

1 BOARD OF PERSONNEL APPEALS
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6

7 STATE OF MONTANA
8 BEFORE THE BOARD OF PERSONNEL APPEALS
9

10 IN THE MATTER OF UNFAIR LABOR PRACTICE 19-2014:
11

12 MONTANA PUBLIC EMPLOYEES)
13 ASSOCIATION,)
14 Complainant,)
15 vs.) RECOMMENDED ORDER
16) STAYING PROCEEDINGS
17)
18 THE TOWN OF WEST YELLOWSTONE)
19 Defendant,)
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22 I. Introduction
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24 On May 9, 2014, the Montana Public Employees Association (MPEA) filed an unfair labor
25 practice charge with the Board of Personnel Appeals alleging that the Town of West
26 Yellowstone (Town) retaliated against Officer Kevin Conlon as a result of Officer Conlon
27 filing a grievance over terms and conditions of employment. Although not specifically cited
28 by the complainant, Sections 39-31-401(1),(4), and (5), MCA are applicable. In Answer to
29 the complaint filed by William B. Hanson, counsel for the Town, the Town denied
30 committing an unfair labor practice.
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33 On June 25, 2014, MPEA filed an amended complaint with the Board alleging that Officer
34 Conlon was terminated by the Town of West Yellowstone, again in retaliation for filing the
35 grievance over terms and conditions of employment. On behalf of the Town, Mr. Hanson
36 filed an Answer to the amended charge, again denying there was an unfair labor practice
37 committed.
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40 Pursuant to Section 39-31-405 (1), MCA John Andrew was appointed by the Board of
41 Personnel Appeals to investigate the charge. During the course of the investigation
42 contact was made with representatives of both parties as was deemed necessary.
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45 II. Findings and Discussion
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47 This matter revolves around two distinct yet arguably related occurrences. The first
48 concerns a change in status and attendant wage increase for Officer Conlon with the
49 request for the same by Officer Conlon being denied by the Town and the Town then
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1 reassigning Officer Conlon from day shift to night shift and removing Officer Conlon
2 from his assignment as school resource officer. That matter has its beginnings in March
3 of 2014 and was grieved under the terms of the collective bargaining agreement
4 between the West Yellowstone Police Protective Unit of MPEA and the Town of West
5 Yellowstone. That grievance is in limbo primarily because of disagreement between the
6 parties over timeframes and the meaning and intent of language in Step III of the
7 grievance procedure. It is this occurrence that is the subject of the charge filed with the
8 Board on May 9, 2014.
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11 The second occurrence concerns Officer Conlon's termination by the Town on June 9,
12 2014. That occurrence as well is subject to a grievance filed by MPEA. The grievance
13 is now at Step IV of the grievance procedure. This occurrence is before the Board in
14 the form of an amendment to the original unfair labor practice charge. This amendment
15 was filed on June 25, 2014. The issue of Officer Conlon's discharge is subject to Title
16 7, Chapter 32, Part 41 of the public safety statutes with Office Conlon, in addition to
17 filing the instant charge with the Board, also electing to appeal his decision under the
18 grievance procedure of the collective bargaining agreement rather than through the
19 police commission, Section 7-32-4164, MCA.
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23 In both occurrences MPEA contends the actions taken by the Town were in retaliation
24 for Officer Conlon filing a grievance, with the filing of grievances being a protected
25 activity under Montana law as part of the ongoing obligation to bargain in good faith.
26 Although not specifically cited by the complainant, Sections 39-31-401 (1) and (5), MCA
27 are applicable. Similarly, although not specifically cited by the complainant, Section 39-
28 31-401(4), MCA is implicated as well.
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31 Since there is a collective bargaining agreement in place between MPEA and the Town,
32 some sections of that contract are particularly applicable to this matter. Article 13
33 provides that "Montana State Law and the article of this agreement shall govern the
34 discharge or suspension of Police Department Employees." Article 13 further provides
35 that the "Employer shall not discharge non-probationary employees without just cause."
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38 Article 14 defines a grievance as "an employee's expressed feeling of dissatisfaction
39 concerning conditions of employment or treatment by the Town administration or
40 supervisors." Article 14 then proceeds to define the grievance processing procedure
41 with Step V providing for final and binding arbitration with the panel of potential
42 arbitrators to be provided by the Board of Personnel Appeals.
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45 In the course of investigating this matter the investigator finds there is merit to the initial
46 complaint and the amendment as well. It is apparent that beyond the triggering event, a
47 less than stellar evaluation of Office Conlon by the Chief, and a comment the Chief
48 made in passing that evaluation to Officer Conlon, there are far more cumulative
49 incidents involving the two, all of which when coupled with the comment of the Chief
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1 provide substantial evidence of possible retaliation. Included in this list of incidents, but
2 certainly not all inclusive, are Officer Conlon's participation in a lawsuit against the
3 Town; Officer Conlon's signature on a petition drafted by MPEA to the Town Council
4 expressing no confidence in the Chief; Officer Conlon submitting complaints to oversight
5 agencies concerning activities of the Chief; and Officer Conlon's cooperation with those
6 agencies investigating activities of the Chief. The nexus of these activities to the denial
7 of the change in status and ultimately to the discharge are clearly sufficient to warrant a
8 hearing, although the nexus of some of the incidents and their relationship to activities
9 protected under the Collective Bargaining Act is in question. In a similar vein it is
10 specifically noted that until the last year when he began serving on the bargaining team
11 Officer Conlon had not been an officer in the Association nor, to his recollection, had he
12 ever filed grievances against the town, other than the current ones, during his tenure
13 with the Town. According to both the Town and MPEA no grievances have been filed
14 by the Association in the past 18 months, and according to Officer Conlon, any
15 grievances prior to then were few and far between. So, although there is a rocky
16 relationship between the Town, Officer Conlon, and MPEA, all the issues that exist are
17 not confined merely to the bargaining relationship nor is any enmity that might exist
18 confined solely to the bargaining relationship of the parties.
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23 In the further course of investigating the complaint and amended complaint the
24 investigator has explored the possibility of deferring either the initial charge and/or the
25 amended charge to arbitration. MPEA has opposed deferral in its entirety. The Town of
26 West Yellowstone suggested deferral of the amended complaint, but not the original
27 complaint. Subsequently, the Town modified its position and agreed to deferral and to
28 proceed to final and binding arbitration with a waiver of the intermediary steps in the
29 grievance procedure while still preserving its arguments on timeliness and procedural
30 issues on the initial grievance with the arbitrator addressing the contract interpretation
31 issues raised in the initial complaint as well as the question of the discharge.
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34 Section 7-31-4264, MCA provides:

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37 Right to Appeal. A member of the police force who is disciplined, suspended, removed,
38 or discharged as a result of a decision by the mayor, city manager, or chief executive
39 has a right of appeal:

- 40 (1) pursuant to the terms of a grievance procedure contained in a collective bargaining
41 agreement if the member is covered by a collective bargaining agreement; or
42 (2) to the police commission. A final decision of the police commission may be appealed
43 to the district court of the proper county. The district court has jurisdiction to review all
44 questions of fact and all questions of law in a suit brought by any officer or member of
45 the police force. A suit to review a decision or an order or for reinstatement to office may
46 not be maintained unless the suit is begun within a period of 60 days after the decision
47 by the police commission has been filed with the city clerk.
48
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50 As previously found, Officer Conlon invoked his appeal rights under Section 7-31-4264

1 (1), MCA. This statute has been interpreted by the Montana Supreme Court in City
2 County of Butte-Silver Bow vs Montana State Board of Personnel Appeals, 225 Mont
3 286, 732 P.2d 837, (Mont 1987). In that case, one involving the termination of a police
4 officer employed by Butte Silver-Bow, and a refusal by Butte-Silver Bow to process the
5 grievance, the dissenting justices point out that, "The majority members ascribe
6 'exclusive' jurisdiction to the police commission under 7-32-4155, MCA." The dissenting
7 opinion further points out that a refusal to process a grievance constitutes bad faith
8 bargaining and that issue is a matter properly before the Board of Personnel Appeals.
9 In fact, recognizing Section 7-32-4155, MCA as the exclusive remedy in the case as
10 before them is exactly what the majority opinion does. The majority opinion also voices
11 the concern present when the same issue/s are being adjudicated in different forums
12 with the inherent potential for competing and even opposite results.
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16 The above cited case would be precisely on point with the instant matter but for the fact
17 that it did not contain one element present in the matter before the investigator, the
18 alleged retaliation. Thus, the questions for the investigator are, should the Board be
19 involved at all in the termination issue? Should the Board be involved in the initial
20 charge? If the Board has involvement in either issue, should the Board withhold its
21 actions and defer the matter to the grievance mechanism of the collective bargaining
22 agreement?
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25 Since the investigation reveals there is substantial evidence retaliation occurred, the
26 Board, at the least has an obligation to remain involved in the initial complaint.
27 Arguably, the Board also has an obligation to remain involved in the amended complaint
28 if it were to be determined that retaliation did occur and it was a factor in Officer
29 Conlon's termination. However, any remedy, if there is one the Board might have, is
30 clearly limited by the holding in Butte-Silver Bow and even then it may be limited to just
31 the initial charge. It might even be that the Board has no remedial powers at all.
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34 The above in mind, the issue is how the Board is to effectuate the broad policy
35 implications of the collective bargaining act, i.e., ensure good faith bargaining and
36 preventing retaliation for engaging in protected activities, in a charge of this nature given
37 its jurisdictional and procedural issues? In ULP 43-81, William Converse v Anaconda
38 Deer Lodge County and ULP 44-81 James Forsman v Anaconda Deer Lodge County,
39 August 13, 1982, the Board of Personnel Appeals adopted National Labor Relations Board
40 precedent set forth in Collyer Insulated Wire, 192 NLRB 387, 77 LRRM 1931, by deferring
41 certain unfair labor practice proceedings to an existing negotiated grievance/arbitration
42 procedure. In so doing, the Board removed a possible source of conflict between the
43 Board of Personnel Appeals and the dispute resolution mechanism contained within the
44 parties' Collective Bargaining Agreement, something recognized in the Butte-Silver-Bow
45 case. The Board has taken that a step further by adopting administrative rules providing
46 for stays in its processes while recognizing the role of arbitration in resolving contractual
47 disputes. This rule is well founded in the long established recognition that contract
48 interpretation is for the arbitrator and not the courts or administrative agencies, Wiley &
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1 Sons v. Livingston, 376 US 543, 557-58, 55 LRRM 2769 (1964). See also, the oft
2 referred to Steelworkers' Trilogy, specifically Steelworkers v. American Manufacturing
3 Co., 363 US 564, 46 LRRM 2414, 34 LA 559 (1960), where the Supreme Court stated
4 at Pages 567-568 as follows:
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7 "The function of the court is very limited when the parties have
8 agreed to submit all questions and contract interpretation to the
9 arbitrator. It is confined to ascertaining whether the party
10 seeking arbitration is making a claim which on its face is governed
11 by the contract. Whether the moving party is right or wrong is a
12 question of contract interpretation for the arbitrator. In these
13 circumstances the moving party should not be deprived of the
14 arbitrator's judgment, when it was his judgment and all that
15 cannotes that was bargained for."
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18 It is also instructive to look to other Montana law. When legislation passed that
19 incorporated arbitration into grievances in school districts, the legislature saw fit to add a
20 caveat to the requirement. 39-31-306 (5), MCA provides in pertinent part:
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23 An agreement to which a school is a party must contain a grievance procedure
24 culminating in final and binding arbitration of unresolved and disputed
25 interpretations of agreements. The aggrieved party may have the grievance or
26 disputed interpretation of the agreement resolved either by final and binding
27 arbitration or by any other available legal method and forum, but not by both.
28 After a grievance has been submitted to arbitration, the grievant and the
29 exclusive representative waive any right to pursue against the school an action or
30 complaint that seeks the same remedy. If a grievant or the exclusive
31 representative files a complaint or other action against the school, arbitration
32 seeking the same remedy may not be filed or pursued under this section.
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36 No similar statute applies to arbitration provisions in the remainder of the public sector,
37 however, the Board of Personnel Appeals has long ago adopted the process of deferral
38 when there was the possibility that the an unfair labor practice charge could find
39 resolution through the grievance process when that process contains final and binding
40 arbitration.
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43 If there were no issue of alleged retaliation associated with this case it would not be at
44 all unusual for the Board to defer a case of this nature to arbitration. In instances
45 alleging retaliation, however, deferral is less probable because of the important public
46 policy considerations at the heart of retaliation cases. This case, however, is unique in
47 large part because of the statutes on discharge applicable to police officers. Further,
48 although there is evidence of retaliation against Officer Conlon, the extent to which that
49 ties to protected activities under the collective bargaining act is questionable. Put
50 another way, if there were retaliation, how much of any retaliation is related to protected

1 activities under the bargaining law? To be sure, there is a possible need for a hearing
2 on the issue, but other than the two grievance involving Officer Conlon subject to this
3 charge, there is little, if any, history of grievances between the Association and the
4 Town. And, if there is enmity between the Association and the Town, much of that may
5 be diminished as the Chief has now been terminated by the Town. In short, many of the
6 standards for deferral¹ are met in this case, and if some are not met, or are marginally
7 met, there remains the issue of the statute on discharge or suspension of police officers
8 and how that fits in the context of this unfair labor practice charge.
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11 Officer Conlon opted to grieve his discharge under the provisions of 7-32-4164, MCA.
12 In doing this while still pursuing his remedies under the collective bargaining act Officer
13 Conlon created the potential for not only an administrative process likely duplicative of
14 arbitration, but also, conceivably competing, and potentially opposite remedies. The
15 decision for the investigator is not an easy one, but weighing the options, in light of the
16 statute, the decision of the Montana Supreme Court and the just cause standard in
17 which an arbitrator will need to operate, the opinion of the investigator is that this matter,
18 the initial charge, as well as the amendment, should be deferred to arbitration. In
19 making this recommendation/finding of merit the investigator is keenly aware of the
20 Board's recent adoption of a rule related to deferral. As stated, this case is not the norm
21 and in other circumstances deferral may not be appropriate, but given the entirety of the
22 situation involving MPEA and the Town of West Yellowstone deferral is appropriate.
23 One, or both, of the parties have the ability to appeal this recommendation and one, or
24 both, of the parties have the ability to petition to lift the stay in proceedings should they
25 deem that appropriate or should they deem in some fashion that the actions of the
26 arbitrator are contrary to public policy, did not vindicate public policy or were not
27 otherwise conducted in a fair and regular manner.²
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32 III. RECOMMENDED ORDER

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34 It is hereby recommended that further action on unfair labor practice charge 19-2014 as
35 well as amended unfair labor practice charge 19-2014 be stayed and the matter deferred
36 to arbitration.
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47 ¹ As enunciated in Winchester v Mountain Line, 1999 MT 134, 982 P.2d 1042, they are: (1) long
48 standing bargaining relationship; (2) No enmity by the employer toward the exercise of
49 protected rights; (3) employer manifested willingness to arbitrate; (4) an arbitration clause
50 sufficiently broad to cover the dispute at issue; and (5) the collective bargaining agreement and
its meaning lay at the center of the dispute and are eminently well suited to resolution by
arbitration.

² The investigator notes that Step IV of Article 14 allows for a transcript of the arbitration
proceedings, something the parties might consider as this matter progresses.

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3 Dated this 28th day of August 2014.
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7 BOARD OF PERSONNEL APPEALS
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11 By: _____
12 John Andrew, Investigator
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15 **SPECIAL NOTICE:**

16 Although formally adopted, new rule ARM, 24.26.680(A) is not yet published. The text of
17 the new rule on stay of proceedings and appeal rights thereunder, is therefore below:
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19 ARM 24.26.680(A). If during the course of the informal investigation of the unfair labor
20 practice charge, the board's agent determines that the charge is one that may be
21 resolved through deferral to the final and binding arbitration provisions contained in the
22 collective bargaining agreement between the parties, the board's agent may issue a
23 recommended order staying the board's proceedings.
24

25 (2) A party may appeal the recommended order to stay proceedings by filing an appeal
26 with the board within 14 days after service of the recommended order.
27

28 (3) An appeal of the recommended order to stay proceedings must clearly set forth the
29 specific factual or legal reasons indicating error. At the discretion of the board,
30 interested parties will be afforded an opportunity to respond to an appeal of the
31 recommended order.

32 (4) The board or the board's agent has the discretion to dissolve the stay and continue
33 with its investigation into the unfair labor practice if a party makes a proper showing
34 that:

35 (a) the unfair labor practice charge has not been resolved in a reasonable amount of
36 time;

37 (b) the arbitration decision has not resolved the unfair labor practice; or

38 (c) the decision to stay the proceedings was inconsistent with the laws that govern
39 collective bargaining in Montana.

40 (5) A decision by the board or the board's agent to dissolve a stay is not appealable.

41 (6) If the board affirms and adopts the recommended order to stay proceedings, the
42 stay remains in place until there is a subsequent request to review the stay or the
43 board's order affirming and adopting the recommended order is removed by operation
44 of court order.
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48 Any appeal of this Recommended Order Staying Proceedings must be filed with the
49 Board of Personnel Appeals, P.O. BOX 201503, Helena, MT 59620-1503 within 14
50 days after service of the recommended order.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing/attached "Recommended Order Staying Proceedings" was served upon the following on the _____ day of _____, 2014, postage paid and addressed or delivered as indicated:

BOB CHATRIAND
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716 SOUTH 20TH STE 101
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