

IN THE SUPREME COURT OF THE STATE OF MONTANA  
DA 24-0455

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IN THE MATTER OF UNFAIR LABOR PRACTICE COMPLAINT  
2023DRS00256.

MITCHELL MCBROOM and BARBARA LEWIS-BACA,  
PETITIONERS/APPELLANTS,

v.

MONTANA BOARD OF PERSONNEL APPEALS and MISSOULA URBAN  
TRANSPORTATION DISTRICT, RESPONDENTS/APPELLEES.

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On Appeal from the Fourth Judicial District Court, Missoula County  
Hon. District Court Judge Jason Marks

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Appendix for Brief of Appellants

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## Appendix for Brief of Appellants

### Table of Contents

1. *Order Denying Petition for Judicial Review of Final Agency Decision*, Mont 4th J. Dist. Ct., Missoula Cnty., DV 23-1273 (June 26, 2024).
2. Order, Board of Personnel Appeals, BOPA Case No.. 2023DRS00256 (Dec. 1, 2023).

Hon. Jason Marks, District Court Judge  
Fourth Judicial District, Dept. No. 4  
Missoula County Courthouse  
200 West Broadway  
Missoula, Montana 59802  
(406) 258-4774

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

MITCHELL MCBROOM and  
BARBARA LEWIS-BACA,

Petitioners,

v.

MONTANA BOARD OF  
PERSONNEL APPEALS and  
MISSOULA URBAN  
TRANSPORTATION DISTRICT,

Respondent.

Dept. No. 4  
Cause No. DV-23-1273

**ORDER DENYING PETITION  
FOR JUDICIAL REVIEW OF  
FINAL AGENCY DECISION**

This matter comes before the Court on Mitchell McBroom and Barbara Lewis-Baca's (collectively "Petitioners") Petition for Judicial Review of Final Agency Decision ("Petition") (Doc. 1). The Court has considered Petitioners' Petition, Respondents Missoula Urban Transportation District's ("MUTD") Brief in

1 Response (Doc. 4), and Petitioners’ Reply thereto (Doc. 8). The Court has also  
2 reviewed all submitted exhibits. The Court is fully informed and prepared to rule.

### 3 **ORDER**

4 (1) The Court hereby AFFIRMS the Board of Personnel Appeals’  
5 (“BOPA”) Order and DENIES Petitioners’ Petition.

### 6 **MEMORANDUM**

#### 7 **I. BACKGROUND**

8 Petitioners are employees of MUTD, a municipal bus service in Missoula,  
9 Montana; they are also bargaining unit members of the Teamsters Local 2 Union  
10 (the “Union”). Petitioners were among a group of MUTD employees who were  
11 investigated for violating the Collective Bargaining Agreement (“CBA”) between  
12 the Union and MUTD by conducting union activity on MUTD property during  
13 working hours. At an informal Step 1 grievance meeting on or about July 8, 2022,  
14 MUTD found Petitioners violated Sections 3.03 (Solicit), 17.02 (No Strike), and  
15 20.01 (Dishonesty) of the CBA, and it imposed discipline by suspending Petitioners  
16 for three days without pay. Petitioners each initiated a grievance process against  
17 MUTD pursuant to the terms of the CBA.

18 The Union pursued Petitioners’ grievances under the process delineated in the  
19 CBA. The Union and MUTD proceeded through Step 2 and Step 3 grievance  
20 meetings. MUTD offered to reduce the discipline to a written warning and reinstate

1 back pay, but Petitioners refused that offer because they believed that the activities  
2 for which they were being disciplined were protected under the Mont. Code Ann. §  
3 39-31-201.<sup>1</sup> Petitioners requested that the Union complete the grievance process by  
4 taking the issue to arbitration.

5 On or about May 4, 2023, nearly one year after the grievances were first filed,  
6 the Union decided to accept the settlement offer from MUTD—which converted  
7 Petitioners’ unpaid suspensions to written warnings with backpay—and cancelled  
8 arbitration. Petitioners allege the Union accepted this offer to settle without their  
9 consent. At the time of settlement, neither Petitioners nor the Union alleged that  
10 MUTD had committed an unfair labor practice (“ULP”).

11 June 29, 2023, subsequent to the settlement of Petitioners’ grievances—and  
12 approximately one year after Petitioners were disciplined—Petitioners filed a ULP  
13 against MUTD with BOPA.<sup>2</sup> Petitioners claimed MUTD violated Mont. Code Ann.  
14 §§ 39-31-201 (titled “Public Employees Protected in Right of Self-Organization), -  
15  
16

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17 <sup>1</sup> “Public employees shall have and shall be protected in the exercise of the right of self-  
18 organization, to form, join, or assist any labor organization, to bargain collectively through  
19 representatives of their own choosing on questions of wages, hours, fringe benefits, and other  
20 conditions of employment, and to engage in other concerted activities for the purpose of collective  
bargaining or other mutual aid or protection free from interference, restraint, or coercion.”

<sup>2</sup> That same day, Petitioners also filed a Complaint against the Union in this Court. *See Mitchell  
McBroom and Barbara Lewis-Baca v. Teamsters Local 2*, DV-32-2023-0000738-OC (Mont. 4th  
Jud. Dist., June 29, 2023). Petitioners complain that: “Because [the Union] abandoned the ULP  
and arbitration and allowed MUTD to successfully discipline [Petitioners] for exercising their right  
to self-organize, [Petitioners] were forced to continue the action against MUTD by filing an unfair  
labor practice charge with [BOPA].” *Id.*, ¶ 49.

1 305 (titled “Duty to Bargain Collectively -- Good Faith”), and -401 (titled “Unfair  
2 Labor Practices of Public Employer”).

3       Petitioners’ ULP contained the following five causes of actions: (1) MUTD  
4 interfered with, restrained, and coerced Petitioners in their right to self-organize and  
5 to engage in concerted activities for the purpose of mutual protection or aid; (2)  
6 MUTD dominated and interfered with the administration of the Union; (3) MUTD  
7 discriminated against Petitioners regarding terms and conditions of employment in  
8 order to discourage membership in a labor organization; (4) MUTD refused to  
9 bargain in good-faith with [Petitioners] exclusive representative; and (5) Ongoing  
10 interference with public employee right of self-organization.

11       On September 20, 2023, BOPA Board Agent Wendy Jackson issued her  
12 Finding of No Probable Merit (the “Findings”) regarding Petitioners’ ULP. The  
13 Findings determined that Petitioners’ ULP was an improper challenge to the  
14 discipline imposed on them and already resolved through the grievance process  
15 described in the CBA between MUTD and the Union. The Findings further  
16 concluded that the ULP was barred by the six-month limitation on ULPs set forth in  
17 Mont. Code Ann. § 39-31-404 and Admin. R. Mont. 24.26.1201(2). Finally, the  
18 Findings concluded that Petitioners’ equitable tolling argument was misplaced  
19 because

20       the majority of this charge is based on the discipline of [Petitioners] that  
      was appropriately addressed through the CBA grievance process.

1 However, nothing prevented [Petitioners] from filing a timely [ULP]  
2 against MUDT with [BOPA] while the CBA grievance process  
progressed.

3 Admin. Rec. Doc. 8, at 165. For these reasons, the Findings determined there was  
4 no merit to the ULP and recommended that it be dismissed.

5 On September 29, 2023, Petitioners requested review of the Findings. They  
6 alleged that “[t]he [U]nion abandoned the grievance before final and binding  
7 arbitration, leaving the [ULP] unresolved, which left [Petitioners] to pursue this  
8 charge before the board.” Admin. Rec. Doc. 6, at 56. On November 16, 2023, BOPA  
9 heard argument from the parties and conducted a review of the administrative record.  
10 On December 1, 2023, BOPA affirmed the Findings. BOPA’s Order specifically  
11 found the following: Petitioners filed their ULPs more than six months after the  
12 alleged ULP occurred, in violation of the applicable statute of limitation; that  
13 Petitioners cited no authority supporting their argument that they could not initiate  
14 their ULP while simultaneously pursuing their grievance under the CBA, and that  
15 Admin. R. Mont. 24.26.1202 allows for timely filing of ULPs under this scenario;  
16 and that equitable tolling did not apply because Petitioners were not barred from  
17 timely bringing their ULP. Admin. Rec. Doc. 2, at 15–16.

18 On December 29, 2023, Petitioners filed the Petition now at issue. The  
19 Petition seeks relief on the grounds that BOPA’s decision is affected by “other error  
20 of law” under Mont. Code Ann. § 2-4-704(2)(a)(iv) because BOPA erred when it  
did not equitably toll the statute of limitation under the facts of this case. The issues

1 pending before the Court are summarized as follows based on Petitioners’ requested  
2 relief: (1) whether BOPA erred in finding that Petitioners were not foreclosed from  
3 filing a ULP while the Union was acting in its role as exclusive representative based  
4 on the facts and the public policy of Montana; (2) whether BOPA erred in stating  
5 that Petitioners did not cite to any authority in support of their argument that they  
6 could not initiate a ULP charge while simultaneously pursuing their grievance under  
7 the CBA; and (3) whether BOPA erred in finding that the doctrine of equitable  
8 tolling was inappropriate in this case.<sup>3</sup> Petitioners rely solely on Mont. Code Ann. §  
9 39-31-101 and *Small v. McRae*, 200 Mont. 497, 651 P.2d 982 (1982).

## 10 **II. LEGAL STANDARD**

11 Mont. Code Ann. § 2-4-704 governs a district court’s review of an agency  
12 action. A district court may affirm the decision of the agency or remand the case for  
13 further proceedings. “The district court reviews an agency’s interpretations and  
14 applications of law to determine whether they are correct.” *Watson v. Mont. Dep’t*  
15 *of Fish, Wildlife & Parks*, 2023 MT 239, ¶ 12, 414 Mont. 217, 539 P.3d 1126 (citing  
16 *Knowles v. Lindeen*, 2009 MT 415, ¶ 22, 353 Mont. 507, 222 P.3d 595. “In reviewing  
17 an administrative agency’s findings of fact, the standard of judicial review for the  
18 District Court . . . is whether the findings are ‘clearly erroneous in view of the  
19  
20

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<sup>3</sup> The Court will not address the service issue because MUTD has voluntarily appeared.



1 reliable, probative and substantial evidence in the whole record.’’ *Id.* (quoting Mont.  
2 Code Ann. § 2-4-704(2)(a)(v) (2023)).

### 3 **III. ANALYSIS**

#### 4 *1. Whether BOPA erred in finding that Petitioners were not foreclosed from* 5 *filing a ULP while the Union was acting in its role as exclusive* 6 *representative based on the facts and the public policy of Montana*

6 In its Order, BOPA affirmed the Findings and it stated that Petitioners were  
7 not precluded from initiating their ULPs in a timely manner. BOPA relied on the  
8 Administrative Rules of the State of Montana, stating “Admin. R. Mont. 24.26.1202  
9 particularly addresses circumstances where a party subject to a CBA’s grievance  
10 process simultaneously pursues a ULP charge, providing that:”

11 (1) If during the course of the informal investigation of the ULP, the  
12 board agent determines the charge may be resolved through the final  
13 and binding arbitration provisions contained in the applicable CBA, the  
board agent may issue a recommended order staying the informal  
investigation.

14 (2) A party may appeal the board agent’s recommended order to stay  
15 proceedings by filing an objection with the board agent within 14 days  
after service of the recommended order.

16 (3) The board agent shall refer an appeal of the recommended order to  
17 stay the informal investigation to a hearing officer pursuant to ARM  
24.26.1008.

18 (4) If the hearing officer affirms and adopts the board agent’s  
19 recommended order to stay the informal investigation, the stay remains  
20 in place until there is a subsequent request to review the stay, or the  
hearing officer’s order staying the informal investigation dissolves by  
operation of law.

1 (5) The board agent may dissolve the stay and continue with the  
2 informal investigation into the ULP if a party provides a written request  
to the board agent and a showing of at least one of the following:

3 (a) the ULP has not been resolved in a reasonable amount of  
time; or

4 (b) the arbitration decision has not resolved the ULP; or

5 (c) the decision to stay the proceedings was inconsistent with the  
6 laws governing collective bargaining in Montana.

7 (6) A decision by the board's agent to dissolve a stay is not appealable  
or subject to review.

8 Admin. Rec. Doc. 2, at 15–16 (BOPA Order) (citing Admin. R. Mont.  
24.26.1202).

9 This Administrative Rule specifically contemplates the dual pursuit of ULPs  
10 before BOPA and a parallel grievance against management. It permits a board agent  
11 to issue a recommended order staying ULP proceedings if it is determined that the  
12 ULP could be resolved through arbitration provisions in the applicable CBA. It also  
13 permits a board agent to dissolve the stay and proceed with the ULP investigation if  
14 the ULP is not resolved through the grievance process. There would be no need for  
15 this Administrative Rule if employees like Petitioners were barred from pursuing  
16 ULPs individually even where a CBA was in place and a grievance procedure was  
17 playing out. Moreover, this Administrative Rule is part of the Title that controls  
18 BOPA procedures. BOPA's interpretation of its own rules here as permitting what  
19 Petitioners argue was forbidden is reasonable and correct. *See Mont. Env't Info. Ctr.*  
20

1 *v. Westmoreland Rosebud Mining, LLC*, 2023 MT 224, ¶ 46, 414 Mont. 80, 545 P.3d  
2 623.

3 Petitioners disregard this Administrative Rule and instead argue that BOPA  
4 “erred when it determined that Petitioner employees could have filed their ULP  
5 charge before the statute of limitations had run. The Union was in control of the  
6 grievance and the instructions in [*Small*] foreclosed the employees from acting on  
7 their own behalf.” Pet., at ¶ 20 (Doc. 1). Petitioners also argue that they “were bound  
8 to rely on the Union to process the grievance under the public policy of this state.”  
9 *Id.*, ¶ 17.

10 First, the public policy statute relied on by Petitioners reads:

11 In order to promote public business by removing certain recognized  
12 sources of strife and unrest, it is the policy of the state of Montana to  
13 encourage the practice and procedure of collective bargaining to arrive  
at friendly adjustment of all disputes between public employers and  
their employees.

14 Mont. Code Ann. § 39-31-101 (2023). Petitioners cannot rely on a public policy  
15 declaration alone to support their position. Moreover, while this statute certainly  
16 encourages collective bargaining, it does not bar individual employees from  
17 pursuing ULPs where a grievance is pursued under a CBA.

18 Second, the holding in *Small* is unhelpful to Petitioners under the facts of this  
19 case. The *Small* Court held:

20 As a general rule in cases to which federal law applies, federal labor  
policy requires that individual employees wishing to assert contract  
grievances must *attempt* use of the contract grievance procedure agreed

1 upon by employer and union as the mode of redress. If the union refuses  
2 to press or only perfunctorily presses the individual's claim, differences  
3 may arise as to the forms of redress then available. But unless the  
contract provides otherwise, there can be no doubt that the employee  
must afford the union the opportunity to act on his own behalf.

4 *Small*, 200 Mont 497, at 503 (emphasis in original). The *Small* Court went on to  
5 provide the following exception: "Only in those cases where it is certain that the  
6 arbitration clause contained in a collective bargaining agreement is not susceptible  
7 to an interpretation that covers the dispute is an employee entitled to sidestep the  
8 provisions of the collective bargaining agreement." *Id.*

9 *Winchester v. Mountain Line* provides an example of the exception delineated  
10 in *Small*. 1999 MT 134, 294 Mont. 517, 982 P.2d 1024. There, a Mountain Line  
11 employee was a member of the same Union present in this matter; the employee filed  
12 a ULP alleging that Mountain Line violated Mont. Code Ann. §§ 39-31-201 and -  
13 401 when his employment was terminated. *Id.*, ¶ 3. The CBA between Mountain  
14 Line and the Union contained the following discrimination provision:

15 *Section 7.1:* There shall be no coercion, intimidation, or discrimination  
16 on the part of either the District or the Union, or their respective agents,  
17 officers, or members against any employee covered by the Agreement  
18 for reasons of age, race, sex, color, religious or political beliefs, national  
origin, marital status, physical disability, Union membership or non-

19 *Section 7.2:* Any alleged violation of Title VI of the Civil Rights Act of  
20 1964, or other applicable federal or state statutes shall be processed  
through the appropriate federal and state agencies and will not be  
subject to the grievance and arbitration procedures as set forth in  
Articles 18 and 19.

1 *Id.*, ¶ 25 (emphasis added). The Montana Supreme Court, identifying that the CBA’s  
2 discrimination provision excluded any alleged violation of state statutes from the  
3 CBA’s grievance and arbitration procedures, held that it is “‘certain’ . . . that [the  
4 employee’s] unfair labor practices charge . . . was not subject to the grievance and  
5 arbitration provisions in the CBA.” *Winchester*, ¶ 28 (quoting *Small*, 200 Mont 497,  
6 at 503).

7       Here, like *Winchester*, it is certain that the arbitration clause in the CBA is not  
8 susceptible to an interpretation that covers Petitioners’ ULP claims. The  
9 discrimination sections of the CBA at issue here, found in Article 6, are identical to  
10 the discrimination provisions in *Winchester*. The language and provisions in CBAs  
11 must be afforded their ordinary meaning. *Hughes v. Blankenship*, 266 Mont. 150,  
12 154, 879 P.2d 685, 687 (1994) (citing *National Labor Relations Board v. Superior*  
13 *Forwarding, Inc.*, 762 F.2d 695, 697 (8th Cir. 1985)). The plain language of Section  
14 6.02 of this CBA excludes “any alleged violation of . . . state statutes . . .” from the  
15 CBA’s grievance and arbitration procedures. Admin. R. Doc. 12, at 255–56.  
16 Petitioners’ ULP alleges that MUTD violated several state statutes—namely Mont.  
17 Code Ann. §§ 39-31-201, -305, and -401—and that MUTD specifically  
18 discriminated against Petitioners in an effort to discourage membership and  
19 participation in the Union. *See* Admin. Rec. Doc. 14, at 1, 9. Thus, because  
20 Petitioners’ ULP concerned an alleged violation of state statutes, it is “certain” that

1 the arbitration clause in the CBA “is not susceptible to an interpretation that covers  
2 the dispute,” meaning Petitioners were “entitled to sidestep the provisions of the  
3 [CBA].” *Small*, 200 Mont 497, at 503. For this additional reason, BOPA’s decision  
4 to affirm the Findings is not in error.

5       2. *Did BOPA err in stating that Petitioners did not cite to any authority in*  
6       *support of their argument that they could not initiate a ULP charge while*  
7       *simultaneously pursuing their grievance under the CBA?*

8       In its Order, BOPA stated: “Petitioners cite to no authority supporting the  
9 argument they could not initiate a ULP charge while simultaneously pursuing their  
10 grievance under the CBA.” Admin. Rec. Doc. 2, at 15. Petitioners claim this  
11 statement disregards the law as discussed in *Small*; Petitioners also argue they “were  
12 bound to rely on the Union to process the grievance under the public policy of this  
13 state.” Pet., ¶ 17 (Doc. 1).

14       The Court has already determined that neither public policy nor *Small* support  
15 Petitioners’ position that they were unable to file a ULP while the Union was  
16 simultaneously pursuing their grievance under the CBA. While the Court notes that  
17 perhaps it would have been more accurate for BOPA to say, “Petitioners cite no  
18 *persuasive* authority supporting the[ir] argument,” BOPA did not incorrectly  
19 interpret or misapply the law. Therefore, BOPA did not err in stating Petitioners did  
20 not cite to any authority in support of their argument that they could not initiate a  
ULP charge while simultaneously pursuing their grievance under the CBA.

1       3. Did BOPA err in finding that the doctrine of equitable tolling was  
2       inappropriate under the facts and legal arguments in this case?

3       The doctrine of equitable tolling applies to procedural time requirements. *See*  
4       *Weidow v. Uninsured Employer*, 2010 MT 292, ¶ 27, 359 Mont. 77, 246 P.3d 704.  
5       “Equitable tolling allows in limited circumstances for an action to be pursued despite  
6       the failure to comply with relevant statutory filing deadlines.” *Lozeau v. GEICO*  
7       *Indem. Co.*, 2009 MT 136, ¶ 14, 350 Mont. 320, 207 P.3d 316. The Montana  
8       Supreme Court has cautioned that “the doctrine of equitable tolling has been applied  
9       only sparingly” and it has recognized “the importance of applying procedural bars  
10      regularly and consistently.” *State v. Redcrow*, 1999 MT 95, ¶ 34, 294 Mont. 252,  
11      980 P.2d 622.

12      In its Order, BOPA relied on Mont. Code Ann. § 39-31-404 in affirming the  
13      Findings’ decree that Petitioners’ ULP was untimely and that equitable tolling was  
14      inapplicable for Petitioners’ ULP. That statute, titled “Six-month limitation on unfair  
15      labor practice complaint -- exception,” reads as follows:

16             A notice of hearing may not be issued based upon any [ULP] more than  
17             6 months before the filing of the charge with the board unless the person  
18             aggrieved was prevented from filing the charge by reason of service in  
19             the armed forces, in which event the 6-month period must be computed  
20             from the day of discharge.

Mont. Code Ann. § 39-31-404 (2023).<sup>4</sup>

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<sup>4</sup> Admin. R. Mont. 24.26.1201(2) also states: “Any ULP must be filed with the board within six months of the alleged unfair labor practice, unless the complainant is a member of the armed forces who was prevented from filing the charge because of serving . . . .”

1       Petitioners do not dispute that their ULP violated the statute of limitations.  
2 Instead, Petitioners argue that BOPA

3       should have applied equitable tolling to [their] ULP charge because  
4       they had timely pursued their grievance, relied on the Union to press  
5       the grievance to a determination on the merits until such a time that the  
6       Union discontinued pressing the grievance, and filed the ULP charge  
7       on their own behalf within a reasonable time. The delay in filing the  
8       ULP charge until after the limitation had run was not through any fault  
9       of Petitioners.

10       Pet., ¶ 23 (Doc. 1). Petitioners also argue that BOPA’s determination “would be  
11       correct if the Union was the party arguing that tolling should apply because the  
12       Union, as the exclusive representative, was in control of managing the grievance  
13       process and was responsible to timely file the ULP.” *Id.*, ¶ 16.

14       The crux of Petitioners’ argument in favor of applying equitable tolling is that  
15       their issues were not resolved on the merits during the grievance process and that the  
16       Union was solely responsible for filing their ULP. Failure to achieve resolution on  
17       the merits of an action is not cause to apply equitable tolling. Moreover, the Court  
18       has determined that BOPA did not err in concluding that the Union was not solely  
19       responsible for filing Petitioners’ ULP, and that Petitioners were likely required to  
20       bring their ULP individually and “sidestep” the CBA since the CBA barred alleged  
violations of state statutes from its grievance and arbitration procedures. Finally,  
Petitioners do not allege untimeliness due to service in the armed forces, which is  
the only exception to the statute of limitations contemplated under Montana law.



1 Therefore, BOPA did not err in interpretation or application of law in determining  
2 that the doctrine of equitable tolling was inapplicable to Petitioners' ULP.

3 **IV. CONCLUSION**

4 In conclusion, BOPA's decision is not affected by "other error of law" under  
5 Mont. Code Ann. § 2-4-704(2)(a)(iv) because BOPA's interpretations and  
6 applications of law are correct. First, BOPA correctly interpreted Admin. R. Mont.  
7 24.26.1202 to mean that Petitioners were not barred from filing ULPs while the  
8 Union pursued their grievances under the CBA. Second, BOPA correctly interpreted  
9 both Mont. Code Ann. § 39-31-101 and *Small* to conclude neither were persuasive  
10 authority for Petitioners' argument that they could not file their ULPs while the  
11 Union pursued their grievances. Third, BOPA correctly applied Mont. Code Ann. §  
12 39-31-404 to determine that Petitioners' ULP was untimely; it further correctly  
13 interpreted that statute to determine that the doctrine of equitable tolling should not  
14 apply. Therefore, BOPA's decisions are hereby AFFIRMED and Petitioners'  
15 Petition is hereby DENIED.

16 **ELECTRONICALLY SIGNED AND DATED BELOW**

17  
18 cc: Natasha Prinzing Jones, Esq.  
19 Susan A. Aaberg, Esq.  
20 Ben Williams, Esq.  
David Wayne Diacon, Esq.

## IN THE MATTER OF UNFAIR LABOR PRATICE COMPLAINTS

ORDER

Board of Personnel Appeals – Order  
Page 1 of 4

At issue before the Board is whether the Board Agent correctly determined Petitioners' ULP charge is barred by the statute of limitations, or whether the Board Agent should have allowed for the equitable tolling of the statute of limitations.<sup>1</sup>

Mont. Code Ann. § 39-31-404 provides that:

A notice of hearing may not be issued based upon any unfair labor practice more than 6 months before the filing of the charge with the board unless the person aggrieved was prevented from filing the charge by reason of service in the armed forces, in which event the 6-month period must be computed from the day of discharge.

Neither party disputes that Petitioners filed their ULP charge more than six months after the alleged unfair labor practice occurred. The actions alleged by Petitioners occurred in June 2022 and their ULP charge was filed in June 2023. However, Petitioners argue the statute of limitations should be equitably tolled because public policy required they first proceed through their CBA grievance process before filing a ULP. Petitioners allege their CBA grievance process ran from June 30, 2022 until May 4, 2023, when they allege their union improperly accepted a settlement offer from MUTD without their consent. Petitioners assert the length of the grievance process precluded them from filing a ULP charge within the six-month statute of limitations set forth in Mont. Code Ann. § 39-31-404.

Petitioners' claim they were precluded from filing a ULP within the six-month statute of limitations because public policy required they first exhaust the grievance process in the CBA is insufficient to toll the statute of limitations. Petitioners cite to no authority supporting the argument they could not initiate a ULP charge while simultaneously pursuing their grievance under the CBA. In fact, Board rule specifically contemplates this scenario. Admin. R. Mont. 24.26.1202 particularly addresses circumstances where a party subject to a CBA's grievance process simultaneously pursues a ULP charge, providing that:

- (1) If during the course of the informal investigation of the ULP, the board agent determines the charge may be resolved through the final and binding arbitration provisions contained in the applicable CBA, the board agent may issue a recommended order staying the informal investigation.
- (2) A party may appeal the board agent's recommended order to stay proceedings by filing an objection with the board agent within 14 days after service of the recommended order.
- (3) The board agent shall refer an appeal of the recommended order to stay the informal investigation to a hearing officer pursuant to ARM 24.26.1008.
- (4) If the hearing officer affirms and adopts the board agent's recommended order to stay the informal investigation, the stay remains in place until there is a subsequent request to review the stay, or the hearing officer's order staying the

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<sup>1</sup> The parties submitted briefing on additional issues contained within the Board Agent's Finding of No Probable Merit, including whether the ULP process was an appropriate means for challenging discipline imposed on the Petitioners; and whether the Petitioners' claims were *res judicata*. The Board need not reach these issues as the threshold matter of the statute of limitations is dispositive.

- informal investigation dissolves by operation of law.
- (5) The board agent may dissolve the stay and continue with the informal investigation into the ULP if a party provides a written request to the board agent and a showing of at least one of the following:
- (a) the ULP has not been resolved in a reasonable amount of time; or
  - (b) the arbitration decision has not resolved the ULP; or
  - (c) the decision to stay the proceedings was inconsistent with the laws governing collective bargaining in Montana.
- (6) A decision by the board's agent to dissolve a stay is not appealable or subject to review.

Petitioners were not precluded from initiating their ULP charge in a timely manner. If they had, and the board agent subsequently determined the ULP charge may be resolved through the CBA grievance process, the board agent may have issued a recommended order staying the ULP proceedings pursuant to Admin. R. Mont. 24.26.1202(1). If Petitioners were then unable to resolve the ULP charge through the grievance process, as they allege occurred here, they may have requested the board agent dissolve the stay pursuant to Admin. R. Mont. 24.26.1202(5) and proceeded with the ULP process. Instead, Petitioners waited a year before initiating a ULP charge.

### Conclusion

Petitioners' assertion they were precluded from timely lodging a ULP charge is incorrect. The Board does not find this matter appropriate for the doctrine of equitable tolling and hereby affirms the board agent's Finding of No Probable Merit and Notice of Intent to Dismiss.

Pursuant to Mont. Code Ann. § 39-31-405(2) and Admin. R. Mont. 24.26.1206(6)(a), this Order constitutes a final agency decision of the Board.

DATED this 1<sup>st</sup> day of December 2023.

BOARD OF PERSONNEL APPEALS

By:   
\_\_\_\_\_  
Brian Hopkins, Presiding Officer

\* \* \* \* \*

NOTICE: A party has 30 days after the date of this order to file a petition for judicial review in the district where the alleged grievable conduct occurred. Mont. Code Ann. § 2-4-702. A party must promptly serve copies of a petition for judicial review upon the Board of Personnel Appeals and all parties of record. Mont. Code Ann. § 2-4-702(2). Judicial review is conducted pursuant to the provisions of Mont. Code Ann. § 2-4-701, et seq.

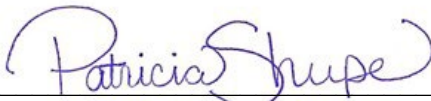
\* \* \* \* \*

## CERTIFICATE OF SERVICE

I, Patricia Shupe, do hereby certify that a true and correct copy of this document was emailed and/or mailed to the following, as addressed, on the 1st day of December 2023:

David W. Diacon  
Counsel for Mitchell McBroom and Barbara Lewis-Baca  
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Department of Labor and Industry