

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 18-2010 AND 19-2010:

ANACONDA-DEER LODGE COUNTY,) Case Nos. 1060-2010 and 1061-2010
)
Complainant,)
)
vs.)
)
ANACONDA POLICE PROTECTIVE)
ASSOCIATION 911 DISPATCHER UNIT,)
AND ANACONDA POLICE PROTECTIVE)
ASSOCIATION DETENTION UNIT,)
)
Defendant.)

AND

IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 33-2010, 34-2010, AND
35-2010:

ANACONDA POLICE PROTECTIVE) Case Nos. 1696-2010, 1697-2010,
ASSOCIATION, ANACONDA POLICE) and 1698-2010
PROTECTIVE ASSOCIATION)
DETENTION UNIT, AND ANACONDA)
POLICE PROTECTIVE ASSOCIATION)
DISPATCHER UNIT - DEER LODGE)
COUNTY,)
)
Complainant,)
)
vs.)
)
ANACONDA-DEER LODGE COUNTY,)
)
Defendant.)

RECOMMENDED DECLARATORY JUDGMENT ORDER

I. INTRODUCTION AND BACKGROUND

The Hearing Officer recommends that the Montana Board of Personnel Appeals (BOPA) issue the following declaratory ruling upon the two questions submitted herein:

(1) Mont. Code Ann. § 26-1-813 governs mediation sessions regarding collective bargaining between a public employer and an exclusive bargaining representative for its employees, which are conducted pursuant to the provisions of Mont. Code Ann., Title 39, Chapter 31.

(2) A public employer or an exclusive bargaining representative shall not make a recording of mediation session or sessions involving them, conducted pursuant to Mont. Code Ann., Title 39, Chapter 31, without either a written agreement with the other party and the mediator(s) for such recording, or express statutory authority for such recording, as required by Mont. Code Ann. § 26-1-813.

This declaratory ruling arises out of five consolidated Unfair Labor Practice complaints filed with the Board of Personnel Appeals (BOPA). Each charge will be briefly summarized in this introduction, up through the point at which the issue for this declaratory ruling became the only current focus of these proceedings.

A. ULP Complaints by the Employer: Anaconda - Deer Lodge County (the county) filed two Unfair Labor Practice complaints. One was against the Anaconda Police Protective Association–Detention Unit (the DU) and the other against the Anaconda Police Protective Association–911 Dispatcher Unit (the Dispatchers). The county later amended both complaints to add additional charges.

Three independent bargaining units' cooperation and cross-participation in bargaining engendered some of the charges involved in these consolidated cases. The three units are the DU and the Dispatchers, and the Anaconda Police Protective Association (APPA). Each of the three recognized bargaining units had its own separate Collective Bargaining Agreement (CBA) with the county. All three CBAs covered a period ending on June 30, 2009. Negotiations regarding successor CBAs between the county and each of the three units began, with each unit represented by its own bargaining team (although at least one individual may have been on all three bargaining teams). The bargaining led to the problems reflected in the five complaints consolidated in this case.

1. ULP No. 18-2010 (Case No. 1060-2010): On December 23, 2009, the county filed an unfair labor practice complaint against the DU. The county charged that the DU refused to bargain in good faith with the county, engaging in surface and dilatory bargaining and shadow coalition bargaining, and bargained through non-empowered agents. On March 3, 2010, the county filed an amended unfair labor practice charge against the Dispatchers. The amended charges included the following specific allegations.

(a) In September and October 2009, DU negotiators specified the terms and conditions that, if offered by the county, would lead to an agreement. The county proposed those terms and conditions. DU negotiators refused to sign the proposal and refused to take it to the membership.

(b) The DU participated with two other separate bargaining units, the Anaconda Police Protective Association (APPA) and the Anaconda Police Protective Association 911 Dispatcher Unit (Dispatchers), separate bargaining units with separate exclusive representatives, in multiple bargaining meetings and bargaining sessions with the county (which consented to meeting with all three bargaining units' representatives) and in mediation meetings between the DU and one or more mediators, and presented a united front such that APPA was confronted with meeting the demands of all three units to obtain a CBA with any of the three units.

(c) In December 2009, the county was told that the DU would now accept the county's last tentative offer, retroactive to July 2009. The county agreed and sent the proposal to the president of APPA, as the county understood the DU had requested, even though the president had not regularly participated in the DU's negotiations. The DU (apparently through the president of APPA) subsequently rejected the proposal because the fact-finding clause had been changed from what was discussed, which the county asserted was untrue.

(d) In February 2010, the Dispatchers tied their bargaining to interest arbitration by the APPA, despite the absence of interest arbitration rights and requirements in their CBA, refused to present counter-proposals to the county's proposals with which they disagreed and asserted they would use the APPA interest arbitration award as a basis for their future bargaining decisions.

2. ULP No. 19-2010 (Case No. 1061-2010): On December 23, 2009, the county filed an unfair labor practice complaint against the Dispatchers. The county charged that the Dispatchers refused to bargain in good faith with the county, engaging in stigmatized bargaining, in surface and dilatory bargaining and shadow coalition bargaining, and bargained through non-empowered agents. On March 3, 2010, the county filed an amended unfair labor practice charge against the Dispatchers. The amended charges included the following specific allegations.

(a) In September 2009, the Dispatchers interposed a mid-bargaining demand that it would only agree to the county's proposal to delete from the new CBA a provision in the last CBA that members of

the Dispatchers absent from work due to industrial injuries would receive their full pay for one year after the injury date, in exchange for a 34% “new money” wage increase for all employees (not just those absent from work due to industrial injuries) “to cover the percentage that workers’ compensation does not cover,” without ever explaining the application of the “34%” to the proposed two-year CBA tentatively agreed upon by the bargaining parties, and declining to withdraw this proposal.

(b) The Dispatchers participated with two other separate bargaining units, the APPA and the DU, separate bargaining units with separate exclusive representatives, in multiple bargaining meetings and bargaining sessions with the county (which consented to meeting with all three bargaining units’ representatives) and in mediation meetings between the Dispatchers and one or more mediators, and presented a united front such that APPA was confronted with meeting the demands of all three units to obtain a CBA with any of the three units.

(c) In February 2010, the Dispatchers tied their bargaining to interest arbitration by the APPA, despite the absence of interest arbitration rights and requirements in their CBA, refused to present counter-proposals to the county’s proposals with which they disagreed and asserted they would use the APPA interest arbitration award as a basis for their future bargaining decisions.

B. ULP Complaints by the Three Bargaining Units: While the county’s two ULP complaints were pending before BOPA, the three independent bargaining units each filed a separate Unfair Labor Practice complaint against the county. All three complaints alleged that the county repeatedly took a “take it or leave it” approach to bargaining about changes the county proposed to the CBA, including but not limited to the grievance procedure, that the changes to the grievance procedure included eliminating a county commission consideration step as well as waivers of constitutional and statutory rights of the members of each bargaining unit, and that the county tried to get each bargaining unit to agree about who could represent a party in front of BOPA (i.e. agree not to have BOPA decide who could represent in front of BOPA). The DU complaint also included allegations that the county’s December 11, 2009 proposal (a) attempted by subterfuge to “slip” into the new CBA a management controlled fact-finding process to which the union had never agreed, (b) refused to bargain on wage increases for categories II and III Detention Officers, (c) insisted that increases in wages would not be negotiable or subject to grievances. In addition, the DU complaint alleged that in December 2009 the county took the position that unless the DU agreed to all provisions in the December 11, 2009 proposal, the detention officers would not receive retroactive pay.

C. BOPA Merit Finding on all five ULPs: On June 14, 2010, BOPA's agent issued an "Investigative Report and Finding of Probable Merit" on the county's charges against the DU and the Dispatchers and a separate "Investigative Report and Finding of Probable Merit" on the charges against the county by the APPA, the DU, and the Dispatchers. The county's two complaints and the three complaints against the county, one each from the DU, the Dispatchers, and the APPA, were all forwarded to the Hearings Bureau for contested case proceedings.

D. Contested Case Proceedings on all five ULPs:

On June 17, 2010, a "Notice of Hearing and Telephone Conference" issued and was served by mail upon the representatives of the parties, consolidating all five complaints in a single proceeding and appointing Gregory Hanchett as presiding Hearing Officer.

On June 21, 2010, the county disqualified Hearing Officer Hanchett without cause, as permitted by law.

On June 23, 2010, the Hearings Bureau received the county's two-page unverified "Answer to Findings of Probable Merit" in all three complaints against the county, forwarded from the Standards Bureau of the Department of Labor, where the parties properly filed their pleadings, etc., until the issuance of the Investigative Report and Finding of Probable Merit. The county had filed this answer with the Standards Bureau on June 21, 2010 (mailed on June 18, 2010, presumably before receipt of the Notice of Hearing and Telephone Conference).

Also on June 23, 2010, the Hearings Bureau appointed Terry Spear as presiding Hearing Officer and reset the telephone conference ("Order Appointing New Hearing Officer and Resetting Telephone Conference").

Also on June 23, 2010, the Hearings Bureau received the answer of the DU and Dispatchers to the Investigative Report and Finding of Probable Merit in the county's two ULPs, with a number of exhibits attached, including a transcript of a January 29, 2010 mediation session ("Exhibit 2").

On June 24, 2010, the Hearings Bureau received the county's separate answers to the three separate complaints of the three collective bargaining units.

On July 6, 2010, the Hearing Officer reset the telephone conference for yet a later date, on the unopposed motion of the DU and the Dispatchers, because the representatives for all the parties were unavailable at the original time and date reset for the telephone conference.

On July 19, 2010, the county filed its "General Affidavit" seeking to disqualify the present Hearing Officer for cause, which was referred directly to the Hearings Bureau Chief. On July 20, 2010, the Hearings Bureau Chief issued his "Order Denying Motion to Disqualify."

On July 22, 2010, after holding the scheduled telephone conference with the representatives of the parties, the Hearing Officer issued his “Scheduling Order,” setting a pre-hearing schedule and setting the hearing on the consolidated five cases for October 21, 2010, in Anaconda, Montana.

A copy of Exhibit 2 (the transcript of a January 29, 2010 mediation session) appears to have been provided to the mediators by the county representatives during an August 30, 2010 mediation session.

On September 2, 2010, the DU and Dispatchers filed a motion to withdraw the Exhibit 2 transcript.

On September 16, 2010, the county filed notice of substitution of its counsel in all five cases, replacing Dr. Don Klepper with current counsel.

On September 20, 2010, the county filed a motion to amend its complaints (the filing is titled “Motion to Amend Complaint [singular]” but the caption is for both the complaint against the DU and the complaint against the Dispatchers). The requested amendment is to add a charge that the “defendant” (not otherwise specified) violated Mont. Code Ann. § 39-31-402(2) by “surreptitiously recording a mediation session on January 29, 2010 and then submitting a transcript of that session, marked as Exhibit 2, as part of its Answer to the Investigative Report and Finding of Probable Merit.” The requested amendment was also to allege that such actions were “in violation of Mont. Code Ann. §§ 26-1-813 and 45-8-213(1)(c).” The motion has not been decided and the proposed amended complaint or complaints were never filed and served. It is not clear whether the amendment would have added APPA as a party defendant to one or both of the complaints.

On September 22, 2010, the DU, the Dispatchers, and the APPA filed a document named “Objection to Motion to Amend Complaint,” which argued that the “issue” was moot because of the motion to withdraw the transcript, and defended on other grounds involving the specific proceedings in the mediation.

On September 27, 2010, the Hearing Officer issued his order holding the consolidated cases in abeyance while the parties mediated, and setting a telephone status conference with counsel for October 18, 2010. That telephone conference was reset for November 8, 2010, then reset again for December 23, 2010, while the parties continued their efforts to resolve the matters at issue. Then, the December 23, 2010 telephone conference was reset for January 26, 2011 to allow for further efforts to resolve the unfair labor practice claims.

On January 27, 2011, the Hearing Officer set a new pre-hearing schedule for the consolidated cases, with the contested case hearing in Anaconda June 8-9, 2011. That order included briefing schedules for the parties on both the motion to withdraw Exhibit 2 and the motion to amend the complaints.

On May 2, 2011, the county filed a brief in support of its motion to amend, with affidavits from State Mediators Paul Melvin and Ron Stormer regarding the specific proceedings in the mediation.

On May 6, 2011, the DU, the Dispatchers, and the APPA filed a new document named "Objection to Motion to Amend Complaint," including an affidavit from Ryan Peterson, president of the APPA, about the specific proceedings in the mediation.

On May 10, 2011, the county filed its reply brief in support of the motion to amend the complaint.

On May 13, 2011, the DU, Dispatchers, and APPA filed "Union's Surreply Brief," with another affidavit from APPA President Peterson about the specific proceedings during mediation sessions between the parties.

On May 16, 2011, the DU, the Dispatchers, and the APPA filed a "motion" requesting that the Hearing Officer accept the "Union's Reply Brief" and "Surreply Brief" that had already been filed, offering a justification for its late filings on the underlying motion to amend.

On May 31, 2011, the Hearing Officer issued a draft pre-hearing order for the use of the parties in participating in the telephonic final pre-hearing conference, set for June 1, 2011.

On June 3, 2011, counsel and the Hearing Officer conferred by telephone, and the Hearing Officer issued his June 6, 2011 "Order Vacating and Setting Declaratory Ruling Schedule." That order set forth the procedures to be followed to obtain this present order.

On June 7, 2011, the parties, through counsel, executed a stipulation that hearing of this current unfair labor practice proceeding be continued without date, that the county would withdraw with prejudice its pending motion to amend the complaints to add unfair labor practice claims based upon recording the mediation(s), and that the parties jointly requested a declaratory ruling on two questions (stated below as the issues to which this order speaks). The stipulation provided that the answers to the two questions would have no effect, bearing, or precedential value on any of the unfair labor practices pending before the Hearing Officer or on any charge that any party might file over any event that happened before the date of the stipulation. The parties also agreed to engage in further discussions to resolve the remaining pending charges. The Hearing Officer has taken no action on any motions pending in these underlying consolidated cases while addressing the questions answered herein.

II. ISSUES

The issues in this matter were presented as two questions, submitted for BOPA's declaratory ruling: (1) Does Mont. Code Ann. § 26-1-813 govern mediation sessions regarding collective bargaining between a public employer and an exclusive bargaining representative for its employees, which are conducted pursuant to the provisions of Mont. Code Ann., Title 39, Chapter 31? (2) May a public employer or an exclusive bargaining representative make a recording of a mediation session or sessions with that public employer and that exclusive bargaining representative conducted pursuant to Mont. Code Ann., Title 39, Chapter 31, without either a written agreement with the other party and the mediator(s) for such a recording, or express statutory authority for such recording, as required by Mont. Code Ann. § 26-1-813?

III. DISCUSSION

Mont. Code Ann. § 26-1-813, entitled "Mediation -- confidentiality -- privilege -- exceptions," was enacted by the Montana Legislature in 1999, and codified in Title 26, Chapter 1, Part 8 ("Privileges"). It has never been amended since its adoption. It reads, in its entirety, as follows:

(1) Mediation means a private, confidential, informal dispute resolution process in which an impartial and neutral third person, the mediator, assists disputing parties to resolve their differences. In the mediation process, decision making authority remains with the parties and the mediator does not have authority to compel a resolution or to render a judgment on any issue. A mediator may encourage and assist the parties to reach their own mutually acceptable settlement by facilitating an exchange of information between the parties, helping to clarify issues and interests, ensuring that relevant information is brought forth, and assisting the parties to voluntarily resolve their dispute.

(2) Except upon written agreement of the parties and the mediator, mediation proceedings must be:

- (a) confidential;
- (b) held without a verbatim record; and
- (c) held in private.

(3) A mediator's files and records, with the exception of signed, written agreements, are closed to all persons unless the parties and the mediator mutually agree otherwise. Except as provided in subsection (5), all mediation-related communications, verbal or written, between the parties or from the parties to the

mediator and any information and evidence presented to the mediator during the proceedings are confidential. The mediator's report, if any, and the information or recommendations contained in it, with the exception of a signed, written agreement, are not admissible as evidence in any action subsequently brought in any court of law or before any administrative agency and are not subject to discovery or subpoena in any court or administrative proceeding unless all parties waive the rights to confidentiality and privilege.

(4) Except as provided in subsection (5), the parties to the mediation and a mediator are not subject to subpoena by any court or administrative agency and may not be examined in any action as to any communication made during the course of the mediation proceeding without the consent of the parties to the mediation and the mediator.

(5) The confidentiality and privilege provisions of this section do not apply to information revealed in a mediation if disclosure is:

- (a) required by any statute;
- (b) agreed to by the parties and the mediator in writing, whether prior to, during, or subsequent to the mediation; or
- (c) necessary to establish a claim or defense on behalf of the mediator in a controversy between a party to the mediation and the mediator.

(6) Nothing in this section prohibits a mediator from conveying information from one party to another during the mediation, unless a party objects to disclosure.

This statute creates a "mediation privilege" of general application in administrative and judicial proceedings. All references hereinafter to "mediation privilege" are about the scope and application of this statute.

BOPA is an "administrative agency." Mont. Code Ann. §§ 2-15-102(2) and 2-15-1705. Its proceedings are thus administrative proceedings that are within the scope of the mediation privilege, by the plain language of the statute.

Since this is a case of first impression, the Hearing Officer has included some of the specifics of the contentions and arguments in this case as background. Many of the filings, beginning with the county's September 2010 "Motion to Amend

Complaint,” delved into the specifics of the proceedings in the mediation. The extensive background is for the benefit of BOPA, in considering this proposed ruling.

Judicial and quasi-judicial (administrative) bodies considering a statutory privilege must ordinarily factor into the equation the public’s right to know and to participate, articulated in a number of Montana Supreme Court decisions, in balancing competing interests. A judicial body has the power to rule part or all of the statute unconstitutional as applied, should the public’s right to know outweigh the public policies behind that statutory privilege. On the other hand, an administrative body has only the authority granted by statute. *Auto Parts of Bozeman v. U.E.F.*, ¶138, 2001 MT 72, 305 Mont. 40, 23 P.3d 193 (“It is a basic rule of law that . . . an administrative agency has only those powers specifically conferred upon it by the legislature”); *quot. City of Polson v. P.S.C.*, 155 Mont. 464, 473 P.2d 508, 511 (1970); *Gwynn v. Town of Eureka*, 178 Mont. 191, 582 P.2d 1262, 1263 (1978). An administrative body lacks the power to declare that a Montana statute is unconstitutional. *Jarussi v. Lake County School District* (1983), 204 Mont. 131, 664 P.2d 316, 319. BOPA can interpret Montana Collective Bargaining for Public Employees statutes and decide whether and how the mediation privilege applies within that law, but BOPA has no power to rule upon whether the mediation privilege is somehow invalid because it is unconstitutional as applied to mediation of issues within BOPA’s jurisdiction.

Depending upon what BOPA decides, extensive sealing of the file in this case may be necessary. On the other hand, if BOPA adopts the proposed decision, it could rule prospectively, that, given the first impression nature of this case, the mediation privilege applies to collective bargaining mediation under Title 39, Chapter 31, beginning with the date of issuance of BOPA’s decision, or some subsequent date certain.

In Title 39, Mont. Code Ann., there are four statutes that address mediation in contexts involving collective bargaining. Mont. Code Ann. §§ 39-31-307, 309 and 502, and Mont. Code Ann. § 39-34-101.

Mont. Code Ann. § 39-31-307 provides, in its entirety, that “If, after a reasonable period of negotiation over the terms of an agreement or upon expiration of an existing collective bargaining agreement, a dispute concerning the collective bargaining agreement exists between the public employer and a labor organization, the parties shall request mediation.” This provision was enacted in 1973 and was last amended in 1975. This statute does not expressly reference any kind of procedures or rules governing such mandatory (“shall request”) mediation. Any settlement in mediation would, of course, still be entirely voluntary.

Mont. Code Ann. § 39-31-309(6) provides that no provisions contained in Mont. Code Ann. §§ 39-31-307 through 310 prohibit the fact-finder from trying to

mediate the dispute. Again, neither a definition of mediation nor any particular rules or procedures are referenced for this voluntary mediation.

Mont. Code Ann. § 39-34-101 provides that in collective bargaining between a public employer and firefighter's organization, either party or both parties jointly may petition BOPA for final and binding arbitration if an impasse is reached and the procedures for mediation and fact-finding in Mont. Code Ann. §§ 39-31-307 through 310 have been exhausted. Again, there is neither a definition of mediation nor any reference to any particular rules or procedures for mediation.

In contrast to all of those statutes, Mont. Code Ann. § 39-31-502, enacted in 2005 and not amended since, provides the procedure to invoke mediation in collective bargaining disputes involving a public employer and police officer employees for whom a strike is unlawful. Among other things, this statute provides for declaration of impasse to conclude mediation, and further provides that after such a declaration of impasse, the final written offers of the parties are made public by the mediator, within seven days of receiving those final offers from the parties, as part of the procedure of concluding mediation. Mont. Code Ann. § 39-31-502(2)(b).

This statutory provision for making final offers public is consistent with the mediation privilege subsection, which is expressly inapplicable to information revealed in a mediation when disclosure of that information is required by any statute. Mont. Code Ann. § 26-1-813(5)(a). The plain language of the 2005 enactment, Mont. Code Ann. § 39-31-502(2)(b), is in complete harmony with the mediation privilege.

Mont. Code Ann. § 26-1-813(5)(2) also provides that, upon written agreement of the parties and the mediator(s), whether prior to, during, or subsequent to the mediation, the mediation proceedings need not be confidential, held without a verbatim record, and held in private. Application of the mediation privilege to public employee collective bargaining expressly allows all participants to agree in writing that the privilege is inapplicable (i.e., is waived).

The Board of Labor Appeals has a rule specifying that the word "mediation" within its rules means "mediation" as defined in Mont. Code Ann. § 26-1-813. Admin. R. Mont. 24.16.7506(1). BOPA has no such cross-reference in its rules, but also has no definition of "mediation."

BOPA's current administrative rules regarding Collective Bargaining for Nurses include a mediation rule adopted in 1979, now Admin. R. Mont. 24.25.802, reading, in its entirety, as follows:

(1) Upon petition, the board, any member or employee thereof designated by the board or any other competent, impartial, disinterested person designated by the board may act as the mediator in a dispute.

(2) Any information disclosed to the mediator in the performance of these duties shall not be divulged unless approved by the parties involved. All files, records, reports, documents, or other papers received or prepared by the mediator shall be classified as confidential and not as a public record. Such matters shall not be disclosed to anyone without the prior consent of the board.

(3) The mediator shall not produce any confidential records or testimony with regard to any mediation conducted on behalf of a party to any case pending in any proceeding before any court, board, investigatory body, arbitrator, or fact finder without the written consent of the board.

(4) The mediator may hold separate or joint meetings with the parties or their representatives, and such meetings shall be private and nonpublic, except if otherwise mutually agreed upon by the parties.

Adoption of this rule two decades before enactment of the mediation privilege sheds no light on the application of that mediation privilege to collective bargaining mediation.¹

Admin. R. Mont. 24.26.630(6) requires mediation of a unit clarification petition that involves one or more questions of fact, but does not define the mediation process other than to put a 45 day time limit upon it.

Admin. R. Mont. 24.26.695(1) provides for interest mediation of labor disputes for which a petition for BOPA's assistance has been properly filed by an employee or group of employees, a labor organization, or public employer. Sections (4) through (6) define the confidentiality applicable to such mediation:

(4) Any information disclosed to the mediator in the performance of these duties shall not be divulged unless approved by the parties involved. All files, records, reports, documents, or other papers received or prepared by the mediator shall be classified as confidential and not as a public record. Such matters shall not be disclosed to anyone without the prior consent of the board.

¹ The only changes to this rule, made in 2010, are as noted in the following quote of the original section (1): "Upon petition, the ~~division board~~, any member or employee thereof designated by the ~~division board~~ or any other competent, impartial, disinterested person designated by the ~~division board~~ may act as the mediator in a dispute or, if available, the division may request a mediator from the Federal Mediation and Conciliation Service or from the American Arbitration Association." MAR Notice No. 24-16-248 (7/29/10), p. 1663 *eff.* 12/10/10 2010 MAR p. 2841.

(5) The mediator shall not produce any confidential records or testimony with regard to any mediation on behalf of a party to any case pending in any proceeding before any court, board, investigatory body, arbitrator, or fact finder without the written consent of the board.

(6) The mediator may hold separate or joint meetings with the parties or their representatives, and such meetings shall be private and nonpublic, except if otherwise mutually agreed upon by the parties.

This rule was adopted in 1974, and amended in 1984 and 1993. Sections (4) through (6) were proposed amendments in 1993, effective in 1994, five years before adoption of the mediation privilege. *See* 1993 Mont. Admin. Reg. 2363 for proposed (4) through (6).

Admin. R. Mont. 24.26.695A(1) provides for grievance mediation of disputes between public employer and labor organizations over the meaning, interpretation, or application of an existing CBA, upon request of the parties, with the agreements of the parties to certain conditions. Sections (2) and (3) define the confidentiality applicable to such mediation:

(2) Matters disclosed to the mediator by the parties during the course of mediation shall be confidential and shall not be divulged unless approved by both parties to the dispute.

(3) In the event the dispute goes to arbitration, the mediator may not be called as a witness or otherwise called to divulge information or settlement offers which may have been discussed during mediation.

This rule in its entirety was proposed in 1993 and effective in 1994, again, five years before adoption of the mediation privilege, and has not been amended since. *See* 1993 Mont. Admin. Reg. 2364 for proposed rule.

Although BOPA has no general collective bargaining rule defining “mediation,” there is no conflict between “mediation” in Title 39, Chapter 31, and/or in BOPA’s existing rules, and the “mediation” definition in Mont. Code Ann. § 26-1-813. Whenever the meaning of a word is defined in any part of the Montana Code, that definition is applicable to the same word or phrase wherever it occurs, except when a contrary intention plainly appears. Mont. Code Ann. § 1-2-207. Thus, under the law of statutory construction, “mediation” in Title 39, Chapter 31 means the same thing as “mediation” in the mediation privilege, and the mediation privilege applies to mediation of collective bargaining disputes between public employers and the representatives of their employees.

The DU, the Dispatchers, and the APPA argue that if this statute applies to mediation of a dispute between a public employer and a collective bargaining representative of its employees, then conduct during such mediation would not be subject to disclosure to BOPA except within the three express exceptions in the statute. This would mean, they argue, that unfair labor practices committed during mediation cannot be reviewed and addressed by BOPA.

Under the mediation privilege, a participant cannot use the confidentiality of mediation as a shield against enforcement efforts regarding signed and written agreements, since such agreements are outside of the scope of the privilege. Mont. Code Ann. § 26-1-813(3). On the other hand, bad faith refusal, in mediation, to sign a written agreement reached therein would appear to be within the scope of the mediation privilege, as would other unfair labor practices committed within mediation.

A law review article states the unions' objection succinctly "A good faith participation requirement becomes pointless if a party's conduct in a mediation is deemed beyond the investigation of the court because of confidentiality concerns." "Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law," 54 Ark. L. Rev. 171, 174 (2001).²

The tension between confidentiality in mediation and accountability for inappropriate conduct in mediation has been explored in the California courts. The California Supreme Court applied state statutes defining mediation privileges to preclude testimony of a mediator regarding conduct of the offending party during court-ordered mediation. That court also held that the lower appellate court erred in creating a judicial exception to the statutory confidentiality of communications in mediation and mediator reports and findings. The California Supreme Court ruled that the statutes unambiguously conferred confidentiality on the mediation process, and there was no need to create a judicial exception to carry out the purpose for which the statutes were enacted or to avoid an absurd result. The court remanded and ruled that if the plaintiff pursued a sanctions motion, evidence of communications during the mediation could neither be admitted nor considered. *Foxgate Homeowners Assoc., Inc. v. Bramalea California, Inc.*, 26 Cal. 4th 1, 25 P.3rd 1117, 1129³:

² The article originated as a symposium article for the Arkansas Law Review Symposium on Alternative Dispute Resolution on February 9, 2001, in Fayetteville, Arkansas, written by a Professor of Law, James J. Alfini, and a third year law student, Catherine G. McCabe, both at Northern Illinois University College of Law.

³ The *Foxgate* case was one of two cases cited in the Arkansas Symposium Article quoted on page 14, above. The article was written before the California Supreme Court decision on appeal. The article cited the *Foxgate* California Court of Appeals decision as a qualified victory for invading mediation confidentiality, but the subsequent California Supreme Court decision reversed that portion of the lower appellate court's decision.

Inasmuch as the superior court's sole basis for imposing sanctions on Bramalea/Stevenson was allegations in and the material offered in support of the motion for sanctions, it is clear that reference to the mediation materially affected their rights and that the Court of Appeal did not err in setting aside the order imposing sanctions. If, on remand, plaintiff elects to pursue the motion, the trial court may consider only plaintiff's assertion and evidence offered in support of the assertion that Bramalea engaged in conduct that warrants sanctions. No evidence of communications made during the mediation may be admitted or considered.

California also has considered when and if a mediator's right to invoke a privilege could be trumped by the parties' consent to disclosure. That precise issue arose in *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (D.C.N.D. 1999), *as amended Oct. 15, 1999*, where the defendants sought enforcement of a Memorandum of Understanding signed by both parties to a court-engendered mediation, which the plaintiff later argued was unenforceable, pleading duress. Both parties waived confidentiality protections in order to allow the court to determine the duress claim. The mediator, however, did not waive his privilege. The federal court concluded, applying California law (even though the mediation occurred under the auspices of the federal court before which the parties' lawsuit was pendant), that the waiver of the parties and the absence of any other equally reliable source of information about formation and execution of the Memorandum of Understanding militated in favor of requiring the mediator's testimony, over the mediator's objection. *Olam at* 1138-39.

California law is similar to Montana's mediation privilege, contemplating enforcement outside of the privilege of a written agreement reached in mediation and signed by the parties. *Olam at* 1125, citing *Ryan v. Garcia*, 27 Cal. App. 4th 1006 (Third Dist. 1994).

Suppose for the sake of analysis that the mediation privilege would establish a "safe haven" in mediation of BOPA disputes. The privilege would bar evidence of conduct in mediation to prove an alleged unfair labor practice. It would also establish that same "safe haven" in mediation from tactical claims of unfair labor practices based on conduct during mediation. There is nothing absurd about such "safe haven" impacts of applying the mediation privilege to mediation of disputes between public employers and the bargaining representatives for their employees.

An example of rejecting a literal interpretation of a statute because the result would be absurd appears in *In re Marriage of Syverson*, 281 Mont. 1, 931 P2d 691 (1997). Literal application of that statute would have conferred jurisdiction on the Montana court when a child whose custody was at issue was moved from Montana to

another state but not when the child was moved from one end of Montana to the other, or from Montana to another country. Obviously, concerns about the viability of existing custody arrangements would be equally likely in all three kinds of situations, so the court rejected the literal interpretation due to its absurdity. *Syverson at* 702.

Unlike the statute in *Syverson*, the mediation privilege appears to be a reasoned legislative determination that encouraging and protecting the option to use mediation as an alternative to litigation requires making mediation confidential unless the parties and mediators waive confidentiality in writing or another statute removes some or all of the confidentiality.

The Legislature could easily have excluded public employer-employee mediation from the mediation privilege, but it did not. The legislative decision to apply confidentiality in mediation to public employer-employee collective bargaining as well as other kinds of disputes under Montana law is not at all absurd. It reflects a policy decision that confidentiality facilitates mediated agreements as a general proposition. Indeed, it appears to extend to all mediation, in collective bargaining as well as elsewhere, the same genre of privilege as BOPA had already extended in several specific settings.

The background information herein includes a litany of the filings of the parties. Obviously, these parties in this particular collective bargaining process have been locked in adversarial positions. Even in a situation like this one, or perhaps in express contemplation of situations like this one, where the hostility between the parties seems extreme, the Montana Legislature has decided that there is merit to making mediation an arena in which privacy is the rule. Recording a mediation session without written agreement of the parties and the mediator(s) is barred by Mont. Code Ann. § 26-1-813(2). No Montana statutory exception has been cited.

Obviously, under the express terms of this request for declaratory ruling, the question of waiver of the privilege by conduct is not addressed.

Perhaps making mediation proceedings confidential except under limited circumstances simply encourages worse behavior by removing the check of potential unfair labor practice charges. Nonetheless, the Montana Legislature decided to test the value of the statutory mediation privilege by applying it to virtually all mediation.

IV. CONCLUSIONS OF LAW

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

2. Mont. Code Ann. § 26-1-813 governs mediation sessions regarding collective bargaining between a public employer and an exclusive bargaining

representative for its employees, which are conducted pursuant to the provisions of Mont. Code Ann., Title 39, Chapter 31.

3. A participant to mediation between a public employer and an exclusive bargaining representative shall not record a mediation session or sessions with that public employer and that exclusive bargaining representative conducted pursuant to Mont. Code Ann., Title 39, Chapter 31, without either a written agreement of the parties and the mediator(s) for such recording, or express statutory authority for such recording, as required by Mont. Code Ann. § 26-1-813.

4. For purposes of the declaratory rulings requested, it is appropriate to designate this a recommended order for BOPA's adoption, subject to the procedure for submission to BOPA, and the time limits for objections thereto, set forth in Admin. R. Mont. 24.26.222, and this order is hereby so designated.

V. RECOMMENDED ORDER

BOPA should issue its order adopting Conclusions of Law Nos. 2 and 3 as declaratory rulings upon the questions submitted by the parties hereto. BOPA may decide to make its ruling prospective, applying to mediation sessions occurring on or after the date of its order, or on or after a date certain thereafter.

DATED this 24th day of February, 2012.

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR
Terry Spear
Hearing Officer

NOTICE: Notice of Exceptions or Objections to these Findings of Fact, Conclusions of Law and Recommended Order may be filed with the Board, pursuant to Admin. R. Mont. 24.26.221 and 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/objections are timely filed through this method, 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**