

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. 28-2012

12
13 JAMES MILLIGAN)
14 Complainant,)
15 -vs-) INVESTIGATIVE REPORT
16) AND
17 STEVE ECKELS, PRESIDENT,) NOTICE OF INTENT TO DISMISS
18 MONTANA FEDERATION OF STATE)
19 PRISON EMPLOYEES LOCAL 4700,)
20 MEA-MFT, AFL-CIO)
21 Defendant,)
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24 **I. Introduction**

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26 On June 29, 2012, James Patrick Milligan, a Correctional Officer at the Montana State
27 Prison (MSP) filed an unfair labor practice charge with the Board of Personnel Appeals
28 against Steve Eckels, President of the Montana Federation of State Prison Employees
29 Local 4700, MEA-MFT, AFL-CIO, hereinafter MFSPE or Local 4700, alleging that
30 President Eckels failed to provide requested addresses of shop stewards and "Local
31 4700 created an unfair labor practice by arbitrarily and capriciously [sic] and
32 discriminated against me by not acting on my grievances." Larry Nielsen, MEA-MFT
33 Field Consultant, responded to the charge on behalf of Local 4700 President Eckels as
34 well as Local 4700 denying that either Local 4700 or President Eckels had committed
35 an unfair labor practice.
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38 John Andrew was assigned by the Board to investigate the charge and has
39 communicated with the parties in the course of the investigation.
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41 **II. Findings and Discussion**

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43 James Milligan has been a Correctional Officer (CO) at the MSP for approximately 26
44 years. While employed at MSP CO Milligan has been a member and officer of Local
45 4700. As a result of this experience he is very familiar with MFSPE, MEA-MFT
46 grievance workings and processes.
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49 The instant case is brought by CO Milligan because he believes that Local 4700 did not
50 fairly represent him a series of grievances brought against MSP. The issue at the heart

1 of the grievances is ETO – earned time off. The issue with ETO occurs when
2 recognized holidays occur at MSP. It is a particular problem for third shift employees,
3 as is CO Milligan, as the recognized holidays are split on that particular shift. Four
4 particular holidays are brought to the attention of the investigator by CO Milligan and all
5 were subject to grievances he filed. According to the read of the collective bargaining
6 agreement by CO Milligan, ETO has not been appropriately credited by MSP and
7 management has been wrong in denying all his grievances. CO Milligan contends that
8 past practice dictates this and in that regard has provided a large volume of information
9 in support of his position. Local 4700 does not share CO Milligan’s interpretation of the
10 collective bargaining agreement.
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13 Addressing the holidays in question, on the first one, Memorial Day, CO Milligan
14 submitted his request for ETO within the timeframe required in the collective bargaining
15 agreement. He believed that request was honored, but subsequently discovered that, in
16 reality, time he took off was debited from his accumulated annual leave as opposed to
17 his accumulated holiday time. This grievance was denied by management. CO Milligan
18 advanced the grievance to the appropriate body in Local 4700, the Steward Council.
19 The Council considered the grievance and made a recommendation to the Executive
20 Council of Local 4700 that the grievance not be advanced to arbitration. The Executive
21 Council met on November 8, 2011, accepted written comment from CO Milligan as he
22 was not able to attend the meeting in person, and on November 9, 2011 advised CO
23 Milligan, in writing, that, by unanimous vote, the grievance would not be advanced.
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26 Although the parties then differ to some degree on the related grievances filed by CO
27 Milligan, CO Milligan relates that he filed additional grievances for Labor Day, Veterans
28 Day and Presidents Day holidays. According to CO Milligan, all the grievances were
29 denied by management with Veterans Day being somewhat distinguishable as
30 management raised a timeliness issue on this grievance. All of the grievances
31 concerned the same article in the contract – Article 6. They then varied as CO Milligan
32 based his grievances in different sections and subsections of Article 6, including Section
33 3, Subsection 1, Section 4 and 5, Sections 4A and 5 and Sections 1, 2, 3, Subsection 1
34 and 4A. It is also during the pendency of these related grievances that CO Milligan
35 addressed numerous e-mails to members of the Stewards Council as well as President
36 Eckels, requesting information and making various arguments in support of his
37 interpretation of the contract.
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40 Article 14 of the collective bargaining agreement (cba) between the MSP and MFSPE,
41 MEA-MFT provides for a grievance procedure to resolve disputes over contract
42 interpretation. The grievance procedure culminates in final and binding arbitration.
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45 The Montana Supreme Court has approved the practice of the Board of Personnel
46 Appeals in using Federal Court and National Labor Relations Board (NLRB) precedent
47 as guidelines in interpreting the Montana Collective Bargaining for Public Employees
48 Act, State ex rel. Board of Personnel Appeals vs. District Court, 183 Montana 223 598
49 P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 vs. State ex rel. Board of
50 Personnel Appeals, 185 Montana 272, 635 P.2d 185, 119 LRRM 2682; and AFSCME

1 Local No. 2390 vs. City of Billings, Montana 555 P.2d 507, 93 LRRM 2753. To the
2 extent cited in this decision, federal precedent is considered for guidance and to
3 supplement state law when applicable.
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5 The duty of fair representation imposes on a union “a statutory obligation to serve
6 the interests of all members without hostility or discrimination toward any, to exercise its
7 discretion with complete good faith and honesty, and to avoid arbitrary conduct.” Vaca
8 v. Sipes, 386 U.S. 171, 177 (1967). However, in carrying out its statutory duty of fairly
9 representing members of the bargaining unit union discretion as to whether it processes
10 grievances, and to what level they are processed, is very broad under the duty of fair
11 representation. The Supreme Court “has long recognized that unions must retain wide
12 discretion to act in what they perceive to be their members best interests.” Peterson v.
13 Kennedy, 771 F.2d 1244, 1253 (9th Cir.1985).
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15 To sustain the burden to prove that a union breached its duty of fair representation a
16 claimant must prove more than that the union was negligent or that it exercised poor
17 judgment. Hines v. Anchor Motor Freight, 424 U.S. 554, 584 (1976); United Steelworks
18 of America, AFL-CIO-CLC v. Rawson, 495 U.S. 362, 372-73 (1990) (holding that
19 negligence does not state a claim for breach of the duty of fair representation).
20 Moreover, any substantive examination of a union’s performance ... must be highly
21 deferential....” Air Line Pilots Ass’n Int’l v. O’Neill, 499 U.S. 65, 78(1991).
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25 In short, unions are vested with a great deal of latitude in the processing of grievances.
26 In determining if the duty of fair representation has been breached the following analysis
27 is used. First, a determination must be made whether the alleged misconduct involves
28 the union’s judgment, or whether it was ministerial or procedural. If the conduct is
29 ministerial or procedural in nature, a claimant must establish that the challenged act or
30 omission was arbitrary, discriminatory, or in bad faith. Wellman v. Writers Guild of
31 America, West, Inc., 146 F.3d 666,670 (9th Cir.1998); Marino v. Writers Guild of
32 America, East, Inc., 992 F.2d 1480, 1486 (9thCir.1993). If, on the other hand, the
33 conduct involves the union’s judgment, the claimant can prevail only if the conduct is
34 discriminatory or in bad faith. Id. A union’s conduct is arbitrary “only if, in light of the
35 factual and legal landscape at the time of the union’s actions, the union’s behavior is so
36 far outside a ‘wide range of reasonableness’ as to be irrational.” Air Line Pilots Assn.,
37 Int’l., 499 U.S. at 67. Conduct can be classified as arbitrary “only when it is irrational,
38 when it is without a rational basis or explanation.” Marquez v. Screen Actors Guild, Inc.,
39 525 U.S. 33, 46 (1998).
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42 Using the above analysis, CO Milligan’s complaint presents a mixed bag of union
43 process and union judgment. What is clear is that Local 4700 did, in fact, consider all
44 that CO Milligan had to offer in support of his initial grievance. Local 4700 heard his
45 complaint and rendered its best (and unanimous) judgment that the grievance should
46 not proceed to arbitration. There is no showing that the actions of Local 4700 were in
47 any fashion arbitrary, discriminatory, or in bad faith. The Executive Council simply
48 disagreed with CO Milligan on how the contract should be interpreted. In doing so, the
49 Council had all the provisions of Article 6 in front of it. In carrying this forward to the
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1 related grievances filed by CO Milligan nothing indicates that Local 4700 shirked its
2 ministerial or procedural obligations. To be certain, Local 4700 may have done a better
3 job of communicating with CO Milligan, but on the other hand, it stretches belief to
4 assume that CO Milligan was not intimately familiar with the workings of the union and
5 those who served on the deliberative bodies of the union. His numerous e-mails and
6 the close relationship amongst MSP correctional officers simply bely any such
7 representations.
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10 In terms of the second prong of the analysis, the judgment of the union in not taking any
11 of the grievances to arbitration, again, all of Article 6 was before the Stewards Council
12 and the Executive Council in their deliberations. Additionally, the whole issue of ETO
13 has been a recurring subject of bargaining and labor management committees. It
14 strains belief to offer that the Steward Council and the Executive Council in some
15 fashion blinded themselves to all the implications of all the sections of Article 6 and
16 whether all the parts of Article 6 read together, or individually, could sustain a grievance
17 before an arbitrator. The role of the Board of Personnel Appeals is not to interpret
18 collective bargaining agreements. The role of the Board in a case of this nature is to
19 determine whether or not the union exercised poor judgment in not taking a grievance to
20 arbitration. Hand in hand with this is a determination by the Board as to whether the
21 judgment exercised by the union was clouded in discriminatory or bad faith conduct.
22 There simply is no evidence of the latter, and in terms of the former, the Board will not
23 substitute its judgment for that of the union given that no discrimination or bad faith is
24 present. CO Milligan has argued his case to Local 4700, and Local 4700 appropriately
25 exercised its discretion. There is no substantial evidence to warrant a finding of
26 probable merit that an unfair labor practice was committed either by Local 4700 or its
27 President, Steve Eckels.
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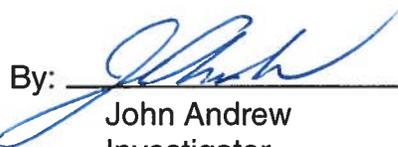
30 As a final note, CO Milligan has indicated to the investigator that in a previous action
31 filed against Local 4700 there was some sort of agreement/understanding/directive that
32 the Executive Council was to provide a written decision as to whether or not it was
33 going to take a grievance to arbitration. CO Milligan contends that the failure of the
34 Executive Council to provide written notice on each of his grievances constituted a
35 violation of that agreement/understanding/directive and was an unfair labor practice.
36 After a great deal of searching, coupled with the helpful cooperation of CO Milligan and
37 others, the investigator finally determined, with CO Milligan agreeing, that the case in
38 question was an unfair labor practice brought by William Martin against Local 4700. The
39 case in question, ULP 12-2002, was settled on August 8, 2003. There was no hearing
40 on the merits of the Martin case and there is nothing on record in the files of the Board
41 indicating the terms of settlement between Local 4700 and Mr. Martin. However, even
42 assuming, arguendo, that something from the Martin case created an obligation to
43 provide a written decision on the part of the Executive Council, the Executive Council
44 has done that. And, as pointed out by Local 4700, once that decision was rendered
45 there was no need to issue additional notifications for each subsection of the contract
46 subsequently grieved by CO Milligan. One notice was sufficient given that all elements
47 of the grievance were in the same article of the bargaining agreement.
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2 **III. Recommended Order**
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4 It is hereby recommended that Unfair Labor Practice Charge 28-2012 be dismissed.
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7 DATED this 23rd day of October 2012.
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10 BOARD OF PERSONNEL APPEALS
11

12 By: 
13 _____
14 John Andrew
15 Investigator
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19 **NOTICE**
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21 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of
22 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss
23 may be appealed to the Board. The appeal must be in writing and must be made within
24 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the
25 Board at P.O. Box 201503, Helena, MT 59620-1503. If an appeal is not filed the
26 decision to dismiss becomes a final order of the Board.
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32 **CERTIFICATE OF MAILING**
33

34 I, Windy Knutson, do hereby certify that a true and correct copy
35 of this document was mailed to the following on the 23rd day of October
36 2012, postage paid and addressed as follows:
37
38

39 JAMES MILLIGAN
40 1501 SOUTH WARREN
41 BUTTE MT 59701
42

43 LARRY NIELSEN FIELD REP
44 MEA MFT
45 1232 EAST 6TH AVENUE
46 HELENA MT 59601
47
48
49
50