STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 23-2011:

MEA-MFT, MONTANA PUBLIC EMPLOYEES ASSOCIATION, THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL NO. 9,	)	Case No. 2030-2011
	)	**PROPOSED ORDER ON REMAND**
Complainants,	)	
vs.	)	
STATE OF MONTANA,	)	
Defendant.	)	

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On December 21, 2011, the Board of Personnel Appeals issued its "Order of Remand" herein, determining that the Hearing Officer's Recommended Decision herein was "premature," because the Hearing Officer should first have decided "whether the Legislature has a duty to bargain collectively in good faith," elaborating in the very next sentence that "By statute, only the public employer (and exclusive representatives) have the duty to bargain in good faith under Section 39-31-305(1), MCA, so the question that needs to be definitively answered is whether the Legislature is a 'public employer'."

In compliance with BOPA's directions, this proposed order addresses both forms of the question posed, also explicating their relationship with the issue addressed in the original proposed order.

1. Does the Legislature Have a Duty to Bargain Collectively in Good Faith – i.e., Is the Legislature a "Public Employer"?

Throughout this case, the Unions have consistently asserted that the Montana Legislature is a public employer under the collective bargaining law the Legislature adopted. Clearly, the definition of "public employer" includes "the state of Montana." Mont. Code Ann. § 39-31-103(1).

From this starting point for the analysis, the Unions assert that "the Legislature is part of the management structure of the 'state of Montana' because . . . the appropriations power of the state lies exclusively with the legislature." "Complainants' Brief on Remand," p. 4. At pp. 4-5 of that brief, the Unions go on to argue that:

> [B]y the plain language of the Act, the State is a 'public employer' and it is an unfair labor practice for a 'public employer' (including by definition the 'state of Montana') to 'refuse to bargain collectively in good faith' with the employees' exclusive representatives. Section 39-31-401(5). By the plain meaning of the Constitution, the Legislature is a necessary part of the management of the State. This simple and obvious analysis means that the Legislature has included itself in the concept of the duty to bargain in good faith and that it meant what it said when it committed the State (and not just the executive) to a policy encouraging 'the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees.' Section 39-31-101 MCA.

The Unions urge that BOPA's analysis of the "narrow issue" before this Hearing Officer ends at this point. However, the construction and interpretation of an ambiguous statute require harmonizing statutes related to the same subject to give effect to each of them. *Mt. Contractors Ass'n v. Dept. of Highways*, 220 Mont. 392, 715 P.2d 1056, 1058 (1986). Montana public employee bargaining law "does not limit the authority of the legislature, any political subdivision, or the governing body relative to appropriations for salary and wages, hours, fringe benefits, and other conditions of employment" (Mont. Code Ann. § 39-31-102). Thus, application of the definition of "public employer" to the Montana Legislature, when it is exercising its legislative appropriation power, is fraught with ambiguity.

The facts of this case provide a perfect illustration of the problem with the Unions' interpretation of the definition of "public employer." Did the Legislature's definition of "public employer" authorize a quasi-judicial administrative body in the Executive Branch of Montana state government to inquire into and sit in judgment of how an appropriations bill, presented to the Legislature by the Executive, was considered during a legislative session? Did the Legislature intend for BOPA to consider whether the bill received sufficient formal consideration? Did it intend to empower BOPA to decide if the legislative process moved forward far enough, if the decision-making (or lack of decision-making) was justified? Is there any indication that the Legislature intended BOPA to hear evidence and argument about whether

the Legislature's fiscal projections were reasonable? Does the law support an interpretation that the Legislature was appointing BOPA to consider whether the House kept the bill out of committee deliberations and readings for too long to permit the exclusive representatives and the Executive from negotiating other pay plan options? How can such legislative intentions be read into a law which says it does not limit the authority of the Legislature to make decisions about appropriations for salary and wages, hours, fringe benefits and other conditions of employment? Mont. Code Ann. § 39-31-102.

In addition, how can BOPA conclude that the Legislature's manifest intent, consistent with and giving effect to all relevant provisions of Montana public employee collective bargaining law, was to subject itself to BOPA's review of the legislative handling of a collective bargaining agreement between the Executive and the employees' exclusive representatives after the submission of that negotiated settlement to the Legislature in the executive budget, or by bill or joint resolution? Mont. Code Ann. § 39-31-305(3) expressly provides that submission of a negotiated settlement to the Legislature, by inclusion in the executive budget or by bill or joint resolution, meets the requirement for negotiating in good faith. How then can anything the Legislature may thereafter do in its legislative appropriations function be retroactively applicable to the duty, already satisfied, of negotiating in good faith?

Indeed, the negotiated agreement itself included the statement that it was "contingent upon legislative funding and approval," recognizing that it was (once the parties actually agreed to it) going to be subject to the legislative appropriations process for ultimate implementation.

Without regard to the New Hampshire case[1], once a negotiated settlement is submitted to the Legislature in any of the three modes specified in the statute, the Legislature is not thereafter a "public employer" for purposes of Montana collective bargaining law. Montana collective bargaining law for public employees does not impose any duty to bargain in good faith upon the Legislature, in its handling of such a negotiated settlement once it has been submitted in any of the three modes specified in the statute. Since the conduct of the Legislature after submission of the negotiated settlement between the Unions and the Executive is the sole subject of the complaints herein, BOPA should dismiss those complaints.

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[1] However similar to Montana statutes the New Hampshire statutes may have been in *Appeal of the House Legislative Facilities Subcommittee*, 685 A.2d 910 (N.H. 1996), the issue in that case was whether permanent, full-time employees of the New Hampshire House of Representatives were "public employees" under the public employee collective bargaining laws of that state. The issue is remote from the issues in the present case.

2. If the Legislature Has a Duty to Bargain in Good Faith (i.e., is a "Public Employer"), Would that Duty Have Been Satisfied by Submission of the Negotiated Settlement?

In the alternative, even if the law could somehow be read to mean that the Legislature is generally within the definition of "public employer," the provisions of Mont. Code Ann. § 39-31-305(3) and the express provisions of the negotiated settlement itself establish that the duty to bargain collectively in good faith was satisfied when the negotiated settlement was submitted to the Legislature, as it was. This, ultimately, was at the heart of the first proposed decision submitted to BOPA. With the express contingency upon legislative funding and approval in this agreement, and with the submission of this negotiated settlement to the Legislature by bill, the state's duty to negotiate in good faith was satisfied whether or not the Legislature, until that point was reached, had a duty to bargain in good faith (whatever that might mean for a legislative body not involved in those negotiations).

The Legislature did not intend Montana public employee collective bargaining law to guarantee particular legislative outcomes or processes once a negotiated settlement between the Executive and the exclusive bargaining representatives of state employees reached the legislative stage of the process. The Legislature certainly did not appoint BOPA to review and to pass judgment upon the appropriations process regarding negotiated agreements between exclusive bargaining representatives and the state. Even if the Legislature had intended to apply to itself the initial duty to bargain in good faith, once the negotiated settlement, with its provision acknowledging an express contingency upon legislative funding and approval, was properly presented to the Legislature, any duty of the state to bargain in good faith (no matter how broad the definition of "public employer" might be) was satisfied, for all of the reasons set forth in the original proposed order.

The legislative process is often complicated and confusing, and is far from transparent. Its turns and twists can frustrate and befuddle, and its outcomes often satisfy nobody. It has little to recommend it, except that it works far better than any of the myriad alternatives to democracy with which humanity has been saddled across recorded history. What democracy does not do is guarantee that its processes will always result in an outcome agreed upon by some of the participants before the rest of the necessary participants address the question. The Unions and the Executive reached an agreement. The Legislature did not adopt it.

The appropriate forum in which to challenge the 2011 Legislature's failure to adopt the pay plan agreed upon by the Executive and the Unions is the public forum, in upcoming elections.

On this basis also, BOPA should dismiss these complaints.

DATED: March 9, 2012.

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR
TERRY SPEAR
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to Admin. R. Mont. 24.26.222 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 201503
Helena, MT 59620-1503