

1 Department of Labor and Industry
2 Board of Personnel Appeals
3 PO Box 201503
4 Helena, MT 59620-1503
5 (406) 444-2718
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8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10
11 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 17-2009

12
13 AMALGAMATED TRANSIT UNION,)
14 LOCAL 381, AFL-CIO/CLC)
15 Complainant,)
16 -vs-)
17)
18 BUTTE SCHOOL DISTRICT NO.1,)
19 Defendant.)
20)
21)

RECOMMENDED ORDER OF
DISMISSAL BASED ON DEFERRAL

22
23 * * * * *

24 **I. Introduction**

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26 On March 16, 2009, Larry Holverson, President/Business Agent of Amalgamated
27 Transit Union, Local 381, hereafter Local 381 or the Union, filed an unfair labor practice
28 charge with the Board of Personnel Appeals alleging that the Butte School District No.
29 1, hereafter the District, has “continually interfered and discriminated against Larry
30 Holverson (president) and Randy Mrkich (steward) in the administration of the Union.”
31 The charge further asserts that the issues at the heart of the complaint have been
32 grieved in accordance with the terms of the collective bargaining agreement and that
33 “the continued practice of the District managers in interfering, restraining and
34 discriminating against Union officers is greatly affecting their ability to adequately
35 represent members and is in violation of the law.” A violation of 39-31-401 MCA is
36 alleged. The District is represented by Patrick Fleming, attorney at law, of Butte,
37 Montana. The District has responded to the charge and has denied any violation of the
38 law. The District further questions the jurisdiction of the Board and whether or not the
39 issues in dispute are more appropriately addressed through arbitration under the
40 collective bargaining agreement.
41

42 John Andrew was assigned by the Board to investigate the charge and has reviewed
43 the information submitted by the parties and communicated with them as necessary in
44 the course of the investigation, including a conference call with Mr. Holverson and Mr.
45 Fleming on May 20, 2009.
46

47 **II. Background and Discussion**

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49 Three grievances are at the heart of this complaint. Local 381 contends they are a part
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1 of a pattern of interference and coercion on the part of the District.
2

3 The first grievance has two components. The first one is that Jed Hoopes, the
4 Transportation Director, and Mr. Holverson's immediate supervisor, unilaterally changed
5 the method in which Mr. Holverson was to be paid overtime or call out. Mr. Holverson is
6 a bus washer with the District. On occasion he also drives bus. His contention is that
7 on January 2, 2009, after working 8 hours as a bus washer, he should have received
8 two hours of overtime for driving bus as that was a "widely known practice". The
9 second component of this portion of Mr. Holverson's complaint concerns an allegation
10 that Mr. Hoopes unilaterally changed Mr. Holverson's hours of work. According to Mr.
11 Holverson the change is documented in a January 21, 2009, letter to him from Therese
12 McClafferty, Director of Human Resources. The letter advises Mr. Holverson that
13 effective January 26, 2009, his hours of work will be from 7:00 a.m. to 3:30 p.m. with
14 one half hour for lunch. The contention of Mr. Holverson is that his hours, based on the
15 contract as well as practice, are 7:00 a.m. to 3:00 p.m. including a one hour lunch. Mr.
16 Holverson grieved these matters on January 26, 2009, with the matters proceeding to
17 the arbitration step of the collective bargaining agreement. Although the belief of the
18 District is that Mr. Holverson has dropped the two hours of overtime/call-out Mr.
19 Holverson has indicated to the investigator that he is still pursuing this issue. The Union
20 is asking for a return to status quo in both instances.
21

22 The second grievance of Mr. Holverson concerns a change in reporting sick leave or
23 other absences. The change occurred on February 10, 2009. Prior to this date, if Mr.
24 Holverson was taking time off he would report that to the secretary of the Transportation
25 Department. Mr. Hoopes changed this practice and required that Mr. Holverson report
26 any absences to him directly, and in his absence, leave a voice message reporting he
27 was going to be off. On February 19, 2009, Mr. Holverson grieved this matter as well.
28 This matter too is at the point of arbitration with the Union asking that the previous
29 reporting method be reinstated.
30

31 The third incident involves Randy Mrkich, Local 381 steward. On February 10, 2009,
32 Mr. Mrkich was driving a bus when it had mechanical problems. There was no
33 disciplinary action taken by the District over the February 10, 2009, incident. However,
34 on February 13, 2009, Mr. Hoopes met with Mr. Mrkich and Carol Biggers, Local 381
35 Vice President, to discuss the incident. The meeting was heated and at one point Mr.
36 Mrkich directed profanity at Mr. Hoopes. On February 18, 2009, Superintendent Chuck
37 Uggetti met with Mr. Holverson and Mr. Mrkich. At the time of this meeting
38 Superintendent Ugetti refused to discuss the events of February 10, 2009. Rather he
39 insisted the meeting focus only the events of February 13, 2009. Concerning the
40 February 13, 2009, incident Mr. Mrkich did not deny to Superintendent Ugetti that he,
41 Mr. Mrkich, directed profanity at Mr. Hoopes. As a result of this Superintendent Uggetti
42 suspended Mr. Mrkich without pay pending an apology from Mr. Mrkich. Ultimately Mr.
43 Mrkich did apologize but the discipline remained in place. The Mrkich matter is also at
44 the arbitration step in the grievance procedure and Local 381 is asking that the
45 suspension be reduced to one day without pay. The contention of Local 381 is that
46 Superintendent Ugetti did not allow the Union to discuss the Mrkich incident fully and in
47 doing so denied the Union a fair airing of the situation.
48

49 Mr. Holverson became Local President in January of 2009 and all the incidents in
50 question occurred after this time, but beyond the mere timing of the incidents there is

1 nothing to overtly indicate that any of the actions taken by the District were related to
2 union activity by Mr. Holverson or Mr. Mrkich. In fact, the District argues that the actions
3 it took involving Mr. Holverson and Mr. Mrkich were done in accordance with the
4 collective bargaining agreement and that there was no anti-union animus associated
5 with its actions. The District further points out that grievances have been filed in all the
6 matters and they have moved forward under the terms of the collective bargaining
7 agreement. The District also points out that the complaint before the Board of
8 Personnel Appeals is inexorably tied to the grievance procedure and that not only are
9 the remedies requested by the Union the same as what they would get before an
10 arbitrator, but the facts are so tied to the arbitration process that to have them proceed
11 before BOPA would not only be duplicative, but it could result in inconsistent or
12 opposing results. The District contends that the matters should be either before the
13 Board, or before an arbitrator, but not before both. The Union points out that part of the
14 remedy it wants is for the District to cease and desist from actions that have a chilling
15 effect on administering the collective bargaining agreement. Nonetheless, the primary
16 thrust of the request of the Union is for reinstatement of the status quo, and in the case
17 of Mr. Mrkich, a reduction in the discipline imposed.

18
19 In 1993 section 39-31-306 MCA was amended to add a new (5) providing:

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21 An agreement to which a school is a party must contain a grievance procedure
22 culminating in final and binding arbitration of unresolved and disputed
23 interpretations of agreements. The aggrieved party may have the grievance or
24 disputed interpretation of the agreement resolved either by final and binding
25 arbitration or by any other available legal method and forum, but not by both.
26 After a grievance has been submitted to arbitration, the grievant and the
27 exclusive representative waive any right to pursue against the school an action or
28 complaint that seeks the same remedy. If a grievant or the exclusive
29 representative files a complaint or other action against the school, arbitration
30 seeking the same remedy may not be filed or pursued under this section.
31

32 In view of this statute the District has told the Union it will not go forward to arbitration
33 until the issue of the correct forum for resolving the disputes at issue is resolved. The
34 District has further indicated that when the Board resolves this threshold question the
35 District is prepared to move forward.
36

37 The collective bargaining agreement between the District and Local 381 in Article XXIII
38 defines the term "grievance" as:

39
40 ". . . any controversy or dispute between the parties or between the District and
41 employees covered by this Agreement as to any matter involving the
42 interpretation, application, or violation of any provision of this Agreement or of
43 existing customs, practices, usages, rules, working conditions".
44

45 This is a broad definition of a grievance. Applying it to the issues in controversy, the
46 question of overtime/call out pay and the hours of work for Mr. Holverson are clearly
47 creatures of the collective bargaining agreement and/ or past practice or custom as
48 alleged by Mr. Holverson. The same is true of the question of to whom Mr. Holverson is
49 to report any leave requests or his whereabouts. Without addressing the merits of the
50 Holverson grievances, there is sufficient evidence in the eyes of the investigator to

1 conclude there were business reasons, as well as contractual language, neither of
2 which relate to anti-union animus, for the District to take the actions it took. In and of
3 themselves these actions do not demonstrate any form of interference or coercion on
4 the part of the District. Moreover, since the remedy requested by the Union is a return
5 to the status quo these issues should proceed to arbitration and not be heard by the
6 BOPA.
7

8 In the instance of Mr. Mrkich, there was no disciplinary action taken against him for the
9 events of February 10, 2009. The disciplinary action was taken as a result of the
10 February 13, 2009, meeting. Was the Superintendent correct in not allowing any
11 discussion of the February 10, 2009, event? To be sure one could see why he directed
12 the discussion in the way he did simply because it was arguably not relevant to, or a
13 justification for the action of Mr. Mrkich on February 13, 2009. However, and most
14 importantly, the position of Local 381 is that this action by the Superintendent was in
15 some fashion a denial of due process considerations and in some manner resulted in an
16 unfair disciplinary action. Whether the Superintendent was correct in the way discipline
17 was imposed, whether it was excessive for the offense, and whether the February 18,
18 2009, actions of the Superintendent in some way resulted in inappropriate or excessive
19 discipline is again a creature of the grievance procedure and the proper province of the
20 arbitrator, not the BOPA.
21

22 The Montana Supreme Court has approved the practice of the Board of Personnel
23 Appeals using Federal Court and National Labor Relations Board precedent as guidelines
24 in interpreting the Montana Collective Bargaining for Public Employees Act as the State
25 act is so similar to the Federal Labor Management Relations Act, State ex rel. Board of
26 Personnel Appeals v. District Court, 183 Mont 223, 598 P.2d 1117, 103 LRRM 2297;
27 Teamster's Local Union No. 45 v. State ex rel. Board of Personnel Appeals, 195 Mont 272,
28 635 P.2d 1310, 110 LRRM 2012; City of Great Falls v Young (Young III) 211 Mont 13, 686
29 P.2d 185, 119 LRRM 2682.
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31
32 In ULP 43-81, William Converse v Anaconda Deer Lodge County and ULP 44-81 James
33 Forsman v Anaconda Deer Lodge County, August 13, 1982, the Board of Personnel
34 Appeals adopted National Labor Relations Board precedent set forth in Collyer Insulated
35 Wire, 192 NLRB 387, 77 LRRM 1931, deferring certain unfair labor practice proceedings
36 to an existing negotiated grievance/arbitration procedure. In the instant case, and
37 although there are allegations of interference or coercion that is interfering with the Union
38 properly attending to its business, there simply is insufficient evidence to say that
39 management is acting in a coercive or interfering manner. To be sure there is some
40 circumstantial evidence pointing out that Mr. Holverson may be treated differently than
41 others in the bargaining unit, but it is not sufficient to say it is because of his union
42 activities. It is clear to the investigator that members of the bargaining unit do not always
43 agree with or appreciate the management style of their supervisor, but they cannot point to
44 specific incidents of actions taken by the supervisor that relate to union activities of Local
45 381 or its members and agents. And, interestingly enough, even the supervisor in
46 question is a member of a bargaining unit as well, so it is hard to find any anti-union
47 animus that comes to the surface. With what has been provided, and given the nature of
48 the complaint to date, this matter is most appropriate for resolution under the grievance
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1 procedure and not before the Board of Personnel Appeals. Accordingly the matter is
2 deferred to the grievance procedure for resolution.
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5 **III. Recommended Order**
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7 It is hereby recommended that the above matter be dismissed. To eliminate the risk of
8 prejudice to any party the Board of Personnel Appeals retains jurisdiction over this matter
9 for the purpose of entertaining an appropriate and timely motion for further consideration
10 upon a proper showing that either the dispute has not, within a reasonable time, been
11 resolved pursuant to the parties' negotiated grievance/arbitration procedure; or the
12 grievance/arbitration proceedings have not been fair and regular or have reached a result
13 which is repugnant to the Montana Collective Bargaining for Public Employees Act.
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15

16 Dated this 23rd day of June 2009.
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19 BOARD OF PERSONNEL APPEALS
20
21

22
23 By: _____
24 John Andrew
25 Investigator
26

27 **SPECIAL NOTICE**

28 Exceptions to this Recommended Order may be filed within twenty (20) days of service
29 thereof. If no exceptions are filed, this Recommended Order shall become the Order of
30 the Board of Personnel Appeals. Address exceptions to the Board of Personnel Appeals,
31 P.O. Box 201503 Helena, Montana 59620-1503.
32
33

34 * * * * *
35 CERTIFICATE OF MAILING
36

37 I, _____, do hereby certify that a true and correct
38 copy of this document was mailed to the following on the _____ day of June, 2009,
39 postage paid and addressed as follows:
40
41

42 LARRY HOLVERSON
43 ATU LOCAL 381
44 1737 FLORENCE AVE
45 BUTTE MT 59701
46

47 PATRICK FLEMING
48 ATTORNEY AT LAW
49 PO BOX 527
50 BUTTE MT 59703