

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 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGES 20 & 21-2011

13 MONTANA PUBLIC EMPLOYEES)
14 ASSOCIATION,)
15)
16 Complainant,)
17 -vs-)
18)
19 EVERGREEN RURAL FIRE DISTRICT,)
20)
21 Defendant.)
22)
23)

INVESTIGATIVE REPORT
AND
NOTICE OF INTENT TO DISMISS

24
25 * * * * *

26 **I. Introduction**

27
28 On April 8, 2011, the Montana Public Employees Association, hereinafter MPEA or the
29 Association, filed two complaints against the Evergreen Rural Fire District, hereinafter
30 Evergreen or District, alleging violations of Section 39-31-401(1), MCA, and Section 39-
31 31-201, MCA. The charges were filed by Bob Chatriand, MPEA Field Representative.
32 Evergreen denied both charges in timely answers filed with the Board of Personnel
33 Appeals by District counsel, Daniel D. Johns. With the consent of the parties, the
34 charges are consolidated for purposes of this investigative report.
35

36
37 John Andrew was assigned to investigate the complaint, has reviewed the submissions
38 of the parties and has communicated with the parties in the course of investigating the
39 charge.
40

41 **II. FINDINGS AND DISCUSSION**

42
43 ULP 21-2011 will be discussed first. This charge finds its roots in a unit determination
44 filed by MPEA on March 11, 2011. Since ULP 21-2011 alleges that the Fire Chief
45 interfered in the right of employees to engage in self-organization a discussion of the
46 unit determination proceeding is not only in order, but ultimately bears on whether or not
47 there is merit to unfair labor practice charge itself.
48

49 In its unit determination petition MPEA proposed to represent a bargaining unit including
50

1 all firefighters and EMT Rescue Personnel, excluding the Chief, Fire Marshall and
2 Administrative Assistant. The petition estimated there would be 25 employees in the
3 proposed unit. On March 25, 2011, the District filed a counter petition with the Board
4 proposing a bargaining unit including regular and part-time firefighters and EMT
5 personnel and excluding the Chief, Fire Marshall and Administrative Assistant. Twenty
6 five employees were included in the District unit description. The District also posted
7 notice of the unit determination proceedings, including notice from the Board that
8 intervention petitions had to be filed with the Board no later than April 6, 2011.
9

10 John Andrew was the election judge assigned to the unit determination and prior to the
11 intervention date worked with MPEA and the District in reaching agreement on the
12 bargaining unit description. MPEA and the District agreed to the employer's proposed
13 unit description. Possible election dates were also discussed with the caveat that the
14 case would not proceed forward until the intervention date had passed.
15

16 On April 6, 2011, the International Association of Firefighters, Local 547, hereinafter
17 Local 547, intervened in the unit determination proceedings. Local 547 proposed a unit
18 consisting of full and part-time employees excluding the Chief, confidential employees
19 and volunteers. Local 547, as had the District and MPEA, anticipated a bargaining unit
20 of 25 employees. The District filed a motion with the Board to disallow the intervention
21 of Local 547 from the unit determination proceedings. Ultimately Local 547 withdrew as
22 an intervener, a fact confirmed by the election judge on May 5, 2011. However, for
23 purposes of considering ULP 21-2011, Local 547 was an interested party in the unit
24 determination proceedings until May 5, 2011.
25

26 As stated earlier, ULP 21-2011 was filed by MPEA on April 8, 2011. It contends that the
27 "Fire Chief informed his crew that he has chosen to campaign against having a union,
28 that things were about to change, and that the next couple weeks were going to 'get
29 rocky'". ULP 20-2011, filed separately and further addressed below, alleged that the
30 District had taken disciplinary action against a union organizer (Lance Melin) and that
31 the discipline imposed was a result of the employee engaging in protected activities.
32 Local 547 did not file any charges against the District. The MPEA charges, however, do
33 relate back to the unit determination to one degree or another.
34

35 Since the investigator assigned by the Board to investigate the unfair labor practices
36 was the same person assigned by the Board to serve as election judge the
37 investigator/election judge asked whether or not the three parties to the unit
38 determination objected to the same person performing dual roles. There were no
39 objections.
40

41 Local 547 was not a party to the charges filed by MPEA against the District and Local
42 547 had no objection to the election judge proceeding to reach agreement on unit
43 composition and then proceeding to election. Similarly, neither the District nor the
44 Association objected to continuing with the election procedures. In short, none of the
45 parties to the unit determination ever indicated that the pending unfair labor practice
46 charges should serve as a blocking charge to the unit determination moving forward nor
47 did any of the parties offer to the election judge/investigator that the pending charges
48 were so destructive of the "laboratory conditions" necessary for a fair election so as to
49 void the election. No party to this case asked that the unfair labor practice charges be
50 moved forward so they were held in abeyance while the election process proceeded.

1 Ultimately, and prior to the withdrawal of Local 547, the election judge secured
2 agreement from Local 547, MPEA, and the District on the appropriate unit description.
3 Agreement was also reached on eligible voters, with the only bar to election being the
4 presence of Local 547 on the ballot. With the withdrawal of Local 547 from the
5 proceedings that obstacle too was removed and the District and MPEA agreed upon an
6 election date. A stipulation to that effect was signed by the Association and the District.
7

8 On June 6, 2011, ballots were opened and a tally furnished to the District and the
9 Association. The parties were advised of the ability to submit election challenges.
10 None were filed and the Board certified the results of the election on June 14, 2011. As
11 of this date the two unfair labor practice complaints remain pending and in need of
12 resolution as neither has been withdrawn and the Association has expressed an interest
13 in moving the charges forward.
14

15 As concerns ULP 21-2011, in consideration of the foregoing, and with nothing more in
16 hand than an assertion that statements from the Fire Chief constituted an unfair labor
17 practice, it is the opinion of the investigator that the assertion lacks probable merit that
18 an unfair labor practice was committed. The statement in and of itself does not
19 demonstrate anything other than a rather vague expression by the Chief that things
20 would be different and that a campaign would be held against unionization. No part of
21 this statement constitutes an unfair labor practice and there is nothing other than this
22 statement and the other unfair labor practice allegation, which will be addressed
23 separately, offered to warrant a finding of probable merit. Further, this matter did
24 proceed to election with the employer being fully cooperative in anything requested of it
25 by the agent of the Board. There were no indications by either Local 547 when it was
26 involved, or MPEA, that laboratory conditions were not present for the election to go
27 forward. Finally, there was an avenue to follow had the actions of the District been so
28 egregious as to disrupt the laboratory conditions needed for a fair election. That avenue
29 was not followed. The charge was questionable from the onset and the election
30 resolves the question of representation thereby rendering the unfair labor practice moot
31 in so far as any bearing it might have on the election process.
32

33 Turning to ULP 20-2011, the allegation of MPEA that the District interfered, coerced and
34 restrained employees in the right of self organization, it's necessary to again look back
35 to ULP 21-2011 and weigh it into the entire picture as, according to the Association and
36 Mr. Melin, one charge essentially supports the other. Even in consideration of that
37 possibility the investigator is not satisfied that there is substantial evidence to warrant a
38 finding of probable merit.
39

40 As pointed out by the District, the Chief does not specifically recall stating that things
41 were going to change and "get rocky". To be sure, in an organizing campaign things do
42 change, and to be equally sure, in the case of an intervention and all that is discussed
43 above, things were complicated in the Evergreen unit determination. In and of itself, the
44 statement of the Chief, even if made, carries little weight to support a violation of the
45 law. The question is, what else is there that demonstrates that the actions taken by the
46 District and its personnel constituted interference, coercion or restraint of protected,
47 concerted activities? To this the Association points to the disciplinary action taken
48 against Lance Melin.
49

50 As it relates to ULP 20-2011, Lance Melin was disciplined by the District during the

1 pendency of organizing activities. In a coincidental twist, and in the normal course of
2 performing his Board duties, the election judge, as a Board agent, fielded an inquiry
3 from first the President of the District and then from the Chief of the District. Both
4 questioned whether or not, in the normal course of District business, they were barred
5 from exercising discipline while an organizing effort was ongoing. No details of the
6 disciplinary action were discussed other than there were safety concerns about an
7 incident that occurred at the District and discipline was being considered. No names
8 were mentioned, but clearly, management of the District was aware of the potential for
9 problems with discipline during an organizing effort and wanted to avoid the same.
10 Nonetheless, both officials expressed a need to the election judge to address a serious
11 safety concern. Had the question been fielded by another Board agent the investigator
12 would not be in the current position he is in, but nonetheless, "a little learning can be a
13 dangerous thing" and here the investigator is aware of an intention on the part of the
14 District to address a safety issue, separate and apart from any organizing activities that
15 might have been ongoing. In this regard, and on the surface at least, the District could
16 point to the fact, known by the investigator, that it did what it could to not run afoul of the
17 bargaining statutes and that, in turn, what the District did in terms of discipline did not
18 relate to protected, concerted activities.

19
20 The investigator has done what he could get information, particularly from Mr. Melin, to
21 show, what substantial evidence, there is to warrant a finding of probable merit to the
22 complaint. In summary, beginning on July 5, and culminating on October 17, 2011,
23 when he was advised all that would be filed was filed, the investigator has attempted by
24 phone and e-mail to obtain information to flesh out the allegations made in the original
25 complaint. What has been offered is lacking in substance and detail and best
26 summarized in e-mail exchanges appended hereto. Beyond that, Mr. Melin did reach
27 the investigator at his home phone number the afternoon of July 29, 2011, to explain the
28 basis of the complaint. That call, as well as the other information will be summarized as
29 follows.
30

31 A major thrust of the complaint, and in addition to the statement made by the Chief, is
32 Mr. Melin's contention that the District did not follow its own grievance procedure when
33 it placed Mr. Melin in a disciplinary probation period. The District denies this contention,
34 but even if it were the case, not following the procedure bears on whether the
35 disciplinary action was proper, not whether the disciplinary action was related to union
36 activities. No nexus between the two has been demonstrated and even Mr. Melin's
37 response to the disciplinary action report makes no mention of any such nexus.
38

39 Addressing the telephone call placed to the investigator, much of the substance of this
40 call centered around procedural irregularities Mr. Melin found with the election process.
41 As previously found, no election challenges were ever filed, and again, there is no
42 demonstrated nexus to perceived irregularities and the pending unfair labor practice
43 complaint. During this telephone call Mr. Melin also offered that some three years
44 previous there were organizing activities at Evergreen and the Chief interfered in these
45 efforts. Mr. Melin also indicated that discipline was taken against a Captain working at
46 the District for what Mr. Melin believed to be a far more severe safety violation than was
47 Mr. Melin's. Mr. Melin's belief was that the unnamed Captain received far less discipline
48 because he was not for the union. It is not clear if the unnamed Captain was not for
49 MPEA, Local 547, or unions in general. Mr. Melin then went on to say that reductions in
50 force, implemented post election certification, unduly singled him out because of his

1 organizing activities. The call between the investigator and Mr. Melin ended mid-stream
2 when Mr. Melin's phone went dead. In follow up the investigator requested a written
3 summation from Mr. Melin (Mr. Melin had offered such a summary before the line went
4 dead) of the incidents discussed, including additional detail if possible. Similar requests
5 were made by the investigator and, again, are reflected in the appended e-mails.
6

7 Suffice to say, non-specific allegations have been made in the original complaint as well
8 as in follow up communication. In the view of the investigator the actions of the
9 employer are easily explained, do not rise to the level of unfair labor practices, and are
10 then not sufficiently explained by the complainant so as to warrant a finding of probable
11 merit.
12

13 **III. Recommended Order**

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15 It is recommended that unfair labor practice charges 20 and 21-2010 be dismissed as
16 without probable merit.
17

18 DATED this 26th day of October 2011.
19

20 BOARD OF PERSONNEL APPEALS

21
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24 By: 
25 John Andrew
26 Investigator
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31 NOTICE

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33 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of
34 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss
35 may be appealed to the Board. The appeal must be in writing and must be made within
36 10 days of the mailing of this Notice, no later than November 9, 2011. The appeal is to
37 be filed with the Board at P.O. Box 201503, Helena, MT 59620-1503. If an appeal is not
38 filed the decision to dismiss becomes a final order of the Board.
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CERTIFICATE OF MAILING

I, Windy Kneeton, do hereby certify that a true and correct copy of this document was mailed to the following on the 21st day of October 2011 postage paid and addressed as follows:

DANIEL D JOHNS
ATTORNEY AT LAW
PO BOX 759
KALISPELL MT 59903

BOB CHATRIAND
MPEA
PO BOX 5600
HELENA MT 59604

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Andrew, John(DLI/ERD)

From: Andrew, John(DLI/ERD)
Sent: Monday, October 17, 2011 1:30 PM
To: 'Bob Chatriand'; Lance Melin
Subject: RE: ulp 21-2011

Is there anything else you – MPEA or Lance – intends to file? Thanks John

From: Bob Chatriand [mailto:bob@mympea.org]
Sent: Monday, October 03, 2011 8:40 AM
To: Lance Melin; Andrew, John(DLI/ERD)
Subject: Re: ulp 21-2011

Some documents that might be helpful attached

----- Original Message -----

From: Andrew, John(DLI/ERD)
To: Lance Melin
Cc: bob@mympea.org
Sent: Friday, September 30, 2011 9:07 AM
Subject: RE: ulp 21-2011

Thanks for the info Lance. Part of what I need - some specifics - are names, dates (as close as possible) and incidents. For instance, when we talked you mentioned a Captain whom you believed received less severe discipline than you did because he was not for a union, or perhaps he was not for MPEA but IAFF, or vice versa, I'm a bit confused on that because which union was preferred also seems to be a part of all this. At any rate, I believe you said he failed to put a defibulator back on a response vehicle. What was his name and what is there to show that he was treated differently than you because he was not for the union? I just need concrete examples so if warranted I can talk with people who saw or knew of what happened. If, as you say, management did not follow its own policies, what is there to show it was because you were involved in organizing activities? You also mentioned that when there were layoffs your belief was that you were treated differently because you were for the union. What evidence is there of this? Incidents? Statements made and by whom? I realize that sounds general, but what I have thus far is circumstantial evidence and that's part of why I am looking for specifics to better define the general. I need as many circumstances as can be named, what they were, when they occurred in time and whatever can be provided to show that what happened demonstrates discrimination against you because of your connection to organizing efforts.

Concerning the meeting with the chief - who called for it? When was it held? Who was present? How long had the district been talking about a new service model? Being the devil's advocate, if I am management I might say, yes, we did not change structure or do reductions in force while the organizing effort was ongoing because that could be considered a violation of the status quo and an unfair labor practice. Arguably, neither the chief or "members" were telling the truth. I don't know one way or the other, but even if it is the case that the chief was not truthful and even of what the chief was talking about actually happened after the vote, how does that tie to some form of discrimination or anti union animus? Was it only you, for instance who was part of the reduction in force? Was it only union supporters who were part of the reduction? I'm asking the same thing that would be asked in a hearing - why is this meeting with the chief supportive of an unfair labor practice, and also, as we discussed, does this have as much or more to do with the laboratory conditions needed for a fair election as it does with a charge of anti union bias?

I hope this helps explain a bit of what I am searching for. I'm not trying to be difficult, but I need more to go on than what I've got so far. I'll copy Bob as well so he knows I got a response from you and also so he can perhaps assist with what I need. Thanks John

From: Lance Melin [viper3k@hotmail.com]
Sent: Friday, September 30, 2011 12:37 AM
To: Andrew, John(DLI/ERD)
Subject: RE: ulp 21-2011

Here is a brief summary of the ULP's filed and the subsequent activities.

A ULP was filed to state that I was unfairly singled out and punished in a process that gave me no due process. I can not remember with exact detail at this time all of the events. I do however remember being punished for what the administration believed was a major safety violation. I filed a complaint or grievance with the district citing several violations of district policy in administration of the disciplinary process. These were clear policies of the district that were not followed in my disciplinary action. Instead of addressing these issues, the board found them to be without merit, in a closed board session for which I was entitled to be present, but given very little warning as to the time of the board meeting and was unable to attend. This gave me no opportunity to defend my grievances and defend myself. It also showed be that the district board had no respect for their own policies and procedures.

A second ULP was filed in response to a statement by the Fire Chief stating that he intended to "campaign" against a collective bargaining unit and that things were "going to get rocky". We witnessed this first hand in the form of official department meeting where the Chief addressed the membership and called some members liars, who were spreading false accusations with the explicit intent to mislead and sway membership toward voting for a collective bargaining unit. These accusations were made in response to questions about plans for reductions in staffing and a new model of service that was being discussed by officers and administrators of the department. The Chief stated that these were lies that were being spread by some members of the department intentionally. Almost immediately after the vote for a collective bargaining unit was completed the exact plans that were being discussed and touted as malicious lies by the administration, were implemented by the administration.

There is much more to these grievances and the actions of those involved. I am willing to provide more information, but would like to be asked specific questions rather than these broad requests for information.

From: joandrew@mt.gov
To: viper3k@hotmail.com
CC: bob@mympea.org; djohns@crowleyfleck.com
Subject: ulp 21-2011
Date: Mon, 26 Sep 2011 19:15:40 +0000

Good afternoon Lance. Below are copies of two e-mail messages I sent, one to Bob Chatriand, and the other to you requesting information relating to the charge filed against Evergreen Fire District. To date, I have not received any response. For me to continue with my work I do need more specifics as to the events or incidents you believe constitute an unfair labor practice by Evergreen Fire District. I need a response by September 30, 2011 so as to determine whether or not there is probable merit to the complaint. By way of this e-mail I am also advising Dan Johns that I have yet to receive additional information from you. John Andrew

Thanks Bob. Only thing is, when he called me at home on the 29th our call ended mid sentence – someone's battery died I guess – and he had just asked if I could use a written summary. Normally I wouldn't ask for one, but since I was at home my notes were not the best and we were all over the place on issues related to process more than substance. He had said he seldom answers his cell phone and he is usually slow to return calls, so if you have such a list of instances of singling him out and/or you talk with him let him know I could use such a thing. Any chance he has an e-mail address and you could provide it? I did leave him another message (8/1) that I wanted something in written form, but did not hear back. Thanks for any assistance and fyi, I'm switching my days and hours around this week to help Joe with a personal matter he needs to address so I'm not yet sure when I'll be here the rest of the week. John

Hi Lance. I asked Bob if he had an e-mail address and he provided this one. Our call was cut off mid stream on the 29th and I left you another voice message asking that you provide a listing of all the incidents you viewed as directed toward you because of your union activities. I did take notes from home, but they are not the best and a short listing from you would really assist as I assess this case. Thanks John

John Andrew, Board Agent
Board of Personnel Appeals

(406) 444-4696
joandrew@mt.gov

Information provided in this response may contain legal information. Legal information is not the same as legal advice -- the application of law to an individual's specific circumstances. We will do our best to provide you with neutral information that is accurate and useful, but we recommend you consult a lawyer if you want professional assurance that our information, and your interpretation of it, is appropriate to your particular situation.

The transmitted documents are intended only for the use of the individual or entity named above, and may contain information that is privileged, confidential, and exempt from disclosure under applicable laws. Please do not distribute without consulting me. If you have received this message in error, please delete it from your system and notify me by replying to this e-mail or by calling me at (406) 444-4696

I file this Grievance Document in accordance with Policy 5.1 of the Evergreen Fire District Policy Manual.

I Lance Melin in the process of being disciplined feel that several violations of policy were made. They are as follows

(6.4.3) States that “The Chef in consultation with the Chairman of the Trustees, will determine the course of action best suited to the circumstances” - Therefore I name Chief Craig Williams, Chairman Jack Fallon, and Ryan Pitts as the accused parties in this grievance filing. Should it be revealed that his policy was not followed, then only those who had knowledge of the incident shall be named as in violation of this and the below listed policies.

(6.4.4) States “If the problem has not been resolved through written counseling or the circumstances warrant it, the individual should be placed on probation.” - No attempt at written counseling was made and no justification as to non-typical or extraordinary circumstances was given for skipping the other steps in the disciplinary process prior to this.

(6.4.3.1.1) States that Verbal Counseling is the first step in correcting unacceptable performance or behavior. No attempt was made at verbal counseling in accordance with this policy.

(6.4.4.2) States “The Chief,...after review of the employee's corrective counseling documentation, will determine the length of probation. Typically, the probation period should be at least two weeks and no longer than 60 days, depending on the circumstances” - No justification was given as to any reason why this case constituted or justified non typical circumstances. Thus setting any probationary period at longer than 60 days is a violation of policy.

(6.4.4.2) States “A written probationary notice to the employee is prepared by the Chief.” - The written probationary notice I was given was prepared by Capt. Pitts

(6.4.4.3.5) States the written probationary notice must contain “A scheduled counseling session or sessions during the probationary period” - None of this information was contained in the document I was given.

(6.4.4.3) States “The Chef should personally meet with the employee to discuss the probationary letter and answer any questions” - No attempt has been made to meet with me or schedule a meeting with me.

I found no policy allowing the Chief or the Chairman of the Trustees to delegate or abdicate the responsibilities above.

Lance M. Melin

I write this document in response to the Disciplinary Action Report I was given by Captain Pitts on 4/7/2011. I believe that the disciplinary action was carried out incorrectly, and not in accordance with the Evergreen Fire District Policy Manual. I disagree with much of the Disciplinary Action Report as being inaccurate and inappropriately issued.

I will first give my account of the incident:

On 3/29/2011 I was ordered by Capt. Evert to use 885 and 881, time permitting, to clean the apron, sidewalks, and parking lot surrounding station 81. After pulling 885 out, pulling the booster line, and engaging the pump I noticed that the vehicle was not operating correctly. Inspection revealed that the discharge valve to the hose-bed had been left partially open by a previous operator and that a line of hose was partially charged with water, possibly by the previous operator, or myself, I do not know. I inspected the hose lay to insure that it was not likely to come off of the vehicle should the vehicle respond to call, and made sure that the state of the hose would not prevent deployment in the event of its use. It was safe, although not pretty, and was able to be deployed. I continued with my task as assigned by Capt. Evert, with the intention of at the completion of the task pulling, draining, and reloading the hose lay. At one point when I was taking a quick break I bled the line in question while still in the hose-bed by opening the nozzle and opening the valve and then putting downward pressure on the line to force out as much water and air as I could and improving the condition of the hose-lay. At the end of the day appx. 1730 hours I completed my task and put 885 back in service having accidentally forgotten about the partially charged line.

At a later time Capt. Evert asked me about the condition of the hose-bed and I stated what happened according to the above, and that I fully intended to correct the issue but forgot. I did not note it on the board because I had no intention of willfully putting the vehicle back in service with the hose-line in said condition. When I did go to correct the condition I noticed that someone else had completed the task.

My issues with the disciplinary action as written and issued are the following;

- 1) The condition that 885 was left in would not have significantly impacted the units ability to perform in an emergency, it was not unsafe, and it was actually safer than prior to my use of it.
- 2) The document states that when asked "Lance gave no reason why he placed 885 back in service without correcting the unsafe condition" and "no reason was given why Lance chose not to report the unsafe condition" This is grossly inaccurate. I gave Capt. Evert the above comprehensive account of what happened. Any camera footage of this conversation will reveal that I did reply to Capt. Evert's inquiry and did not simply walk away without responding as indicated by the Disciplinary Action Report.
- 3) My actions do not constitute a willful disregard, or major violation of policy, and it did not intentionally endanger the safety of others. 885 does not have a hose-bed cover as stipulated by nationally accepted safety standards which would have prevented any potential safety hazard of this type and places the vehicle in an unsafe condition at all times.
- 4) Policy 6.3.2 is a policy that I perhaps could be disciplined in accordance with but NOT in violation of.

I believe that the lack of due diligence displayed in the process of this disciplinary action constitutes negligence on the part of those involved in administering the discipline. I will also be filing a separate grievance document that states what I believe to be violations of district policy in regard to this incident.