Department of Labor and Industry
Board of Personnel Appeals
PO Box 6518
Helena, MT 59604-6518
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 5-2009

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES MONTANA COUNCIL 9, RED LODGE PUBLIC WORKS Petitioner -vs- CITY OF RED LODGE, Respondent.	)	INVESTIGATIVE REPORT AND NOTICE OF INTENT TO DISMISS

I. INTRODUCTION

On September 26, 2008, James Bushnell, Local President and Shop Steward for Montana AFSCME Council 9, Red Lodge Public Works, hereafter Union, filed an unfair labor practice charge with the Board of Personnel Appeals alleging that the City of Red Lodge, hereafter City, violated MCA 39-31-402(5)(*sic*). Sam Painter, Red Lodge City Attorney, responded to the charge on October 10, 2008, and denied that the City had committed an unfair labor practice.

John Andrew was assigned to investigate the charge, has reviewed the submissions of the parties and has communicated with the parties in the course of investigating the charge. Follow up by the investigator confirmed that the intent of Jim Bushnell was to allege a violation of MCA 39-31-401(5), not 402(5), a non-existent statute. The complaint is hereby amended to conform to the applicable statute.

II. FINDINGS AND DISCUSSION

The City and the Union have been engaged in negotiations for a successor agreement to a contract that expired on June 30, 2008. Numerous proposals over various issues, some permissive and some mandatory, have been made and tentative agreements seemingly reached on several items. There have been the usual scheduling difficulties associated with getting negotiating teams together, but there has never been a refusal to meet and bargain on the part of either the Union or the City. In fact, the parties met

most recently on October 3, 2008. Further, Mr. Bushnell and Mr. Painter have both confirmed to the investigator that they remain willing to schedule additional meetings in hopes of resolving the contract. To date, mediation assistance has not been requested.

The basis of the complaint of the Union centers on language offered by the City in response to a Union proposal. That language cited by the Union provides:

> "Upon receipt of the salary survey and conferring with Union representatives, the City commits to adopting a pay matrix acceptable to both parties that takes into consideration base salaries of comparable jurisdictions and benefits, the grade levels of the predominant duty of each employee, and such factors as revenue sources and amounts."

The salary survey was a contracted service performed by Local Government Associates, Inc., hereafter LGA. LGA submitted an initial work product to the City and two subsequent revisions have been submitted as well. All three LGA work products have been forwarded to the Union for review and have been discussed in negotiations. Although there is some disagreement on the timing of the last exchange of the LGA work product, there is no disagreement that the City supplied the most recent draft to the Union.

During the negotiations the parties have been stymied over the content of job descriptions that are integral to adopting a pay matrix. Job descriptions in the public works arena may be particularly problematic due to seasonal considerations as well as the variety and frequency of various duties performed in public works. According to the Union, old job descriptions, not previously known to the Union, have been utilized by the City during negotiations. The Union contends there are more accurate, current job descriptions. The Union further contends that these job descriptions are the ones that should be used in order to correct pay "inequities" in the bargaining unit. It is noted that the Union has discussed and offered other options as has the City.

The October 3, 2008, bargaining notes of the Union reflect:

> "Discussed our proposal. City did not accept the third pay matrix because they said it causes to (*sic*) much pay inequities in other departments and that were (*sic*) the only ones that got to use new descriptions."

The bargaining notes conclude with:

> "Did not get anything accomplished and the mayor walked out."

The Union contends that what they offered at the table in the way of job descriptions – the ones collaboratively put together by bargaining unit members and supervisors - is what the City had agreed would be accepted in terms of adopting the pay matrix. The City contends otherwise, but as previously found, remains open to further discussion and negotiation, even after the October 3, 2008, meeting.

The fundamental allegation of the Union is that the City violated the law by "refusing to meet with us to discuss the third draft of the pay matrix and to bargain as they stated to 'adopt a pay matrix acceptable to both parties'".

Section 39-31-305 MCA provides that "to bargain collectively is the performance of the mutual obligation of the public employer or his designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession". See for instance Consolidated ULP 19 and 30-88, Teamsters Local Union No. 190 v City of Billings.

Nothing presented to the investigator by the Union demonstrates that the City agreed to do any more than commit to "adopting a pay matrix acceptable to **both** parties" (emphasis added). To be sure, the City may well have said "no", or taken firm positions on proposals offered by the Union, including those addressing position descriptions and the third pay matrix. However, hard bargaining, and even insistently saying "no" to any given proposal or portion thereof is not, in and of itself, an unfair labor practice. See for instance, ULP 7-89, International Brotherhood of Teamsters and International Union of Operating Engineers v Flathead County.

The City has not refused to meet or refused to discuss any proposal offered by the Union. The City just disagrees with the Union on the content of some, not all, job descriptions, offered by the Union. The language referred to by the Union is not evidence of a refusal to bargain, nor is it evidence of a refusal by the City to abide by some agreement the Union believes exists. Moreover, there is no specific incident or event pointed out to the investigator that constitutes a refusal to bargain on the part of the City. Similarly, in reviewing the all the information offered to the investigator by both parties there is no substantial evidence that the overall totality of conduct by the City constitutes bad faith bargaining or a refusal to meet and negotiate over mandatory subjects of bargaining.

III. RECOMMENDED ORDER

It is hereby recommended that Unfair Labor Practice Charge 5-2009 be dismissed for lack of merit.

DATED this _____ day of October, 2008.

BOARD OF PERSONNEL APPEALS

By: _____
John Andrew
Investigator

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. Box 6518, Helena, MT 59604-6518. 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, _____ , do hereby certify that a true and correct copy of this document was mailed to the following on the _____ day of October, 2008 postage paid and addressed as follows:

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