

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE

Montana Federation of Public Employees
(MFPE),
Claimant,

And
Montana Department of Administration,
Montana Lottery,
Respondent.

Case No.: 2022DRS00008

INVESTIGATIVE REPORT
AND
NOTICE OF INTENT TO DISMISS

I. Introduction

On December 29, 2021, Montana Federation of Public Employees filed an unfair labor practice complaint, on behalf of MFPE Local #8518 Federation of Lottery with the Board of Personnel Appeals. The charge alleges that during contract negotiations, Montana Lottery indicated Montana Federation of Public Employees (MFPE) would not receive desired pay increases due to political affiliation.

Matt Mitchell, Attorney for Department of Administration (DOA) filed a timely answer on January 25, 2022, on behalf of Montana Lottery (Employer), denying an unfair labor practice was committed.

This investigative report is presented on the authority appointed to the department under section 39-31-405 MCA. Dave Luckey was assigned by the Board to investigate the charge and has reviewed the information submitted by the parties.

II. Findings and Discussion

In the Unfair labor Practice Charge (ULP), the application requires the charging party to provide details of the charge. Details are to include a clear and concise statement of facts constituting the alleged violation, place of occurrence of particular acts, and a specific statement describing the laws or rules allegedly violated.

MFPE provides a date of September 8, 2021, as the date of occurrence; however, they provide no specific law, no allegation of violation of Section 39-31-401 MCA or Section 39-31-402 MCA. To proceed in this investigation by assuming which statute was violated would be overstepping the authority appointed to the department under section 39-31-405 MCA. As such, this investigator is obligated to base this determination on the facts as presented by the parties.

It appears this investigation hinges on MFPE's allegation that Management returned from a caucus during negotiations on September 8, 2021 and made a statement that indicated MFPE Local #8515 would not receive desired pay increase due to political affiliation. In their ULP charge, they provide the following quote: "Scott Sales stated 'you should have done this under democrat[e]sic] Bullock and Democrat[e]sic] Angela Wong because they are labor friendly, your grievances are with them'".

In the opening remarks of DOA's response, they identify the fact that MFPE's ULP cites no statute or rules alleged to have been violated and suggest the ULP complaint must be dismissed for failing to meet the requirements as provided by law. Their response indicates the pay increases were declined due to Lottery's budgetary constraints, not due to political affiliation as alleged in the ULP Charge. In addition, DOA argues MFPE failed to provide any additional information on how the alleged, quoted statement alone, rises to an unfair labor practice.

DOA disputes the quoted language MFPE provided in the charge, and in their opinion, when the totality of the circumstance is evaluated, the ULP must be dismissed because it lacks probable merit.

In an attempt to establish their position DOA provided their account of events that led up to the alleged statement. They claim the parties began wage discussions on September 8, 2021. Both parties exchanged proposals on wages and remunerations. The meeting went from 9:00 am until around 2:00 p.m. without reaching an agreement. DOA contends MFPE brought its wage proposal forward and after listening to their rationale, Lottery rejected their proposal, explaining to the members that the increases were not available due to budgetary reasons, classifications, and position pay.

DOA noted, the budget constraints were consistent with the Department's pay raises given to Lottery bargaining unit members on July 13, 2021. DOA also noted, these targeted rate increases were determined to be the most effective allocations of funds, with a limited available budget. As a result, Lottery explained it did not have the budget availability to provide additional wage increases. DOA indicated two additional proposals were brought to the table and rejected by Lottery; however, both parties scheduled a second date of September 29, 2021, to continue negotiations.

DOA contends that during the course of the September 8, 2021, negotiation, bargaining unit members frequently mentioned the historical lack of bargained increases that led to their large wage increase proposals. They noted, MFPE cited 16 years without a bargained increase and MFPE's desire to see a large jump in compensation. They acknowledge Scott Sales' statement but, they maintain the comment was made in response to the members comments citing the prior administrations lack of bargained wage increases. They further maintain the statement's intent was to point out the grievance of past bargaining did not fall with Sales, given the fact that he is a newly appointed Director and was not involved in previous bargaining sessions.

In closing, DOA identified the allegation fails to recognize Lottery or Scott Sales have no knowledge of political affiliations of the bargaining unit members. It is their position, there cannot be causal connection between "political affiliation" and denying a wage increase when MFPE fails to provide evidence that Lottery has any knowledge of members' political affiliation.

In their response, DOA states that when determining whether statements are permissible under the NLRA, THE Board considers the context in which they were made in view of the totality of the employer's conduct. *NLRB v Lenkurt Electric Co.*, 438 F.2d 1102, 1107 (9th Cir. 1971). This investigator concurs and finds that when one statement is isolated from all statements made during the course of five hours of negotiations, as it was in this case, it is easy to misrepresent the true context of the statement.

Although it appears both parties could have chosen words more carefully to assure a collaborative outcome, based on information provided by both parties, MFPE failed to establish evidence necessary to prove MFPE Local #8515 was denied desired pay increases due to political affiliation.

III. Recommended Order

This investigator finds no merit to the charge of Unfair Labor Practice. It is hereby recommended this Unfair Labor Practice charge be dismissed without merit.

Dated this 11th day of March 2022

Board of Personnel Appeals

By: *Dave Luckey*

Dave Luckey
Investigator

NOTICE

Pursuant to 39-31-405 (2), MCA, if a finding of no probable merit is made by an agent of the board, it may be appealed the Board of Personnel Appeals. The appeal is to be filed in writing within ten (10) days of the receipt of the notice of intent to dismiss. Appeals should be filed with the board at the following address.

Board of Personnel Appeals
ATTN: Dave Luckey
PO. Box 201503
Helena, Montana 59620-1503
Fax: 406 444-4140
Email: dlierdbopa@mt.gov

CERTIFICATE OF SERVICE

The undersigned does certify a true and correct copy of this document was served upon the following on the 11th day of March, 2022, postage paid and addressed as follows:

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