

1 Department of Labor and Industry
2 Board of Personnel Appeals
3 PO Box 201503
4 Helena, MT 59620-1503
5 (406) 444-0032
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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. 9-2013

12
13 LAME DEER EDUCATION)
14 ASSOCIATION, MEA-MFT,)
15 Complainant,) INVESTIGATIVE REPORT
16 -vs-) AND
17) NOTICE OF INTENT TO DISMISS
18 LAME DEER PUBLIC SCHOOLS,)
19 Defendant.)
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22 **I. Introduction**

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24 On October 17, 2012, the Lame Deer Education Association, hereinafter LEA or
25 Association, filed an unfair labor practice charge with the Board of Personnel Appeals
26 alleging that the Lame Deer Public Schools, hereinafter LDPS, committed the unfair
27 labor practice of bad faith bargaining manifested by statements allegedly made to a
28 Board of Personnel Appeals appointed mediator during the course of mediation.
29 Violations of Section 39-3-402(2), MCA and Section 39-31-401(5), MCA are alleged.
30 The LEA is represented in this matter by Vicki McDonald, attorney at law, and the LDPS
31 is represented by Jeffrey Weldon, attorney at law.
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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 Other than the original complaint no additional charges have been filed by the
39 complainant nor has the initial charge been amended.
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41 **II. Findings and Discussion**

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43 There is a long bargaining history between the parties to this matter and the issues at
44 the heart of this particular round of bargaining are difficult as they are founded in levels
45 of federal funding available, or not available to LDPS. As a result of this, on March 29,
46 2012, the LEA submitted a request for contract negotiation mediation assistance to the
47 Board of Personnel Appeals. Board agent Paul Melvin was appointed to the case. Two
48 mediation sessions were conducted by agent Melvin and a third one was held on
49 October 11, 2012. It is the third session which gives rise to the instant charge.
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1 On the day in question mediation began at approximately 4:30 p.m. For the duration of
2 the mediation session the parties were in separate caucus sessions. The contention of
3 the Association centers around allegations which, according to the LEA, are evidence of
4 bad faith bargaining. Both allegations are founded in representations purportedly made
5 by the mediator based on representations purportedly made to the mediator in caucus
6 with the employer and its representatives. Specifically, the LEA contends that the
7 mediator reported the defendant said it “could not do anything” until after the November
8 6th general election. According to the LEA, the mediator further reported that the
9 defendant stated, “Why would I (the negotiator for the LDPS) want to sign a collective
10 bargaining agreement when Rick Hill (candidate for governor) would abolish collective
11 bargaining?”
12

13
14 The complaint further contends that through the mediator it was told that “he (the
15 negotiator for LDPS) would not do anything until he had the board chair, the clerk and
16 the superintendent all giving the ok.” On its face this allegation does not say what
17 “anything” was, only that consent was needed by three officials, which needed to be
18 obtained in some undefined way, in order for the LDPS negotiator to take action.
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21 From the above the complainant alleges the defendant bargained in bad faith and
22 beyond that, the defendant did not send representatives to the table with the authority to
23 bargain.
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25 In addressing the basis of the complaint there is one overriding issue. Whatever may or
26 may not have been said, by whom it may or may not have been said, and the context in
27 which whatever may or may not have been said, all came through the screen of an
28 intermediary – the Board appointed mediator. No direct observations were made by the
29 complaining party to whatever may or may not have occurred in the management
30 caucus attended by the mediator. Very simply, the basis of the entire complaint is not
31 backed up by any substantial evidence. Then, even if true, some of what may have
32 been said does not constitute an unfair labor practice; some might not constitute the
33 basis for an unfair practice when placed in appropriate context; and, in total, what may
34 or may not have been said does not rise to the level of a totality of conduct standard
35 needed to sustain an unfair labor practice charge. In fact, and in light of the totality of
36 conduct standard adopted by the Board of Personnel Appeals, see for instance,
37 Consolidated ULPs 2-2001 and 25-2001, Anaconda Police Protective Association vs.
38 Anaconda-Deer Lodge County and Anaconda-Deer Lodge County vs Anaconda Police
39 Protective Association, the parties have met subsequent to the third mediation session
40 in question, and they continue to meet to this day. There is no refusal to bargain on the
41 part of the employer.
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44 Beyond the nature of the evidence offered by the LEA further issues arise in this case
45 that bear directly on whether a finding of probable merit is in order. Communication in
46 mediation is subject to the privilege contained in Section 26-1-813, MCA. Moreover,
47 mediators cannot be called to testify as to what did or did not happen in the course of
48 mediation nor for that matter would the investigator breach the confidentiality of the
49 mediation process to ascertain what may have happened from the perspective of the
50

1 mediator. See, for instance, NLRB v. Joseph Macaluso, Inc., d/b/a Lemon Tree, 104
2 LRRM 2097, (9th Cir. 1980). Also see Board of Personnel Appeals rule ARM 24.26.695
3 (4) and (5).
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5 The investigator is charged to determine whether substantial evidence exists to warrant
6 a finding of probable merit. There is not substantial evidence presented on which to
7 make a finding of probable merit
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11 **III. Recommended Order**

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13 It is hereby recommended that Unfair Labor Practice Charge 9-2013 be dismissed.
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16 DATED this 23rd day of May 2013.
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20 BOARD OF PERSONNEL APPEALS

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23 By: _____
24 John Andrew
25 Investigator
26

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28 NOTICE

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30 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of
31 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss
32 may be appealed to the Board. The appeal must be in writing and must be made within
33 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the
34 Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to
35 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 _____ 2013, postage paid and addressed as follows:

JEFFREY WELDON
ATTORNEY AT LAW
PO BOX 2558
BILLINGS MT 59103 2558

VICKI L MCDONALD
ATTORNEY AT LAW
2422 APPLEWOOD AVENUE
BILLINGS MT 59102

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