

1 Department of Labor and Industry
2 Board of Personnel Appeals
3 PO Box 201503
4 Helena, MT 59620-1503
5 (406) 444-0032
6
7

8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10
11 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 19-2015

12
13 TEAMSTERS UNION LOCAL NO. 2.)
14 Complainant,)
15 -vs-) INVESTIGATIVE REPORT
16) AND
17 ANACONDA-DEER LODGE COUNTY,) FINDING OF PROBABLE MERIT
18 Defendant.)
19)
20)
21)

22
23 **I. INTRODUCTION**

24
25 On February 23, 2015, Teamsters Local No. 2 (Local 2, or Union), through its field
26 representative Erin Foley, filed an unfair labor practice charge with the Board of
27 Personnel Appeals alleging Anaconda-Deer Lodge County (ADLC) violated Sections
28 39-31-401(1), 39-31-201, and 39-31-401(1) and (5) of the Montana Code Annotated by
29 refusing to process a grievance to final and binding arbitration. In Answer filed with the
30 Board on March 10, 2015, ADLC denied committing an unfair labor practice.
31

32
33 John Andrew was assigned by the Board to investigate the charge and has reviewed
34 the information submitted by the parties and communicated with them as necessary in
35 the course of the investigation.
36

37 **II. FINDINGS AND DISCUSSION**

38
39 This case begins on or about October 2, 2014, at which point the Union filed a
40 grievance on behalf of Mike McNamara, a member of the Anaconda-Deer Lodge
41 County Detention Unit. Mr. McNamara had been suspended for three days by ADLC
42 with that suspension being the basis for the grievance. The investigator takes note that
43 in a previous complaint, Unfair Labor Practice Charge 9-2015, the Union complained
44 that ADLC had failed to provide information necessary for the Union to process the
45 grievance and that ADLC had refused to arbitrate the matter. With the production of
46 information relevant to the grievance by ADLC, the investigator dismissed ULP 9-2015
47 on the basis that with the information provided the Union was in a position to define its
48 grievance and proceed with the grievance if it decided to do so. Subsequently, the
49 Union did further define its position, but ADLC refused to strike arbitrators, which lead to
50 the instant charge.

1
2 The current collective bargaining agreement between ADLC and Local 2 is in effect
3 from July 1, 2013 through June 30, 2015. For all periods of this dispute the current
4 contract, or its predecessor and its identical grievance procedure, including a final and
5 binding arbitration provision, have been in full force and effect.
6

7 ADLC contends that the subject matter of the McNamara grievance is not covered
8 within the four corners of the contract. Therefore, in their view there is no need to
9 proceed to arbitration and, therefore, no basis for the unfair labor practice charge. On
10 the other hand, the Union contends the dispute is subject to the bargaining agreement,
11 the grievance procedure, and final and binding arbitration. The Union cites the reasons
12 for its position, and the articles of the contract allegedly violated as being:
13

14 Article V: Management Rights: The County cannot discipline an employee in
15 violation of state law. That includes statutory law, Constitutional law, Contractual
16 law, and policies of Anaconda Deer Lodge County. The county violated Mr.
17 McNamara rights under the law, the constitution and the policies when they
18 suspended him for 3 days without pay. The county did not have just cause to do
19 so and violated his due process rights as well.
20

21 Article X: Seniority: ALDC (sic) can't infringe upon or terminate an employee's
22 seniority rights without just cause. The county did not have just cause to suspend
23 him for 3 days without pay. Mr. McNamara's seniority rights were violated when
24 he was suspended for 3 days without pay.
25

26 Article XIII: Grievance Procedure: The Chief Executive wrote a letter stating for
27 Mr. McNamara to file a grievance consistent with language¹³ found in the
28 Detentions Unit's Collective Bargaining Agreement, and has not been given due
29 process since filing the grievance.
30
31

32 The letter referenced by the Union is one dated September 26, 2014, signed by Connie
33 Ternes Daniels, ADLC's Chief Executive. It came at the conclusion of an investigation
34 conducted per ADLC policy, and advised Mr. McNamara that, if he disagreed with the
35 three day suspension, he could grieve the decision under the terms of the collective
36 bargaining agreement.
37

38 The Union further offers that there was an ongoing understanding that any issues
39 involving grievances were to be processed up to and including final and binding
40 arbitration.
41

42 ADLC disagrees with the interpretation offered by Local 2 and asserts that the question
43 of whether or not Mr. McNamara engaged in activities fostering a hostile work
44 environment – the basis of the disciplinary action - are not within the four corners of the
45 contract. ADLC offers that the language of the contract is clear in that Article XII, the
46 grievance procedure provides:
47
48
49
50

1 The parties agree that any difference involving the interpretation of this
2 Agreement which cannot be settled among themselves, may be submitted to
3 arbitration upon request of either party. The written notice to proceed to
4 arbitration must be submitted to the other party within five (5) days of the
5 agreement is reached that it cannot be settled between the parties.
6

7
8 ADLC also disagrees with the proposition that it agreed to submit all issues to final and
9 binding arbitration, only those subject to the four corners of the bargaining agreement.

10
11 In a case of this nature, the Board of Personnel Appeals, and by extension, the
12 investigator, are faced with an issue of the appropriate forum for resolution for disputes
13 involving application and interpretation of the collective bargaining agreement. In the
14 investigative phase the issue is one of whether there is substantial evidence to support
15 a finding of probable merit. Specifically, ADLC asks the investigator to dismiss the
16 complaint as without merit. The Union asks the investigator to find merit to the
17 complaint the result of which would, in the view of the Union, compel arbitration. In
18 either instance, to do what is requested by the parties would require the investigator to
19 interpret the collective bargaining agreement.

20
21 One option for the investigator is to recommend the pending charge be stayed and the
22 case deferred to arbitration. There is established precedent for this as the Board has
23 long held that matters involving contract interpretation are properly before an arbitrator
24 be the issue one of whether the dispute is properly before the arbitrator or whether the
25 issue is one of the actual substance of the grievance. In ULP 43-81, William Converse v
26 Anaconda Deer Lodge County and ULP 44-81 James Forsman v Anaconda Deer Lodge
27 County, August 13, 1982, the Board of Personnel Appeals adopted National Labor
28 Relations Board precedent set forth in Collyer Insulated Wire, 192 NLRB 387, 77 LRRM
29 1931, by deferring certain unfair labor practice proceedings to an existing negotiated
30 grievance/arbitration procedure. In so doing, the Board removed a possible source of
31 conflict between the Board of Personnel Appeals and the dispute resolution mechanism
32 contained within the parties' Collective Bargaining Agreement. The Board has taken that a
33 step further by adopting administrative rules providing for stays in its processes, while
34 recognizing the role of arbitration in resolving contractual disputes.

35
36 In determining whether or not a matter should be stayed and referred to arbitration
37 guidance is found in Winchester v Mountain Line, 1999 MT 134, 982 P.2d 1042,
38 wherein the Montana Supreme Court cited standards for deferral with those standards
39 being:

- 40 (1) a long standing bargaining relationship;
- 41 (2) no enmity by the employer toward the exercise of protected rights;
- 42 (3) an employer manifested willingness to arbitrate;
- 43 (4) an arbitration clause sufficiently broad to cover the dispute at issue; and
- 44 (5) the collective bargaining agreement and its meaning lay at the center of the
45 dispute and was thus eminently well suited to resolution by arbitration
46

47
48 As the National Labor Relations Board held in United Technologies Corp, 268 NLRB
49 557, (1984), in deferring a case to arbitration:
50

1 It is fundamental to the concept of collective bargaining that the parties to a
2 collective bargaining agreement are bound by the terms of their contract. Where
3 an employer and a union have voluntarily elected to create dispute resolution
4 machinery culminating in final and binding arbitration, it is contrary to the basic
5 principles of the National Labor Relations Act for the National Labor Relations
6 Board to jump into the fray prior to an honest attempt by the parties to resolve
7 their disputes through that machinery. For dispute resolution under the
8 grievance-arbitration process is as much a part of collective bargaining as the act
9 of negotiating the contract. In our view, the statutory purpose of encouraging the
10 practice and procedure of collective bargaining is ill-served by permitting the
11 parties to ignore their agreement and to petition this Board in the first instance for
12 remedial relief.
13
14

15 Here, there is an established and relatively long bargaining relationship with no
16 demonstrated enmity by the employer toward the exercise of protected rights. The
17 arbitration provision cited above is arguably sufficiently broad to cover the dispute –
18 “any differences involving the interpretation of this Agreement” - and the meaning of the
19 agreement – whether the issue is properly before the arbitrator or not, would answer the
20 charge filed before the Board. This leaves the issue of whether the employer has
21 manifested a willingness to arbitrate. On that issue ADLC does not have a willingness
22 to arbitrate. Although deferral would otherwise be appropriate, because the employer
23 does not have a willingness to arbitrate a stay of this charge and deferral does not seem
24 appropriate at the investigative level.
25

26 The above in mind, ADLC asks that the investigator recommend dismissal of this
27 charge given that, in the opinion of ADLC, the matter is clearly not covered by the
28 collective bargaining agreement. To do this, the investigator is thus asked to do what
29 the Board of Personnel Appeals, as well as the National Labor Relations Board have
30 clearly indicated is not a task to be taken lightly by either board – to bypass the
31 mechanism created by the parties to resolve disagreements over contract language, or
32 in this case the allegation of lacking contract language. If for no other reason than that,
33 a recommended order of dismissal by the investigator does not seem appropriate.
34

35 It is fundamental that the processing of grievances, up to and including final and binding
36 arbitration if contained in the bargaining agreement, is part of the ongoing obligation to
37 bargain in good faith, assuming the bargaining agreement is not expired. On its very
38 face, the Union has come forward with substantial evidence of an unfair labor practice.
39 Given, as previously found, that other options seem precluded, the role of the
40 investigator is to determine whether or not substantial evidence exists to warrant a
41 finding of probable merit. That evidence does exist, and when coupled with the
42 disputed facts between the parties, an evidentiary hearing is in order to determine
43 whether the preponderance of evidence will demonstrate that a violation of the
44 bargaining act occurred and/or the appropriate forum in which this matter should
45 ultimately be resolved.
46
47
48
49
50

1 **III. Recommended Order**

2
3 This investigation has shown that based on the available evidence there is probable
4 merit to the unfair labor practice charge. Accordingly, pursuant to Section 39-31-405,
5 MCA, the Board will be issuing a notice of hearing on the unfair labor practice
6 complaint.
7

8
9
10 DATED this 16th day of April 2015.

11
12
13 BOARD OF PERSONNEL APPEALS

14
15
16 By: _____
17 John Andrew
18 Investigator
19

20
21
22 NOTICE

23 ARM 24.26.680B (6) provides: As provided for in 39-31-405 (4), MCA, if a
24 finding of probable merit is made, the person or entity against whom the charge is filed
25 shall file an answer to the complaint. The answer shall be filed within ten (10) days with
26 the Investigator at PO Box 201503, Helena MT 59620-1503.
27

28
29
30 CERTIFICATE OF MAILING

31
32 I, _____, do hereby certify that a true and correct copy
33 of this document was mailed to the following on the _____ day of _____
34 2015, postage paid and addressed as follows:
35

36 CONNIE TERNES DANIELS CEO
37 ANACONDA-DEER LODGE COUNTY
38 800 SOUTH MAIN
39 ANACONDA MT 59711
40

41
42 ERIN FOLEY
43 TEAMSTERS LOCAL 2
44 PO BOX 3745
45 BUTTE MT 59702
46

47 DON KLEPPER
48 PO BOX 4152
49 MISSOULA MT 59806 4152
50

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 19-2015:

TEAMSTERS UNION LOCAL NO. 2,)	Case No. 1599-2015
)	
Complainant,)	
vs.)	ORDER RECOMMENDING
)	GRANTING
)	COMPLAINANT'S
ANACONDA-DEER LODGE COUNTY,)	MOTION FOR SUMMARY
)	JUDGMENT
Defendant.)	

* * * * *

I. INTRODUCTION

On February 23, 2015, the Teamsters Union Local #2 ("Union") filed an Unfair Labor Practice Charge with the Board of Personnel Appeals ("BOPA") against Anaconda Deer Lodge County ("ADLC"). The charge alleged that ADLC had failed to arbitrate a grievance it filed over the disciplinary action taken against one of its members, Michael McNamara.

ADLC responded to the charge on March 10, 2015 disputing all the bases for the alleged unfair labor practice. On April 17, 2015, BOPA's investigator issued an Investigative Report and Finding of Probable Merit. Thereafter, the Office of Administrative Hearings issued a Notice of Hearing on behalf of BOPA, appointing the undersigned Hearing Officer, who issued a Scheduling Order after a telephone conference with counsel for the parties, and ADLC filed its Answer to the Charge in compliance with that order.

On July 9, 2015, the Union filed a Motion for Summary Judgment on the grounds that ADLC's failure to arbitrate the McNamara grievance was a violation of the CBA and an unfair labor practice. On July 13, 2015, ADLC filed its own Motion for Summary Judgment arguing in essence that the CBA grievance provision did not require it to arbitrate the McNamara grievance.

II. UNDISPUTED FACTS

1. Anaconda-Deer Lodge County (County) is a public employer as defined by Section 39-31-103 (10) MCA.

2. Erin Foley, is a Business Agent for Union Local No. 2 which is a labor organization as defined by Section 39-31-103 (6) MCA.

3. The Union and Employer entered into a collective bargaining agreement (CBA) with the detention unit of the County covering the period of July 1, 2013 through June 30, 2015.

4. Michael McNamara is employed by the County as a detention officer and is a member of the Union.

5. On or about September 3, 2014, a complaint was filed against Mr. McNamara by a co-employee alleging that Mr. McNamara created a hostile work environment. Mr. McNamara was placed on paid administrative leave pending an investigation.

6. On September 26, 2014, Anaconda-Deer Lodge County suspended William McNamara for three days without pay after it determined he had violated the workplace violence provision of the employer's personnel policy. The three days McNamara was suspended were September 28-30, 2014.

7. The suspension letter specifically refers to Article V: (A) of the CBA, the management rights clause, as a basis for suspending Mr. McNamara. The suspension letter also refers to Article V (b) of the CBA which provides:

b. The retention of these rights does not preclude any employee from filing a grievance.

8. CEO Ternes-Daniels further specifically states in the suspension letter:

"If you disagree with my decision, you are able without penalty, harassment, or retaliation, to file a grievance consistent with language found in Detention Unit's Collective Bargaining Agreement 2013-2014 [sic] Article XII Grievance Procedure. Enclosed is a copy of the procedure.

9. On September 30, 2014, the Union sent an information request to ADLC officials requesting information relevant to the suspension.

10. On or about October 2, 2014, the Union filed a grievance regarding McNamara's suspension.

11. On October 16, 2014, ADLC sent a letter to the Union asking for clarification about its grievance.

12. On October 22, 2014, the Union responded to the October 16 letter.

13. On October 28, 2014, Chief Executive Ternes-Daniels called the union office to inform them that all relevant documents would be sent out that day or the next.

14. On October 30, 2014, the Union received a two-page letter in the mail with a copy of the collective bargaining agreement and the ADLC personnel manual. On or about that same date the Union filed an unfair labor practice regarding the failure to supply the requested information.

15. On December 30, 2014, the Union received the requested information through BOPA's agent - John Andrew. Subsequently, the investigator for the Board of Personnel Appeals dismissed the ULP. ULP No. 9-2015, Final Order to Dismiss (Jan. 27, 2015).

16. On January 20, 2015, the Union requested to arbitrate the grievance it had filed regarding McNamara's suspension.

17. On January 22, 2015, the Union provided the questions to be arbitrated:

ADLC violated the Collective Bargaining Agreement including but not limited to the following provisions:

1. Article V Management Rights:

The County cannot discipline an employee in violation of state law. That includes statutory law, Constitutional Law, contractual law, and policies of Anaconda Deer Lodge County. The county violated Mr. McNamara's rights under the law, under the constitution and the policies when they suspended him for 3 days without pay. The county

did not have just cause to do so and violated his due process rights as well.

2. Article X. Seniority: ALDC can't infringe upon or terminate an employee's seniority rights without just cause. The county did not have just cause to suspend him for 3 days without pay. Mr. McNamara's seniority rights were violated when he was suspended for 3 days without pay.

3. Article XII: Grievance procedure: The Chief Executive wrote a letter stating for Mr. McNamara to file a grievance consistent with the language found in the Detention Unit's Collective Bargaining Agreement, and has not been given due process since filing the grievance.

The dispute between the parties is over these terms because the ADLC's discipline of Mr. McNamara was in violation of the law and the contract.

18. On January 28, 2015, Erin Foley emailed Don Klepper, ADLC representative asking whether he had received the documentation for arbitration and set a time to pick arbitrators. Klepper responded that he understood the ULP was dropped and that ADLC was concerned that another grievance might be filed by the Union. Foley informed Klepper that there was not an additional grievance filed.

19. On February 2, 2015, Foley emailed Klepper again to inquire about arbitration documentation and to provide her availability for picking an arbitrator.

20. On or about February 3, 2015, Bill Rowe and Foley had a phone conversation with Klepper wherein he stated that ADLC would review the documents and respond.

21. On February 9, 2015, Foley emailed Klepper to inform him she had not heard from ADLC regarding the McNamara grievance.

22. On February 10, 2015, Klepper emailed Foley to inform her that she should be receiving a response from ADLC in the next day or two.

23. On February 17, 2015, Foley and Rowe had a phone conference with Klepper where Klepper indicated that the Union should have received a response by that day.

24. On February 18, 2015, Foley informed Klepper that the Union still had not received a response.

25. Later that day, Foley received the response from ADLC which stated "we have finished our review of the dismissed ULP [regarding the McNamara documents], the CBA and your new grievance and it is our opinion that the grievance is without merit and we are not going to strike arbitrators with the Union. There simply is no attachment point in the contract language you have cited."

26. On February 25, 2015, the Union filed the instant unfair labor practice alleging that ADLC's conduct described in findings 2-27 constituted an unfair labor practice as described in Mont. Code Ann. 39-31-405 (1) and (5).

III. PROPRIETY OF SUMMARY JUDGMENT IN A UNIT CLARIFICATION PROCEEDING

Motions may be made within contested case proceedings before the Board of Personnel Appeals. Admin. R. Mont. 24.16.212. In the event a motion is made, it must state the relief requested and shall be accompanied by affidavits setting forth the grounds upon which the motion is based. Answering affidavits, if any, must be served on all parties. *Id.*

The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials. *Klock v. City of Cascade*, (1997), 284 Mont. 167, 173, 943 P.2d 1262, 1266. Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where "the pleadings . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Peila, supra.*

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once a party moving for summary judgment has met the initial burden of establishing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law, the burden shifts to the nonmoving party to establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that the moving party is not entitled to judgment as a matter of law. *Meloy v. Speedy Auto Glass, Inc.*, 2008 MT 122, ¶18 (citing *Phelps v. Frampton*, 2007 MT 263, ¶16, 339 Mont. 330,

¶16, 170 P.3d 474, ¶ P16). If no such countervailing evidence is presented and the motion demonstrates that the movant is entitled to summary judgment, entry of summary judgment in favor of the movant is appropriate. *Klock, supra*, 284 Mont. at 174-75, 943 P.2d at 1267.

In the instant case, the parties do not dispute the underlying facts, only whether based upon those facts, an unfair labor practice has occurred.

A. The Unfair Labor Practice

The question that must be resolved in determining this unfair labor practice charge is whether grievances that do not involve the interpretation of the collective bargaining agreement are subject to its arbitration clause.

1. Article XII

Article XII of the CBA provides, in most pertinent part:

A. Before filing a written grievance, the employee and/or the union shall discuss the problem with the supervisor and/or the employer within fourteen (14) days of first knowledge that a grievance exists. Any grievance or misunderstanding which cannot be settled between the Employer and the employee must be taken up with the Employer by the Business Representative of the Union, or anyone designated by the Union within thirty (30) days of the alleged infraction.

B. The parties agree that any differences involving the interpretation of this Agreement, which cannot be settled among themselves, may be submitted to arbitration upon request of either party. The written notice to proceed to arbitration must be submitted to the other party within five (5) days after agreement is reached that it cannot be settled between the parties.

C. The party desiring such arbitration shall give to the other party written notice, as specified above, that the matter is to be submitted to arbitration and shall specify the question or questions to be arbitrated. The parties will use the Board of Personnel Appeals, State of Montana, to obtain a list of five (5) names to arbitrate the dispute. The arbitration hearing shall be conducted within forty-five (45) days after the arbitrator is selected, unless the selected arbitrator is unavailable.

The union interprets the CBA's grievance provision as one that culminates in final and binding arbitration. ADLC interprets the same provision to limit arbitration to instances where there is a difference involving the interpretation of the agreement and that processing a grievance does not involve the interpretation of the CBA. Article XII Section (A) provides, in pertinent part:

Any grievance or misunderstanding which cannot be settled between the Employer and the employee *must be taken up* with the Employer by the Business Representative of the Union . . .

(emphasis added).

This provision clearly contemplates some additional step that will occur after the employer and employee have tried to resolve the grievance between themselves. The only remaining step identified in the CBA is arbitration, which as the ADLC argues appears on its face to be limited to interpretations of the provisions of the CBA.

If "must be taken up" means nothing, ADLC's interpretation may be correct and it need not arbitrate, McNamara's or any other employee's grievance that does not strictly address an interpretation issue.

However, as a result of the filing of the grievance and the related unfair labor practice, an issue regarding the interpretation of the CBA has arisen - does the arbitration provision apply to McNamara's or any other employee's grievances.

Looking at Article XII as a whole leads to the conclusion that it allows arbitration of grievances. If a grievance or misunderstanding that does not involve the interpretation of the CBA, can nonetheless be taken up with the employer by the Union, which can do absolutely nothing to adjust the grievance under ADLC's interpretation of Article XII, that provision is a nullity. The terms of a CBA are to be given an interpretation that gives meaning to all its provisions. *Bonner Sch. Dist. No. 14 v. Bonner Educ. Ass'n*, 2008 MT 9, P39 (Mont. 2008)(We must interpret the CBA in a manner that "give[s] effect to every part if reasonably practicable . . .") See also Mont. Code. Ann. § 28-3-202.

Accordingly, Article XII of the CBA allows all grievances to be arbitrated. That conclusion is supported by the Preamble which states:

The purpose of this Agreement is to promote and improve a means of amicable and equitable adjustment of any and all differences or grievances which may arise between the parties hereto.

ADLC's interpretation of the arbitration clause of the Grievance provision conflicts with the overarching goal of the CBA to adjust any and all differences and grievances. Its interpretation also could result in unnecessary disputes about whether some dispute is about an interpretation or application of the CBA. The Hearing Examiner can see many labor disputes framed at least initially as an interpretation issue in efforts to defeat the limited interpretation ADLC argues for. Moreover, no other provision in the CBA provides a procedure for "amicable and equitable adjustment of any and all differences or grievances."

The Union sought to resolve McNamara's grievance through the arbitration process identified in the CBA, ADLC refused to strike arbitrators. Such a refusal is a failure to bargain in good faith and is an unfair labor practice as defined by Mont. Code Ann 39-31-401(5). See *Savage Pub. Schools v. Savage Edu. Ass'n* (1982), 199 Mont. 39, 647 P.2d 833; *Painters Local 1023 v. M.S.U.*, ULP 1-1975; *International Association of Fire Fighters, Local 521 v. Billings*, ULP 3-1976; *Sutton and Fleming v. Billings City Library*, ULPs 13 & 14-1976.

B. Attorneys' fees

ADLC is correct that the Board of Personnel Appeals has stated it does not award attorney fees because it follows *Thornton v. Commissioner of the Department of Labor and Industry*, 190 Mont. 442, 621 P.2d 1062 (1981). See, e.g., *McCarvel v. Union Local 45* (1983), ULP 24-77; *Billings Firefighters Local No. 521 v. City of Billings*, ULP 27-2004. In *Thornton*, the Montana Supreme Court held attorney fees may not be awarded to the prevailing party in an administrative hearing absent a contractual agreement or specific statutory authority. 190 Mont. at 448, 621 P.2d at 1066.

Here, there is no contractual agreement allowing for an award of attorney fees and the statute cited by the Union does not apply to a ULP, only "civil actions." Mont. Code Ann. § 25-10-711. Even if the statute did apply, it requires a showing that a "suit or defense is frivolous or pursued in bad faith." *Id.* The Union has not met its burden to show ADLC's defense of this ULP is frivolous or pursued in bad faith. Mont. Code Ann. § 25-10-711(b). Accordingly, the Union's request for an award of attorney fees is denied.

IV. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to Mont. Code Ann. § 39-31-405.

2. The Union has demonstrated by a preponderance of the evidence that ADLC's failure to strike arbitrators was an unfair labor practice as alleged in the complaint.

3. It is appropriate to order ADLC to participate in the arbitration of McNamara's grievance.

V. RECOMMENDED ORDER

The hearing officer recommends that:

1. The Union's Motion for Summary Judgment be GRANTED. ADLC's Motion for Summary Judgment be DENIED.

2. The Board order Anaconda Deer Lodge County to strike arbitrators with the Union regarding McNamara's grievance within 30 days of the Board's final order.

DATED this 26th day of August, 2015.

BOARD OF PERSONNEL APPEALS

By:



DAVID A. SCRIMM
Hearing Officer

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

Timothy McKittrick
Attorney at Law
P.O. Box 1184
Great Falls, MT 59403

Cynthia Walker
Attorney at Law
1341 Harrison Avenue
Butte, MT 59701

DATED this 26th day of August, 2015.


