith,” in the performance of the employer’s duty to  
40 bargain...or the union’s...is not readily ascertainable, although thousands of cases  
41 and exhaustive commentaries have undertaken the task. The duty to bargain in  
42 good faith is an evolving concept, rooted in statute. The ...Board has characterized  
43 the test of good faith as a fluctuating one, “dependent in part upon how a reasonable  
44 [person] might be expected to react to the bargaining attitude displayed by those  
45 across the table.” Such a “test,” however, should not be confused with the  
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50 <sup>2</sup> Chapter 13, Section 13.1.A, page 882, *The Developing Labor Law*, 6<sup>th</sup> Edition, John E. Higgins, Jr.,  
Editor; Bloomburg BNA, Washington, 2012

1           definitional standards the Board and the courts have developed to describe the  
2           concept.  
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5 Under National Labor Relations Board precedent the Board of Personnel Appeals' authority  
6 to examine, evaluate and pass judgment upon bargaining strategies, proposals and counter  
7 proposals is limited to that necessary to determine whether such are offered or pursued in  
8 an attempt to frustrate the purposes of the act : *American National Insurance*, 343 U.S. at  
9 404, 30 LRRM 2147; (1952); *H.K. Porter v NLRB* 397 US 99, 73 LRRM 2561 (1960);  
10 *Reichhold Chemicals*, 288 NLRB 69, 127 LRRM 1265 (1988) affirmed 906 F2d 719, 134  
11 LRRM 2481, (DC CA 1990) cert denied 498 US 1053, 136 LRRM 2152, 1991. The Board  
12 of Personnel Appeals reached a similar conclusion in ULP 20, 22, 23, 25, 26 and 33-1978  
13 *Big Fork Area Education Association v Board of Trustees, Flathead and Lake County*  
14 *School District # 36*, final order July 20, 1979 affirmed 11<sup>th</sup> Judicial District DV-79-425, May  
15 28, 1980<sup>3</sup>:  
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25           The end of Section 39-31-305(2) MCA, Duty to Bargain Collectively in good faith  
26 states "Such obligation does not compel either party to agree to a proposal or the  
27 making of a concession." If the Board of Personnel Appeals were to judge the  
28 sincerity of a proposal it could be forcing one or both parties to make a  
29 concession....  
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34 "Laws are like sausages. It's better not to see them being made" Otto von Bismarck,  
35 German-Prussian politician (1815 - 1898). Legislators and sausage makers do not have a  
36 corner on repulsive progressions. The collective bargaining process is not always a thing of  
37 beauty. It is sometimes messy and downright unpleasant. Former NLRB Chairman William  
38 Gould offered the following in *White Cap Inc., Chicago, Ill. and Chicago Local 458-3m*,  
39 *Graphic Communications Union*, 25 NLRB 1166, 325 NLRB No. 220, 158 LRRM 1241,  
40 1998 affirmed *Chicago Local No. 458-3M v. NLRB*, 206 F.3d 22, 163 LRRM 2833 (D.C. Cir.  
41 2000):  
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<sup>3</sup> [http://erd.dli.mt.gov/ulp-category-listing/cat\\_view/13-labor-standards/21-ulp-decisions/96-1978.html](http://erd.dli.mt.gov/ulp-category-listing/cat_view/13-labor-standards/21-ulp-decisions/96-1978.html)

1 I must write separately to stress that tough and sometimes distasteful tactics are  
2 often lawful under the National Labor Relations Act. ....While I join in Member  
3 Hurtgen's conclusion that the Respondent's actions did not constitute bargaining in  
4 bad faith... Section 8(a)(5) and 8(d) of the Act limit the bargaining tactics undertaken  
5 by employers, respectively, by prohibiting bargaining undertaken with a bad-faith  
6 intent not to consummate a collective agreement. *Atlanta Hilton & Tower*, 271 NLRB  
7 1600 [117 LRRM 2424] (1984). But, in doing so, Section 8(d) specifically states that  
8 the bargaining obligation "does not compel either party to agree to a proposal or  
9 require the making of a concession." The Supreme Court in the so-called "freedom  
10 of contract" trilogy<sup>4</sup> has interpreted these provisions as permitting "the parties [to]  
11 'take their gloves off' and to exert whatever economic pressure is at their disposal." "  
12 William B. Gould IV, *A Primer on American Labor Law* 105 (3d ed. 1993). In light of  
13 these provisions, as interpreted by the Supreme Court, an employer's bargaining  
14 tactics are permissible as long as they are not designed or serve to affect the union's  
15 role in the collective-bargaining process or "used . . . as a means . . . to evade his  
16 duty to bargain collectively."

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22 In consolidated ULPs 2and 25-2001, *Anaconda Police Protective Association and*  
23 *Anaconda-Deer Lodge County*, final order September 10, 2003<sup>5</sup> the Board of Personnel  
24 Appeals adopted the following:  
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28 In *The Developing Labor Law*, Third Edition, Patrick Hardin, Editor in chief, BNA  
29 Publications, Washington, D.C., 1992, p.608-9, the proper role of the parties is  
30 described as follows:  
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33 The duty to bargain in good faith is an "obligation ... to participate actively in  
34 the deliberations so as to indicate a present intention to find a basis for  
35 agreement ...." This implies both "an open mind and a sincere desire to reach  
36 an agreement" as well as a "sincere effort ... to reach a common ground."  
37 Except in cases where the conduct fails to meet the minimum obligation  
38 imposed by law or constitutes and outright refusal to bargain, relevant facts of  
39 a case must be studied to determine whether the employer or the union is  
40 bargaining in good or bad faith. The "totality of conduct" is the standard by  
41 which the "quality" of negotiations is tested. Thus, even though some specific  
42 actions, viewed alone, might not support a charge of bad-faith bargaining, a  
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<sup>4</sup> The trilogy consists of *NLRB v. American National Insurance Co.*, 343 U.S. 395, 30 LRRM 2147 (1952); *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 45 LRRM 2705 (1960); and *American Ship Building Co. v. NLRB*, 380 U.S. 300, 58 LRRM 2672 (1965).

<sup>5</sup> [http://erd.dli.mt.gov/ulp-category-listing/cat\\_view/13-labor-standards/21-ulp-decisions/119-2001.html](http://erd.dli.mt.gov/ulp-category-listing/cat_view/13-labor-standards/21-ulp-decisions/119-2001.html)

1 party's over course of conduct in negotiations may reveal a violation of the  
2 Act. (citations omitted).  
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5 The Board of Personnel Appeals has adopted this standard. (See for example, ULP  
6 No. 4-76, No. 33-81 and No. 19-85). The "totality of conduct" is the standard by  
7 which the quality of negotiations is tested. *NLRB v. Virginia Electric & Power Co.*,  
8 314 U.S. 4699 LRRM 405 (1941), *B.F. Diamond Constr. Co.*, 163 NLRB No. 25, 64  
9 LRRM 1333 (1967).  
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12 The sixth edition of *The Developing Labor Law*<sup>6</sup> updates and affirms the principles of the  
13 third edition adopted by the Board of Personnel Appeals in consolidated ULPs 2 and 25-  
14 2001 referenced above:  
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18 The duty to bargain in good faith is an "obligation...to participate actively in the  
19 deliberation so as to indicate a present *intention* to find a basis for agreement....  
20 This implies both "an open mind and a sincere effort...to reach a common ground."  
21 The presence or absence of intent "must be discerned from the record." Except in  
22 cases in which the conduct fails to meet the minimum obligations imposed by law or  
23 constitutes an outright refusal to bargain, relevant facts of the case must be studied  
24 to determine whether the employer or the union is bargaining in good or bad faith.  
25 The "totality of conduct" is the standard by which the "quality" of negotiations is  
26 tested. Thus, even though some specific actions, viewed alone, might not support a  
27 charge of bad faith bargaining, a party's overall course of conduct in negotiations  
28 may reveal a violation of the Act. Conversely, in viewing all of the relevant  
29 circumstances, the Board may overlook certain "misconduct" in an effort to preserve  
30 the bargaining process. In *Logemann Bros. Co.*, for example, the Board refused to  
31 consider statements by the employer's negotiator to the effect that it would be "their  
32 agreement" or none at all and "it is this contract or none," as evidencing a refusal to  
33 bargain in good faith. The Board stated, "Although some statements by negotiating  
34 parties may show an intention not to bargain in good faith, the Board is especially  
35 careful not to throw back in a party's face remarks made in the give-and-take  
36 atmosphere of collective bargaining." Similarly, "a stray statement indicating  
37 inflexibility will not overcome the general tenor of good faith negotiation," even if the  
38 employer's position does not change during negotiations.  
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50 <sup>6</sup> Chapter 13, Section 13.III.A pages 914-916; *The Developing Labor Law*, 6<sup>th</sup> Edition, John E. Higgins,  
Jr., Editor; Bloomberg BNA, Washington, 2012

1 Because the Board considers the entire course of conduct in bargaining, isolated  
2 misconduct will not be viewed as a failure to bargain in good faith... (citations  
3 omitted)  
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6 Accordingly, the totality of the Defendant's conduct must be weighed to determine whether  
7 there has been a deliberate attempt to avoid reaching an agreement with the Complainant.  
8 It is not the Board's function or purpose to pass judgment on the Defendant's demeanor  
9 once it has been determine the minimum obligations of good faith bargaining have been  
10 meet.  
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17 The February 4, 2013 Unfair Labor Practices Charge's complaints<sup>7</sup> are addressed below:  
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### 20 **1. Change in Bargaining Representatives**

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22 When negotiations resume the Defendant will be represented by the third spokesperson to  
23 lead the Employer's bargaining efforts. No doubt a less than optimum situation. The first  
24 change was necessitated by the departure of the District Superintendent (Defendant's Chief  
25 Executive Officer). That change is beyond the scope and authority of any party to this  
26 dispute, including the Board of Personnel Appeals. The arrival of a new CEO (District  
27 Superintendent) resulted in a new spokesperson and/or lead negotiator. Changing  
28 leadership on the labor or management bargaining team is hardly the preferred practice for  
29 successful negotiations.  
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40 The Act<sup>8</sup> defines unlawful interference in the selection of either management's or labor's  
41 bargaining representative as an unfair labor practice. See ULP 20 -89 and 22-89, *Livingston*  
42 *School District and Livingston Education Association*, Final Order March 8, 1990<sup>9</sup> and ULP  
43 45-81 and 1-82, *Butte Silver Bow and Local 2033, Butte Silver Bow Sheriff's Officers*, Final  
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48 <sup>7</sup> It could be debated whether the charge as filed satisfies the precision envisioned by ARM 24.26  
49 .680(3)(c)

50 <sup>8</sup> at §39-31-401 and §39-31- 402

<sup>9</sup> [http://erd.dli.mt.gov/ulp-category-listing/cat\\_view/13-labor-standards/21-ulp-decisions/107-1989.html](http://erd.dli.mt.gov/ulp-category-listing/cat_view/13-labor-standards/21-ulp-decisions/107-1989.html)

1 Order October 22, 1982<sup>10</sup>. The Act clearly specifies the parties are to be represented in  
2 collective bargaining through representatives of their own choosing. The Board of  
3 Personnel Appeals lacks authority to influence a party's choice unless and until it can be  
4 shown extraordinary action is necessary.  
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10 Both parties have served notice on the other that they will be represented by professional  
11 negotiators when negotiations resume.  
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16 It could, and perhaps, should be noted that the Complainant has changed its spokesperson  
17 and/or lead negotiator as well. The Complainant's Field Consultant initiated negotiations,  
18 stepped aside for several meetings, and is about to return.  
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23 There is no evidence in the record sufficient to substantiate probable merit for a claim that  
24 these bargaining team alterations are in any way designed to adversely affect either parties  
25 status or role, frustrate the bargaining process, avoid agreement, evade either party's  
26 obligation to bargain in good faith and/or undertaken with a bad-faith intent not to  
27 consummate a collective bargaining agreement.  
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## 33 **2. Rejection of tentative agreements**

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35 The role and function of tentative agreements were addressed by former NLRB Chairman  
36 William Gould in *White Cap Inc., Chicago, Ill. and Chicago Local 458-3m, Graphic*  
37 *Communications Union*, 25 NLRB 1166, 325 NLRB No. 220, 158 LRRM 1241, 1998  
38 affirmed *Chicago Local No. 458-3M v. NLRB*, 206 F.3d 22, 163 LRRM 2833 (D.C. Cir. 2000)  
39 as follows  
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50 <sup>10</sup> [http://erd.dli.mt.gov/ulp-category-listing/cat\\_view/13-labor-standards/21-ulp-decisions/107-1989.html](http://erd.dli.mt.gov/ulp-category-listing/cat_view/13-labor-standards/21-ulp-decisions/107-1989.html)

1 ...it has been the default practice of collective-bargaining negotiations to allow  
2 withdrawal at will from tentative agreements prior to final agreement. Professor  
3 Chamberlain in an early treatise on collective bargaining stated that:

4 "Until the conclusion of the entire contract and its approval in entirety by both  
5 parties, however, any agreement upon particular issues is recognized as only  
6 tentative, for the clauses of a contract may be interrelated. The settlement of  
7 one may be affect the determination of another, and a concession on one  
8 clause won early in the conference may be traded by it for a concession on  
9 another issue more important to it sometime later." Neil W. Chamberlain,  
10 *Collective Bargaining* 88 (McGraw Hill 1st ed. 1951).<sup>11</sup>

11 Similarly, the Board also recognizes this principle as the default rule of collective  
12 negotiations:

13 "In the normal course of negotiations, there is much give and take until a final  
14 collective-bargaining agreement is reached. Frequently, agreement may be  
15 reached on some issues, only to be *modified* as other issues come into play.  
16 Consequently, there is usually no binding agreement until a final, complete  
17 agreement is reached. Notwithstanding that practice, parties negotiating for a  
18 contract always have the ability to make any provisions final and binding  
19 along the way, thus precluding any further negotiations on those issues. . . .  
20 Absent such evidence, we conclude that, as in the normal course of  
21 negotiations, the parties here reached agreement on several provisions en  
22 route to reaching a final agreement, but no agreement became final and  
23 binding until the final contract was made." *Stroehmann Bakeries, Inc.*, 289  
24 NLRB 1523 [ 129 LRRM 1011] (1988).

26 It is not a *per se* violation of the act to withdraw from a tentative agreement. There are  
27 conditions under which it is an indicia of bad faith bargaining. See *Oklahoma Fixture Co.*  
28  
29 331 NLRB No. 145, 165 LRRM 1122 (2000)

31 The Board, consistent with *American National Insurance* and *H.K. Porter*, discussed  
32 supra, declines to make subjective determinations regarding the content of  
33 bargaining proposals, including whether the proposals are acceptable or  
34 unacceptable to the other party.<sup>12</sup> Instead, the Board examines proposals only for  
35 the purpose of evaluating whether they were "clearly designed to frustrate  
36 agreement on a collective-bargaining contract."<sup>13</sup>

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41 With respect specifically to the withdrawal of bargaining proposals and tentative  
42 agreements, the Board has followed the standard articulated by the Eleventh Circuit  
43 in *Mead Corp. v. NLRB*, 697 F.2d 1013, 1021 [112 LRRM 2797] (11th Cir. 1983). In  
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<sup>11</sup> See also C. Loughran, *Negotiating a Labor Contract: A Management Handbook* 48 (BNA 1992) (all agreements on individual issues are tentative until final agreement by union to employer's complete offer); and C. Stevens, "Strategy and Collective Bargaining Negotiations" in D. Rothschild, L. Merrifield & C. Craver, *Collective Bargaining and Labor Arbitration* 28-29 (Michie 1988) (agreement on individual items may be *withdrawn* prior to final agreement).

<sup>12</sup> *Reichhold Chemicals*, 288 NLRB 69 [ 127 LRRM 1265] (1988).

<sup>13</sup> *Id*

1 *Mead*, the court recognized that the employer's conduct must be considered in light  
2 of all the circumstances, adding:  
3

4 “The withdrawal of previous proposals or tentative agreements does not in  
5 and of itself establish the absence of good faith. [Citation omitted.] However,  
6 withdrawal of a proposal by an employer without good cause is evidence of a  
7 lack of good faith bargaining by the employer in violation of Section 8(a)(5)  
8 where the proposal has been tentatively agreed upon or acceptance by the  
9 Union appears to be imminent.” [Id. at 1022.]  
10  
11

12 Relying on *Mead*, the Board found in *Driftwood Convalescent Hospital*, 312 NLRB  
13 247 [ 146 LRRM 1009] (1993), that the employer bargained in bad faith with the  
14 intent of obstructing bargaining when it withdrew from tentative agreements reached  
15 with the union and provided no explanation for its action to the union or the Board.  
16 The Board also found that, based on the totality of the circumstances and particularly  
17 in the context of the employer's reneging on the parties' tentative agreements, the  
18 employer also engaged in bad-faith bargaining by its unexplained withdrawal of other  
19 proposals and substitution of regressive proposals.<sup>14</sup>  
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23 In contrast, the Board in *White Cap, Inc.*, 325 NLRB 1166, 1167 [158 LRRM 1241]  
24 (1998), enfd. 206 F.3d 22 [ 163 LRRM 2833] (D.C. Cir. 2000), found that the  
25 employer complied with its bargaining obligation when it withdrew portions of its  
26 proposal, to which the union had tentatively agreed, after the employees failed to  
27 ratify the proposal by the deadline specified by the employer.<sup>15</sup> In *enforcing* the  
28 Board's decision, the D.C. Circuit found that the employer, which had offered  
29 favorable terms in order to obtain timely agreement concerning the implementation  
30 of a new work schedule, had good cause for *withdrawing* from its tentative  
31 agreements when timely ratification did not occur.  
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37 In some cases, the Board in finding bad faith has noted, among other things, that the  
38 employer provided no explanation for its withdrawal of bargaining proposals and  
39 substitution of regressive proposals. For example, in *Central Management Co.*, 314  
40 NLRB 763 [ 147 LRRM 1033] (1994), the Board found that the totality of the  
41 circumstances demonstrated bad faith where the employer solicited employees to  
42 abandon the union, bypassed the union by making direct offers to employees in  
43 exchange for their abandonment of the union, failed to timely furnish information to  
44  
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47 <sup>14</sup> See also *Homestead Nursing Center*, 310 NLRB 678 [ 143 LRRM 1116] (1993) (employer bargained in  
48 bad faith by *withdrawing* from tentative agreements without good cause).

49 <sup>15</sup> In *White Cap*, the Board did not pass on the continued viability of the standard applied in *Driftwood*.  
50 Because the present case does not involve tentative agreements or the imminent acceptance of  
proposals by the Union, we find it unnecessary to pass on the *Driftwood* standard here.

1 the union, threatened a striker with physical harm, unilaterally ceased benefit fund  
2 contributions on behalf of employees, and replaced its 5 bargaining proposals with  
3 43 proposals. The change in proposals was explained only by the negotiator's  
4 testimony that he "had to go back and make up additional proposals, which I hoped  
5 later on I could trade off to some concessions by the union." <sup>16</sup>  
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9 However, the Board has found it immaterial whether the union, the General  
10 Counsel, or the administrative law judge found the asserted reasons for making the  
11 regressive proposals totally persuasive. "What is important is whether they are 'so  
12 illogical' as to warrant the conclusion that the Respondent by offering them  
13 demonstrated an intent to frustrate the bargaining process and thereby preclude the  
14 reaching of any agreement." <sup>17</sup>  
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17  
18 Regressive proposals are not *per se* violation of the duty to bargain, see *Brink's USA*, 354  
19 NLRB No. 41, 186 LRRM 1315 (2009)  
20

21  
22 The General Counsel has characterized many of Brink's bargaining proposals as  
23 regressive. A reading of the cited cases shows that the Board defines "regressive"  
24 bargaining as a change from a prior more favorable bargaining proposal. *Mid-*  
25 *Continent Concrete*, 336 NLRB 258, 260 [171 LRRM 1016] (2001); *Challenge-Cook*  
26 *Bros.*, 288 NLRB 387, 388 [128 LRRM 1074] (1988); *Rescar, Inc.*, 274 NLRB 1, 2 [  
27 118 LRRM 1371] (1985). It is clear that, as in *Challenge-Cook* and *Rescar*, even a  
28 regressive proposal advanced during the course of negotiations is not unlawful if the  
29 circumstances explain it.  
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34 In its February 7, 2013 charge the Complainant states:  
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36 Bargaining resumed on November 27, 2012,...At that first meeting, the employer  
37 rejected every single item PESSO and the District collaborated over five months  
38 earlier and instead advanced new proposals never discussed by the parties.  
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41 The charge does not identify the items discussed or the agreements reached during the  
42 collaboration five months earlier, prior to the first meeting. The Defendant's response denies  
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48 <sup>16</sup> 314 NLRB at 771. See also *Pacific Grinding Wheel*, *supra*.

49 <sup>17</sup> *Barry-Wehmiller Co.*, 271 NLRB 471, 473 [ 116 LRRM 1496] (1984), quoting *Hickinbotham Bros. Ltd.*,  
50 254 NLRB 96, 103 [ 106 LRRM 1462] (1981).

1 any proposals or counterproposals were exchanged or agreements reached prior to the  
2 meeting on May 30, 2012.  
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7 On the last page of its February 27, 2013 rebuttal the Complainant states:

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9 After all this time the parties have yet to sign off on a single tentative agreement  
10 (PESSO does not admit TA's do not exist. Most recently, the parties had a meeting  
11 of the minds on Representation Fee which PESSO proposed on day one, and the  
12 district finally proposed eight months later, in January 2013)  
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15 The original charge, the Defendant's response and the Complainant's rebuttal have been  
16 accompanied by a plethora of paper. None of it provides substantive evidence of any  
17 tentative agreement (signed or unsigned).  
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21 If there is or was such an agreement, it was probably forgotten or abrogated when the  
22 Defendant's Superintendent (CEO) resigned during the bargaining hiatus over the school's  
23 summer break. The arrival of the new Superintendent (CEO) brought change and  
24 circumstances which could well explain the lack of agreement concerning purported  
25 tentative agreements.  
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29 The February 4, 2013 charge does not provide a clear and concise statement<sup>18</sup> identifying  
30 regressive proposals and/or rejected tentative agreements. There is insufficient substantive  
31 evidence to establish the existence of any tentative agreements. Nor is there sufficient  
32 substantial evidence to establish the purported tentative agreements were withdrawn or  
33 repudiated in an effort to affect the Complainant's role in the collective-bargaining process,  
34 undertaken with a bad-faith intent not to consummate a collective agreement, affect either  
35 party's status or role, and/or evade either party's obligation to bargain in good faith  
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42 **3. Pursuing a permissive subject, namely; Negotiations Ground Rules preserving**  
43 **an open table, allowing new subjects and/or proposals, until mutual agreement**  
44 **to close the table.**  
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<sup>18</sup> See ARM 24.26.680(3)(c)

1 The Complainant alleges the Defendant is bargaining bad faith because it has included the  
2 following language in each of its proposals:  
3

4           Table is open to any new items and/or subjects of bargaining until parties agree to  
5 close the table.  
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9 The investigator presumes the language is intended to advise the Complainant it intends to  
10 preserve maximum flexibility throughout the bargaining process. It is unclear whether the  
11 verbiage is a statement or a proposal. If it is a proposal, it is a proposal for a ground rule, a  
12 procedural matter relating to the conduct of negotiations. It is not related to wages, hours,  
13 working conditions, or any mandatory subject for bargaining. It is a permissive subject for  
14 negotiations. The Complainant is under no obligation to bargain a permissive subject. There is  
15 no evidence the Defendant has conditioned future negotiations upon agreement with the  
16 “open table” language.  
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26 The Defendant and Complainant have an equal and identical duty “to meet at reasonable  
27 times and negotiate in good faith with respect to wages, hours, fringe benefits, and other  
28 conditions of employment or the negotiation of an agreement or any question arising under  
29 an agreement and the execution of a written contract incorporating any agreement  
30 reached.”<sup>19</sup> Over the years it has been established that issues brought to negotiations can  
31 be categorized as mandatory subjects for bargaining, permissive subjects for bargaining, or  
32 illegal subjects for bargaining. The boundary between each category is sometimes fuzzy,  
33 occasionally fluid, and seldom crisp. The parties’ negotiating responsibilities and options on  
34 various issues are dependent upon its classification as mandatory, permissive or illegal.  
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43 Federal precedent under the National Labor Relations Act was applied in *NLRB v Bartlett-*  
44 *Collins Co.*, 639 F2d 652, 106 LRRM 2272 (10 CA 1981):  
45

46           Section 8(a) (5) of the Act states that “[i]t shall be an unfair labor practice for an  
47 employer to refuse to bargain collectively with the representatives of his employees .  
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<sup>19</sup> § 39-31-305 MCA

1 . . .” 29 U.S.C. §158(a) (5). Section 8(d) defines collective bargaining, in pertinent  
2 part, as  
3

4 “the performance of the mutual obligation of the employer and the  
5 representative of the employees to meet at reasonable times and confer in  
6 good faith with respect to wages, hours, and other terms and conditions of  
7 employment, or the negotiation of an agreement, or any question arising  
8 thereunder, and the execution of a written contract incorporating any  
9 agreement reached if requested by either party, but such obligation does not  
10 compel either party to agree to a proposal or require the making of a  
11 concession . . . .”  
12

13  
14 Id. §158(d). In *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349,  
15 42 LRRM 2034 (1958), the Supreme Court read these two provisions together as  
16 “establish[ing] the obligation of the employer and the representative of its employees  
17 to bargain with each other in good faith with respect to ‘wages, hours, and other  
18 terms and conditions of employment . . . .’” The Court held that the “duty is limited to  
19 those subjects, and within that area neither party is legally obligated to yield. . . . As  
20 to other matters, however, each party is free to bargain or not to bargain, and to  
21 agree or not to agree.” Id. (citation omitted); accord, *Fibre-board Paper Products  
22 Corp. v. NLRB*, 379 U.S. 203, 210, 57 LRRM (1964).  
23  
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26 Thus, the Court has divided bargaining proposals into two mutually exclusive  
27 categories, mandatory and non-mandatory subjects of bargaining. It is “lawful to  
28 insist upon matters within the scope of mandatory bargaining and unlawful to insist  
29 upon matters without.” *Borg-Warner*, 356 U.S. at 349. The good faith intentions of  
30 the insisting party do not affect how the proposal is categorized. The Court  
31 specifically stated in *Borg-Warner* that good faith does not entitle a party to insist  
32 upon non-mandatory subjects as a precondition to agreement.  
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36 Ground rules are not mandatory subjects for bargaining. It is unlawful to hold negotiations in  
37 abeyance pending agreement on nonsubstantive procedural matters, *Vanguard Fire and  
38 Supply Company v NLRB*, 468 F3d 952, 180 LRRM 3137 (6 CA 2006).:  
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42 Section 8(a)(5) of the Act requires parties to meet and bargain in good faith as to  
43 mandatory subjects of bargaining such as wages, hours, and other terms and  
44 conditions of employment. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203,  
45 210 [57 LRRM 2609] (1964). Parties are not required to bargain over non-mandatory  
46 subjects, however, one cannot insist upon a non-mandatory subject of bargaining to  
47 impasse or as a precondition to bargaining on mandatory subjects. *NLRB v. Wooster  
48 Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 [42 LRRM 2034] (1958); *Taylor*  
49  
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1 *Warehouse Corp. v. NLRB*, 98 F.3d 892, 901 [153 LRRM 2641] (6th Cir. 1996). A  
2 party who insists upon a non-mandatory subject to impasse or as a precondition to  
3 bargaining violates Sections 8(a) (1) and (5) of the Act. *Id.* A meeting agenda is not a  
4 mandatory subject of bargaining; therefore, Vanguard's insistence upon an agenda's  
5 being submitted by the Union fourteen days prior to proposed meetings between the  
6 parties resulted in Vanguard's violation of the Act. See *Caribe Staple Co.*, 313 NLRB  
7 877, 890 [146 LRRM 1182] (1994) (concluding that an employer's "attempt to force  
8 capitulation by declining to agree to any future bargaining session unless the Union  
9 acceded to this nonsubstantive, procedural demand" of providing an agenda before  
10 meetings violated Sections 8(a)(5) and (1) of the Act).

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15 The parties are free to bring permissive subjects to negotiations. A party to contract  
16 negotiations is well within the parameters of good faith bargaining to propose ground rules.  
17 It is be unlawful for either party to insist future negotiations are conditioned upon agreement  
18 to the proposed rules. It is generally held that disagreements concerning procedural  
19 matters ought not prohibit the discussion and negotiation of substantive issues related to  
20 mandatory subjects, wages, hours, working conditions and other terms and conditions of  
21 employment. While either party is free to bring such matters to the table, neither may  
22 withhold agreement or negotiations pending their resolution. See ULP 61-94 *Smith Valley*  
23 *Teachers Association v Smith Valley School District*,<sup>20</sup> final order December 15, 1995:

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32 It is well established that a party may not bargain to impasse over an illegal or  
33 permissive subject of bargaining. In affirming the NLRB, however, the Supreme  
34 Court also clarified its ruling to reflect that bargaining need not be confined to the  
35 statutory subjects. *NLRB v. Borg Warner*, 356 U.S. 342 (1958)., 42LRRM 2034.  
36 Thus, the NLRB has held that a party violates the NLRA when it demands that an  
37 unfair labor practice charge against it be withdrawn as a condition to agreement.  
38 *Stackpole Components Co.*, 232 NLRB 723. 96 LRRM 1324 (1977).

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42 As contended by the school board, however, it is also well established that the mere  
43 request by one party that the other party withdraw an unfair labor practice charge  
44 does not violate the law. In *Inner City Broadcasting corp.*, 270 NLRB 1230 (1984),  
45 the NLRB held: Even assuming that Respondent's comments could be considered  
46 that, as a condition precedent to the reaching of an agreement, the Union withdrew  
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50 <sup>20</sup> [http://erd.dli.mt.gov/ulp-category-listing/cat\\_view/13-labor-standards/21-ulp-decisions/112-1994.html](http://erd.dli.mt.gov/ulp-category-listing/cat_view/13-labor-standards/21-ulp-decisions/112-1994.html)

1 its charge and arbitration demands, such a proposal is not *per se* illegal. However,  
2 Respondent could not legally insist to impose on its acceptance in the face" of: a  
3 clear and expressed refusal by the Union to bargain about the [non-mandatory  
4 subjects)" Id. at 1223. A similar result was reached in *Carlsen Porsche Audi, Inc.*,  
5 266 NLRB 141 (1983).  
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9 In this particular instance, the verbiage affixed to the bottom of the defendant's is of no  
10 consequence. There is no evidence in the record indicating the parties had adopted ground  
11 rules for negotiations. In the absence of a negotiated ground rule to the contrary," the table"  
12 remains open to new items and/or subjects until the parties agree to "close the table".  
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18 Moreover, the offending jargon is more statement than proposal. It is also redundant. The  
19 protested verbiage is followed by unprotested boilerplate similar to that common to many  
20 labor and/or management bargaining proposals:  
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24 The District reserves the right to add/delete or modify to any and/or all proposals  
25 during the course of negotiations.  
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28 The Defendant's consultant has successfully agitated and aggravated the Complainant's  
29 consultant.  
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34 There is no evidence in the record sufficient to substantiate probable merit for a claim the  
35 "open table" verbiage inserted in the Defendant's proposal is in any way designed to  
36 adversely affect either parties status or role, frustrate the bargaining process, avoid  
37 agreement, evade either party's obligation to bargain in good faith and/or undertaken with a  
38 bad-faith intent not to consummate a labor agreement.  
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#### 43 44 45 **4. Advancing new subjects and/or proposals in later stages of bargaining** 46

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48 The Complainant asserts the Defendant is advancing new proposals and/or subjects in later  
49 stages of negotiations. In the charge, the Complainant's consultant writes she though the  
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1 parties were close to agreement following the May 30, 2012 meeting. History does not  
2 confirm her assessment. The Complainant does not define the criteria by which one can  
3 identify when negotiations have reached their later stage. The Complainant does not  
4 disclose how it could be determined management was about to adopt labor's position on  
5 any or all issues being negotiated. Negotiations are complete when the parties reach  
6 agreement. That can happen immediately when either labor or management capitulates,  
7 conceding to the other's proposal. Usually it takes time and effort for the parties to fine tune  
8 their proposals and modify their positions to make them acceptable to the other side. In  
9 other cases considerable time and energy is expended before defeat is acknowledged and  
10 a proposal withdrawn.  
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22 The Complainant presented its first formal proposal at the May 30, 2012 meeting. There  
23 was no subsequent meeting until November 15, 2012. During the five month bargaining  
24 hiatus the Defendant lost and replaced its Superintendent (CEO). Understandably, a good  
25 portion of the second meeting was devoted to bringing the new Superintendent "up to  
26 speed". In view of the time lag between meetings it was appropriate to review what  
27 happened during the first meeting on May 30, 2012, including a discussion of the  
28 Defendant's proposal.  
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37 The Defendant offered its first bargaining proposal at the parties' third negotiations session  
38 on November 27, 2012. From what can be determined from the evidence available to this  
39 investigator, the Defendant's proposal contained six items, at least five of which were  
40 responses to subjects broached in the Complainant's proposal.  
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46 At the parties fourth session, there was a discussion of the Defendant's third meeting  
47 proposal. Management provided additional clarification and proposed language to  
48 implement provisions proposed at the fifth session.  
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The investigator is unaware of any statutory provision or case law precedent prohibiting the introduction of new proposals, concepts, or issues after a particular number of bargaining sessions. It goes without saying, inserting unrelated new items to the bargain in an attempt to frustrate the process, prevent an agreement or some other bad-faith objective would be a violation of the duty to bargain. For example, when the employer presented 43 new proposals on the second day of a strike it was seen as an indicia of bad faith: *Central Management Co.*, 314 NLRB 763, 147 LRRM 1033 (1994):

Second, the list of 43 proposals was a sudden, unexplained, and major departure from the Respondent's previous position. Although some of the 43 items related to the previous five proposals, most were new proposals asking for substantially greater concessions.

As stated above, the Board does not evaluate the acceptability of particular proposals, but we will examine proposals to determine, on an objective basis, whether they are designed to frustrate reaching an agreement. Similarly, while a party is normally free to change its negotiating position in response to a change in bargaining strength, we will also examine changes in bargaining position to determine if they are designed to impede agreement. In this case, it is clear that the Respondent's 43 proposals, when viewed in the totality of the circumstances, constitute merely another tactic to frustrate reaching an agreement. (citation omitted)

The rule promulgated by the Board of Personnel Appeals at ARM 24.26.680(3)(c) requires an unfair labor practice charge provide a clear and concise statement of facts constituting the alleged violation, including the time and place of occurrence of the particular acts and a statement of the portion or portions of the law or rules alleged to have been violated

There insufficient substantial evidence to support the Complainant's allegation the Defendant is unlawfully advancing new proposals in the later stages of negotiations. Assuming *arguendo*, it can be determined the parties are in the later stages of negotiations, and assuming, the Defendant has submitted substantive proposals late in the bargain the

1 Complainant does not substantiate the purported proposals were designed to affect either  
2 parties status or role, frustrate the bargaining process, avoid agreement, evade either  
3 party's obligation to bargain in good faith and/or undertaken with a bad-faith intent to  
4 prevent the consummation of a collective bargaining agreement.  
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## 9 **5. Refusing to meet**

10 The Act, at § 39-31-305(2) imposes upon the employer and the exclusive representative a  
11 mutual obligation to meet at reasonable times to negotiate in good faith regarding wages,  
12 hours and other mandatory subjects. The Complainant's February 4, 2013 charge and  
13 February 27 rebuttal alleges the Defendant is engaging dilatory tactics by refusing to meet  
14 at reasonable times and intervals. Under certain circumstances, dilatory tactics may be  
15 indicia of bad faith. See: *Calex Corp. v. NLRB*, 144 F.3d 904, 158 LRRM 2223 (6 CA 1998).  
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23 Dilatory and delaying tactics that undermine the process of collective bargaining are  
24 indicative of bad faith bargaining. See *Kobell v. Paperworkers*, 965 F.2d 1401, 1408 [ 140 LRRM 2788] (6th Cir. 1992); see also *Radisson Plaza Minneapolis v. NLRB*, 987  
25 F.2d 1376, 1382 [ 142 LRRM 2761] (8th Cir. 1993); *A.H. Belo Corp. v. NLRB*, 411  
26 F.2d 959, 968 [ 71 LRRM 2437] (5th Cir. 1969).  
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31 The Complainant's February 7 charge, the Defendant's response and the Complainant's  
32 contain assertions and counter assertions alleging the other is responsible for delayed  
33 and/or cancelled bargaining sessions. The parties have failed to negotiate the calendar.  
34 The record is clear, scheduling meeting has been difficult. The record is also clear, neither  
35 the Complainant nor the Defendant is blameless. Neither has been the model for  
36 cooperative and collaborative scheduling.  
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43 The Complainant notified the Defendant it wished to negotiate a successor agreement to  
44 the contract set to expire June 30, 2012 in February 2012 and renewed that request in  
45 March 2012 and again a month later in April. The parties finally conducted their first  
46 bargaining session on May 30, 2012.  
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The four to five month delay remains unexplained. Apparently contract negotiations were not a high priority. There is no evidence either side intentionally and purposefully sought to forestall the initial meeting. Neither party refused to meet. Neither party put forward the energy necessary to overcome the other's lethargy.

After the initial meeting there was a hiatus during the summer break. The Complainant's consultant was unaware of the negotiation vacation. There is no evidence of a conscientious effort by either party to schedule, or conversely, avoid meeting. There is no evidence any one was disturbed by the absence of meetings until the Complainant's consultant inquired as to the status of negotiations in September 2012.

The parties finally resumed negotiations in November meeting on November 15 and 27, 2012, December 4, 2012, and January 16, 2013.

The Complainant cancelled the meeting scheduled for January 22, 2013. To date the parties have been unable to schedule a subsequent meeting. The documentation filed along with the charge, response, and rebuttal show the parties' respective consultants have exchanged several missives regarding meeting dates and schedules. Neither has been the epitome of scheduling affability. However, neither has been so egregious as to support a finding one or the other is intentionally engaged in behavior calculated to undermine the collective bargaining process, affect either parties status or role, frustrate the bargaining process, avoid agreement, evade either party's obligation to bargain in good faith and/or undertaken with a bad-faith intent to prevent the consummation of a collective bargaining agreement.

1                   **IV. CONCLUSION**

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4 Montana courts and the Board of Personnel Appeals use National Labor Relations Board  
5 precedent when interpreting and administering the Montana Public Employee Collective  
6 Bargaining Act. In *Atlanta Hilton & Tower*, 271 NLRB 1600, 117 LRRM 1224 (1984) set the  
7 criteria for determining good faith bargaining as follows:  
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12                   Under Section 8(d) of the Act, an employer and its employees' representative are  
13 mutually required to "meet at reasonable times and confer in good faith with respect  
14 to wages, hours, and other terms and conditions of employment . . . but such  
15 obligation does not compel either party to agree to a proposal or require the making  
16 of a concession." Both the employer and the union have a duty to negotiate with a  
17 "sincere purpose to find a basis of agreement,"<sup>21</sup> but "the Board cannot force an  
18 employer to make a 'concession' on any specific issue or to adopt any particular  
19 position."<sup>22</sup> The employer is, nonetheless, "obliged to make some reasonable effort in  
20 some direction to compose his differences with the union, if § 8(a) (5) is to be read  
21 as imposing any substantial obligation at all."<sup>23</sup>  
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26                   It is necessary to scrutinize an employer's overall conduct to determine whether it  
27 has bargained in good faith. "From the context of an employer's total conduct, it must  
28 be decided whether the employer is lawfully engaging in hard bargaining to achieve  
29 a contract that it considers desirable or is unlawfully endeavoring to frustrate the  
30 possibility of arriving at any agreement."<sup>24</sup> A party is entitled to stand firm on a  
31 position if he reasonably believes that it is fair and proper or that he has sufficient  
32 bargaining strength to force the other party to agree. *NLRB v. Advanced Business*  
33 *Forms Corp.*, 474 F.2d 457, 467, 82 LRRM 3189 (2d Cir. 1973).  
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38                   Although an adamant insistence on a bargaining position is not of itself a refusal to  
39 bargain in good faith, *Neon Sign Corp. v. NLRB*, 602 F.2d 1203, 102 LRRM 2485  
40 (5th Cir. 1979), other conduct has been held to be indicative of a lack of good faith.  
41 Such conduct includes delaying tactics,<sup>25</sup> unreasonable bargaining demands,<sup>26</sup>  
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<sup>21</sup> 9 *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231, 40 LRRM 3072 (5th Cir. 1960)

<sup>22</sup> *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134, 32 LRRM 2225 (1st Cir. 1953), *cert. denied* 346 U.S. 887, 33 LRRM 3133 (1953).

<sup>23</sup> *Id.* at 135.

<sup>24</sup> *J.D. Lunsford Plumbing*, 254 NLRB 1360, 1370, 107 LRRM 1033 (1981), quoting from *West Coast Casket Co.*, 192 NLRB 624, 636, 7 LRRM 1026 (1971), *enfd.* in relevant part 469 F.2d 871, 81 LRRM 2857 (9th Cir. 1972).

<sup>25</sup> *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 59 LRRM 2065 (8th Cir. 1965); *Crane Co.*, 244 NLRB 103, 102 LRRM 1351 (1979).

<sup>14</sup> *NLRB v. Holmes Tuttle Broadway Ford*, 465 F.2d 717, 81 LRRM 3026 (9th Cir. 1972).

1 unilateral changes in mandatory subjects of bargaining,<sup>27</sup> efforts to bypass the  
2 union,<sup>28</sup> failure to designate an agent with sufficient bargaining authority,<sup>29</sup>  
3 withdrawal of already agreed-upon provisions,<sup>30</sup> and arbitrary scheduling of  
4 meetings.<sup>31</sup> None of these indicia is present here. There was, on the other hand,  
5 evidence of the Company's good faith, such as its appearance at 13 negotiating  
6 sessions, its offer of a 20-cent-per-hour wage increase effective 29 May 1984, the  
7 prior successful bargaining relationship between the parties, and the agreement in  
8 principle to the Union's sick leave proposal.  
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12 The Company's firmness in insisting on a one-year extension of the current contract  
13 does not of itself constitute bad faith. We find that the totality of the Company's  
14 conduct throughout the course of bargaining establishes that the Company engaged  
15 in hard bargaining, rather than surface bargaining. To hold otherwise in such  
16 circumstances would be tantamount to requiring an employer to offer improved  
17 benefits over an expired contract or be guilty of bad-faith bargaining.  
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21 We conclude that the Respondent did not refuse to bargain in good faith with the  
22 Union in violation of Section 8(a) (5) and (1) of the Act.  
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26 The February 7, 2013 charge, the Defendant's response and the Complainant's rebuttal do  
27 not evidence an effort by the Defendant to affect the Complainant's role in collective  
28 bargaining (*White Cap, supra*).  
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33 Up to this point, in the case at hand, the Defendant's minimum obligations have been  
34 satisfied<sup>32</sup>.  
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42 <sup>27</sup> *NLRB v. Fitzgerald Mills Corp.*, 133 NLRB 877, 48 LRRM 1745 (1961), *enfd.* 313 F.2d 260, 52 LRRM  
2174 (2d Cir. 1963), *cert. denied* 375 U.S. 834, 54 LRRM 2312 (1963).

43 <sup>28</sup> *Cal-Pacific Poultry*, 163 NLRB 716, 64 LRRM 1462 (1967).

44 <sup>29</sup> *Billups Western Petroleum Co.*, 169 NLRB 964, 67 LRRM 1323 (1968), *enfd.* 416 F.2d 1333, 72 LRRM  
45 2687 (5th Cir. 1969).

46 <sup>30</sup> *Valley Oil Co.*, 210 NLRB 370, 86 LRRM 1351 (1974).

47 <sup>31</sup> *Moore Drop Forging Co.*, 144 NLRB 165, 54 LRRM 1024 (1963).

48 <sup>32</sup> Chapter 13, Section 13.III.A, page 915; *The Developing Labor Law*, 6<sup>th</sup> Edition, John E. Higgins, Jr.,  
49 Editor; Bloomburg BNA, Washington, 2012  
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1 The Complainant is obviously disappointed in the Defendant's demeanor and performance.  
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3 However, the Complainant does not provide substantial evidence sufficient to support a  
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5 finding the Defendant's performance and demeanor were designed to affect the  
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7 Complainant's status or role as exclusive representative, evade either party's obligation to  
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9 bargain in good faith and/or undertaken with a bad-faith intent to prevent the consummation  
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11 of a collective bargaining agreement.  
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14 The Complainant's February 7, 2010 charge and February 27 rebuttal along with their  
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16 associated documentation provide insufficient evidence and/or legal foundation to justify a  
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18 finding of probable merit.  
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## 21 22 **V. DETERMINATION**

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24 Based on the foregoing, the record does not support a finding of probable merit to the  
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26 charge and this matter must be dismissed.  
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32 Dated this 4th day of April 2013  
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34

35 BOARD OF PERSONNEL APPEALS  
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39

40 Arlyn L. Plowman, Investigator  
41

## 42 43 **NOTICE**

44  
45 ARM 24.26.680B(6) provides: As provided for in 39-31-405(4), MCA, if a finding of no  
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47 probable merit is made, the parties have ten (10) days to accept or reject the Notice of  
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49 Intent to Dismiss. Written notice of acceptance or rejection is to be sent to the attention of  
50  
the Investigator at PO Box 201503, Helena MT 59620-1503. The Dismissal becomes the  
final order of the board unless either party requests a review of the decision to dismiss the  
complaint.

**CERTIFICATE OF MAILING**

I, Windy Knutson, do hereby certify that a true and correct copy of this document was mailed to the following on the 4<sup>th</sup> day of April 2013:

Michael Dahlem, Esq  
6009 Wengen Place, Unit B  
Whitefish, Mt 59937-3282

Maggie Copeland  
MEA-MFT Field Consultant  
PO Box 1008  
Glendive, Mt 59330-008



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