BOARD OF PERSONNEL APPEALS
PO BOX 201503
HELENA MT 59620-1503
(406) 444-2718

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO: 16-2013

CITY OF LIVINGSTON Complainant, vs. MONTANA PUBLIC EMPLOYEES ASSOCIATION Defendant	Case No.: 1184-2013 INVESTIGATIVE REPORT AND NOTICE OF INTENT TO DISMISS

I. INTRODUCTION

On February 13, 2013, the Complainant, City of Livingston, filed an unfair labor practice charge with this Board alleging the Defendant, Montana Public Employees Association, violated the Montana Collective Bargaining Public Employees Act (the Act), specifically § 39-31-402(1)(b), when Matthew Tubaugh allegedly e-mailed a purported threat to city council members. That e-mail was perceived as an effort to coerce the Complainant in the selection of its representative for the purpose of collective bargaining or the adjustment of grievances. The Defendant filed a timely response asserting Matthew Tubaugh was not an agent of the Defendant. The undersigned was assigned to investigate the charge and has communicated with the parties in the course of the investigation.

II. BACKGROUND

The Defendant, a labor organization, is the recognized and/or certified exclusive representative for a bargaining unit of police department employees employed by the Complainant. Matthew Tubaugh was the president of the Defendant's local affiliate, Montana Public Employees Association (MPEA) Livingston Police Unit, aka, Livingston Police Department Employees Association. As such, Matthew Tubaugh was signatory to the most recent Collective Bargaining Agreement between the Complainant and Defendant[1].

For reasons unknown and irrelevant to the matter at hand, Matthew Tubaugh was terminated from his employment with the Complainant on or about October 28, 2012. His termination was grieved and is scheduled for grievance arbitration March 27 and 28, 2013.

His disciplinary discharge resulted in his removal from office as president of the Defendant's local affiliate, Montana Public Employees Association (MPEA) Livingston Police Unit, aka, Livingston Police Department Employees Association. John Leonard is the local affiliate's current president.

Matthew Tubaugh's termination did not drop him from the Complainant's radar. The local newspaper's web site has several articles relating events subsequent to his discharge[2].

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[1] http://mympea.org/wp-content/uploads/2012/11/LivingstonPoliceDept.pdf
[2] http://www.livingstonenterprise.com/search/node/tubaugh

The Complaint's attention was refocused on Matthew Tubaugh when a February 4, 2012 e-mail was sent to Livingston City Council members. That e-mail, presumably authored by Matthew Tubaugh was hardly conciliatory. The Complainant perceived the e-mail to be threatening and an attempt to coerce the employer's collective bargaining agent selection. Accordingly the above captioned unfair labor practice charge was filed.

III. DISCUSSION

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals using Federal Court and National Labor Relations Board (NLRB) precedent as guidelines when interpreting the Montana Collective Bargaining for Public Employees Act, *State ex rel. Board of Personnel Appeals vs. District Court*, 183 Montana 223, 598 P.2d 1117, 103 LRRM 2297; *Teamsters Local No. 45 vs. State ex rel. Board of Personnel Appe*als, 185 Montana 272, 635 P.2d 185, 119 LRRM 2682; and *AFSCME Local No. 2390 vs. City of Billings,* Montana, 555 P.2d 507, 93 LRRM 2753. To the extent cited in this decision, federal precedent is considered for guidance and to supplement state law when applicable.

The Act at §39-31-402 MCA provides:

> 39-31-402. Unfair labor practices of labor organization. It is an unfair labor practice for a labor organization or its agents to:
> (1) restrain or coerce:
> (a) employees in the exercise of the right guaranteed in 39-31-201; or
> (b) a public employer in the selection of a representative for the purpose of collective bargaining or the adjustment of grievances;
> (2) refuse to bargain collectively in good faith with a public employer if it has been designated as the exclusive representative of employees

(3) use agency shop fees for contributions to political candidates or parties at state or local levels.

Rules promulgated by the Board of Personnel Appeals at ARM 24.26.680 (3) (c) and 24.26.680B (2) establish criteria for unfair labor practice charges:

ARM 24.26 .680(3) provides:

> A complaint shall contain the following:
> (a) the name, address and telephone number of the complainant;
> (b) the name, address and telephone number of the party against whom the charge is made; and
> (c) 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.

ARM 24.26.680B (2) provides:

> As provided for in 39-31-405(1), MCA, after receipt of the response, the board shall appoint an investigator to investigate the alleged unfair labor practice. In making a determination of probable merit, the investigator must determine whether there is substantial evidence to support the allegation(s). In reaching this decision, the board's agent shall rely on the type of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Substantial evidence is something more than a scintilla of evidence but may be less than a preponderance of the evidence.

It is an unfair labor practice for a labor organization or its agents to restrain or coerce a public employer a public employer in the selection of a representative for the purpose of collective bargaining or the adjustment of grievances: See ULP 20 -89 and 22-89,

Livingston School District and Livingston Education Association, Final Order March 8, 1990[3].

It is an unfair labor practice for a labor organization or its agents to circumvent the employer's designated representative: See ULP 45-81 and 1-82, *Butte Silver Bow and Local 2033, Butte Silver Bow Sheriff's Officers,* Final Order October 22, 1982.

The Complainant perceives Matthew Tubaugh's February 4, 2013 e-mail to City Council members as a threat, an attempt to coerce the Complainant in its selection of its representative and spokesperson for negotiations and grievance handling. The e-mail could also be construed as an attempt to "direct deal" with councilmembers, circumventing the Council's designated agent for negotiations and grievance handling.

To find Matthew Tombaugh's activity unlawful, he must first be determined an agent of the Defendant labor organization. Private sector Federal precedent is instructive. See: Aguirre *v. Automotive Teamsters*, 633 F.2d 168, 174, 105 LRRM 3478 (9th Cir. 1980);

> Long before enactment of Taft-Hartley, the Supreme Court held that the standard of agency for unions was to be the same as that for corporations. *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 395 (1922). By enacting §185(e), Congress was merely reaffirming application of common law doctrines of agency to labor law. *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 217, 102 LRRM 3017 (1979); *N.L.R.B. v. International Longshoremen's Union Local 10*, 283 F.2d 558, 46 LRRM 3141 (9th Cir. 1960).

And *NLRB v Local 64, Carpenters,* 497 F.2d 1335, 86 LRRM 2670 (6th Cir. 1974);

[3] http://erd.dli.mt.gov/ulp-category-listing/cat_view/13-labor-standards/21-ulp-decisions/107-1989.html

> We are thus faced with the determination of an agency relationship. It has been said that such a determination must be made, as contemplated by the applicable statute, in light of the general law of agency, *NLRB v. Int. Long. & Ware. Union, et al.*, 283 F.2d 558. 563, 46 LRRM 3141 (9th Cir. 1960). 29 U.S.C. § 152(13). Indeed, this Court has held, in a somewhat analogous situation involving a Board determination, that a question of agency must be factually determined "under common law agency principles." *Ace Doran Hauling & Rigging Co. v. NLRB*, 462 F.2d 190. 193, 80 LRRM 2816 (6th Cir. 1972). Viewed in this context, the Board's agency determination herein must be upheld if it comports with the recognized law of agency.
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> It is well settled that the right to control the agent is fundamental to the existence of the agency relationship. Cf. *NLRB v. Cement Transport. Inc.*, 490 F.2d 1024, 1027, 85 LRRM 2292 (6th Cir. 1974). See generally, 2A C.J.S. Agency, § 6, and treatises and texts on Agency.

When Matthew Tubaugh allegedly sent the ill-advised e-mail he was a terminated police officer. He was not a city employee. He was not a union officer. He was not under the Defendant's control. As egregious as Matthew Tubaugh's conduct may have been, it is beyond the Board of Personnel Appeal's purview. At the time the e-mail was composed and delivered he was not an agent of the Defendant. Section 39-31-402 MCA refers specifically to labor organizations and their agents. Matthew Tubaugh is neither.

It would take more positive energy than this investigator can muster to find anything constructive about Matthew Tubaugh's alleged February 4, 2013 e-mail to city council members. It represents the type of conduct case law recognizes as potential justification for an exclusive representative labor organization to exercise broad discretion when considering its duty of fair representation[4]. Similar post-event conduct has been considered

[4] Chapter 25, Section 25.III.B pages 2155-2166; *The Developing Labor Law*, 6th Edition, John E. Higgins, Jr., Editor; Bloomburg BNA, Washington, 2012

by arbitrators adjudicating discipline grievances[5]. However, in the case at hand, Matthew Tubaugh's behavior does not constitute an unfair labor practice. He could not violate § 39-31-402 MCA because he was neither a labor organization nor a labor organization's agent.

IV. DETERMINATION

Based on the foregoing, the record does not support a finding of probable merit to the charge and this matter must be dismissed.

Dated this 7th day of March 2013.

BOARD OF PERSONNEL APPEALS

Arlyn L. Plowman, Investigator

NOTICE

ARM 24.26.680B(6) provides: As provided for in 39-31-405(4), MCA, if a finding of no probable merit is made, the parties have ten (10) days to accept or reject the Notice of Intent to Dismiss. Written notice of acceptance or rejection is to be sent to the attention of 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, _____ do hereby certify that a true and correct copy of this document was mailed to the following on the 7th day of March 2013:

Quinton Nyman, Executive Director
Montana Public Employees Association
P.O. Box 5600
Helena, Mt 59604-5600

Edwin R. Meece, City Manager
City of Livingston
414 East Calendar Street
Livingston, Mt 59047-2700

[5] Chapter 8 Section 8.8.D.ii, page 408-411; *Elkouri & Elkouri, How Arbitration Works*, 6th Edition; Alan Mile Ruben, Editor; Bloomburg BNA, Washington, 2003