STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 31-2005:

MONTANA PUBLIC EMPLOYEES ASSOCIATION,	)	Case No. 1502-2005
Complainant,	)	
vs.	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**
MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,	)	
Defendant.	)	

* * * * * * * * * * *

I. INTRODUCTION

On January 27, 2005, Complainant Montana Public Employees Association (MPEA) filed this charge alleging that the Montana Department of Environmental Quality (DEQ) did not negotiate in good faith with the union in implementing 020 broadband pay scales among union employees of the DEQ. MPEA alleged that this conduct violated Mont. Code Ann. §§ 39-31-305(2) and 39-31-306(1) and (4).

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this proceeding on November 1, 2005 in Helena, Montana. Carter Picotte, Attorney at Law, represented MPEA. Ruth Anne Hansen represented DEQ. MPEA field representative Stacey Bird and bargaining team members Alan Harbaugh and Christine Barstow testified under oath for the complainant. DEQ Human Resources Manager Virginia Cameron testified under oath on behalf of DEQ. The parties jointly submitted Exhibits A, B, and C. The parties filed post-hearing briefs by December 1, 2005, at which time the matter was deemed submitted. Based on the evidence submitted at the hearing and the parties' arguments in their post-hearing briefing, the hearing officer finds that no unfair labor practice has been committed and recommends that the complaint be dismissed. The rationale that supports this position is set forth in the following findings of fact, conclusions of law, and recommended order.

II. ISSUE

The issue in this case is whether DEQ committed an unfair labor practice in violation of Mont. Code Ann. §§ 39-31-305(2) and 39-31-306(1) and (4) as alleged in MPEA's charge.

III. FINDINGS OF FACT

1. DEQ is a public employer for purposes of the Public Employees Act, Title 39, Chapter 31 of the Montana Code Annotated. MPEA is the exclusive representative for the employees alleged to have been affected in the instant unfair labor practice charge.

2. In May 2002, DEQ and MPEA reached an agreement on Pay Plan rules and converted to the alternative "broadband" pay plan. DEQ adopted this pay plan in April 2003.

3. DEQ initiated negotiations with MPEA in June 2004 to propose salary adjustments consistent with the "broadband" pay plan for 24 DEQ employees in the MPEA bargaining unit. On June 16, 2004, DEQ Human Resources Manager Virginia Cameron and Ruth Anne Hansen met with MPEA field representative Stacey Bird to discuss market rates and salary adjustments for the employees under the broadband pay rules. To that end, on June 24, 2004, Cameron sent Bird DEQ's proposed salary adjustments that would cover MPEA's DEQ employees. (See Joint Exhibit B, June 24, 2004 letter from Cameron to Bird.) That letter listed the affected MPEA employees as well as the proposed adjustments to be made to each of those employee's salaries. In addition, Cameron's letter set out the rationale for the proposed adjustments for each of the affected employees.

4. On June 30, 2004, Bird responded in writing to the proposed salary adjustments, indicating that MPEA would only agree to adjust 11 of the 24 proposed salary adjustments. In addition, for those MPEA employees for whom adjustment was permitted, MPEA set out what it thought were appropriate adjustments. (See Joint Exhibit B, Bird letter to Cameron dated June 30, 2004.) MPEA carefully and thoroughly reviewed the information provided by DEQ.[1]

5. On July 8, 2004, Cameron and Bird e-mailed back and forth as to how MPEA had arrived at the proposed adjustments for the employees for whom it would authorize adjustments. These e-mails included a large amount of give and take and presentation of rationale to support the figures proposed by each side. (See Joint Exhibit B.)

6. On approximately July 14 or 15, 2004, DEQ implemented only the proposed salary adjustments agreed to by MPEA. Those adjustments were carried out in strict conformity with MPEA's proposal.

7. Unrelated to the June 2004 negotiations, DEQ hosted an Employee Appreciation Day in August 2004, which included recognition for top performers and other service awards. Of the 55 employees listed, 32 were MPEA employees. Of the 32 MPEA employees on the list, 24 were included in the salary adjustment proposal, eight were not. The selection criteria for top performer status was set out in the employee appreciation day flyer (Joint Exhibit B).

---

[1]This fact is confirmed not only by Bird's letter (which specifically pointed out that MPEA had reached its determination based on "careful and thorough review of the list of salary adjustments"), but also by Bird's testimony at hearing which reiterated that MPEA "sat down and analyzed all of the information provided."

8. Apparently, rumors began to surface amongst the DEQ employees that the "real" reason for the pay adjustments was to provide performance bonuses to the persons that MPEA had agreed could receive salary adjustments. Bird received phone calls from her constituency who were upset that MPEA had permitted the salary adjustments to occur. Bird herself at first insisted that the salary adjustments were properly based entirely upon conformity with the broadband pay increase.

9. DEQ had no ulterior motive in proposing the initial broadband pay adjustments. The only purpose was to begin the process of switching all DEQ employees over to the broadband pay criteria, which DEQ had implemented only after discussion and agreement with MPEA.

10. MPEA, perhaps because of the active discontent of some of its constituents, adopted the theory that DEQ had some nefarious ulterior motive in implementing the initial broadband pay adjustments in the manner dictated by MPEA during its negotiation with DEQ.

IV. DISCUSSION[2]

The union contends that DEQ committed an unfair labor practice, notwithstanding the union's opportunity fully to bargain over implementation of the broadband pay plan, including bargaining over the proposed salary adjustments and examining fully the rationale for DEQ's proposed salary adjustments. To the contrary, the only rational findings under the facts adduced at hearing are that DEQ bargained in good faith with no ulterior motive other than to implement the broadband pay plan that had been approved by MPEA for its DEQ employees.

Among other things, Mont. Code Ann. § 39-31-305(2) requires that public employers negotiate in good faith with respect to wages, hours, fringe benefits and other conditions of employment. An employer engages in an unfair labor practice when that employer refuses to bargain collectively in good faith with an exclusive representative. Mont. Code Ann. § 39-31-401(5).

Mont. Code Ann. § 39-31-306(1) provides that agreements between a public employer and the union be reduced to writing and Mont. Code Ann. § 39-31-306(4) provides that the procedure prescribed by Title 39, Chapter 31 for the making of an agreement between a public employer and the union is the exclusive method of making a valid agreement for public employees of the union.

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals of using federal court and National Labor Relations Board (NLRB) precedents as guidance in interpreting the Montana collective bargaining laws. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

---

[2]Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

The duty to bargain in good faith is an "obligation to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement . . ." *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943). This implies both "an open mind and a sincere desire to reach an agreement." *Id.; see also, The Developing Labor Law*, Volume 1, p. 793-94 (4th Ed, 2003). The presence or absence of good faith is measured by reviewing the totality of the circumstances in which the bargaining took place. *Id.; see also, Sage Develop. Co.,* 301 NLRB 1173 (1991). Applying these basic precepts to the instant case immediately demonstrates that DEQ's bargaining in this case was unquestionably undertaken in good faith.

Reviewing the employer's conduct as a whole fails to reveal any evidence of a lack of good faith on the part of DEQ. The lynch pin of the union's argument - that the salary adjustments were disguised pay for performance bonuses - has not been substantiated. The credible evidence in this case shows that DEQ's only motive in undertaking the bargaining process was to implement the broadband pay plan among DEQ employees. The union had agreed to the implementation of the broadband pay plan for DEQ employees and, as noted by Cameron in her testimony, the implementation of the plan had to start somewhere. To that end, DEQ proposed adjustments for certain individuals, explained the reasons for those proposed adjustments, gave the union the opportunity to respond, and took no action until the union had given its blessing. Stated simply, there has been no showing that DEQ had any ulterior motive in implementing the pay plan in the method it did, much less an impermissible motive that would call into question DEQ's good faith in negotiating the salary adjustments.

The union suggests that "the Defendant selected a universe of employees by criteria of favoritism, disguised its bonus program in other legitimate criteria for comparison, and then imposed time pressure on MPEA to prevent any independent action to verify the Defendants assertions as to dates and people." In fact, the paper trail in this case (the e-mails and letters), the testimony of the DEQ's witness and the testimony of the union witnesses all demonstrated that the very opposite is true. Bird herself noted that the union thoroughly looked at the information submitted by the DEQ. The review was so thorough that the union in fact paired down the list of those persons receiving salary adjustments and then further suggested different adjustments for the remaining employees. DEQ neither "strong armed" nor finagled the union into accepting the salary adjustments. DEQ negotiated the adjustments in good faith.

Moreover, the existence of the "Top Performers" award does nothing to substantiate the union's contentions. Although the union argued that there was some connection, they offered no substantial evidence to establish the alleged connection. The union failed to prove and presented no rational argument to establish that the existence of the "Top Performer" program somehow shows that DEQ was acting in bad faith in negotiating the salary adjustments. No unfair labor practice has been proven in this case.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this case and controversy. Mont. Code Ann. § 39-31-207.

2. DEQ did not fail or refuse to bargain collectively in good faith when it proposed and implemented (with MPEA approval) salary adjustments for the broadband pay plan for DEQ union employees.

VI. RECOMMENDED ORDER

As the union has failed to demonstrate an unfair labor practice, its complaint should be dismissed.

DATED this 9th day of February, 2006.

BOARD OF PERSONNEL APPEALS

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to Admin. R. Mont. 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. Mont. Code Ann. § 39-31-406(6). Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518