

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 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 1-2014

13 DANIEL R. KENNEY,	)	
14 Complainant,	)	
15 -vs-	)	INVESTIGATIVE REPORT
16	)	AND
17 MONTANA PUBLIC EMPLOYEES	)	NOTICE OF INTENT TO DISMISS
18 ASSOCIATION; MEA-MFT AND	)	
19 AMERICAN FEDERATION OF STATE,	)	
20 COUNTY AND MUNICIPAL	)	
21 EMPLOYEES, COUNCIL 9,	)	
22 Defendants.	)	

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25 **I. Introduction**

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27 On July 5, 2013, Daniel R. Kenney, filed an unfair labor practice charge with the Board  
28 of Personnel Appeals alleging violations of 39-31-402(2), Montana Code Annotated by  
29 the above named labor organizations. Answers to the complaint were filed in timely  
30 manner by Quint Nyman, Executive Director, Montana Public Employees Association  
31 (MPEA); Timm Twardoski, Executive Director, American Federation of State, County  
32 and Municipal Employees Council 9 (AFSCME); and Eric Feaver, President, MEA-MFT.  
33 All three labor organizations denied any violation of 39-31-402(2), MCA.  
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36 John Andrew was assigned by the Board to investigate the charge and has  
37 communicated with the parties in the course of the investigation.  
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39 **II. Findings and Discussion**

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41 Dan Kenney is employed in the Department of Environmental Quality as an  
42 enforcement specialist. He is a member in good standing of the Montana Public  
43 Employees Association and has been actively involved in union matters including  
44 contract negotiation.  
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47 Mr. Kenney alleges that the three named labor organizations did not bargain in good  
48 faith in that they represented the interests of individuals outside their respective  
49 bargaining units rather than those employees for whom they are the exclusive  
50 bargaining representative. Further, Mr. Kenney alleges that the unions met with

1 representatives of the executive branch of state government in what the investigator will  
2 term side-bar discussions, and from that, returned with five options offered by  
3 management to resolve the major economic portions of bargaining. The contention is  
4 that this form of bargaining constituted an unfair labor practice as it failed to provide  
5 bargaining team members opportunity to formulate counter proposals. Essentially, the  
6 complaint of Mr. Kenney boils down to the assertion that the three unions failed to fairly  
7 represent his interests as well as those of other bargaining unit members  
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10 Two of the labor organizations, AFSCME and MEA-MFT have asserted, and correctly  
11 so, that they are not the exclusive bargaining agent for Mr. Kenney. As such, his  
12 complaint is not well taken against either of them. The investigator agrees. Mr.  
13 Kenney's complaint as applied to AFSCME and MEA-MFT is deficient as Mr. Kenney  
14 does not have standing to bring a complaint against either organization. MPEA is Mr.  
15 Kenney's exclusive bargaining representative, not AFSCME or MEA-MFT.  
16

17 Concerning the complaint and representations that may or may have not been made by  
18 union representatives and negotiators, to be certain, it is not as though negotiations  
19 between the unions and the State of Montana, including what transpired in the most  
20 recent legislative session, have not been highly visible and publicly aired. Further, it is  
21 also well recognized, and an established pattern over many years, that negotiations  
22 between the executive branch and the three largest unions for state employees, if they  
23 result in a change in base pay, become the basis for pay not only for rank and file  
24 bargaining unit members, but for all others in the executive branch and, generally  
25 speaking, the university system as well. It is thus understandable that statements were  
26 made by representatives of the unions that what they agreed to would also be what  
27 non-union members, including supervisors and others statutorily excluded from  
28 collective bargaining would, more than likely, receive as well. Statements of this nature  
29 do not represent bad faith bargaining, nor do they reflect a failure to bargain for the best  
30 interests of bargaining unit members. Rather, they reflect what has been reality and  
31 common practice for many years. Hand in hand with this is the recognition that,  
32 ultimately, what is finally agreed to in terms of wages, hours, benefits and conditions of  
33 employment must be ratified and agreed to in the various supplemental agreements  
34 negotiated throughout state government. The agreement thus far reached is still  
35 subject to further negotiation and ratification in the various agencies and bargaining  
36 units of state government. The process is not over.  
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40 Concerning the process used to reach the current agreement between the  
41 administration and the three unions, the original tentative agreement reached with the  
42 previous administration and carried forward by the current one called for 5% base pay  
43 increases in each year of the biennium as well as increases to insurance premium  
44 contributions. The unions had an obligation to stick to this agreement as it was  
45 bargained in good faith. To stray from it would put them in the position of committing an  
46 unfair labor practice. It is not surprising that their statements reflected the need to  
47 maintain a 5/5 position. However, once it was clear through legislative action that  
48 funding vis-à-vis the state pay plan was not available at anticipated levels, it was  
49 understandable that new negotiations would ensue based on the new reality. Given the  
50

1 length and depth of bargaining already done coupled with all that transpired during the  
2 legislative session it is not hard to imagine how set alternatives were formulated by the  
3 executive branch and provided to the unions with an opportunity to review the same,  
4 accepting or rejecting them, in whole or in part. That is precisely what transpired. An  
5 offer was made and it was deemed sufficient by the three largest unions, subject still to  
6 ratification in all the various agency agreements. The manner in which proposals were  
7 formulated, offered, and ultimately accepted is not outside the norms of bargaining.  
8 There is no basis for an unfair labor practice.  
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11 The above in mind, this complaint at its heart is a question of whether or not one union,  
12 MPEA, fairly represented a member, Dan Kenney. In this it is important to note that  
13 even Mr. Kenney acknowledges that of the three labor organizations named in his  
14 complaint MPEA, in his view, operated most in the scope of what Mr. Kenney expected  
15 of the unions in terms of bargaining obligations. That said, however, this remains a  
16 question of whether or not MPEA breached its obligation to fairly represent Mr. Kenney.  
17 In addressing this question one must first recognize that the duty of the Board of  
18 Personnel Appeals is not to determine whether a settlement that was reached was “fair”  
19 or could have been better than reached. Rather the responsibility of the Board is to  
20 determine whether or not a member has been fairly represented.  
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23 A union violates its duty of fair representation to the employees it represents only if its  
24 actions are “arbitrary, discriminatory or in bad faith . . .” Vaca v. Sipes, 386 U.S. 171, 190  
25 [64 LRRM 2369] (1967). To determine if the duty to fairly represent has been breached  
26 each element in the three part standard must be examined, Airline Pilots Ass’n, Int’l v.  
27 O’Neill, 499 U.S. 65, 77 [136 LRRM 2721] (1991). The Board of Personnel Appeals has  
28 adopted the Vaca standard and in Ford v. University of Montana and Missoula  
29 Typographical Union No. 277, 183 MT 112, 598 P.2d 604, (Mont 1979) the Montana  
30 Supreme Court in reviewing an unfair labor practice charge brought before the Board  
31 held:  
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34 In short, the Court has to find that the Union’s action was in some way a product  
35 of bad faith, discrimination, or arbitrariness. The mere fact that Bonnie Ford  
36 disagrees with the decision of the Union [in determining that her grievance was  
37 without merit] is not sufficient basis for a finding of breach of the duty of fair  
38 representation absent these factors.  
39

40 Although Ford addresses a question of moving forward with a grievance the same  
41 standards apply when considering whether a union fairly represented a member in  
42 contract negotiations. Very simply, there is no substantial evidence offered by Dan  
43 Kenney to substantiate that his union, or any of the unions for that matter, acted in an  
44 arbitrary or discriminatory manner.  
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47 In terms of the third prong of the test, bad faith, the good-faith conduct of a union is  
48 preserved unless it can be demonstrated that the conduct is sufficiently outside a “wide  
49 range of reasonableness” so as to be considered irrational. To establish a lack of good  
50 faith, there must be evidence of fraud, deceitful action, or dishonest conduct by the

1 union, Schmidt v. Electrical Workers (IBEW) Local 949, 980 F.2d 1167, 141 LRRM 3004  
2 (8<sup>th</sup> Cir. 1992) and Aguinaga v. Food & Commercial Workers, 993 F.2d 1167, 143  
3 LRRM 2400 (10<sup>th</sup> Cir 1993) Cert. Denied 510 U.S. 1072, 145 LRRM 2320 (1994). And,  
4 as the Ninth Circuit held, there is a mandated deferential standard of review in  
5 evaluating union actions. They can be challenged successfully only if wholly irrational  
6 and even “unwise” or “unconsidered” union decisions will not rise to the level of  
7 irrational conduct, Stevens v. Moore Bus. Forms, 18 F3d. 1443, 145 LRRM 2668 (9<sup>th</sup>  
8 Cir. 1994). As with the other two prongs of the test, there simply is no evidence offered  
9 or found by the investigator to warrant a finding that MPEA, or the other unions, did not  
10 operate in good faith. There is no fraud, deceitful action or dishonest conduct on the  
11 part of MPEA, or the other unions for that matter had Mr. Kenney had standing to bring  
12 such a charge against them. There was no breach of the duty of fair representation.  
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15 **III. Recommended Order**

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17 It is hereby recommended that MEA-MFT and AFSCME be dismissed entirely from this  
18 complaint as not being proper parties to this matter. It is further recommended that  
19 Unfair Labor Practice Charge 1-2014 as it applies to MPEA be dismissed as well.  
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22 DATED this 31st day of July 2013.  
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26 BOARD OF PERSONNEL APPEALS  
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29 By:   
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31 John Andrew  
32 Investigator  
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NOTICE

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

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CERTIFICATE OF MAILING

I, Wendy Knutson, do hereby certify that a true and correct copy of this document was mailed to the following on the 31<sup>st</sup> day of July 2013, postage paid and addressed as follows:

DANIEL R. KENNEY  
PO BOX 6476  
HELENA MT 59604

PRESIDENT ERIC FEAVER  
MEA MFT  
1232 EAST 6<sup>TH</sup> AVE  
HELENA MT 50601

EXECUTIVE DIRECTOR TIMM TWARDOSKI  
AFSCME COUNCIL 9  
PO BOX 5356  
HELENA MT 59604

EXECUTIVE DIRECTOR QUINT NYMAN  
MPEA  
PO BOX 5600  
HELENA MT 59604