

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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8 STATE OF MONTANA  
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10  
11 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 8-2013

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13 FEDERATION OF MONTANA STATE )  
14 WOMENS PRISON, MEA-MFT, )  
15 Complainant, )  
16 -vs- )  
17 )  
18 MONTANA DEPARTMENT OF )  
19 CORRECTIONS, MONTANA WOMEN'S )  
20 PRISON, )  
21 Defendant. )  
22 )  
23

INVESTIGATIVE REPORT  
AND  
NOTICE OF INTENT TO DISMISS

24 **I. Introduction**

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26 On October 17, 2012, the Federation of Montana State Women's Prison, hereinafter  
27 Federation or Union, filed an unfair labor practice charge with the Board of Personnel  
28 Appeals alleging that the Montana Department of Corrections, hereinafter DOC,  
29 committed the unfair labor practice of bad faith bargaining when its representatives left  
30 a mediation session without waiting for a Federation counter proposal. Violations of  
31 Section 39-3-402(2), MCA and Section 39-31-401(5), MCA are alleged.  
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34 John Andrew was assigned by the Board to investigate the charge and has reviewed  
35 the information submitted by the parties and communicated with them as necessary in  
36 the course of the investigation.  
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38 **II. Findings and Discussion**

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40 There is a longstanding bargaining history between the Federation and DOC. The  
41 parties are currently negotiating a successor agreement to the contract that expired  
42 June 30, 2012.  
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45 In June of 2012, the Board of Personnel Appeals was asked to provide mediation  
46 assistance to the parties. The first mediation session took place in Billings in August of  
47 2012. A second session was conducted on October 11, 2012. It is events occurring  
48 during the October mediation session which are the subject of the instant charge.  
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1 On the day in question mediation began at 8:30 a.m. and concluded on or about 2:30  
2 p.m. the same day. The contention of the Union is that after receiving a comprehensive  
3 management proposal the management representatives left the mediation session  
4 without considering a not yet formulated Union counter-proposal. From what the  
5 investigator can garner, there were no face to face interactions between the  
6 management negotiators and the Union bargaining team on October 11 as the parties  
7 were in separate caucuses during the mediation. Whatever happened to bring the  
8 mediation to an end transpired through whatever communication there was between the  
9 mediator and the respective parties. Management believed it was known and  
10 understood that they were leaving for the day. Conversely, the Union contends it had  
11 indicated a counter-proposal would be forthcoming. In that vein the Union anticipated  
12 management would be available to receive the counter-proposal only to discover,  
13 apparently through the mediator, that the management representatives had left for the  
14 day. In short, both parties are relying on hearsay statements for their respective  
15 positions vis-à-vis this charge.  
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18 The mediator cannot be called to testify as to what did or did not happen nor would the  
19 investigator breach the confidentiality of the mediation process to ascertain what may  
20 have happened from the perspective of the mediator. Rather, the investigator is  
21 charged to determine whether substantial evidence exists to warrant a finding of  
22 probable merit. Based on a conversation with the Union representative, as well as the  
23 pleadings on their face, what exists as evidence to explain what happened to end the  
24 mediation is hearsay in nature. That does not constitute substantial evidence sufficient  
25 to warrant a finding of probable merit.  
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28 There is more to consider than the hearsay nature of the evidence. The Board of  
29 Personnel Appeals has adopted a "totality of conduct" standard to determine whether or  
30 not a party has engaged in bad faith bargaining. To be certain, what has been related  
31 in the complaint and to the investigator in follow-up is not of such an egregious nature  
32 as to constitute bad faith on the part of DOC. In fact, the parties have again met in  
33 mediation, this time for two consecutive days. There is nothing to demonstrate any  
34 refusal to bargain on the part of the DOC nor are there other demonstrated indications  
35 of bad faith on the part of DOC. In consolidated ULPs 2-2001 and 25-2001, Anaconda  
36 Police Protective Association vs. Anaconda-Deer Lodge County and Anaconda-Deer  
37 Lodge County vs Anaconda Police Protective Association the hearing officer stated, and  
38 the Board adopted the following:  
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41 In The Developing Labor Law, Third Edition, Patrick Hardin, Editor in chief, BNA  
42 Publications, Washington, D.C., 1992, p.608-9, the proper role of the parties is  
43 described as follows:  
44

45 The duty to bargain in good faith is an "obligation ... to participate actively in the  
46 deliberations so as to indicate a present intention to find a basis for agreement  
47 .... " This implies both "an open mind and a sincere desire to reach an  
48 agreement" as well as a "sincere effort ... to reach a common ground." Except in  
49 cases where the conduct fails to meet the minimum obligation imposed by law or  
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1 constitutes and outright refusal to bargain, relevant facts of a case must be  
2 studied to determine whether the employer or the union is bargaining in good or  
3 bad faith. The "totality of conduct" is the standard by which the "quality" of  
4 negotiations is tested. Thus, even though some specific actions, viewed alone,  
5 might not support a charge of bad-faith bargaining, a party's over course of  
6 conduct in negotiations may reveal a violation of the Act. [Citations omitted].  
7 (Emphasis added) The Board of Personnel Appeals has adopted this standard.  
8 (See for example, ULP No. 4-76, No. 33-81 and No. 19-85). The "totality of  
9 conduct" is the standard by which the quality of negotiations is tested. NLRB v.  
10 Virginia Electric & Power Co., 314 U.S. 4699 LRRM 405 (1941), B.F. Diamond  
11 Constr. Co., 163 NLRB No. 25, 64 LRRM 1333 ( 1967).  
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14 Based on the minimal and hearsay evidence offered, as well as the totality of conduct  
15 standard adopted by the Board of Personnel Appeals, a finding of probable merit is not  
16 appropriate in this case.  
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19 **III. Recommended Order**  
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21 It is hereby recommended that Unfair Labor Practice Charge 8-2013 be dismissed.  
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25 DATED this 6<sup>th</sup> day of December 2012.  
26

27  
28 BOARD OF PERSONNEL APPEALS  
29

30  
31 By: \_\_\_\_\_  
32 John Andrew  
33 Investigator  
34

35  
36  
37 NOTICE  
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39 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of  
40 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss  
41 may be appealed to the Board. The appeal must be in writing and must be made within  
42 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the  
43 Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to  
44 dismiss becomes a final order of the Board.  
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CERTIFICATE OF MAILING

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

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