

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 21-96:

JIM R. WAGNER,)
)
 Complainant,)
)
 vs.)
)
 FEDERATION OF MONTANA STATE)
 PRISON EMPLOYEES, LOCAL #4700,)
 MONTANA STATE PRISON,)
)
 Defendant.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

On May 14, 1996, the Complainant filed an Unfair Labor Practice Charge against the Federation of Montana Prison Employees, Local #4700 and their affiliate organization, the Montana Federation of State Employees, under MCA 39-31-402. Subsequently, this matter was filed with the Hearings Bureau for adjudication on June 13, 1996. By agreement of the Parties, a pre-hearing conference was held on September 23, 1996, at which time by stipulated agreement the hearing was scheduled to be held on November 21, 1996. Thereafter, on October 25, 1996, Defendant submitted a **MOTION TO DISMISS** requesting the dismissal of their affiliate, the Montana Federation of State Employees, AFT, AFL-CIO, because the ultimate responsibility for any decisions regarding the local rests with the Executive Board of Local #4700. As the affiliate has no governance authority over decision-making at the local level, the Defendant's motion was granted in this particular matter.

1 The in-person hearing in the above entitled case was
2 conducted on November 21, 1996, in Deer Lodge, Montana before
3 Gordon D. Bruce, Hearing Officer for the Montana Department of
4 Labor and Industry Hearings Bureau. The hearing was conducted
5 under the authority of Section 39-31-406, MCA, in accordance with
6 the Montana Administrative Procedures Act, Title 2, Chapter 4, Part
7 6, MCA. The Complainant represented himself in this matter. The
8 Complainant and Don Curlin, Correctional Supervisor (CS), served as
9 the only witnesses for the Complainant. The Defendant was
10 represented by Tom Burgess, Staff Director, Montana Federation of
11 State Employees, AFT, AFL-CIO. Jim Milligan and Bill Roberts, both
12 past presidents of Local 4700, were called as witnesses for the
13 defendant. Exhibits J-1 through J-17 and Exhibits E 1 through E 9
14 were admitted into the record.

15 Briefing schedules were agreed to by the parties, and on
16 January 6, 1997, final post hearing brief was filed with the
17 Hearing Officer and the record was *closed*.

18 **II. ISSUE**

19 The essential issue to be determined is whether Defendant,
20 Local Union No. 4700, Federation of Montana State Prison Employees,
21 failed to provide adequate representation to union member Jim R.
22 Wagner, Complainant.

23 **III. FINDINGS OF FACT**

24 1. In this case, Complainant filed a grievance in October
25 1995 charging the employer with a contractual violation when he was
26 informed that the four-day ten-hour work schedule (hereafter 4-10s)
27 he was working under was not a valid schedule under Corrections
28 policies, nor agreed to in the collective bargaining agreement.

1 Complainant further asserted that the State Federation Field
2 Representative and Local #4700 should have forced management into
3 accepting a 4-10s schedule. (Testimony Complainant and Exh. J-5)

4 2. In the *INVESTIGATION REPORT AND DETERMINATION* issued by
5 the Board of Personnel Appeals on June 13, 1996, it held in
6 pertinent part based on Complainant's appeal filed May 14, 1996, as
7 follows:

8 There is a dispute as to whether a change in work shifts from
9 five eight [hours] shifts to four ten hour shifts per work
10 week was "established," or a continuing experiment initiated
11 by management.

12 There is a dispute as to whether there was a violation of
13 Article 9, Working Conditions, ratified in May 1995, and
14 whether it was the responsibility of the union to arbitrate a
15 grievance regarding Article 9.

16 There is a dispute as to whether the agreement negotiated
17 between management and the union to extend the four ten hour
18 shift for this bargaining unit to April 16, 1996, constituted
19 abandonment of an "established" shift or extended an
20 experiment which otherwise would have ceased in October, 1995.
21 Further efforts were made by the union to extend the shift
22 change past April, 1996, but the second extension was
23 unacceptable to management.

24

25 (Exh. J-5)

26 3. In April 1994, as a result of a labor/management
27 agreement (no written document on record), a 4-10s schedule was
28 implemented by management for Correctional Supervisors (hereafter
"CS") on a trial basis. This agreement was to be experimental in
nature and to expire in three or four months; however, the option
to continue the 4-10 could be extended, and in fact, by mutual
agreement it continued to be extended for another six months, and
was still in place in January 1995.

(Exh. J-1, p.1 and Testimony Curlin and Complainant)

1 4. In January 1995, Complainant became a CS, and he thought
2 that the 4-10s schedule was permanent; however, there is nothing in
3 the record to show the status of the 4-10s was ever changed to a
4 permanent schedule. (Testimony Complainant). It is uncontested
5 that the schedule was created as "experimental" by agreement of
6 both parties, and Curlin's credible testimony revealed that CS's
7 were sent letters about extending the 4-10s. Further, after using
8 the schedule for approximately three months, labor and management
9 orally agreed to extend the 4-10s for a few months, but Curlin was
10 aware that no guarantee was given to the CS's that the schedule
11 become permanent. (Testimony Curlin)

12 5. On March 14, 1995, the 4-10 schedule was again discussed
13 during a Labor/Management meeting wherein that issue was raised
14 under agenda item number one (1) as follows:

15 1. Labor: How are the four ten-hour shifts proposal
16 standing?

17 Management: Mike Mahoney feels if it is offered to one
18 unit, it should be offered to all of the units to keep
19 morale up and things running smoothly. Mike is not sure
20 if there is enough staff to do this. Also, mutual
21 agreement would need to be gotten from all involved. If
22 this new schedule was implemented and the Unit manager
23 was covering for another staff member, he/she must do
24 that person's actual duties.

25 Any new schedule would be done on a trial basis so that
26 if problems developed, the five eight-hour days could be
27 restored. If overtime expenses added up or there was
28 inadequate coverage in the units, staff would need to
29 return to the traditional schedule.

30 Staff interested in **proposing** the four ten-hour days per
31 week can draft a proposal, and **administrative staff** will
32 review it. (Emphasis added)

33 It is clear that "Labor" asked the question: How are the four ten-
34 hour shifts **proposal standing**? No mention whatsoever is made in
35 the minutes that "Labor" ever considered the 4-10s to be a

1 permanent working schedule. Further noted is the fact that the
2 Complainant is not listed as one of the staff present at the
3 meeting. (Exh. J-1, p. 3)

4 6. The uncontroverted testimony of Jim Milligan who had sat
5 on the Executive Board of the Union, and had been president on two
6 occasions, reveals that the original plan to try the 4-10s for 90
7 days was extended to allow more time to study the outcome of the 4-
8 10s. Further, no agreement on the 4-10s was ever negotiated
9 between the parties that abrogated the CS's original work shifts.
10 (Testimony Milligan)

11 7. Ultimately, on October 17, 1995, a written agreement
12 between CS's and management was memorialized pursuant to **Memorandum**
13 **Of Understanding Between The State Of Montana, Montana State Prison**
14 **And The Federation Of Montana State Prison Employees Local #4700.**
15 Here, Union and Management agreed to extend the temporary 4-10's
16 shift until no later than April 16, 1996. It reads as follows:

17 THE ABOVE NAMED PARTIES HEREBY AGREE TO CONTINUE THE PRACTICE
18 OF ALLOWING CORRECTIONAL SUPERVISORS WHO ARE PRESENTLY
19 ASSIGNED TO CLOSE I TO WORK FOUR 10 HOUR DAYS PER WEEK. THIS
20 PRACTICE WILL CONTINUE NO LATER THAN APRIL 16, 1996. AS OF
21 APRIL 17, 1996 THE SHIFTS OF THE CORRECTIONAL SUPERVISORS
22 ASSIGNED TO CLOSE I WILL REVERT TO 8 HOUR DAYS.

23 IN THE EVENT THAT A VACANCY(S) OCCURS IN A CORRECTIONAL
24 SUPERVISOR POSITION ASSIGNED TO CLOSE I PRIOR TO APRIL 17,
25 1996 THE UNIT MANAGER HAS THE OPTION OF REVERTING BACK TO AN
26 8 HOUR DAY FOR THAT POSITION

27 (Exh. J-1 p. 11)

28 8. On October 18, 1995, Mike Mahoney, Bureau Warden,
(Mahoney) wrote a letter to Complainant confirming that the
Personnel Office had received his grievance form on October 11,
1995, and reiterated certain of his allegations in the complaint.
Complainant was also informed that his grievance was considered

1 "moot" as management and union had agreed to extend the 4-10s (See
2 Above Mentioned "Memorandum"). (Exh. J-1, p. 9)

3 9. Mahoney also informed Wagner in the above letter that "it
4 must also be noted that management retains the rights to manage the
5 institution which includes establishing work schedules"
6 notwithstanding Article 9--Working Conditions of the CS Addendum
7 which reads in part:

8 Shifts and days off will be determined by mutual agreement
9 between the CS and the Unit Manager. Once shifts and days off
10 are established they can only be changed through mutual
11 agreement between the Unit Manager and the Correctional
Supervisor, provided, however, that in the case of an
emergency, the shift and days off may be temporarily
altered....

12 (J-1, P. 4)

13 10. As Wagner was informed by Mahoney, under their contract,
14 **ARTICLE 13 --RIGHTS OF MANAGEMENT**, management has the authority to
15 establish work schedules and assignments pursuant to the following:

16 Section 1. The Employer retains the rights to manage,
17 direct, and control functions in all particulars except as
18 limited by the terms of this agreement, or state law. Such
rights shall include but not be limited to:

19
20 F. Establish work schedules and assignments.

21 (Exh. E-5)

22 11. Complainant asserts that Article 9 (above) prevents
23 management from rescinding the temporary 4-10s schedule because
24 that schedule was somehow "established" as being permanent when he
25 and certain other CS's were told by a Unit Manager that they would
26 continue working the shift. Nothing in the record, however, shows
27 that the warden and prison management ever intended to make the 4-
28 10s an established permanent schedule. Further, it is

1 uncontroverted that no written agreement between management and
2 union was ever memorialized which elevated the CS's 4-10s to
3 permanent status. Nor is there any reliable, credible record of
4 any verbal agreement between management and union that created a
5 permanent 4-10 work schedule. (See Exh. J-1, p. 4, id.,
6 referencing "established")

7 12. At the Labor Management Meeting of March 19, 1996, Local
8 4700 asked for extension of the 4-10's for CS's in Close Unit I,
9 and the minutes of the meeting reveal the following response:

10 Management indicated a six month extension had previously been
11 granted. Within that window of time there was ample
12 opportunity to move out of that unit. Warden Mike Mahoney has
13 a hard time granting this extension when this was never a
14 permanent work schedule and feels it is irresponsible of
15 management to continue this practice when there is not a
16 permanent work schedule. Mike indicated he is willing to look
17 at alternative work schedules in the future and a Committee to
18 look at options was established. If it can be demonstrated we
19 can go to 4-10's or 3-12's, we are willing to look at it.

20 (Exh. E-1, item 5.)

21 13. Ultimately, in April, 1996, Howie Wigert, President of
22 Local 4700, attempted to get an extension of the April 16, 1996,
23 cut-off date as set by Mahoney; however, Mahoney informed him the
24 4-10's were being rescinded. (Exh. J-4, p. 2)

25 14. As to Wagner's complaint that Local #4700 violated the
26 collective bargaining agreement because the union simply ignored
27 his grievance, the record reflects that the executive council made
28 the decision not to pursue Wagner's grievance for reason that they
found no violation of the collective bargaining agreement and
decided not to pursue his grievance to the point of Arbitration.
Further, the credible testimony of former Local President Milligan
reveals that the same procedures were followed in reviewing

1 Complainant's case for potential arbitration as in other cases.
2 (Testimony Milligan)

3 15. ARTICLE 18--GRIEVANCES AND ARBITRATION as submitted by
4 Wagner reads in part:

5 Should the aggrieved employee and the Federation consider the
6 decision of the Director unsatisfactory, the Federation **may**,
7 within fifteen (15) working days of receipt of such decision,
8 notify the Director and the Chief of Labor and Employee
9 Relations Bureau of its decision to take the grievance to
10 final and binding arbitration.

11 (Exh. J-17)

12 16. The Constitution Of The Federation Of Montana State
13 Prison Employees, Article VI, Section 5., follows:

14 The Executive Council shall make recommendations of support or
15 **opposition** to any grievance in which final and binding
16 arbitration has been requested by the Stewards Council.
17 (Emphasis added)

18 As there have not been any changes to the grievances procedures in
19 several years, Local #4700 follows the prescribed grievance
20 procedure in addressing grievances of members (See Exh. E-3,
21 Article 10). It declined to take Wagner's grievance to arbitration
22 because when he first filed his complaint, the 4-10s were still in
23 place. The grievance procedure in place allows for the grievant or
24 the steward or representative to complete a grievance form, submit
25 it to the appropriate supervisor who then responds; then the
26 grievant or union representative may proceed to level two. Once
27 the employer responds to level two, the grievance may be pursued to
28 level three, and in all events, finally, the executive board of the
local may decide to withdraw the grievance for lack of merit.

(Testimony Curlin and Milligan) (Emphasis added)

1 17. Additionally, the credible testimony of Milligan, which
2 is essentially consistent with the testimony of Curlin where both
3 testified on similar factual matters, reveals that as Assistant
4 Steward for the Local #4700, he had addressed Wagner's grievance on
5 numerous occasions and attended an Executive Board meeting to
6 discuss the grievance which was ultimately given to Warden Mahoney
7 for a decision. Further, Milligan thought that Wagner's grievance
8 had flowed through the routine complaint "steps" as provided under
9 the contract, although he did not have complete recall of that
10 event. (Testimony Milligan)

11 18. Although no official union vote of the membership was
12 taken as to shift preference during pertinent times herein, most,
13 if not all, the CS's and certain other union members favored
14 keeping the 4-10's schedule. Nevertheless, a majority of the
15 Executive Council, which has authority over such matters, voted not
16 to take the matter to arbitration after considering Wagner's
17 grievance. The Board decided there was insufficient merit for them
18 to support and advance his grievance to the ultimate arbitration
19 level. Further, the same steps in the grievance procedure were
20 considered for Wagner as for any other grievant. (Testimony
21 William Roberts, past union President)

22 19. That Local #4700 attempted to assist Wagner and other
23 CS's in extending the 4-10's schedule is evident in the fact that
24 on October 12, 1996, just two days before the 4-10's schedule was
25 to be discontinued, and upon the request of CS Larry Briggs, the
26 union tried to negotiate a continuance of 18 months for the
27 schedule. The result was a six month extension. (Testimony
28 Roberts)

1 IV. CONCLUSIONS OF LAW

2 1. The Board of Personnel Appeals has jurisdiction over this
3 unfair labor practice charge pursuant to Section 39-31-402, MCA.

4 2. The Montana Supreme Court has approved the practice of
5 the Board of Personnel Appeals (Board) in using federal court and
6 National Labor Relations Board (NLRB) precedence as guidelines
7 interpreting the Montana Collective bargaining for Public Employees
8 Act as the State Act is so similar to the Federal Labor Management
9 Relations Act. **State ex rel board of Personnel Appeals v. District**
10 **Court**, 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297 (1979);
11 **Teamsters Local No. 45 v. State ex rel Board of Personnel Appeals**,
12 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981); **City of Great**
13 **Falls v. Young (III)**, 211 Mont. 13, 686 P.2d 185, 119 LRRM 2682.

14 3. In this matter, Complainant Wagner charges Local #4700
15 with breaching its duty of fair representation, a violation of 39-
16 31-402, MCA, when it made the decision not to pursue Wagner's
17 grievance to Step 4 (Arbitration), pursuant to the collective
18 bargaining agreement between the local and the Montana Department
19 of Corrections. In **Vaca v. Sipes**, 386 U.S. 171 (1967), however,
20 the Supreme Court held that a breach of the statutory duty of fair
21 representation occurs "only when a union's conduct toward a member
22 of the collective bargaining unit is arbitrary, discriminatory, or
23 in bad faith."

24 4. Further acknowledged by the Court in **Vaca**, Id, was the
25 argument that the union be given substantial discretion ("if the
26 collective bargaining agreement so provides") to decide whether a
27 grievance should be taken to arbitration, "subject only to the duty
28 to refrain from patently wrongful conduct such as racial

1 discrimination or personal hostility." And, it is clear the
2 agreement between Local #4700 and its members grants such
3 discretion to the union. (See also **Sheremet v. Chrysler Corp.**, 372
4 Mich. 626, 127 N.W. 2d 313)

5 5. The **Vaca** court also ruled that "although we accept the
6 proposition that a union may not arbitrarily ignore a meritorious
7 grievance or process it in a perfunctory fashion, we do not agree
8 that the individual employee has an absolute right to have his
9 grievance taken to arbitration regardless of the provisions of the
10 applicable collective bargaining agreement." (**Vaca**, Id)

11 6. As contended by Defendant, the record reflects that the
12 decision not to pursue arbitration was made by the elected
13 leadership of the local, after reviewing the facts of the grievance
14 and finding no merit. And, as the Court held in **Ford Motor Co. v.**
15 **Huffman**, 345 U.S. 330, 338 (1953), "Inevitably differences arise in
16 the manner and degree to which the terms of any negotiated
17 agreement affect individual employees and classes of employees.
18 The mere existence of such differences does not make them invalid.
19 The complete satisfaction of all who are represented is hardly to
20 be expected. A wide range of reasonableness must be allowed a
21 statutory bargaining representative in serving the unit it
22 represents, subject always to complete good faith and honesty of
23 purpose in the exercise of its discretion."

24 Here, the assertions of impropriety on the part of the union
25 is not supported by the record. Testimony of Milligan and Roberts
26 reveals that the same process for handling grievances at the
27 executive council level was used during Complainant's grievance was
28 used in all other grievances filed by the membership.

1 7. That the "duty of fair representation was judicially
2 evolved to enforce fully the important principle that no individual
3 union member may suffer invidious hostile treatment at the hands of
4 the minority of his coworkers," was observed by the Court in **Motor**
5 **Coach Employees v. Lockridge**, 403 U.S. 274, 301 (1971).
6 Notwithstanding, the Court also made it clear that this doctrine
7 "carries with it the need to adduce substantial evidence of
8 discrimination that is intentional, severe, and unrelated to
9 legitimate union objectives." Here, Complainant has failed to meet
10 the necessary burden of proof to support his contentions of
11 misrepresentation. Clearly, nothing in the record shows that the
12 Executive Council of union treated Complainant's grievance
13 different than other grievances it reviewed, albeit, the council
14 decided not to progress to Arbitration in his case.

15 8. Arguendo, even if there were certain errors in judgment
16 on the part of Local #4700, the Court in **Hines v. Anchor Motor**
17 **Freight**, 424, U.S. 554, 571 (1976) addressed similar circumstances
18 and held as follows:

19 To prevail against . . . the Union, petitioners must . . .
20 also carry the burden of demonstrating breach of duty by the
21 Union . . . this involves more than demonstrating mere errors
22 in judgment. The grievance processes cannot be expected to be
23 error-free. The finality provision has sufficient force to
24 surmount occasional instances of mistake. . . .

25 In this case, as contended by Defendant and supported by the
26 record, the 4-10s schedule Complainant was working under was not a
27 valid schedule under prison policy or collective bargaining
28 agreement. It is clear that the schedule was kept in place for
some time, however, prison **management** never agreed upon a permanent
4-10s schedule. Ultimately, the Warden ordered the Unit Manager to

1 | discontinue this temporary and essentially "experimental" work
2 | shift.

3 | 9. It appears that Local #4700 made considerable effort to
4 | obtain a 4-10s schedule for all Correctional Supervisors at Montana
5 | State Prison. The union recognized, however, that prison
6 | **management** has the right to schedule employees pursuant to Article
7 | 9 and Article 13 of the Collective Bargaining Agreement (see
8 | Exhibits 4 and 5) unless otherwise prohibited by specific
9 | agreements such as a collective bargaining agreement.
10 | Nevertheless, the union attempted to arrange for the 4-10's
11 | schedule as an experiment, with the hopes of having a permanent
12 | agreement in the future, but failed to accomplish that goal.

13 | 10. There is no reliable, credible evidence that Wagner was
14 | ignored by the local union regarding his grievance. Again, the
15 | local union executive council made the decision not to pursue the
16 | Claimant's grievance to the point of Arbitration because no
17 | violation of the collective bargaining agreement occurred. And, it
18 | is understandable that Wagner was upset when the schedule he
19 | desired could not be formally agreed to between union and
20 | management. Nevertheless, the overall record reflects that the
21 | union negotiated in good faith the extension of the 4-10s in an
22 | effort to afford affected employees an opportunity to utilize
23 | alternative shifts to accommodate their personal needs.

24 | 11. As contended by Defendant, Complainant also appears to
25 | argue that the union failed to represent him when a continuance of
26 | the 4-10s schedule was negotiated between prison management and the
27 | union, at the request of a co-worker of the Complainant. As the
28 | record reflects, on October 12, 1996, just prior to the time the

1 4-10 schedule was supposed to be discontinued, the Federation
2 office received a phone call from CS Larry Briggs, who asked the
3 Federation to try and negotiate a continuance of 18 months.
4 Clearly, in fairly representing its members, the union negotiated
5 a short extension in an effort to afford the employees an
6 opportunity to transfer into shifts and days of which they wanted,
7 rather than work a schedule they didn't want.

8 12. Although Wagner argues that by arranging for such six
9 month extension of the 4-10s signed by the union and management
10 that agreement somehow reached the level of an "agreement" to
11 discontinue the 4-10s. The record does not support such
12 contentions. Clearly, the extension was negotiated to try and
13 prevent the employees from being forced to accept a work schedule
14 which they did not want. But, the union was unable to successfully
15 negotiate a longer or permanent schedule with management, as
16 management correctly held that the 4-10s was only a temporary,
17 "experimental" schedule, and the Warden had legal authority to deny
18 further use of the temporary schedule.

19 13. In summary, based on the overall record, the Complainant
20 has failed to show that the Defendant in any way violated the
21 collective bargaining agreement. And as to fair representation,
22 there may have been differences that remained unresolved, but the
23 Defendant acted reasonably and appeared to act in good faith and
24 honesty of purpose in the exercise of its discretion.

25
26
27
28

1 V. RECOMMENDED ORDER

2 Unfair Labor Practice Charge No. 21-96 is DISMISSED.

3 DATED this 7th day of March, 1997.

4 BOARD OF PERSONNEL APPEALS

5
6 By: Gordon D. Bruce
7 Gordon D. Bruce
8 Hearing Officer

9 NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER
10 shall become the Final Order of this Board unless written
11 exceptions are postmarked no later than March 31, 1997.
12 This time period includes the 20 days provided for in ARM
13 24.26.215, and the additional 3 days mandated by Rule 6(e),
14 M.R.Civ.P., as service of this Order is by mail.

15 The notice of appeal shall consist of a written appeal of the
16 decision of the hearing officer which sets forth the specific
17 errors of the hearing officer and the issues to be raised on
18 appeal. Notice of appeal must be mailed to:

19 Board of Personnel Appeals
20 Department of Labor and Industry
21 P.O. Box 6518
22 Helena, MT 59604
23
24
25
26
27
28

1 * * * * *

2 CERTIFICATE OF MAILING

3 The undersigned hereby certifies that true and correct copies
4 of the foregoing documents were, this day served upon the following
5 parties or such parties' attorneys of record by depositing the same
6 in the U.S. Mail, postage prepaid, and addressed as follows:

7 Tom Burgess, Staff Director
8 Montana Federation of State Employees
9 PO Box 6169
10 Helena MT 59604

11 Jim R Wagner
12 602 Washington St
13 Deer Lodge MT 59722

14 Howie Wigert, President
15 Federation of Montana State
16 Employees, Local #4700
17 PO Box 2
18 Anaconda MT 59711

19 DATED this 7th day of March, 1997.

20 Christine A. Roland