

1 Department of Labor and Industry  
2 Board of Personnel Appeals  
3 PO Box 201503  
4 Helena, MT 59620-1503  
5 (406) 444-2718  
6  
7

8 STATE OF MONTANA  
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 11-2012

11 MICHAEL R. EVANS, )  
12 Complainant, )  
13 -vs- )  
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21 )  
22 )

INVESTIGATIVE REPORT  
AND  
NOTICE OF INTENT TO DISMISS-  
DEFENDANT MEA-MFT

23 **I. Introduction**

24  
25 On November 10, 2011, Michael Evans filed a complaint against Flathead Valley  
26 Community College (FVCC) and the Montana Education Association-Montana  
27 Federation of Teachers (MEA-MFT). Mr. Evans was employed in a bargaining unit at  
28 FVCC, the Flathead Valley Community College Classified Employees' Union,  
29 (FVCCCEU or Union), an affiliate of the MEA-MFT. In his complaint Mr. Evans alleges  
30 "retaliation because of Union activity at Flathead Community College 2010, and gross  
31 negligence on MEA-MFT's part 2010-2011, in violation of Montana Code Annotated,  
32 Sections 39-31-201 and 39-31-401(1)."  
33

34  
35 FVCC is represented in this matter by Michael Dahlem, attorney at law. An  
36 investigation report was issued on that matter recommending the complaint be  
37 dismissed. No appeal was taken.  
38

39 MEA-MFT is represented in this matter by Karl Englund, attorney at law, who has filed  
40 an answer on behalf of MEA-MFT denying that MEA-MFT and its agent Bill Howell  
41 engaged in an unfair labor practice.  
42

43  
44 Michael Evans is represented in this matter by James Bartlett, attorney at law, of  
45 Kalispell, Montana. On January 24, 2012 Mr. Bartlett made his formal appearance  
46 before the Board agent when he responded in letter format to the Motion to Dismiss  
47 filed by FVCC. Mr. Bartlett's January 24, 2012 letter then goes on to address specifics  
48 relating to that portion of Mr. Evans' complaint against MEA-MFT, all of which are  
49 subject to this investigative report.  
50

1 John Andrew was assigned by the Board to investigate the charge and has reviewed  
2 the information submitted by the parties and communicated with them as necessary in  
3 the course of the investigation.  
4

## 5 **II. Findings and Discussion**

6

7 Because Mr. Evans originally filed this complaint pro se, the investigator will attempt to  
8 address the numerous issues brought forward by Mr. Evans and then tie those in with  
9 the ones addressed by his counsel. In doing so, there are several dates that bear  
10 particular significance to this case. They are:  
11

12  
13 November 4, 2009 – the date of a corrective action disciplinary letter from FVCC to Mr.  
14 Evans

15 January 15, 2010 – the date of revised corrective action disciplinary letter from FVCC to  
16 Mr. Evans

17 June 15, 2010 – the date Mr. Evans was terminated by FVCC

18 June 23, 2010 – the date MEA-MFT filed the termination grievance

19 November 16, 2010 – the date of the arbitration hearing

20 April 2, 2011 – the date of the arbitration decision.

21 October 11, 2011 – the date Mr. Evans received a copy of the arbitration decision

22 November 16, 2011 – the date Mr. Evans filed his charge with the Board of Personnel  
23 Appeals.  
24

25  
26 Prior to the above dates, yet integral to Mr. Evans' complaint, Mr. Evans contends that  
27 FVCC engaged in anti-union activities, bargained directly with bargaining unit members,  
28 and generally bargained in bad faith with the classified bargaining unit. Hand in hand  
29 with this, Mr. Evans contends that when he accepted a position as vice president of the  
30 local, FVCC singled him out for disparate treatment because of his union activities. In  
31 all of this, Mr. Evans contends that Mr. Howell did not adequately represent him or, for  
32 that matter, the bargaining unit in general.  
33

34  
35 In reviewing the initial element of his complaint alleging retaliation, one must first look  
36 back to 2009. At that point in time, according to Mr. Evans, what was transpiring was a  
37 significant disagreement amongst bargaining unit members. It went so far that some  
38 members, according to Mr. Evans, wanted to decertify the bargaining unit entirely.  
39 Others were upset about the substance of proposed pay plan proposals with many in  
40 the unit wanting to accept a FVCC broad band pay proposal. At one point in the  
41 continuum of bargaining over pay plans, a grievance was even filed by Mr. Howell. The  
42 grievance satisfied that particular pay issue, but bargaining continued over the overall  
43 proposal advocated by FVCC with the unit ultimately accepting that proposal. However,  
44 and in summary, Mr. Evans' issues with discrimination based on his union activities  
45 were, in major part, issues internal to the union, and ones over which Mr. Howell and/or  
46 MEA-MFT had little, if any control. At the most, in these early years of Mr. Evans'  
47 complaint, FVCC bargained hard over the pay proposal it wanted in the contract. There  
48 is no evidence of an actual unfair labor practice being committed, and even if there  
49 were, any such complaint is well outside the six month filing requirement of Section 39-  
50 31-404, MCA. Nonetheless, it was during this period of time – prior to November of

1 2009 that Mr. Evans contends the seeds were planted and the characters cast for the  
2 disciplinary actions that eventually led to his discharge.  
3

4 On October 4, 2009, Mr. Evans was providing technical audio visual assistance at a  
5 FVCC sponsored event called Chef's Table. On this date Mr. Evans directed an  
6 inappropriate sexual comment toward a female student attending the event. The  
7 comment, as well as Mr. Evans' related actions, were witnessed by other students.  
8 Ultimately, the female student in question filed a police report and retained counsel who  
9 demanded Mr. Evans be terminated and who further threatened FVCC with a sexual  
10 harassment suit. In response, Warren Tolley, FVCC Human Resources Director issued  
11 a disciplinary letter to Mr. Evans on November 4, 2009. On November 25, 2009 Bill  
12 Howell advised Mr. Tolley that he would be representing Mr. Evans in the grievance.  
13 Mr. Howell did, in fact, represent Mr. Evans with the end result being a substitute  
14 disciplinary letter of January 15, 2010 from FVCC President Jane Karas to Mr. Evans.  
15 Mr. Evans signed off on President Karas' letter that same date thus resolving the  
16 grievance. The clear content of the letter was that further inappropriate behavior on the  
17 part of Mr. Evans would lead to further discipline up to, and including termination.  
18 Additionally, the January 15, 2010 letter would remain in Mr. Evans' personnel file until  
19 November 4, 2011. Nothing done by Mr. Howell in the course of handling this matter  
20 reflects anything other than proper actions on his part in handling a very serious  
21 disciplinary action. As with the first element of Mr. Evans' complaint, any of the actions  
22 taken, or not taken by Mr. Howell, are well outside the six month filing requirements of  
23 Section 39-31-404, MCA.  
24  
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26

27 On April 16, 2010, another incident involving Mr. Evans occurred. In this incident, a  
28 fellow employee and bargaining unit member, Reid McFarland, observed Mr. Evans  
29 making an inappropriate gesture of a sexual nature toward a young female. This  
30 incident involving Mr. Evans was similar in nature to the October 2009 incident.  
31 Eventually, Mr. McFarland reported this incident to his supervisor. The report went up  
32 the chain of command and, after investigation of the incident by FVCC, a termination  
33 letter was sent to Mr. Evans by President Karas. Mr. Evans denied the incident  
34 occurred and further contended that Mr. McFarland, who is related by marriage to an  
35 employee in the Human Resources Department, was part of a deliberate effort to  
36 terminate Mr. Evans. Mr. Evans further contends that other relationships between line  
37 staff and human resources personnel were also prejudicial to him and part of a  
38 concerted effort to terminate him, with his fellow bargaining unit members complicit in  
39 the effort.  
40  
41

42 The Union grieved Mr. Evans' termination, an arbitrator was selected, and a date set to  
43 hear the grievance – November 6, 2011. Mr. Evans contends that prior to the hearing  
44 date he met with Bill Howell to prepare for the hearing. Mr. Evans further contends that  
45 Mr. Howell told him that any other actions Mr. Evans might contemplate could not be  
46 filed until Mr. Evans had exhausted his administrative remedies. In the course of this  
47 investigation, Mr. Evans told the investigator the things he wanted to file complaints  
48 about ranged from his termination in general, to age discrimination, to filing with state  
49 and federal authorities – seemingly including discrimination based on union activities.  
50

1  
2 As previously found, this investigator can find no basis for any an unfair labor practice  
3 based on Mr. Evans' union activities. Similarly, Mr. Evans presented nothing to indicate  
4 age discrimination. To be certain, nothing would have prevented Mr. Evans from filing  
5 an age discrimination complaint, but he did not, according to him, as a result of Mr.  
6 Howell's admonition. Even assuming Mr. Howell did tell Mr. Evans he had to exhaust  
7 his administrative remedies, such a statement is largely an accurate one, given many of  
8 the things Mr. Evans seems to request. But beyond that, obviously Mr. Evans did  
9 exercise one administrative remedy. He filed for, and received, unemployment benefits.  
10 Given this, it is clear that Mr. Howell did not put an "exhaust your administrative  
11 remedies" roadblock in Mr. Evans' way so as to take away any remedies to which he  
12 was entitled. In any regard, even assuming that all Mr. Evans alleges is true, once  
13 again, all this occurred in October or November of 2010, and again, is time barred under  
14 the filing requirements of Section 39-31-404, MCA  
15  
16

17 The arbitration hearing addressing Mr. Evans' discharge was held November 16, 2010,  
18 and the case submitted to the arbitrator on December 30, 2010. Mr. Evans contends  
19 that Mr. Howell did not do an adequate job representing him in the hearing. Apparently,  
20 Mr. Evans was of the understanding that the hearing would include evidence of the  
21 allegation of discrimination based on union activities. Apparently, it was not a focus of  
22 the arbitration, nor, in Mr. Evans mind, was what should have been a significant focus,  
23 namely the familial relationship between staff members, Mr. McFarland in particular,  
24 and members of the Human Resources Division of FVCC.  
25  
26

27 Addressing the issue of familial relationship, the arbitration decision does consider the  
28 credibility of witnesses to the incidents that led to Mr. Evans' termination. Obviously,  
29 there must have been some testimony or understanding on the part of the arbitrator as  
30 to what he defines in the allegations of the Union as "an interesting relationship [which]  
31 existed among employees of the Human Resources office and the custodial staff."  
32 (Page 11 of the arbitration decision.) The arbitrator then assesses that relationship in  
33 assessing the credibility of Mr. McFarland and concludes his testimony is credible.  
34 (Page 15 of the arbitration decision.) In view of the award of the arbitrator, there is no  
35 basis for the contention of Mr. Evans that this factor was not considered or that, in  
36 whatever manner it came to the attention of the arbitrator, it was not afforded the weight  
37 deemed appropriate by the arbitrator.  
38  
39

40 Concerning what may or may have not been presented to the arbitrator in terms of  
41 discrimination based on union activities by Mr. Evans, again, from what is presented to  
42 the investigator there simply is insufficient evidence to warrant such a finding. Further,  
43 such a matter would have been appropriately filed with the Board of Personnel Appeals  
44 and not for the arbitrator to determine, absent some stipulation conferring that authority  
45 upon the arbitrator. There was no such stipulation. Even, for the sake of argument, had  
46 this been offered to the arbitrator, or for that matter had an unfair labor practice been  
47 filed with the Board of Personnel Appeals, this factor would likely have had little  
48 influence on the arbitrator given the nature of the sexual harassment allegations, and in  
49 the case of the Board of Personnel Appeals the likely result would have been no basis  
50

1 for the charge. In any event, since the arbitration hearing occurred on November 16,  
2 2010, with final briefs filed on December 30, 2010, the allegation of Mr. Evans that he  
3 was not properly represented at the arbitration hearing is also barred by Section 39-31-  
4 404, MCA.  
5

6 Mr. Evans next contends that subsequent to the arbitration MEA-MFT failed to timely  
7 notify him of the results of the arbitration decision. Mr. Evans contends that it was not  
8 until October 11, 2011, that he received a copy of the arbitration award, and then only  
9 after repeatedly requesting the Union about the status of the arbitration decision.  
10 Suffice to say, there are factual disagreements as to when MEA-MFT notified Mr. Evans  
11 about the decision of the arbitrator. Mr. Howell recalls the first time to be via telephone  
12 on an unknown date. He then offers that in June of 2011, he and Mr. Evans had lunch  
13 at a Kalispell restaurant where they discussed the decision extensively. Regardless of  
14 when he was notified, Mr. Evans once again argues that he was denied the ability to  
15 appeal the decision of the arbitrator and the fault for that rests with MEA-MFT either for  
16 not filing the appeal, or in the alternate, making Mr. Evans aware of the decision so late  
17 in time as to bar an appeal.  
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19

20 In attempting to determine what remedy was denied Mr. Evans by the actions or lack of  
21 action by MEA-MFT, the investigator asked Mr. Evans and his counsel what would have  
22 been, or could have been done, had proper notice been afforded Mr. Evans. The  
23 response was that Mr. Evans was denied judicial review of the arbitration decision since  
24 the 30 days for such an appeal lapsed. Two points are of particular significance. First,  
25 "judicial review" is a term generally reserved for, and accepted to be, an appeal of an  
26 administrative decision arising from a contested case under the Montana Administrative  
27 Procedure Act (MAPA). Arbitration which occurs under the Collective Bargaining Act for  
28 Public Employees is not a process subject to MAPA. There is no judicial review of an  
29 arbitration award under Section 39-31-101 et seq. MCA. Secondly, any appeal of an  
30 arbitration award exists under the Uniform Arbitration Act, Chapter 5 of Title 27. Under  
31 the Act, such an appeal should have been taken within 90 days of the arbitration award,  
32 April 4, 2011. Arguably, once again, any claim of Mr. Evans is barred in time.  
33  
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35

36 Even considering that all the various time bars that exist in this case did not exist, and  
37 that in some fashion the entire continuum of events mentioned previously could be  
38 considered to have matured at a point where some sort of appeal would be timely, two  
39 other points bear consideration. The first point being that the contract under which Mr.  
40 Evan's grievance arises is a contract between the Union and the FVCC. Mr. Evans is a  
41 beneficiary of that contract, but it is not his contract. It is the Union's contract. Very  
42 simply, Mr. Evans did not, and does not, have standing to challenge the arbitration  
43 award. Only the Union or the employer could challenge the arbitration decision. See  
44 for instance, *Andrus v. Convoy Co.*, 480 F.2d 60-4, 606 (9<sup>th</sup> Cir.) Cert denied 414 U.S.  
45 989 (1973). Further, in its sound discretion the Union elected not to challenge the  
46 decision of the arbitrator. Why? Again, and quite simply, Mr. Evans committed a first  
47 offense which could have led to his discharge. Then, while clearly subject to ongoing  
48 disciplinary overview, Mr. Evans committed a second offense of an equally egregious  
49 nature. The Union did what it could and grieved Mr. Evans discharge. But, in the most  
50

1 important of areas, credibility, the arbitrator weighed any competing evidence and in  
2 consideration of that as well as other factors, the arbitrator ruled against Mr. Evans. Mr.  
3 Evans was adequately represented and fairly represented. The Union cites an  
4 abundance of case law concerning the obligation of lay representatives in arbitrations,  
5 the obligations of a union to fairly represent its members, and the factors relevant to  
6 determine whether those obligations have been met. The cases cited by the Union are  
7 directly on point. MEA-MFT did not breach its obligation to fairly represent Michael  
8 Evans, and there is insufficient evidence offered by Mr. Evans to demonstrate anything  
9 to the contrary.  
10

11  
12 **III. Recommended Order**

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14 Upon review of this case it is the opinion of the investigator that substantial evidence  
15 does not exist to warrant a finding of probable merit. Therefore, the investigator  
16 recommends that the unfair labor practice complaint of Michael Evans against MEA-  
17 MFT be dismissed as without merit.  
18

19  
20 DATED this 10<sup>th</sup> day of May 2012.  
21

22 BOARD OF PERSONNEL APPEALS

23  
24  
25 By:   
26 \_\_\_\_\_  
27 John Andrew  
28 Investigator  
29

30 NOTICE

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

I, Windy Knutson, do hereby certify that a true and correct copy of this document was mailed to the following on the 10<sup>th</sup> day of May 2012, postage paid and addressed as follows:

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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. 11-2012  
12

13 MICHAEL R. EVANS, )  
14 Complainant, )  
15 -vs- )  
16 )  
17 FLATHEAD VALLEY COMMUNITY )  
18 COLLEGE AND MEA-MFT, )  
19 Defendants. )  
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21 )  
22 )

INVESTIGATIVE REPORT  
AND  
NOTICE OF INTENT TO DISMISS-  
DEFENDANT FLATHEAD VALLEY  
COMMUNITY COLLEGE

23 **I. Introduction**  
24

25 On November 10, 2011, Michael Evans filed a complaint against Flathead Valley  
26 Community College (FVCC) and the Montana Education Association-Montana  
27 Federation of Teachers (MEA-MFT) alleging "retaliation because of Union activity at  
28 Flathead Community College 2010, and gross negligence on MEA-MFT's part 2010-  
29 2011, in violation of Montana Code Annotated, Sections 39-31-201 and 39-31-401(1)."  
30

31  
32 FVCC is represented in this matter by Michael Dahlem, attorney at law, who has filed a  
33 Motion to Dismiss the portion of the complaint against FVCC on the basis that the  
34 complaint was not filed in a timely manner.  
35

36 MEA-MFT is represented in this matter by Karl Englund, attorney at law, who has filed  
37 an answer on behalf of MEA-MFT denying that MEA-MFT engaged in an unfair labor  
38 practice.  
39

40 Michael Evans is now represented in this matter by James Bartlett, attorney at law, of  
41 Kalispell, Montana. On January 24, 2012, Mr. Bartlett made his formal appearance  
42 before the Board agent when he responded in letter format to the Motion to Dismiss by  
43 stating, "Please be advised that Mr. Evans does not have the resources to weigh in on  
44 the matters raised by FVCC." Mr. Bartlett's January 24, 2012, letter then goes on to  
45 address specifics relating to that portion of Mr. Evans' complaint against MEA-MFT.  
46  
47  
48  
49  
50

1 John Andrew was assigned by the Board to investigate the charge and has reviewed  
2 the information submitted by the parties and communicated with them as necessary in  
3 the course of the investigation.  
4

5 **II. Findings and Discussion**  
6

7 Given that there are two defendants in this matter with a Motion to Dismiss filed by one  
8 defendant, for purposes of this charge, the investigator is bifurcating the complaint with  
9 this Notice of Intent concerning the complaint against FVCC only. The investigator will  
10 address the complaint against MEA-MFT in a separate report.  
11

12 Michael Evans contends that FVCC violated Section 39-31-201, MCA, which provides:  
13

14  
15 Public employees protected in right of self-organization. Public employees shall  
16 have and shall be protected in the exercise of the right of self-organization, to  
17 form, join, or assist any labor organization, to bargain collectively through  
18 representatives of their own choosing on questions of wages, hours, fringe  
19 benefits, and other conditions of employment, and to engage in other concerted  
20 activities for the purpose of collective bargaining or other mutual aid or protection  
21 free from interference, restraint, or coercion.  
22

23 Mr. Evans further contends that in violation Section 39-31-201, MCA, FVCC committed  
24 an unfair labor practice under Section 39-31-401, MCA, which provides:  
25

26  
27 It is an unfair labor practice for a public employer to:  
28 (1) interfere with, restrain, or coerce employees in the exercise of the rights  
29 guaranteed in 39-31-201;  
30

31 Mr. Evans contends that in some fashion FVCC and MEA-MFT denied his rights by  
32 systematically "withholding options and information". There is no substantial evidence  
33 offered by Mr. Evans to support this allegation against FVCC. The investigator agrees  
34 with FVCC that, at best, the most recent action of FVCC that could have been brought  
35 forth as an unfair labor practice charge occurred on the date Mr. Evans was terminated  
36 – June 15, 2010. The investigator can find no nexus between Mr. Evan's termination  
37 date and what happened in the course of processing the grievance over his discharge  
38 that would implicate FVCC in an unfair labor practice in any manner.  
39

40  
41 In addition to, and with the above in mind as well, Section 39-31-404, MCA, provides for  
42 a six month limitation for filing an unfair labor practice charge:  
43

44  
45 A notice of hearing may not be issued based upon any unfair labor practice more  
46 than 6 months before the filing of the charge with the board unless the person  
47 aggrieved was prevented from filing the charge by reason of service in the armed  
48 forces, in which event the 6-month period must be computed from the day of  
49 discharge.  
50

1 Again, Mr. Evans was terminated on June 15, 2011, and absent any showing on the  
2 part of Mr. Evans that actions of FVCC after that date were indicative of an unfair labor  
3 practice, certainly anything occurring outside the 6 month filing period, December 15,  
4 2011, is time barred by Section 39-31-404, MCA.  
5

6 **III. Recommended Order**  
7

8 Based on the foregoing, there is no substantial evidence to support a finding that FVCC  
9 committed an unfair labor practice, and further, the complaint of Mr. Evans is time  
10 barred by Section 39-31-404, MCA. Therefore, it is hereby recommended that Unfair  
11 Labor Practice Charge 11-2012, as pertains to the complaint against Flathead Valley  
12 Community College, be dismissed.  
13  
14  
15

16 DATED this 15<sup>th</sup> day of February 2012.  
17

18 BOARD OF PERSONNEL APPEALS  
19

20  
21  
22 By: \_\_\_\_\_  
23

  
24 John Andrew  
25 Investigator  
26

27 NOTICE

28 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of  
29 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss  
30 may be appealed to the Board. The appeal must be in writing and must be made within  
31 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the  
32 Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to  
33 dismiss becomes a final order of the Board.  
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CERTIFICATE OF MAILING

I, Windy Knulson, do hereby certify that a true and correct copy of this document was mailed to the following on the 15<sup>th</sup> day of February 2012, postage paid and addressed as follows:

JAMES C BARTLETT  
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