IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0145

CITY OF GREAT FALLS,

Petitioner and Appellant,

v.

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, Local #8, MONTANA FEDERATION OF PUBLIC EMPLOYEES, and CITY OF GREAT FALLS CRAFT COUNCIL

Respondents and Appellees.

On Appeal from the Montana Eighth Judical District Court
Cascade County, Casue No. DDV 20-0612,
Honorable Judge Kaydee Snipes Ruiz

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE

1. Did the District Court correctly dismiss the City of Great Falls' Petition for Judicial Review for failure to exhaust administrative remedies?

STATEMENT OF THE CASE

Appellant/Petitioner City of Great Falls ("the City") notified City employees in early 2019 that it would adopt an updated January 17, 2019, Alcohol and Controlled Substances Policy ("the 2019 Policy"), effective April 1, 2019. The 2019 Policy expanded drug and alcohol testing to certain safety-sensitive positions within the City. The City did not bargain the 2019 Policy with the Appellees/Respondents, International Association of Fire Fighters Local #8, Montana Federation of Public Employees, and City of Great Falls Crafts Council: Carpenters Union Local No. 82, Teamsters Local Union No. 2, Operating Engineers Local No. 400, Laborers Union Local No. 1685, and Machinists Union Local No. 24 (together "the Unions"). The City maintains that ensuring safe public operations through the 2019 Policy is within its management rights and is not a mandatory subject of bargaining.

The Unions filed three separate unfair labor practices ("ULPs") charges against the City with the Montana Board of Personnel Appeals ("BoPA") in 2019 concerning the 2019 Policy, asserting that the drug and alcohol testing changes in the Policy were mandatory subjects of bargaining. The three unfair labor practices charges were consolidated and assigned to a BoPA hearing officer. The parties to

the consolidated ULPs—the City and the Unions—then agreed that the ULPs could be decided on cross-motions for summary judgment regarding whether the 2019 Policy was a mandatory subject of collective bargaining. *See* AR 000535.[1]

The BoPA hearing officer issued an October 22, 2020, Summary Judgment Order ("the Hearing Officer's Order"). Dkt. 1, Ex. A; *see also* BoPA Admin. Record Doc. 38. The Hearing Officer's Order granted summary judgment to the Unions, concluding that there were no genuine issues of material fact and that the 2019 Policy's updates were mandatory subjects of bargaining as a matter of law. BoPA Admin. Record Doc. 38, pgs. 8-10. The Hearing Officer's Order also proposed ordering the City to "cease and desist" its efforts to impose the 2019 Policy and proposed requiring the City to pose a notice informing employees of this. *Id*.

The City filed a Petition for Judicial Review ("the Petition") in Montana Eighth Judicial District Court, Cascade County, on November 20, 2020. Dkt. 1. The Petition sought review of the Hearing Officer's Order. Dkt. 1, pg. 2. The Unions responded to the Petition and filed a motion for summary judgment dismissing or denying the Petition. Dkts. 3, 4, 7, and 9. The District Court held oral argument on the City's Petition and the Unions' motion for summary judgment on July 23, 2021. Dkt. 24. The District Court granted the Unions' Motion for Summary

[1] The Administrative Record was filed with the District Court. *See* Dkt. 8.

Judgment on May 31, 2022 ("the District Court Order").[2] Dkt. 26. The District Court Order did not determine whether the City's updated drug and alcohol testing in the 2019 Policy was a mandatory subject of bargaining as a matter of law. The District Court only concluded that the City could not petition for judicial review because the City failed to exhaust its administrative remedies. Dkt. 26, pg. 5. The City appeals from this conclusion.

STATEMENT OF FACTS

A. The City's update of its drug and alcohol testing policies.

In 2018 and 2019, City management became aware of instances of City employee drug or alcohol use or abuse in violation of the City's Personnel Policy and contrary to the City's obligation to provide safe public services to residents. Dkt. 14, ¶ 21; BoPA Admin. Rec., Doc. 56, Affidavit of Gregory T. Doyon; BoPA Admin. Rec., Doc. 56, Affidavit of Gaye McInerney; BoPA Admin. Rec., Doc. 41, ¶ 4.

At this time, the City operated under a 2006 Drug and Alcohol Policy ("the 2006 Policy"). Dkt. 14, ¶ 4; BoPA Admin. Rec., Petitioners' Exhibit 5 (AR 000913-000927). The 2006 Policy provided for various forms of drug and alcohol testing of City employees for a whom a commercial driver's license (CDL) was a job or requirement and of City employees that performed "safety-sensitive functions." Dkt. 14, ¶ 4; BoPA Admin. Rec., Pet. Ex. 5, pg. AR 000916. "Performing a safety-

[2] Because of an inadvertent error, the District Court's May 22, 2022, Order was not served on the parties. The Unions filed a Notice of Entry of Judgment pursuant to Rule 77(d) on January 12, 2023, and the parties agree that the City's appeal is timely.

sensitive function" was defined in the 2006 Policy as all times when a driver was performing his or her duties. BoPA Admin. Rec., Pet. Ex. 5, pgs. AR 000917-918. Pre-employment, reasonable suspicion, post-accident, and random drug and alcohol testing were permitted for City employees required to hold a CDL and those performing a "safety-sensitive function" under the 2006 Policy. BoPA Admin. Rec., pgs. AR001105-001107. The 2006 Policy was motivated and obligated by, in part, federal drug and alcohol testing requirements for CDL drivers and federal drug free workplace rules and the City's need to ensure public safety. Dkt. 14, ¶ 20; BoPA Admin. Rec., Pet. Ex. 5, pg. 000915; 49 CFR Parts 382, 391, 392, and 395, and 49 CFR Part 29. In addition, the 2006 Policy provided that "[t]he City retains the sole right to change, amend, or modify any term or provision of this policy with notice." Dkt. 14, ¶ 4; BoPA Admin. Rec., Pet. Ex. 5, pg. AR 000915.

The City's operative 2016 Personnel Policy Manual also "strictly prohibited" alcohol and drug use by ***all*** City employees on City premises or while performing City business. Dkt. 14, ¶ 3; BoPA Admin. Rec., Ex. 4, pg. AR 000911. The 2016 Personnel Policy applied to all City employees. *Id*. Supervisors who suspected that any City employee was unfit for duty due to the influence of alcohol or drugs could suspend the employee pending further investigation. BoPA Admin. Rec., Ex. F, pg. 001438. Employees who "appear to be unfit for duty" due to alcohol or drug use "may be subject to drug or alcohol screening or a medical evaluation" under the

Personnel Policy. BoPA Admin. Rec., Ex. F, pg. 001438. The Personnel Policy advised all City employees that it incorporated the 2006 Policy testing guidelines and notified City employees that the City may "at its sole discretion, invoke disciplinary actions as appropriate for employee misconduct related to the use or abuse of alcohol or drugs or both." Dkt. 14, ¶ 25; BoPA Admin. Rec., Ex. F, pg. AR 001439. Public safety concerns and federal funding requirements motivated, and required, the 2016 Personnel Policy Manual's prohibition of alcohol or drug abuse. BoPA Admin. Rec., Ex. 4, pg. AR 000911.

City departments that employ the Unions' members receive significant amounts of federal funding, implicating federal drug-free workplace requirements. Dkt. 14, ¶ 20; BoPA Admin. Rec., pg. AR 000512. For example, the City received over $13,200,000 in federal funding from 2015 to 2019. Dkt. 14, ¶ 20.

Therefore, prior to the 2019 Policy, City policies and federal laws and regulations required a drug- and alcohol-free workplace and imposed potential discipline for violations *on all City employees*. *See, e.g.*, BoPA Admin. Rec., Ex. F, pgs. AR 001438-001439.

The three collective bargaining agreements ("CBAs") applicable to the Unions recognized the public safety duties of the City *and* the application of the 2016 Personnel Policy. Dkt. 14, ¶ 25; BoPA Admin. Rec., pr. AR 000745.

More broadly, the City possessed inherent state law rights and obligations to provide a safe working place. *See, e.g.*, Mont. Const., Art. XI, §§ 4 & 6; § 7-1-106, MCA; § 7-3-4464, MCA.

The Unions' CBAs also included recognition of the City's management rights. This included the implicit recognition that the City reserved the unilateral management right to amend or modify the 2006 Policy. Dkt. 14, ¶ 25.

In this context, on January 29, 2019, the City notified employees that it was updating the 2006 Policy. Dkt. 14, ¶ 5; BoPA Admin. Rec., Pet. Ex. 7, pg. AR 000931. The proposed new Alcohol and Controlled Substance Policy ("the 2019 Policy") would become effective April 1, 2019, and testing would be administered by a third-party contractor. Dkt. 14, ¶¶ 10, 22. The City required all employees, including the Unions' members, to review the 2019 Policy and sign and return an acknowledgment form. Dkt. 14, ¶ 5; BoPA Admin. Rec., Pet. Ex. 7, pg. AR 000942.

The 2019 Policy expanded the scope of the 2006 Policy due to City management's concerns about substance abuse by City employees and the City's obligations to provide safe public services and a drug-free workplace. Dkt. 14, ¶¶ 21-24; BoPA Admin. Rec., Pet. Ex. 7, pg. AR 000934. Specifically, the 2019 Policy provided that:

This policy applies to all employees of The City of Great Falls with safety sensitive positions as defined below. Employees who exercise a Commercial Driver's License for The City of Great Falls (CDL employees) have additional regulations that apply.

This policy applies to all employee of The City of Great Falls who hold safety sensitive positions, including but not limited to:

Life Guards;
Employees who operate City vehicles;
Employees who supervise and transport minors; and
Employees who exercise a Commercial Driver's License (CDL employees), who also have additional regulations which apply to them.

This policy also applies to all employees who may be suspected on a reasonable basis of being under the influence of Alcohol and/or Controlled Substances while on duty or operating city equipment or vehicles.

Dkt. 14, ¶¶ 6, 23-24. While the 2019 Policy's scope was expanded, the 2019 Policy's scope was similarly limited to CDL employees and those City employees directly tasked with "safety sensitive" positions like lifeguards, drivers of City vehicles, and City employees supervising minors. *Id*. The 2019 Policy's expanded scope included some, but not all, of the Unions' members.

The above covered City employees could also be subject to random testing under the updated 2019 policy. Dkt. 14, ¶ 7. Refusals to test or positive tests could carry consequences for City employees. *See* Dkt. 14, ¶ 8. These potential consequences included removal from a safety-sensitive position, being notified of available rehabilitation or educational resources, or termination. *Id*.

The City did not bargain the 2019 Policy with the Unions. Dkt. 14, ¶¶ 11. The City instead provided notice to all City employees of the updated 2019 Policy months before its effective date. Dkt. 14, ¶¶ 11, 29. The City relied upon its inherent

management rights to update the 2006 Policy, including the 2006 Policy's specific reservation of the sole authority to change or modify the policy ***to the City***. *See* Dkt. 14, ¶ 4; BoPA Admin. Rec., Pet. Ex. 5, pg. AR 000915; BoPA Admin. Rec., Doc. 41, pgs. AR 000509-000510. For example, the City's Charter provides that, according to the City's Commissioner-Manager form of self-government, the City Manager must "[d]irect, organize, supervise and administer all City departments, and appoint and be administratively responsible for all City employees, including adopting administrative and personnel code and/or policies." Dkt. 14, ¶ 19.

The Unions opposed the 2019 Policy and demanded to bargain the revisions. Dkt. 14, ¶¶ 12-14. The City thereafter agreed to postpone application of the 2019 Policy to the Unions' members. Dkt. 14, ¶ 30.

B. <u>The underlying administrative proceedings.</u>

The Unions filed three unfair labor practice ("ULP") charges with the Board of Personnel appeals in early- to mid-2019 relating to the 2019 Policy. Dkt. 14, ¶ 31. The three ULP cases were consolidated by stipulation of the parties and assigned to a hearings officer with the Office of Administrative Hearings. Dkt. 14, ¶¶ 32-33; BoPA Admin. Rec. Doc. 62, pg. AR 000836.

Importantly, the City ***and the Unions*** agreed that no material fact issues existed and filed cross motions for summary judgment to determine the central, ***legal***, question at issue in the ULPs: whether the 2019 revisions to the City's drug

and alcohol testing policies were mandatory subjects of collective bargaining. Dkt. 14, ¶ 34. This fact must be stressed: the parties all agreed that the Unions' ULPs presented purely legal questions subject to resolution via summary judgment. The BoPA Hearing Officer *also* agreed and memorialized this agreement in a May 13, 2020, order that vacated the scheduled contested hearing because "the parties agreed that the hearing could be vacated and the matter decided on the motions and cross-motions for summary judgment." BoPA Admin. Rec., Doc. 45, pg. AR 000535; *see also* City's Appendix, Ex. 3. The parties and the Hearing Officer understood that no contested material facts were at issue in the ULPs and that the ULPs presented a purely legal question regarding whether the revisions in the 2019 Policy were mandatory subjects of collective bargaining under Montana law. *Id*.

The Hearing Officer's resulting Summary Judgment Order, issued October 22, 2022, reiterated that the Unions' consolidated ULP charges only raised the same legal question: "[t]he real question here regarding the merits of these ULPs depend[s] upon whether the City had a duty to bargain these changes with the complainants because the February 2019 revisions to its drug and alcohol policy constituted unilateral changes to an existing term or condition of employment which was a mandatory subject of bargaining." Dkt. 1, Ex. A ("Hearing Officer's Order"), pg. 4, fn. 1; *see also* City's Appendix, Ex. 2.

To resolve this legal question, the Hearing Officer's Order made essentially five factual findings: 1.) the City sent a January 2019 notice directly to all City employees regarding the 2019 Policy and requested that all City employees sign and return an acknowledgement form; 2.) the revised 2019 Policy was more expansive than the 2006 Policy and newly included certain members of the Unions; 3.) the City did not bargain the 2019 Policy and directly communicated it to employees, not through the Unions; 4.) the City had bargained some alcohol and drug policy issues in the past; and 5.) the Unions considered the subject of the 2019 Policy to be a mandatory subject of collective bargaining and communication with members to be improper direct dealing. Dkt. 1, Ex. 1, pgs. 2-4. These facts were not contested by the City in the BoPA proceedings. *See, e.g.*, BoPA Admin. Rec., Doc. 41, pgs. AR 000508-000515 (City's Undisputed Facts).

The Hearing Officer's Order thereafter analyzed the requirements of Montana's Collective Bargaining for Public Employees Act (Title 39, Ch. 31 of the Montana Code Annotated) given these undisputed facts. Dkt. 1, Ex. A, pgs. 4-10. Briefly, the public employee collective bargaining statutes impose a duty to "negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment[.]" *See* § 39-31-305(2), MCA. The key issue before the BoPA Hearing Officer was, accordingly, whether the changes in the 2019 Policy affected a "condition of employment" within the ambit of the statutory bargaining

duty. *See* Dkt. 1, Ex. A, pgs. 4-5. The BoPA Hearing Officer concluded, as a matter of law, that persuasive authority from the National Labor Relations Board ("NLRB") instructed that the City's proposed 2019 Policy was a mandatory subject of collective bargaining because drug and alcohol testing was a "condition of employment." *Id*., pgs. 6-7, citing *Johnson-Bateman Co.*, 295 NLRB 180 (1989), and *Minneapolis Star Tribune*, 295 NLRB 542 (1989). The BoPA Hearing Officer, construing NLRB decisions arising from *private*, *for-profit companies*, concluded as a matter of law that drug and alcohol testing was not a "managerial decision" within the City's "core of entrepreneurial control" or concerning "the basic scope of the enterprise" of the City. Dkt. 1, Ex. A, pg. 7. In the course of reaching this legal conclusion, the BoPA Hearing Officer affirmed that "[t]here is [sic] no genuine issues of material fact" and construed NLRB decisions to hold, as a matter of law, that drug and alcohol testing was a mandatory subject of collective bargaining. *Id*., pgs. 5-8.

The City did not file exceptions to the Hearing Officer's Order with the Board of Personnel Appeals. *See* Dkt. 1, pg. 6. The City instead chose to seek immediate judicial review of the Hearing Officer's legal conclusion that alcohol and drug testing is a mandatory subject of collective bargaining under Montana law. *See id*.

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C. **The City's Petition to the District Court.**

Again, the BoPA Hearing Officer concluded, as a matter of law, that employee drug testing was not a management right inherent to the scope of the enterprise of the employer public entity, the City. The Hearing Officer concluded as a matter of law that employee drug testing was a condition of employment that fell within the scope of the mandatory bargaining subjects in § 39-31-305(2), MCA. Dkt. 1, Ex. A, pgs. 5-6.

The City did not desire the *non-judicial* review of these legal conclusions by the Board of Personnel Appeals, such as would have occurred through the filing of exceptions to the Hearing Officer's Order under § 39-31-406(6), MCA. No further administrative fact-finding would occur at the BoPA—the parties had stipulated to resolution of the sole, *legal* question in the case via dispositive cross motions for summary judgment. BoPA Admin. Rec., Doc. 45, pg. AR 000535. Because the resulting Hearing Officer's Order only considered a legal question, specifically the application of competing persuasive authority to Montana's collective bargaining statutes, the City chose to petition the District Court for immediate *judicial* review of the Hearing Officer's Order's purely legal conclusions. *See* Dkt. 1; *see also* City's Appendix, Ex. 4. The Petition primarily relied upon § 2-4-701, MCA, the statutory mechanism for immediate review of an agency decision, and Montana's longstanding exception to the administrative exhaustion doctrine *for purely legal*

questions. Dkt. 1, pgs. 1, 5-6, citing *Shoemaker v. Denke*, 2004 MT 11, ¶ 20, 319 Mont. 238, 244, 84 P.3d 4, 8; Dkt. 12, pg. 8.

The City's Petition only challenged the Hearing Officer's legal conclusion that drug and alcohol testing was a mandatory subject of collective bargaining under Montana law. The City's Petition did not challenge any of the Hearing Officer's fact findings. *See* Dkt. 1. As the Petition explained:

> [t]he Hearing Examiner's *Summary Judgment Order*, incorrectly found that public safety and testing of public employees is a mandatory subject of collective bargaining and is not at the core of City control. . . . This petition is made upon the grounds that the Hearing Examiner's *Summary Judgment Order* is in violation of constitutional or statutory provisions and/or affected by other error law, under Mont. Code Ann. § 2-4-704(2)(a)(i) and (iv).
>
> In the above-referenced matter before the Board of Personnel Appeals Hearings Examiner, the parties filed cross Motions for *Summary Judgment*, agreeing that the issue before the Hearings Examiner involved questions of law.

Dkt. 1, pg. 5.

The City's Brief in support of its Petition did not raise *any* alleged fact-finding errors in the Hearing Officer's Order. *See* Dkt. 12. The City's Brief only sought review of the legal conclusions in the Hearing Officer's Order. Specifically, the City sought review of the Hearing Officer's legal conclusions that: 1.) the City was not entitled to summary judgment as a matter of law (Conclusion of Law No. 2); 2.) that the 2019 Policy was a "mandatory subject of collective-bargaining" with the Unions

(Conclusion of Law No. 3); 3.) that the City engaged in improper direct dealing and unfair labor practices by communicating and implementing the 2019 Policy (Conclusions of Law Nos. 4 & 5); and 4.) that the City must "cease and desist" from these alleged unfair labor practices by stopping communication and enforcement of the 2019 Policy against the Unions' members (Conclusions of Law Nos. 6 & 7 and Proposed Order). Dkt. 12, pgs. 5-6; Dkt. 1, Ex. A, pgs. 8-9.

As the City's Brief explained, "[t]he legal determination of whether the City's decision was a management right or a condition of employment is the issue that must be decided in this matter." Dkt. 12, pg. 8. In support, the City's Brief argued that the *private sector* NLRB decisions that the Hearing Officer's Order rested on were distinguishable because the City possessed constitutional and statutory public safety duties that were irrelevant or inapplicable to the for-profit private companies in the NLRB decisions. *See, e.g.*, Dkt. 12, pgs. 9-10. As the City's Brief argued, the "City's primary, fundamental and basic obligation to the public is to protect and safely serve its citizens," while this was not true of the newspaper or pipe manufacturer employers in the NLRB decisions that formed the basis Hearing Officer's Order's legal analysis. Dkt. 12, pgs. 10-13. The City's Petition advanced a purely legal argument regarding the correct application of persuasive legal authority to Montana's mandatory collective bargaining statute, not whether factual findings were erroneous.

D. <u>The District Court's Dismissal of the City's Petition.</u>

In response to the City's Petition to the District Court, the Unions filed a March 12, 2021, Motion for Summary Judgment. *See* Dkt. 9 (Unions' Motion); Dkt. 11 (Unions' Brief in Support). The Unions' Motion advanced two alternative arguments: 1.) that the District Court should dismiss the City's Petition on procedural grounds due to an alleged failure to exhaust administrative remedies; or 2.) that the District Court should deny the City's Petition on the substantive legal merits, according to persuasive authority regarding the duty to bargain certain conditions of employment. *See* Dkt. 11, pgs. 2, 6-8 (regarding the exhaustion argument), 8-14 (regarding the legal merits argument).

The City opposed the Unions' Motion for Summary Judgment. *See* Dkt. 15. The City first opposed procedural dismissal by arguing that Montana Supreme Court precedent recognized an exception to the administrative exhaustion requirement. Dkt. 15, pgs. 5-10; *see also* Dkt. 1, pgs. 5-6. This exception exists because *no* deference is afforded to administrative hearing officers' legal conclusions and because the central purpose of administrative exhaustion is to develop the factual record. Dkt. 15, pg. 6, citing *Shoemaker*, ¶ 18. Resolving legal questions is for the judiciary, meaning that the exhaustion doctrine is inapplicable to district court reviews of purely legal questions. *Id.*

The City also argued, in addition and in the alternative, that the combined effect of the plain language of § 39-31-406(6), MCA, ARM 24.16.1208, and § 2-4-702, MCA did not obligate it to file exceptions to the Hearing Officer's Order prior to petitioning the District Court for judicial review. *See* Dkt. 15, pgs. 8-10. Instead, the City argued that § 39-31-406(6), MCA, and ARM 24.26.254, provided that "a hearing officer's proposed order becomes final and becomes the order of the BoPA by self-executing operation of law after 20 days if the charged party does not file exceptions." Dkt. 15, pg. 9. Because the BoPA Hearing Officer's Order became a final administrative order by operation of law once exceptions were not filed, § 2-4-702, MCA, permitted judicial review of the final agency order under the Montana Administrative Procedure Act ("MAPA"). *See* Dkt. 15, pg. 9. The City accordingly alternatively argued that the combined effect of the plain language of § 39-31-406(6), MCA, and § 2-4-702, MCA, permitted two potential paths for judicial review of the Hearing Officer's Order: 1.) file exceptions to the Order with the full Board of Personnel Appeals and thereafter seek judicial review of the BoPA's final order; or, 2.) allow the Hearing Officer's Order to become a final order by operation of law and seek immediate judicial review. Dkt. 15, pg. 9. The City argued that it chose the second path, as allowed by the plain language of relevant statutes and rules. *Id*.

The Unions' arguments largely rested on the City's alleged failure to exhaust administrative remedies and *Flowers v. Bd. of Pers. Appeals, Montana Dep't of Fish,*

Wildlife & Parks, 2020 MT 150, 400 Mont. 238, 465 P.3d 210, 211. *See,* Dkt. 11, pgs. 7-8. The Unions *did not argue* that respect for administrative factfinding should preclude judicial review under an exception to the exhaustion doctrine. The Unions' argument at the District Court instead acknowledged that the ULPs and Hearing Officer's Order concerned only a legal question of statutory interpretation: "The Unions concede that if random drug and alcohol testing that could lead to an employee's termination is not a 'condition of employment' on which the law requires bargaining, the City did nothing wrong by unilaterally enacting the policy." Dkt. 16, pgs. 2-3.[3] The Unions conceded that *no* factual disputes were at issue in either the Hearing Officer's Order, their ULPs, or the City's Petition: "[l]ike the present dispute, there were no factual disputes in *Flowers*[.]" Dkt. 17, pg. 2. The Unions' briefing before the District Court, like the City's, focused on the correct application of mandatory and persuasive *legal* authority. This makes sense—if the Unions argued that there were disputed issues of material fact, the Hearing Officer could not have granted summary judgment in their favor.

[3] The Unions' Response Brief (Dkt. 16) briefly takes issue with the City's factual allegations regarding the prevalence of employee drug and alcohol abuse. Dkt. 16, pg. 3. However, these factual allegations were not factual findings in the Hearing Officer's Order. *Compare* Dkt. 16, pg. 3, n. 1 *with* Dkt. 1, Ex. 1, pgs. 2-4. As a result, the City's Petition did not allege that the Hearing Officer committed *any* clear error regarding a factual finding on the presence, absence, or frequency of City employee drug and alcohol use. Regardless, the City's Petition only sought review on the Hearing Officer's legal conclusions about the statutory scope of mandatory bargaining. *See* Dkt. 1, pg. 6 ("The parties having [sic] stipulated that legal issues were to be determined. This *Petition* requests review of legal issues, that involves a judicial determination. Having additional procedural actions before a non-judicial board would not remedy the erroneous conclusions of law, would violate public policy as set forth in statute, would delay the implementation of proactive public safety procedures, and would not be in the interests of judicial economy."). The Unions' allege factual dispute on the prevalence of drug and alcohol use is irrelevant to the Hearing Officer's Order and the City's Petition.

The District Court thereafter issued a June 1, 2022,[4] Order ("District Court Order") dismissing the City's Petition. Dkt. 26; *see also* City's Appendix, Ex. 1. The District Court Order initially noted that §§ 2-4-701 and -702 require administrative exhaustion. Dkt. 26, pg. 1. The District Court then more particularly noted that while § 2-4-701, MCA, provides an exception to the exhaustion requirement, it also "imposes a heavy burden to demonstrate that judicial review of the final agency decision would not provide an adequate remedy," citing *Flowers v. Bd. Of Personnel Appeals*, 2020 MT 150, ¶ 1, 400 Mont. 238, 240, 465 P.3d 210, 211, and *Wilson v. Dep't of Pub. Serv. Regulation*, 260 Mont. 167, 172, 858 P.2d 368, 371 (1993).

The District Court Order then recognized that the core purpose of the administrative exhaustion doctrine is to "'allow[] a governmental entity to make a factual record and to correct its own errors within its specific expertise before a court interferes.'" Dkt. 26, pg. 2, citing *Bitterroot River Prot. Ass'n v. Bitterroot Conservation Dist.*, 2002 MT 66, ¶ 22, 309 Mont. 207, 45 P.3d 24. And, the District Court Order recognized that § 39-31-406(6), MCA, provided that if exceptions to a BoPA hearing officer's decision are not filed within 20 days, that hearing officer's decision "'becomes the order of the board.'" Dkt. 26, pg. 3.

[4] An inadvertent error led to the Order not being served upon the parties. When the parties became aware of the Order, the Unions filed a Notice of Entry of Judgment on January 12, 2023, and the City filed a Notice of Appeal on March 1, 2023.

Somewhat incongruently, the District Court Order then concluded that the City's Petition was untimely "as the Order from the BOPA is not a preliminary, procedural, or intermediate ruling, but serves as a final ruling or decision after the 20-day period passed to file exceptions to the proposed decision," while also concluding that "this Court finds that the City's petition fails due to the City's failure to exhaust all administrative remedies." Dkt. 26, pgs. 3-4. In other words, the District Court concluded that the City could not utilize § 2-4-701, MCA, because the Hearing Officer's Order was a final order *while also concluding* that the City could not utilize § 2-4-702, MCA, because the City did not exhaust administrative remedies and thereby receive a final written decision. *Id*. The Hearing Officer's Order was apparently both final and not, existing in an vague middle state that prohibited judicial review as either an intermediate order or as a final order.

The District Court's Order relied upon *Flowers* to reach this contradictory conclusion, concluding that *Flowers* required exhaustion of all available administrative remedies—meaning, here, filing exceptions to the Hearing Officer's Order with BoPA—before seeking judicial review. *See* Dkt. 26, pgs. 4-5, citing *Flowers*, ¶ 13. The District Court dismissed the City's Petition for lack of subject matter jurisdiction[5] for failure to exhaust administrative remedies. Dkt. 26, pg. 5.

[5] This Court clarified, a day before the District Court's Order, that "the correct jurisdictional basis for dismissal of a petition for judicial review due to failure to exhaust administrative remedies is lack of procedural justiciability rather than lack of subject matter jurisdiction." *N. Star Dev., LLC v. Montana Pub. Serv. Comm'n*, 2022 MT 103, ¶ 23, 408 Mont. 498, 510 P.3d 1232.

Importantly, the District Court Order only minimally—and incorrectly—engaged with the City's first argument, that Montana's exception to the administrative exhaustion doctrine for legal issues applied. In two citation-free sentences, the District Court Order determined that "the City has not established" that any exceptions to the exhaustion rule applied because "[t]he Court agrees with the Respondents that the City's arguments and issues with the BOPA's Order do not present purely legal questions, nor constitutional issues, nor errors of law." Dkt. 26, pg. 6. There was no explanation of *what* material factual disputes inhibited review of the Hearing Officer's Order, however. There was also no squaring of this conclusion with the Unions' concession that ***"[l]ike the present dispute***, there were no factual disputes in *Flowers*," or that the Unions conceded that the City's Petition concerned whether the phrase "conditions of employment" in § 39-31-305, MCA, could be interpreted to include the 2019 Policy's changes. Dkt. 17, pg. 2 (emphasis added); Dkt. 16, pg. 2. Instead, the District Court's conclusion that the City's Petition did not present purely legal issues ran counter to the City's Petition, the parties' agreement in the administrative proceedings, the Unions' arguments at the District Court, and the Hearing Officer's Order. *See, e.g.*, Dkt. 1, Ex. A, pg. 8 (Hearing Officer's conclusion of law that there were no genuine issues of material fact). Again, the City's Petition specifically restricted itself to judicial review of the central legal conclusion in the Hearing Officer's Order, arguing only that the Hearing

Officer "incorrectly found that public safety and testing of public employees is a mandatory subject of collective bargaining and is not at the core of City control." Dkt. 1, pg. 5.

The City's Petition did not put *any* of the findings of fact in the Hearing Officer's Order at issue. The exclusive basis of the City's Petition was the Hearing Officer's legal error regarding interpretation of Montana's collective bargaining statutes and application of persuasive legal authority, not a factual dispute. Further, the District Court's conclusion that material factual disputes inhibited judicial review ran contrary to the parties' and Hearing Officer's agreement that the ULPs could be resolved on cross-motions for summary judgment because no contested material facts were at issue. *See* BoPA Admin. Rec., Doc. 45, pg. AR 000535. Last, and most importantly, the District Court contradictorily refused judicial review of a summary judgment order that, by operation of law, could not have been entered in the face of disputed material factual disputes. The Hearing Officer's Order recognized this legal necessity, of course. As the Hearing Officer's Order concluded, "[t]here is no genuine issues of material fact with regard to the complainants' [Unions'] motion, and they are entitled to judgment as a matter of law; the City is not entitled to summary judgment on its motion." Dkt. 1, Ex. 1, pg. 8.

All those involved in the administrative process acknowledged that there was no factual dispute before the Hearing Officer. The City did not bargain the 2019

Policy and directly informed the Unions' members of the changes. Those facts are not in dispute, and no further relevant fact-finding would have occurred at the BoPA. BoPA Admin. Rec., Doc. 45, pg. AR 000535. As the Unions recognize, the phrase "other conditions of employment" is "an undefined term" in Montana's collective bargaining law. Dkt. 16, pg. 4. This required the Hearing Officer to engage in statutory analysis via reference to persuasive legal authority—i.e., resolution of a purely legal question. The City contested whether the persuasive NLRB authority that the Hearing Officer relied upon applied to the ULPs, as those NLRB decisions distinguishingly dealt with for-profit employers imposing drug and alcohol testing to further *for-profit* motives. *See, e.g.*, BoPA Admin. Rec., Doc. 48, pg. AR 000564-000569; BoPA Admin. Rec., Doc. 56, pgs. AR 000752-000762. The Hearing Officer disagreed and applied the Unions' proffered persuasive authority to resolve the legal question at the heart of the cross-motions for summary judgment. The arguments before the Hearing Officer were inherently and exclusively *legal* arguments.

STANDARD OF REVIEW

Legal conclusions, including the interpretation or application of statutes or rules and the presence of subject matter jurisdiction, are reviewed de novo. *See State v. Steigelman*, 2013 MT 153, ¶ 10, 370 Mont. 352, 302 P.3d 396; *LHC, Inc. v. Alvarez*, 2007 MT 123, ¶ 13, 337 Mont. 294, 160 P.3d 50. "A district court's conclusions as to whether it had subject matter jurisdiction to adjudicate a particular

claim or controversy, and whether the subject claim or controversy was a justiciable controversy, are questions of law reviewed de novo for correctness." *N. Star Dev., LLC v. Montana Pub. Serv. Comm'n*, 2022 MT 103, ¶ 11, 408 Mont. 498, 508, 510 P.3d 1232, 1239; *see also Art v. Montana Dep't of Lab. & Indus. ex rel. Mason*, 2002 MT 327, ¶ 9, 313 Mont. 197, 199, 60 P.3d 958, 960. Similarly, "[a]bsent a factual dispute, a decision on a motion to dismiss is an issue of law that this Court reviews de novo for correctness." *State v. Lund*, 2020 MT 53, ¶ 6, 399 Mont. 159, 162, 458 P.3d 1043, 1044.

Similarly, the Montana Administrative Procedure Act provides that a district court reviews an agency's legal conclusions for correctness. *Monforton v. Motl*, 2020 MT 202, ¶¶ 14-15, 401 Mont. 38, 44–45, 469 P.3d 709, 713. "This same standard of review applies to both the district court's review of the agency decision and this Court's review of the district court's decision." *Id*.

SUMMARY OF ARGUMENT

The District Court incorrectly ignored the combined effect of § 2-4-701, MCA, and the *Shoemaker* exception to the administrative exhaustion doctrine for cases presenting purely legal issues. Immediate review of an agency decision is available under § 2-4-701, MCA, if "review of the final agency decision would not provide an adequate remedy." Montana's administrative exhaustion doctrine is founded upon deference to administrative fact-finding. Courts will accordingly

require parties to allow the administrative agency a full opportunity to develop and correct the factual record, as pertains to that agency's factual expertise. This deference does not extend to an agency's legal conclusions. Montana law instead prefers that courts—judges—resolve purely legal questions. And, the District Court cast aside *Shoemaker* by incorrectly concluding that factual disputes remained, despite agreement by the parties and Hearing Officer that no material factual disputes stood in the way of disposing of the ULPs through cross motions for summary judgment.

In addition and in the alternative, the District Court incorrectly ignored the combined operation of § 39-31-406(6), MCA, and § 2-4-702, MCA. Section 39-31-406(6), MCA, provides that if a party does not file exceptions to a hearing officer's proposed order within 20 days, "the recommended order becomes the order of the board." The permissive Mont. Admin. R. 24.26.1208 similarly provides that "[a] party that disputes the hearing officer's recommended order may file exceptions pursuant to ARM 24.26.254 within 20 days after service of the hearing officer's recommended order." Mont. Admin. R. 24.26.1208; *see also* Mont. Admin. R. 24.26.254(1) ("A party may request review of the hearing officer's recommended order by filing exceptions with the board within 20 days of service of the hearing officer's recommended order."). The Hearing Officer's Order became final *as a matter of law* after 20 days, leaving the City with no more administrative remedies.

§ 39-41-406(6), MCA; Mont. Admin. R. 24.26.254. Section 2-4-702, MCA, permits "a person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final written decision in a contested case is entitled to judicial review under this chapter." Judicial review is initiated by filing a petition in district court within 30 days of the final written decision. § 2-4-702(2), MCA. The City alternatively properly invoked review under § 2-4-702, MCA. The Hearing Officer's Order became the BoPA's order by operation of law when the City did not file exceptions and the City's Petition was filed November 20, 2020, within 30 days of the October 22, 2020, Hearing Officer's Order.

The District Court contradictorily concluded that the Hearing Officer's Order was both final and not final to preclude judicial review under any route, whether § 2-4-701, MCA, *Shoemaker*, or § 2-4-702, MCA. This was both incorrect under those substantive legal procedures for judicial review of agency legal conclusions and a violation of this Court's rule that "[i]n order to best serve justice and allow parties to have their day in court, we encourage, as a general rule, a liberal interpretation of procedural rules governing judicial review of administrative decisions." *Hilands Golf Club v. Ashmore*, 2002 MT 8, ¶ 18, 308 Mont. 111, 115, 39 P.3d 697, 700. The Hearing Officer's Order cannot be simultaneously final and not final so as to preclude any possibility that the City will have its day in court.

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ARGUMENT

The District Court concluded that § 2-4-701, MCA, ***did not*** apply because the Hearing Officer's Order "serves as a final ruling or decision after the 20-day period passed to filed exceptions to the proposed decision." Dkt. 26, pg. 3. But, one sentence later, the District Court ***also*** concluded that "the City's petition fails due to the City's failure to exhaust all administrative remedies." Dkt. 26, pg. 4. Both conclusions cannot be true at once—that the City cannot use § 2-4-701, MCA, because the Hearing Officer's Order is a final order ***and*** that the City cannot use § 2-4-702, MCA, because the City did not exhaust its administrative remedies and procure a final written decision. The Hearing Officer's Order is either preliminary, intermediate, or final; there is no other purgatory-like category it could occupy. If it is one of the first two categories, § 2-4-701, MCA, and *Shoemaker* permitted judicial review. If it is the third category, § 39-31-406(6), MCA, and § 2-4-702, MCA, permitted judicial review. The District Court erred as a matter of law by concluding that it lacked subject matter jurisdiction to consider the City's Petition.

I. Section 2-4-701, MCA, and this Court's decision in *Shoemaker* allow immediate judicial review of an agency's purely legal conclusions.

The Montana Administrative Procedure Act ("MAPA") provides at § 2-4-701, MCA, that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Hearing officer's orders are typically the sort of intermediate or

preliminary orders reviewable under § 2-4-701, MCA. *See Kingsbury Ditch Co. v. Dep't of Nat. Res. & Conservation*, 223 Mont. 379, 381–82, 725 P.2d 1209, 1210–11 (1986) ("The orders appealed here are clearly intermediate, procedural orders of the hearing examiner.").

Judicial review under § 2-4-701, MCA, presumes that the agency has adjudicated the issues in a way that prejudices the party seeking review. *See Qwest Corp. v. Montana Dep't of Pub. Serv. Regul.*, 2007 MT 350, ¶¶ 30-33, 340 Mont. 309, 316, 174 P.3d 496, 502, ¶ 30 (recognizing that "[w]hen an agency has not adjudicated the issues raised on appeal, there is no final agency action upon which a district court can assume jurisdiction."). This Court has denied judicial review under § 2-4-701, MCA, when there is only a speculation of some future agency action that "may have legal consequences." *Qwest*, ¶¶ 32-33 (emphasis in original). *Qwest* provides guidance on what sort of intermediate or preliminary agency decisions may be reviewed under § 2-4-701, MCA. There, the PSC issued requests for information to Qwest regarding Qwest's revenues and utility rates. *Qwest*, ¶ 9. Qwest opposed these requests and filed a petition for judicial review of the information requests under § 2-4-701, MCA. *Qwest*, ¶ 12. The Supreme Court reviewed whether § 2-4-701, MCA, could apply to agency requests for information without any corresponding agency action or adjudication. *Qwest*, ¶ 29. The Supreme Court concluded that § 2-4-701, MCA, did not allow judicial review because Qwest only

speculated about future agency action that "*may* have legal consequences," and "[c]ourts may intervene in agency process only when a specific final agency action has an actual or immediately threatened effect." *Qwest*, ¶ 32. Section 2-4-701, MCA, requires *some form of final agency adjudication* that has a prejudicial, nonspeculative legal effect upon the petitioner. *Qwest* required an agency order that had immediate legal effect.

The Hearing Officer's Order here fits the bill. The Hearing Officer's Order concluded, as a matter of legal statutory interpretation, that the phrase "other conditions of employment" in § 39-31-305(2), MCA, included drug and alcohol testing by a public employer. Dkt. 1, Ex. A, pg. 6. As a result, the Hearing Officer's Order concluded that the City committed unfair labor practices by violating Montana's statutory duty to engage in collective bargaining and the prohibition on direct dealing with union members. Dkt. 1, Ex. 1, pg. 9. The remedy ordered for these unfair labor practices was an order directing the City to cease from imposing the 2019 Policy on the Unions' members and to post a notice informing employees that the City had violated the collective bargaining act. Dkt. 1, Ex. A, pgs. 9-12. The Hearing Officer's Order *had* legal consequences: it found that the City committed unfair labor practices and could not impose the 2019 Policy against the Unions' members. Unlike in *Qwest*, there was not some amorphous speculation of future harmful agency action. Instead, as *Qwest* instructed, the City asked the

District Court to intervene pursuant to § 2-4-701, MCA, "when a specific final agency action has an actual or immediately threatened effect." *Qwest*, ¶ 32.

The City's requested review of the Hearing Officer's Order under § 2-4-701, MCA, also dovetails with this Court's recognition that "further exhaustion of administrative remedies may not be necessary where the aggrieved party makes a supported showing that the subject final agency decision or order is based on application of an unconstitutional or fundamentally erroneous principle of law, the challenge of which is neither dependent on, nor otherwise involves, an agency factual determination or exercise of discretion." *N. Star Dev.*, ¶ 16, citing *Shoemaker*, ¶¶ 20-26. Montana has recognized the exception to administrative exhaustion for purely legal questions for over forty years. In *Shoemaker*, this Court explained that "[t]he purpose of the exhaustion doctrine is to 'allow [] a governmental entity to make a factual record and to correct its own errors within its specific expertise before a court interferes.'" *Shoemaker*, ¶ 18, citing *Bitterroot River Protection Ass'n v. Bitterroot Conservation Dist.*, 2002 MT 66, ¶ 22, 309 Mont. 207, 45 P.3d 24. This purpose does not extend to a "purely legal issue," as legal interpretations must be made by courts. *Shoemaker*, ¶ 20; *Taylor v. Dep't of Fish, Wildlife & Parks, State of Mont.*, 205 Mont. 85, 94, 666 P.2d 1228, 1232 (1983) ("We held that the particular Department of Revenue ruling was an interpretation of law that must be made by the judiciary and, thus, the exhaustion doctrine is inapplicable.

The same applies here."); *see also Bitterroot River Protective Ass'n, Inc.*, ¶ 18 (noting that "'no discretion is involved when a tribunal arrives at a conclusion of law—the tribunal either correctly or incorrectly applies the law.'"). This Court has been clear for decades: "Montana recognizes an exception to the exhaustion doctrine when a purely legal issue is at the center of the dispute." *Shoemaker*, ¶ 20, citing *Keller v. Dep't of Revenue*, 182 Mont. 478, 483, 597 P.2d 736, 739 (1979).

The petitioner in *Shoemaker* could not make use of the legal interpretation exception to the exhaustion doctrine because his petition "presented a contested issue of fact[.]" *Shoemaker*, ¶ 25. The *factual issues* the petitioner raised in his petition required exhaustion of administrative remedies. *Id*., ¶ 26 ("Because Shoemaker's petition for judicial review presented a challenge to both findings of fact and conclusions of law, it did not qualify under the exception to the exhaustion doctrine."). This Court put repeated emphasis on that point: "the factual questions at issue here also required exhaustion of the administrative process." *Shoemaker*, ¶ 26. The necessary corollary of *Shoemaker*'s repeated instruction that factual questions require exhaustion is that petitions that present only legal issues do not require administrative exhaustion as a matter of law. That is what happened here: the City's Petition exclusively raised issues with the Hearing Officer's Order's legal conclusions. Dkt. 12, pgs. 8-19. The City specifically declined to put the Hearing Officer's Order's factual findings at issue. *Id*. Indeed, the factual findings necessary

to the Hearing Officer's Order—that the City implemented the 2019 Policy without bargaining it and by directly communicating it to the Unions' members, among other City employees—*were admitted by the City*. *Compare* BoPA Admin. Rec. Doc. 41, ¶¶ 1, 5-10, 24 *with* Dkt. 1, Ex. A, pgs. 2-4.

Ultimately, § 2-4-701, MCA, would be rendered a nullity if the possibility of judicial review of a *final* agency decision were determined to be a *per se* "adequate remedy." This absurd result would not give effect to both § 2-4-701, MCA, *and* § 2-4-702, MCA, and would violate this Court's rules governing statutory interpretation. *Hampton v. Lewis & Clark Cnty.*, 2001 MT 81, ¶ 29, 305 Mont. 103, 111, 23 P.3d 908, 913; *Matter of Est. of Engellant*, 2017 MT 100, ¶ 11, 387 Mont. 313, 316, 400 P.3d 218, 220; *Montana Sports Shooting Ass'n, Inc. v. State, Montana Dep't of Fish, Wildlife, & Parks*, 2008 MT 190, ¶ 11, 344 Mont. 1, 4, 185 P.3d 1003, 1006. The route to judicial review available under § 2-4-701, MCA, is *meant* to be distinct from the route provided in § 2-4-702, MCA. *Stenstrom v. State, Child Support Enf't Div.*, 280 Mont. 321, 328, 930 P.2d 650, 654 (1996) ("Section 2–4–701, MCA, is another means of judicial review which is apparently not limited by § 2–4–702, MCA."). Holding that final agency review is a *necessarily* or *per se* "adequate remedy" would improperly nullify the distinct path afforded by § 2-4-701, MCA.

Such a holding would also ignore Montana's purely legal question exception to the exhaustion doctrine. Again, Montana law will not require administrative exhaustion when a party challenges an agency order due to an alleged legal, but not factual error. *North Star Development*, ¶ 16; *Shoemaker*, ¶ 26; *Keller*, 182 Mont. at 483. Put another way, Montana law recognizes that further or final agency review of a purely legal error committed in the administrative case does not present the sort of "adequate remedy" that would require a petitioner to pursue the administrative case to exhaustion or render § 2-4-701, MCA, unavailable. This is the upshot of *Shoemaker*, *Keller*, and *North Star Development*: final agency review of a purely legal conclusion should not be presumed to be an "adequate remedy" and exhaustion is not required for judicial review. Judicial review is accordingly the adequate remedy for an agency's *legal* errors. That is the case here: the Hearing Officer proceeded upon essentially admitted material facts. In the face of these undisputed material facts, the Hearing Officer interpreted the meaning of "other conditions of employment" in § 39-31-305(2), MCA. That phrase was interpreted in the Hearing Officer's Order mainly through the application of persuasive authority that dealt with plainly distinguishable *private employers' for-profit motives*. The differences between the "scope of managerial control" in a public versus a private employer renders the Hearing Officer's *legal* reliance upon the NLRB authority to interpret the § 39-31-305(2), MCA, suspect. The City's Petition *only* desired judicial

resolution of this purely legal conclusion; the Petition did not put *any* factual findings at issue. Dkt. 12, pgs. 8-19. Montana statutory and common law permit the City's Petition, which properly sought judicial review of the Hearing Officer's purely legal conclusions.

The District Court's determination that § 2-4-701, MCA, did not apply was incorrect, especially when that statute is read in conjunction with *Shoemaker*. The District Court did not substantively consider *Shoemaker*, holding, without citation or analysis, that "[t]he Court agrees with the Respondents that the City's arguments and issues with the BOPA's Order do not present purely legal questions, nor constitutional issues, nor errors of law." Dkt. 26, pg. 5. However, the conclusion that the City raised factual issues sufficient to deny it access to the *Shoemaker* exception was directly contradicted by the Hearing Officer's Order, the City's Petition, and the Unions themselves. *See* Dkt. 1, Ex. A, pg. 8; Dkt. 12, pgs. 8-19; Dkt. 17, pg. 2. The *only* factual issues were raised *by the Unions* and concerned the alleged prevalence of members' drug and alcohol use. *See* Dkt. 16, pg. 3, and discussion *supra* at footnote 3. These alleged factual disputes are red herrings that were neither fact findings in the Hearing Officer's Order nor issues raised by the City's Petition. The Court's cursory treating of the *Shoemaker* exception was an incorrect application of longstanding Montana law.

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II. Alternatively, § 2-4-702, MCA, and § 39-31-406(6), MCA, combine to permit review of the Hearing Officer's Order as a final order.

While the District Court earlier held that the Hearing Officer's Order was "a final ruling or decision after the 20-day period passed to file exceptions to the proposed decision," it denied the City judicial review under § 2-4-702, MCA, for a failure to exhaust administrative remedies. Dkt. 26, pgs. 3-4. The District Court based this incorrect conclusion on this Court's decision in *Flowers*. But, *Flowers* is inapplicable here and the Hearing Officer's Order incorrectly dealt with the combined operation of § 2-4-702, MCA, and § 39-31-406(6), MCA.

In the alternative, § 39-31-406(6), MCA, rendered the Hearing Officer's Order final as a matter of law, making it amenable to judicial review via the City's Petition under § 2-4-702, MCA. *Flowers* does not nullify the plain language of § 39-31-406(6), MCA, or place the Hearing Officer's Order in some sort of purgatory of non-status, neither final nor intermediate. That would violate this Court's commands to give effect to the plain language of statutes and liberally interpret administrative procedural rules to allow parties their day in court. *Hampton*, ¶ 29; *Hilands Golf Club*, ¶ 18.

Section 2-4-702, MCA, more generally provides that "a person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final written decision in a contested case is entitled to judicial review under this chapter."

In turn, § 39-31-406, MCA, more specifically applies to unfair labor practices complaints before the BoPA, as occurred here. Subsection (6) of this statute provides that if evidence in a contested ULP cases is presented to an examiner—as occurred here—"the member or the examiner shall issue and cause to be served on the parties to the proceeding a proposed decision, together with a recommended order, which must be filed with the board, ***and if exceptions are not filed within 20 days after service of the proposed decision and recommended order upon the parties or within a further period that the board may authorize, the recommended order becomes the order of the board***." § 39-31-406(6), MCA (emphasis added).

When faced with differing, general versus specific administrative procedural requirements, this Court instructs that "[w]here a statute provides different procedural requirements for judicial review of decisions from a specified agency, however, the requirements of the specific statute prevail over the provisions of the MAPA." *Pickens v. Shelton-Thompson*, 2000 MT 131, ¶ 11, 300 Mont. 16, 20, 3 P.3d 603, 606.

By operation of the plain language of the more-specific statute governing ULPs and collective bargaining, a hearing officer's proposed decision and recommended order becomes the order of the BoPA "if" exceptions are not filed within 20 days. § 39-31-406(6), MCA. Then, the plain language of § 2-4-702, MCA, permits a party to ULP *that did not file exceptions within 20 days* to seek

judicial review of the hearing officer's order. There is no specific exhaustion requirement within § 39-31-406(6), MCA. Instead, there is an option to more expeditiously receive a final order by accepting the hearing officer's order and declining review by the BoPA. This interpretation properly harmonizes the more specific § 39-31-406(6), MCA, and the more general § 2-4-702, MCA, giving effect to each. *Montana Sports Shooting Ass'n, Inc.*, ¶ 11.

Here, the City declined to file exceptions to the Hearing Officer's Order with the BoPA. Dkt. 1, pg. 6. The more-specific provisions of § 39-31-406(6), MCA, provide, as a matter of law, that the Hearing Officer's Order became a final order of the BoPA as a result. Section 39-31-406(6), MCA, did not *obligate* the City to file exceptions with the BoPA to obtain a final decision of the BoPA. If it did, the language in subsection (6) that transforms a hearing officer's decision into the BoPA's decision after 20 days would be a nullity. This would be improper. *Hampton*, ¶ 29. Instead, the more specific § 39-31-406(6), MCA, provides two paths to a final BoPA decision: 1.) decline to file exceptions within 20 days; or 2.) file exceptions with the BoPA and receive a decision "within 5 months." § 39-31-406(6), MCA. A party not want to wait an additional five months for a final agency decision. That party could elect to pursue option 1 to receive a more expeditious final agency decision and enable sooner judicial review. This is what the City desired.

The District Court incorrectly denied the City its opportunity for a more expeditious judicial review of the Hearing Officer's Order by applying this Court's opinion in *Flowers*. *Flowers* is distinguishable and inapplicable here, however. There, a different FWP employee (Loewen) filed a grievance challenging the hiring process that resulted in Flowers' hiring. *Flowers*, ¶ 2. The hearing officer recommended that Loewen be appointed to the position at issue and the FWP reassigned Flowers to a different position. *Flowers*, ¶ 2. Flowers petitioned for judicial review of the hearing officer's decision *in Loewen's grievance*. *Flowers*, ¶ 3. The district court determined that Flowers had failed to exhaust *his own* administrative remedies because he did not file *his own* grievance or intervene in Loewen's grievance and dismissed the petition. *Id*.

Flowers thereafter filed his own grievance, but the hearing officer determined that it was untimely under § 87-1-205, MCA, and Mont. Admin. R. 24.26.403(1)(a). *Flowers*, ¶ 4. The hearing officer's order included a notice that, under Mont. Admin. R. 24.26.403(1)(a), the recommended order would become the final order of the BoPA unless exceptions were filed within 20 day. *Id*. Flowers filed a petition for judicial review and did not file exceptions with the BoPA. *Flowers*, ¶ 5. The district court dismissed this second petition for failure to exhaust administrative remedies and collateral estoppel. *Id*.

On appeal, this Court reviewed the specific three-part grievance procedures required by the combined operation of the (now repealed) § 81-1-205, MCA, and Mont. Admin. R. 24.26.403(1)(a). The opinion concluded that Flowers failed to exhaust his administrative remedies. In particular, this Court concluded that "Hearing Officer Holien's recommended order directed him to file exceptions with BOPA if he was unsatisfied with her decision. That her recommendation became a final order of the Board twenty days later did not obviate the requirement to file exceptions in order to completely exhaust the 'available' administrative remedies." *Flowers*, ¶ 13.

Neither § 39-31-406(6), MCA, nor ULPs were at issue in *Flowers*. *Flowers* also did not consider this Court's previous command that specific procedural statutes apply over MAPA, *see Pickens*, ¶ 11, or that administrative procedural rules be applied liberally to allow parties their day in court. *Hilands Golf Club*, ¶ 18. It would be absurd, and violative of *Pickens*, to read the *general* administrative exhaustion requirement into § 39-31-406(6), MCA, when that statute's plain language *specifically provides an* alternative to gaining a final BoPA order without an administrative appeal. If *Flowers*'s treatment of *different, repealed statutes and rules* is applied to § 39-31-406(6), MCA, the provision that the hearing officer's order becomes the BoPA order by operation of law after 20 days would be rendered meaningless. This distinct, more-specific language cannot exist solely to be

overridden by a more general statute. That would be directly contrary to how statutory interpretation of competing provisions in general versus specific statutes works in Montana law. The Legislature does not pass meaningless legislation, and this Court must interpret competing commands in general and specific statutes so that the specific statute controls. *Matter of V.K.B.*, 2022 MT 94, ¶ 22, 408 Mont. 392, 407, 510 P.3d 66, 76.

The primary reason a party would seek a BoPA order could be, as in this case, to seek a more expeditious review of an agency's legal conclusion, as supported by *Shoemaker* and *Keller*. The convoluted, distinct administrative procedural path at issue in *Flowers* did not even enable consideration of this issue. Section 39-31-406(6), MCA, is not an idle or useless act. *See Montana Sports Shooting Ass'n, Inc.*, ¶ 15. The statute cannot be plausibly interpreted as a trap for parties where one form of a final BoPA order—that obtained under § 39-31-406(6), MCA, by declining to file exceptions—is overridden by a more general statute.

The District Court erred in applying *Flowers* to deny judicial review of the Hearing Officer's Order under § 39-31-406(6), MCA, and § 2-4-702, MCA, where even the District Court found that the Hearing Officer's Order was final. *See* Dkt. 26, pg. 3. This erroneous conclusion created a procedural purgatory for a third form of final BoPA orders that are somehow distinct from the sort of final orders amenable

to judicial review under § 2-4-702, MCA. This purgatory is not supported by the plain language of the statutes or Montana law on statutory interpretation.

CONCLUSION

The City respectfully requests that the District Court's Order be reversed and that the matter be remanded for substantive consideration of the City's Petition.

DATED this 1st day of June, 2023.

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CERTIFICATE OF COMPLIANCE

I certify that Petitioner/Appellant's foregoing Brief is double spaced, proportionately spaced, has a Time New Roman typeface of 14 points, and contains 9702, excluding the caption, Table of Contents, Table of Authorities, and Certificate of Compliance.

DATED this 1st day of June, 2023.

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