

1 DEPARTMENT OF LABOR & INDUSTRY
2 BOARD OF PERSONNEL APPEALS
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6

7 STATE OF MONTANA
8 BEFORE THE BOARD OF PERSONNEL APPEALS
9

10 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO: 18-2013
11

12 JAMES SWAFFORD,)	Case No.: 1625-2013
13 Complainant,)	
14 vs)	INVESTIGATIVE REPORT
15)	AND
16 MELANIE A. B. CHARLSON, PRESIDENT,)	NOTICE OF INTENT TO DISMISS
17 MISSOULA EDUCATUION ASSOCIATION)	
18 LOCAL 7638, MEA-MFT,)	
19 Defendant)	

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22 **I. INTRODUCTION**
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24 On May 6, 2013, the Complainant, James Swafford, filed an unfair labor practice
25 charge with this Board alleging the Defendant, Melanie A. B. Charlson, President,
26 Missoula Education Association Local 7638, MEA-MFT committed an unfair labor
27 practices as defined in Section 39-31-402 MCA of the Montana Collective Bargaining
28 for Public Employees Act when it failed its Duty of Fair Representation relating to the
29 Complainant's termination and subsequent reinstatement as a tenured teacher with
30 Missoula County Public Schools (MCPS). The Defendant filed a timely response.
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32 Arlyn "Butch" Plowman was assigned by the Board to investigate the charge and has
33 communicated with the Complainant and his attorney, John Ferguson, in the course of
34 the investigation.
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43 **II. BACKGROUND**
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45 The Complainant was and is a tenured teacher employed by Missoula County Public
46 Schools. At the time of the events in dispute, he had been employed by Missoula
47 County Public Schools for nine years.
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1 The Employer, Missoula County Public Schools (MCPS) is a public employer.
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4 The Defendant, Missoula Education Association, MEA-MFT is a labor organization.
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7 The Defendant and Employer are subject to the Montana Collective Bargaining for
8 Public Employees Act (the Act), § 39-31-101 et seq, MCA.
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12 The Employer recognizes the Defendant as the exclusive representative for a
13 bargaining unit limited to teachers certificated in Class I, II, IV, V, VI, or VII as provided
14 in Section 20-4-106, MCA, whose positions call for or require such certification and/or
15 license, for those positions¹.
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20 The Complainant was and is employed by the Employer in the bargaining unit for which
21 the Defendant is the recognized exclusive representative.
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25 At the time of the events leading to the dispute at hand, the Complainant was the
26 Department Chair of the Hellgate High School Industrial Technology Department. As
27 such he had certain administrative and/or ministerial responsibilities. Whether those
28 administrative and/or ministerial responsibilities were sufficient to warrant an §39-31-
29 103(9)(b) (iii) or (iv) exclusion as a supervisory or managerial employee is of no
30 consequence since the Complainant was in a position within the bargaining unit as
31 defined in the collective bargaining agreement.
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38 The Complainant recommended a teacher for hire within his department. Although the
39 Complainant recommended the new hire, their subsequent professional relationship
40 was less than harmonious. Allegedly the educational environment within the
41 department degenerated. The Employer confronting a dispute between a Department
42 Head and a Department member took the rank and file teacher's side. The Employer's
43 Superintendent recommended the Complainant be discharged pursuant to § 20-4-207
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49 ¹ See Article 1 page 1 of the Defendant's and Employer's Collective Bargaining Agreement
50 <http://www.mcpsmt.org/cms/lib03/MT01001940/Centricity/Domain/836/MEA-MFTCBA2012-13.pdf>

1 MCA and Section 2-2 of the controlling Collective Bargaining Agreement². The
2
3 Superintendent's discharge recommendation contained the following:

4 Mr. Swofford has engaged in a pattern of harassment that undermined a fellow
5 staff member's performance, engaged in significant and substantial retaliation
6 against that staff member after being specifically warned not to retaliate
7 significantly interfered with a student's educational program for his own benefit
8 and was dishonest in the course of an internal investigation.
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11 The Board of Trustees adopted the Superintendent's recommendation and the
12 Complainant was discharged. As permitted by statute and the collective bargaining
13 agreement, the Complainant retained his own counsel and appealed his discharge
14 through the statutory and contractual arbitration process. The arbitrator determined the
15 Employer did not have just cause to discharge the Complainant and ordered his
16 reinstatement with appropriate compensation for lost wages and benefits³.
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22 During the course of the events leading to the Complainant's discharge and his
23 subsequent arbitrator ordered reinstatement, the Defendant was faced with a dilemma,
24 a conflict between two bargaining unit employees. The Defendant was the exclusive
25 representative for both protagonists, the Complainant, the Department Head and a
26 subordinate Department member, a fellow bargaining unit employee for whom the
27 Claimant had administrative and/or ministerial responsibility. The Defendant had a duty
28 of fair representation to both the Complainant and his purported victim.
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35 The Complainant sensing the Defendant's predicament chose his own path,
36 successfully representing and preserving his interests with his own attorney.
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40 Moreover, in the charge at hand, the Complainant alleges the Defendant was less than
41 cooperative in his effort to protect his employment. According to the May 6, 2013
42 charge, the Complainant asserts the Defendant prohibited or dissuaded potential
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45 ² <http://www.mcpsmt.org/cms/lib03/MT01001940/Centricity/Domain/836/MEA-MFTCBA2012-13.pdf>
46 Bargaining unit members may only be suspended without pay, reduced in compensation, dismissed or
47 terminated as defined in M.C.A., for Just Cause. The bargaining unit member and his/her representative,
48 the Association, together as one will have the right to pursue either statutory or contractual grievance
49 procedural rights and remedies, but not both.

50 ³ The parties' post hearing briefs and the arbitrator's opinion and award are part of the record.

1 witnesses including Dave Severson, a MEA-MFT Field Consultant from testifying on his
2 behalf during a discharge proceeding before the Employer's Board of Trustees⁴. Mr.
3 Severson was subpoenaed and testified as a witness for the Complainant during the
4 arbitration. Melanie Charlson, the Defendant's President voluntarily appeared as an
5 Employer witness.
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10 A concluding paragraph of the Complainant's May 6 charge contains the following"
11

12 ... [T]here was no reason for Ms. Charlson to testify without a subpoena at the
13 arbitration...as a witness for the ... [employer]. Her decision to do so was
14 arbitrary because no policy or other directive obligated her to testify against
15 ...[the Complainant], was discriminatory because it sought to harm...[the
16 Complainant}...and because Mr. Severson would only testify with a subpoena,
17 and was in bad faith because her testimony was calculated to undermine ...[the
18 Complainant's] position...
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21 The Arbitrators January 7, 2013 Discussion and Decision does not identify Ms.
22 Charlson's or Mr. Severson's testimony as determinative or compelling.
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26 III. DISCUSSION 27

28 There are several sections of the Montana Collective Bargaining for Public Employees
29 Act (the Act) that may provide guidance when considering the complaint at hand:
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32 **39-31-101. Policy.** In order to promote public business by removing certain
33 recognized sources of strife and unrest, it is the policy of the state of Montana to
34 encourage the practice and procedure of collective bargaining to arrive at friendly
35 adjustment of all disputes between public employers and their employees.⁵
36

37 **39-31-103. Definitions.** When used in this chapter, the following definitions
38 apply:
39

- 40 (1) "Appropriate unit" means a group of public employees banded
41 together for collective bargaining purposes as designated by the
42 board.
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47 ⁴ The Defendant's timely response includes an affidavit by Melanie Charlson in which she denies
48 attempting to dissuade anyone from assisting the Complainant or testifying in his behalf.

49 ⁵ Section 39-31-101 contains language similar to that found in the last paragraph of Section 1 of the
50 National Labor Relations Act.

1 (4) "Exclusive representative" means the labor organization which has
2 been designated by the board as the exclusive representative of employees in an
3 appropriate unit or has been so recognized by the public employer.
4 ***

5 (6) "Labor organization" means any organization or association of any
6 kind in which employees participate and which exists for the primary purpose of
7 dealing with employers concerning grievances, labor disputes, wages, rates of
8 pay, hours of employment, fringe benefits, or other conditions of employment.
9 ***

10 (9) (a) "Public employee" means:

11 (i) except as provided in subsection (9)(b), a person employed by a public
12 employer in any capacity; and
13 ***

14 (10) "Public employer" means the state of Montana or any political
15 subdivision thereof, including but not limited to any town, city, county, district,
16 school board, board of regents, public and quasi-public corporation, housing
17 authority or other authority established by law, and any representative or agent
18 designated by the public employer to act in its interest in dealing with public
19 employees. Public employer also includes any local public agency designated as
20 a head start agency as provided in 42 U.S.C. 9836.
21 ***

22 (12) "Unfair labor practice" means any unfair labor practice listed in 39-
23 31-401 or 39-31-402.

24 **39-31-201. Public employees protected in right of self-organization.** Public
25 employees shall have and shall be protected in the exercise of the right of self-
26 organization, to form, join, or assist any labor organization, to bargain collectively
27 through representatives of their own choosing on questions of wages, hours,
28 fringe benefits, and other conditions of employment, and to engage in other
29 concerted activities for the purpose of collective bargaining or other mutual aid or
30 protection free from interference, restraint, or coercion.⁶
31

32 **39-31-205. Designated labor organizations to represent employees without**
33 **discrimination.** Labor organizations designated in accordance with the
34 provisions of this chapter are responsible for representing the interest of all
35 employees in the exclusive bargaining unit without discrimination for the
36 purposes of collective bargaining with respect to rates of pay, hours, fringe
37 benefits, and other conditions of employment.⁷
38

39 **39-31-306. Collective bargaining agreements.** (1) An agreement reached by
40 the public employer and the exclusive representative must be reduced to writing
41 and must be executed by both parties.
42 ***

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49 ⁶ Section 39-31-201 is analogous to Section 7 of the National Labor Relations Act.

50 ⁷ Section 39-31-205 is analogous to Section 9 of the National Labor Relations Act.

1 (3) An agreement between the public employer and a labor organization
2 must be valid and enforced under its terms when entered into in accordance with
3 the provisions of this chapter and signed by the chief executive officer of the
4 state or political subdivision or commissioner of higher education or by a
5 representative. A publication of the agreement is not required to make it effective.
6

7 ***

8 (5) An agreement to which a school is a party must contain a grievance
9 procedure culminating in final and binding arbitration of unresolved and disputed
10 interpretations of agreements. The aggrieved party may have the grievance or
11 disputed interpretation of the agreement resolved either by final and binding
12 arbitration or by any other available legal method and forum, but not by both.
13 After a grievance has been submitted to arbitration, the grievant and the
14 exclusive representative waive any right to pursue against the school an action or
15 complaint that seeks the same remedy. If a grievant or the exclusive
16 representative files a complaint or other action against the school, arbitration
17 seeking the same remedy may not be filed or pursued under this section.⁸
18

19 **39-31-402. Unfair labor practices of labor organization.** It is an unfair labor
20 practice for a labor organization or its agents to:

21 (1) restrain or coerce:

22 (a) employees in the exercise of the right guaranteed in 39-31-201; or

23 (b) a public employer in the selection of a representative for the purpose
24 of collective bargaining or the adjustment of grievances;

25 (2) refuse to bargain collectively in good faith with a public employer if it
26 has been designated as the exclusive representative of employees;

27 (3) use agency shop fees for contributions to political candidates or
28 parties at state or local levels.⁹
29

30 **39-31-406. Hearing on complaint -- findings -- order.**
31

32 ***

33 (4) If, upon the preponderance of the testimony taken, the board is of the
34 opinion that any person named in the complaint has engaged in or is engaging in
35 an unfair labor practice, it shall state its findings of fact and shall issue and cause
36 to be served on the person an order requiring the person to cease and desist
37 from the unfair labor practice and to take affirmative action, including
38 reinstatement of employees with or without backpay, that will effectuate the
39 policies of this chapter. The order may further require the person to make reports
40 from time to time showing the extent to which the person has complied with the
41 order. An order of the board may not require the reinstatement of an individual as
42 an employee who has been suspended or discharged or the payment to the
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48 ⁸ There is no similar provision in the National Labor Relations Act

49 ⁹ Section 39-31-402 contains language similar to that found in Section 8(b) of the National Labor
50 Relations Act

1 employee of any backpay if it is found that the individual was suspended or
2 discharged for cause¹⁰.
3

4 In addition to the provisions of the Act cited above, the matter at hand also requires
5 consideration of the following from Montana's Teacher Tenure Statutes:
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7 **20-4-203. Teacher tenure.** (1) Except as provided in 20-4-208, whenever a
8 teacher has been elected by the offer and acceptance of a contract for the fourth
9 consecutive year of employment by a district in a position requiring teacher
10 certification except as a district superintendent or specialist, the teacher is
11 considered to be reelected from year to year as a tenured teacher at the same
12 salary and in the same or a comparable position of employment as that provided
13 by the last-executed contract with the teacher unless the trustees resolve by
14 majority vote of their membership to terminate the services of the teacher in
15 accordance with the provisions of 20-4-204.
16

17 ***

18 (4) Upon receiving tenure, the employment of a teacher may be
19 terminated for good cause.
20

21 **20-4-204. Termination of tenure teacher services.** (1) (a) The following
22 persons may make a recommendation in writing to the trustees of the district for
23 termination of the services of a tenure teacher:
24

25 (i) a district superintendent;
26

27 (b) The recommendation must state clearly and explicitly the specific
28 reason or reasons leading to the recommendation for termination.
29

30 (2) Whenever the trustees of a district receive a recommendation for
31 termination, the trustees shall notify the teacher of the recommendation for
32 termination and of the teacher's right to a hearing on the recommendation. The
33 notification must be delivered by certified letter or by personal notification for
34 which a signed receipt is returned. The notification must include:
35

36 (a) the statement of the reason or reasons that led to the
37 recommendation for termination; and
38

39 (b) a printed copy of this section for the teacher's information.
40

41 (3) The teacher may, in writing, waive the right to a hearing. Unless the
42 teacher waives the right to a hearing, the trustees shall set a hearing date, giving
43 consideration to the convenience of the teacher, not less than 10 days or more
44 than 20 days from receipt of the notice of recommendation for termination.
45

46 (4) The trustees shall:
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48 (a) conduct the hearing on the recommendation at a regularly scheduled
49 or special meeting of the board of trustees and in accordance with 2-3-203; and
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(b) resolve at the conclusion of the hearing to terminate the teacher or to
reject the recommendation for termination.

¹⁰ Section 39-31-406(4) contains language similar to that found in Section 10(c) of the National Labor Relations Act

1 (5) If the employment of the teacher is covered by a collective
2 bargaining agreement pursuant to Title 39, chapter 31, a tenure teacher shall
3 appeal a decision to terminate an employment contract to an arbitrator agreed
4 upon by the district and the teacher's exclusive representative. If the exclusive
5 representative has declined to represent the teacher, the teacher or the district
6 may request that the board of personnel appeals provide a list of arbitrators from
7 which the teacher and the district shall, after the toss of a coin to determine the
8 order of striking, alternately strike names from the list until one arbitrator is
9 selected and appointed. By mutual agreement between the parties, the county
10 superintendent of schools may be appointed as the arbitrator.
11

12 ***

13 (7) In a termination involving a teacher whose employment is covered by
14 a collective bargaining agreement pursuant to Title 39, chapter 31, a request for
15 arbitration must be made within 20 days from the date of termination unless an
16 alternative time period is provided by the terms of a collective bargaining
17 agreement.

18 (8) The decision of the arbitrator is final and binding. Each party shall pay
19 one-half of an arbitrator's charges unless a different cost allocation arrangement
20 is agreed upon by the parties.

21 (9) An arbitrator may order a school district to reinstate a teacher who has
22 been terminated without good cause and to provide compensation, with interest,
23 to a teacher for lost wages and fringe benefits from the date of termination to the
24 date that the teacher is offered reinstatement to the same or a comparable
25 position. Interim earnings, including the amount that the teacher could have
26 earned with reasonable diligence, must be deducted from the amount awarded
27 for lost wages. Before interim earnings are deducted from lost wages, reasonable
28 amounts spent by a teacher in searching for, obtaining, or relocating to new
29 employment must be deducted from interim earnings.

30 (10) Except as provided in this section, an arbitrator may not order a
31 school district to provide compensation for punitive damages, pain and suffering,
32 emotional distress, compensatory damages, attorney fees, or any other form of
33 damages.
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37 **20-4-207. Dismissal of teacher under contract.** (1) The trustees of any district
38 may dismiss a teacher before the expiration of the teacher's employment contract
39 for good cause.

40 (2) (a) The following persons may recommend the dismissal of a teacher
41 for cause under subsection (1):

42 (i) a district superintendent;

43 ***

44 (b) A person listed in subsection (2) (a) who recommends dismissal of a
45 teacher shall give notice of the recommendation in writing to each trustee of the
46 district and to the teacher.

47 (c) The notice must state clearly and explicitly the specific reason or
48 reasons that led to the recommendation for dismissal.
49
50

1 (3) (a) Whenever the trustees of any district receive a recommendation for
2 dismissal, the trustees shall notify the teacher of the right to a hearing before the
3 trustees either by certified letter or by personal notification for which a signed
4 receipt must be returned. The teacher may in writing waive the right to a hearing.
5 Unless the teacher waives the right to a hearing, the teacher and trustees shall
6 agree on a hearing date not less than 10 days or more than 20 days from the
7 notice of intent to recommend dismissal.

8 (b) The trustees shall conduct a hearing on the recommendation and
9 resolve at the conclusion of the hearing to dismiss the teacher or to reject the
10 recommendation for dismissal.

11 ***

12 (5) Any teacher who has been dismissed may in writing within 20 days
13 appeal the dismissal under the guidelines set forth in 20-4-204. The teacher may
14 appeal a decision to terminate an employment contract to the county
15 superintendent if the teacher's employment is not covered by a collective
16 bargaining agreement pursuant to Title 39, chapter 31. If the employment of the
17 teacher is covered by a collective bargaining agreement, a teacher shall appeal a
18 decision to terminate an employment contract to an arbitrator.

19 Rules promulgated by the Board of Personnel Appeals at ARM 24.26.680 (3) (c) and
20 24.26.680B (2) establish criteria for unfair labor practice charges:
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22 ARM 24.26 .680(3) provides:

23 A complaint shall contain the following:

- 24 (a) the name, address and telephone number of the complainant;
25 (b) the name, address and telephone number of the party against whom the
26 charge is made; and
27 (c) a clear and concise statement of facts constituting the alleged violation,
28 including the time and place of occurrence of the particular acts and a statement
29 of the portion or portions of the law or rules alleged to have been violated.
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37 ARM 24.26.680B (2) provides:

38 As provided for in 39-31-405(1), MCA, after receipt of the response, the board
39 shall appoint an investigator to investigate the alleged unfair labor practice. In
40 making a determination of probable merit, the investigator must determine
41 whether there is substantial evidence to support the allegation(s). In reaching this
42 decision, the board's agent shall rely on the type of evidence on which
43 responsible persons are accustomed to rely in the conduct of serious affairs.
44 Substantial evidence is something more than a scintilla of evidence but may be
45 less than a preponderance of the evidence.
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48 The Montana Supreme Court has approved the practice of the Board of Personnel
49 Appeals using Federal Court and National Labor Relations Board (NLRB) precedent as
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1 guidelines in interpreting the Montana Collective Bargaining for Public Employees Act,
2 *Bonner School District No. 14 v. Bonner Education Association*, 183 LRRM 2673, 176
3 P.3d 262, 341 Mont. 97 (2008); *City of Great Falls v. Young (Young III)*, 686 P.2d 185,
4 119 LRRM 2682 (1984); *Teamsters Local No. 45 v. State ex rel. Board of Personnel*
5 *Appeals*, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981); *State ex rel. Board of*
6 *Personnel Appeals v. District Court*, 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297
7 (1979); *AFSCME Local No. 2390 vs. City of Billings, Montana*, 555 P.2d 507, 1976, 93
8 LRRM 2753 (1976). To the extent cited in this decision, federal precedent is
9 considered for guidance and to supplement state law when applicable.
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17 In 1980 the United States Eighth Circuit Court of Appeals provided a legal analysis of an
18 exclusive representative's duty of fair representation with the following from *National*
19 *Labor Relations Board v. American Postal Workers Union*, 618 F.2d 1249, 103 LRRM
20 3045:
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24 Section 8(b) (1) (A) of the Act makes it an unfair labor practice for a union to
25 "restrain or coerce" employees in the rights guaranteed in § 7 of the Act. 29
26 U.S.C. § 158(b) (1) (A). Section 7 of the Act protects the right of employees to
27 engage in union or other concerted activities or to refrain from such activities. 29
28 U.S.C. § 157. The rights protected by § 7, however, are limited by the principle of
29 exclusive representation set forth in § 9(a) of the Act. 29 U.S.C. § 159(a). See
30 *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S.
31 50, 61-70, 95 S.Ct. 977, 984-88, 43 L.Ed.2d 12 (1975); *NLRB v. Tanner Motor*
32 *Livery, Ltd.*, 419 F.2d 216, 218-221 (9th Cir. 1969). In view of the restraints
33 imposed on individual employee rights by the principle of exclusive
34 representation, the Board and the courts have imposed upon unions a reciprocal
35 obligation of the Act to fully and fairly represent all of the employees. *Vaca v.*
36 *Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842 (1967); *General*
37 *Truck Drivers Local 315*, 217 N.L.R.B. 616, 619, 89 L.R.R.M. 1049, 1053 (1975),
38 enforced, 545 F.2d 1173 (9th Cir. 1976). A union which fails to live up to this
39 obligation unjustifiably restrains employees in the exercise of their § 7 rights and
40 thereby violates § 8(b) (1) (A). *Vaca v. Sipes*, supra, 386 U.S. at 177-78, 181-83,
41 87 S.Ct. at 909-10, 912-13. The duty of fair representation gives employees a
42 correlative right under § 7 to be represented without arbitrary, irrelevant or
43 invidious discrimination by their exclusive representative. *Kling v. NLRB*, 503
44 F.2d 1044, 1046 (9th Cir. 1975). Arbitrary conduct alone may suffice to establish
45 a violation of the duty of fair representation. *Griffin v. UAW*, 469 F.2d 181, 183
46 (4th Cir. 1972); *Smith v. Hussman Refrigerator Co.*, 100 L.R.R.M. 2238, 2244-45
47 (8th Cir. 1979), reh. en banc, 619 F.2d 1229 (8th Cir.1980). In evaluating whether
48 union conduct is so arbitrary as to breach the duty of fair representation, so long
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1 as a union exercises its discretion in good faith and with honesty or purpose, a
2 "wide range of reasonableness must be allowed." *Ford Motor Co. v. Huffman*,
3 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953). Mere negligence,
4 poor judgment or ineptitude are insufficient to establish a breach of the duty of
5 fair representation. *Id.* On the other hand, a union may not impair individual
6 employee interests on the basis of personal preferences. Branch 6000, *National*
7 *Ass'n of Letter Carriers v. NLRB*, 194 U.S.App.D.C. 1, 4-6, 595 F.2d 808, 811-13
8 (D.C.Cir.1979); *Griffin v. UAW*, *supra*, 469 F.2d at 183.

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11 The Montana Supreme Court applied federal private sector labor law standards to an
12 exclusive representative's duty of fair representation under the Montana Public
13 Employee Collective Bargaining Act in *Teamsters Local No. 45, Affiliated With*
14 *International Brotherhood Of Teamsters, Et Al. v. State Of Montana, Ex Rel., Board Of*
15 *Personnel Appeals And Stuart McCarvel*, (ULP 24-77), 223 M 89, 724 P2d 18, 43 St.
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19 Rep 1555 (1986):

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21 A union's duty of fair representation is a judicially created doctrine first
22 recognized in the context of the Railway Labor Act in *Steele v. Louisville &*
23 *Nashville Railroad Co.* (1944), 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed.173. *Steele*
24 required the Union to represent its individual members "without hostile
25 discrimination, fairly, impartially and in good faith." -*Id.* at 204, 65 S.Ct. at 232, 89
26 L.Ed. at 184. The *Steele* principle was later extended to bargaining
27 representations under the National Labor Relations Act (NLRA) *Syres v. Oil*
28 *Workers International Union, Local 23* (1955), 350 U.S. 892, 76 S.Ct. 152, 100
29 L.Ed. 785. The NLRB first recognized a breach of the duty of fair representation
30 as an unfair labor practice in *Miranda Fuel Co.* (1962), 140 NLR 181, 51 LRRM
31 1584, reasoning the privilege to act as an exclusive bargaining representative
32 granted in § 9 of the NLRA necessarily gives rise to a corresponding § 7 right in
33 union constituents to fair representation by the exclusive representative.
34 Although the duty of fair representation arose in the context of racial
35 discrimination, the doctrine has been expanded to include arbitrary conduct by a
36 union toward bargaining unit members. In *Vaca v. Sipes* (1967), 386 U.S. 171,
37 87 S.Ct. 903, 17 L.Ed.2d 842, the United States Supreme Court stated the
38 controlling test for breach of the union duty of fair representation: "A breach of
39 the statutory duty of fair representation occurs only when a union's conduct . . . is
40 arbitrary, discriminatory, or in bad faith." -*Id.* at 190, 87 S.Ct. at 916, 17 L.Ed.2d
41 at 857.
42
43

44 Montana's teacher tenure statute, specifically §20-4-207(5) MCA, allows discharged
45 teachers to arbitrate their dismissal with or without their exclusive representative's
46 participation and/or support. A teacher's statutory right to appeal termination or
47 discharge outside the applicable collective bargaining agreement's grievance and
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1 arbitration process could be construed as a limit on an exclusive representative's
2 representational exclusivity and subsequent duty of fair representation.
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6 The duty of fair representation attaches to a labor organization (and its agents), in its
7 role as the certified or recognized exclusive representative for bargaining unit
8 employees in their relationship with the employer, *Air Line Pilots v O'Neill*, 499 US 65,
9 136 LRRM 2721 (1991); *Hollie v. Smith*, 813 F.Supp.2d 214, 192 LRRM 2046 (D.D.C.
10 2011). Individual union members and/or officers have no duty of fair representation
11 *Ralph Wells, Plaintiff-Appellee Appellant, v. Southern Airways, Inc., Air Line Pilots*
12 *Association, International*, 616 F.2d 107,104 LRRM 2338, (5th CA 1980):
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16 ...individual union members have no representational duties to other members of the
17 bargaining unit. The duty of fair representation is incumbent upon the labor
18 organization only,....
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22 See *Williams v. U.S. Postal Service*, 34 F.Supp. 350 , 148 LRRM 2764 (W.D. Okl.
23 1993), *aff'd*, 35 F.3d 575 (10th CA. 1994), *cert denied*, 513 US 1095:
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25 As to Plaintiff's claims against Defendants Davis and Purdy, the Court agrees with
26 Defendants that the actions which Plaintiff, in his allegations, attribute to those
27 Defendants constitute actions taken within the course of their duties as union officers
28 and employees and that said Defendants are immune from personal liability for such
29 actions. See *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 , 101 S.Ct. 1836 , 68
30 L.Ed.2d 248, [107 LRRM 2145] (1981; *Atkinson v. Sinclair Refining Co.*,370 U.S.
31 238 , 82 S.Ct. 318 , 8 L.Ed.2d 462, 50 LRRM 2433 (1962); *Borowic v. Local No.*
32 *1570*, 889 F.2d 23 , 28 n. 3; 132 LRRM 2970 (1st Cir. 1989); *Evangelista v.*
33 *Inlandboatmen's Union of Pacific*, 777 F.2d 1390 , 1400 ; 121 LRRM 2570 (9th Cir.
34 1985); *Peterson v. Kennedy*,771 F.2d 1244 , 1256; 120 LRRM 2520 (9th Cir. 1985),
35 *cert. denied*, 452 U.S. 1122 , 106 S.Ct. 1642 , 90 L.Ed.2d 187; 122 LRRM 2080
36 (1986). Plaintiff's claims against the individual union officials herein, Defendants
37 Davis and Purdy, whether based upon federal or state law, are barred.
38

39
40 See also *Carter V. Smith Food King*, 765 F2d 916, 120 LRRM 2479 (9th CA 1985):
41

42 Although a triable question of fact exists as to whether the union breached its duty of
43 fair representation, we affirm the district court's decision to grant summary judgment
44 in favor of Union Business Representative David Thornton and Union President
45 Larry Sooter. It is well settled that section 301 provides the basis for an action for
46 breach of the duty of fair representation only against a union as an entity, and not
47 against individuals who happen to hold positions in that union. See, e.g., *Atkinson v.*
48 *Sinclair Refining Co.*, 370 U.S. 238, 247-48, 50 LRRM 2433 (1962); *Williams v.*
49 *Pacific Maritime Association*, 421 F.2d 1287, 1289, 73 LRRM 2333 (9th Cir. 1970).
50

1 The individually named defendants were thus entitled to judgment as a matter of
2 law.

3
4 Melanie Charlson as an individual union member and/or officer had no duty of fair
5 representation to the Complainant.
6

7
8 In contract negotiations and contract administration, the exclusive representative
9 has extensive flexibility in the exercise of its discretion. See *Merritt v. International*
10 *Association of Machinists Aerospace Workers*, 613 F.3d 609, 188 LRRM 3227 (6th
11 CA 2010):
12
13
14

15
16 Following *Huffman*, the Supreme Court in *O'Neill*, ...emphasized that "any
17 substantive examination of a union's performance . . . must be highly
18 deferential, recognizing the wide latitude that negotiators need for the effective
19 performance of their bargaining responsibilities." *O'Neill*, 499 U.S. at 78, 111
20 S.Ct. 1127. The Court noted that Congress did not "intend judicial review of a
21 union's performance to permit the court to substitute its own view of the proper
22 bargain for that reached by the union." *Id.*
23

24
25 A breach of the duty of fair representation occurs only when a union's conduct
26 toward a member of the collective bargaining unit is arbitrary, discriminatory, or
27 in bad faith. *Vaca*, 386 U.S. at 190, 87 S.Ct. 903.
28

29 Under this tripartite standard, a court should look to each element when determining
30 whether a union violated its duty. *O'Neill*, 499 U.S. at 77, 111 S.Ct. 1127. Therefore,
31 the three separate levels of inquiry are as follows: "(1) did the union act arbitrarily;
32 (2) did the union act discriminatorily; or (3) did the union act in bad faith." *Griffin v.*
33 *Air Line Pilots Ass'n, Int'l*, 32 F.3d 1079, 1083 (7th Cir. 1994). In order to
34 successfully defend against a motion for summary judgment on a duty of fair
35 representation claim, the plaintiff must point the court to evidence in the record
36 supporting at least one of these elements. Fed.R.Civ.P. 56(e).
37
38

39 A union's actions breach the duty of fair representation under the "arbitrary prong" if
40 the union's conduct can fairly be characterized as "so far outside a wide range of
41 reasonableness" that it is "wholly irrational." See *O'Neill*, 499 U.S. at 78, 111 S.Ct.
42 1127 (internal citation omitted). A union acts in "bad faith" when "it acts with an
43 improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other
44 intentionally misleading conduct." *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120,
45 126 (2d Cir.1998) (citing *Baxter v. United Paperworkers Int'l Union, Local 7370*, 140
46 F.3d 745, 747 (8th Cir.1998)). Although it is difficult to provide a precise definition of
47 "discriminatory" conduct that breaches the duty of fair representation, the Supreme
48 Court in *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees*
49 *of America v. Lockridge*, 403 U.S. 274, 301, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971),
50

1 held that the duty "carries with it the need to adduce substantial evidence of
2 discrimination that is intentional, severe, and unrelated to legitimate union
3 objectives." See also *Vaca*, 386 U.S. at 177, 87 S.Ct. 903 (noting that the duty of fair
4 representation developed in a series of cases alleging racial discrimination that was
5 "irrelevant or invidious" and served no legitimate union objectives).
6

7
8 The union has an obligation "to serve the interests of all members without hostility or
9 discrimination toward any, to exercise its discretion with complete good faith and
10 honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177; 64
11 LRRM 2369 (1967). A union breaches its duty of fair representation "only when a
12 union's conduct toward a member of the collective bargaining unit is arbitrary,
13 discriminatory, or in bad faith." *Id.* at 197. Thus, "a union may not arbitrarily ignore a
14 meritorious grievance or process it in a perfunctory fashion." *Id.* at 191. However,
15 "[m]ere negligence is insufficient to establish that the union acted arbitrarily." *Noble v.*
16 *USPS*, 537 F.Supp.2d. 210, 216 (D.D.C. 2008); *Watkins v. Commc'ns Workers of*
17 *Am.*, 736 F.Supp. 1156, 1161 (D.D.C. 1990). "In considering DFR complaints that
18 are premised on assertions of arbitrary action, the courts and the Board accord
19 deference to a union, finding a DFR breach only if the union's action 'can be fairly
20 characterized as so far outside a "wide range of reasonableness" ' that it is entirely
21 irrational." *Thomas v. N.L.R.B.*, 213 F.3d. 651, 656; 164 LRRM 2577 (D.C. Cir.
22 2000) (quoting *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 78 ; 136 LRRM 2721
23 (1991)).
24

25
26 More recently (June 18, 2013), the U.S. Seventh Circuit Court of Appeals endorsed the
27 foregoing in *Yeftich v. Navistar Inc.* 196 LRRM 2012, 2013 BL159788:
28

29 "When a labor organization has been selected as the exclusive representative of
30 the employees in a bargaining unit, it has a duty... to represent all members
31 fairly." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44; 159 LRRM 2641
32 (1998). This duty exists through the negotiation of a collective-bargaining
33 agreement and during the administration of the agreement, see, e.g., *Thomas*,
34 890 F.2d at 917-18, 922; *Schultz v. Owens-Ill. Inc.*, 696 F.2d 505, 514; 112
35 LRRM 2181 (7th Cir. 1982), and the union's obligation throughout is "to serve the
36 interests of all members without hostility or discrimination toward any, to exercise
37 its discretion with complete good faith and honesty, and to avoid arbitrary
38 conduct," *Vaca*, 386 U.S. at 177. A union has wide latitude in performing this
39 obligation, however. "A breach of the statutory duty of fair representation occurs
40 only when a union's conduct toward a member of the collective bargaining unit is
41 arbitrary, discriminatory, or in bad faith." *Id.* at 190. "Each of these possibilities
42 must be considered separately in determining whether or not a breach has been
43 established." *Neal v. Newspaper Holdings, Inc.*, 349 F.3d 363, 369; 173 LRRM
44 2577 (7th Cir. 2003). For example, declining to pursue a grievance as far as a
45 union member might like isn't by itself a violation of the duty of fair
46 representation. Rather, "[t]o prevail on a claim that his union violated its duty of
47 representation by dropping a grievance, a plaintiff-member must show that the
48 union's decision was arbitrary or based on discriminatory or bad faith motives."
49
50

1 *Trnka v. Local Union No. 688, UAW*, 30 F.3d 60, 61; 146 LRRM 2790 (7th Cir.
2 1994).

3
4 The Complainant faces a significant challenge, a high bar, in his attempt to prove Ms.
5 Charlson's voluntary testimony at the arbitration hearing was arbitrary: See *Hollie v.*
6 *Teamsters Local 639*, 196 LRRM 2036, [June 14, 2013] DDC 2013 No. 11-561 (ESH):
7

8
9 A union has a statutory duty to fairly represent all employees in enforcement of the
10 CBA. *Vaca v. Sipes*, 386 U.S. 171, 177; 64 LRRM 2369 (1967). A union breaches
11 that duty "if its actions are either 'arbitrary, discriminatory, or in bad faith.'" *Air Line*
12 *Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67; 136 LRRM 2721 (1991) (quoting *Vaca*,
13 386 U.S. at 190). Plaintiff here argues only that the Union's conduct was arbitrary. ...
14 This is undeniably a high bar; unions are entitled to a "wide range of
15 reasonableness" in performing their duties. *Air Line Pilots Ass'n*, 499 U.S. at 78
16 (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338; 31 LRRM 2548 (1953)).
17 Thus, "mere negligence" does not constitute a breach of the duty of fair
18 representation. *Brown v. Gino Morena Enters.*, 44 F.Supp.2d 41, 45; 161 LRRM
19 2350 (D.D.C. 1999) (collecting cases). Rather, union conduct will be considered
20 arbitrary only if "the union's behavior is so far outside a wide range of
21 reasonableness as to be irrational." *Air Line Pilots*, 499 U.S. at 67 (internal quotation
22 marks and citations omitted).
23
24

25 "The crucial elements for a claim of arbitrariness are that the union's error involved a
26 ministerial rather than judgmental act, that there was no rational or proper basis for
27 the union's conduct, and that the union's conduct prejudiced a strong interest of the
28 employee." *Watkins v. Commc'ns Workers of Am., Local 2336*, 736 F. Supp. 1156,
29 1161 (D.D.C. 1990) (citing *NLRB v. Local 282*, 740 F.2d 141, 147; 116 LRRM 3292
30 (2d Cir. 1984)).
31
32

33 In *Ferguson v. Transit Union Local 689*, 191 LRRM 2857 (D.D.C. 2010) the court
34 attempted to define union's conduct rises to the level of arbitrariness
35

36 Although a union's actions are accorded substantial deference, courts have
37 "attempted to formulate some standards for determining when a union's conduct
38 rises to the level of arbitrariness." See *Watkins*, 736 F.Supp. at 1160-61. "[A]n act of
39 omission by a union may be so egregious and unfair as to be arbitrary." *Id.* (quoting
40 *Galindo v. Stooddy*, 793 F.2d 1502, 123 LRRM 2705 (9th Cir. 1986)). "The crucial
41 elements for a claim of arbitrariness are that the union's error involved a ministerial
42 rather than judgmental act, that there was no rational or proper basis for the union's
43 conduct, and that the union's conduct prejudiced a strong interest of the employee."
44 *Watkins*, 736 F.Supp. at 1161. Timeliness is a ministerial duty, and courts have
45 found a breach of the duty of fair representation when a union fails to meet a
46 mandatory deadline. *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1273-74,
47 113 LRRM 3532 (9th Cir. 1983) (citing cases) ("Keeping track of deadlines is a
48 mechanical function that depends on establishing a tickler system and diligence in
49 using it, not on special training.")
50

1
2
3 The evidence at hand indicates Ms. Charlson’s decision to testify as a rebuttal witness
4 was a judgmental rather than a ministerial act. The Complainant may rightfully dispute
5 the rational and basis behind her voluntary testimony. Her decision to attend the
6 hearing and testify was not arbitrary, without cause and or reason.
7
8

9
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11 There are three prongs to the test for the duty of fair representation. If the Defendant’s
12 performance was not arbitrary, the other prongs, discrimination and bad faith must be
13 considered. See: *Aguinaga v. United Food & Commercial Workers Int’l Union*, 993 F.2d
14 1463, 143 LRRM 2400 (10th CA. 1993).
15

16
17 A union breaches its duty of fair representation of its conduct toward a member is
18 “arbitrary, discriminatory, or in bad faith.” *Vaca v. Sipes*, 386 U.S. 171, 190; 64
19 LRRM 236] (1967). *Alots Ass’n Int’l. v. O’Neill*, 499 U.S. 65, 111 S.Ct. 1127,
20 1130; 136 LRRM 2721 (1991) (citation omitted). A union’s discriminatory
21 conduct violates its duty of fair representation if it is “invidious.” *Id.* at 1137. Bad
22 faith requires a showing of fraud, or deceitful or dishonest action. *Mock v. T.G. &*
23 *Y. Stores Co.*, 971 F.2d 522, 531; 140 LRRM 3028 (10th Cir. 1992).
24

25
26 See also: *Bejjani v. Manhattan Sheraton Corp.* 196 LRRM 2190, (June 27, 2013) U.S.
27 District Court, Southern District of New York, No. 12 Civ. 6618 (JPO), 2013 BL 171417:
28

29 “A breach of the statutory duty of fair representation occurs... when a union’s
30 conduct toward a member of the collective bargaining unit is arbitrary,
31 discriminatory, or in bad faith.” *Vaca v. Sipes*, 386 U.S. 171, 190; 64 LRRM 2369
32 (1967); see *Marquez v. Screen Actors Guild*, 525 U.S. 33, 44; 159 LRRM 2641]
33 (1998). Judicial review of such allegations is “highly deferential, recognizing the
34 wide latitude that [unions] need for the effective performance of their bargaining
35 responsibilities.” *O’Neill*, 499 U.S. at 78. “To prove that a union has breached its
36 duty of fair representation, the challenging members must establish two
37 elements. *First*, they must prove that the union’s actions or inactions are either
38 arbitrary, discriminatory, or in bad faith. *Second*, the challenging members must
39 demonstrate a causal connection between the union’s wrongful conduct and their
40 injuries.” *Vaughn v. Air Line Pilots Ass’n, Int’l*, 604 F.3d 703, 709-10; 188 LRRM
41 2641 (2d Cir. 2010) (quotation marks and citations omitted) (emphasis in
42 original). As Judge Pooler has explained:
43

44 A union’s actions are “arbitrary only if, in light of the factual and legal
45 landscape at the time of the union’s actions, the union’s behavior is so far
46 outside a wide range of reasonableness as to be irrational.” *O’Neill*, 499
47 U.S. at 67 (citation and quotation marks omitted). Moreover, “[t]actical
48 errors are insufficient to show a breach of the duty of fair representation;
49 even negligence on the union’s part does not give rise to a breach.” *Barr v.*
50

1 *United Parcel Serv., Inc.*, 868 F.2d 36, 43; 130 LRRM 2593] (2d Cir.
2 1989). A union's acts are discriminatory when "substantial evidence"
3 indicates that it engaged in discrimination that was "intentional, severe,
4 and unrelated to legitimate union objectives." *Amalgamated Ass'n of St.,*
5 *Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274,
6 301; 77 LRRM 2501 (1971). Bad faith, which "encompasses fraud,
7 dishonesty, and other intentionally misleading conduct," requires proof that
8 the union acted with "an improper intent, purpose, or motive." *Spellacy*,
9 156 F.3d at 126 (citations omitted).

10
11 *Vaughn*, 604 F.3d at 709-10; see also, e.g., *Acosta v. Potter*, 410 F.Supp.2d at
12 311 ("The Supreme Court's test for arbitrariness—which requires that a union
13 behave irrationally—is difficult to meet."). In applying this law, courts "are not
14 necessarily left with shifting ad hoc standards to be fashioned anew in each
15 case, [though they do] have broad parameters of judgment that necessarily vary
16 from context to context." *Ryan v. N.Y. Newspaper Printing Pressmen's Union No.*
17 *2*, 590 F.2d 451, 455 [100 LRRM 2428] (2d Cir. 1979).

18
19 ***

20
21 It is also well settled that a union enjoys "broad discretion to adjust the demands
22 of competing groups within its constituency as long as it does not act arbitrarily."
23 *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798; 86 LRRM 2086 (2d Cir.
24 1974). Thus, though an "employee may challenge actions other than those
25 involving anti-minority animus or malice," union actions that reveal good faith
26 trade-offs among employee constituencies do not give rise to DFR claims. *Ryan*
27 *v. New York Newspaper Printing Pressmen's Union No. 2*, 590 F.2d 451, 455;
28 100 LRRM 2428 (2d Cir. 1979). Indeed, the Second Circuit has emphasized that
29 "[a] union's reasoned decision to support the interests of one group of employees
30 over the competing interests of another group does not constitute arbitrary
31 conduct." *Spellacy*, 156 F.3d 120, 129; 159 LRRM 2336 (2d Cir. 1998) (citations
32 omitted); see also *Vaughn*, 604 F.3d at 712 ("[T]here is no requirement that
33 unions treat their members identically as long as their actions are related to
34 legitimate union objectives." (citation omitted)).

35
36
37 The Complainant's May 6, 2013 charge alleges the Defendant's performance was
38 discriminatory but provides no information or evidence to show the Defendant's actions
39 were "intentional, severe, and unrelated to legitimate union objectives". The charge
40 does not support an assertion the Defendant's performance was invidious or an attempt
41 to restrain or coerce the Complainant or any employee in the exercise of the right
42 guaranteed in §39-31-201 MCA.

43
44
45
46
47
48 To substantiate allegations of bad faith it is incumbent upon the Complainant to provide
49 information or evidence of fraud, dishonesty, and other intentionally misleading conduct
50

1 showing the Defendant acted with improper intent, purpose, or motive. The May 6,
2 2013 charge does not demonstrate fraud, deceit or dishonest action on the part of the
3 Defendant.
4

5
6
7 The Complainant's successful defense of his tenure indicates the Defendant's
8 performance did not seriously flaw the arbitration process. Ms. Charlson's testimony
9 had little or no influence in the arbitrators opinion and award: See: *Dushaw v. Roadway*
10 *Exp., Inc.*, 66 F.3d 129, 132;] (6th CA1995) (citing *Black v. Ryder/P.I.E. Nationwide,*
11 *Inc.*, 15 F.3d 573, 585; 145 LRRM 2387(6th Cir. 1994) cert denied , 517 US 1120, 151
12 LRRM 2928 (1996)
13

14
15
16 To prove breach of the duty of fair representation, Dushaw must show that the
17 Union's actions were either arbitrary, discriminatory, or in bad faith. *Air Line Pilots*
18 *Ass'n, Int'l v. O'Neill*, 499 U.S. 65 , 67; 136 LRRM 2721 (1991). Once a plaintiff
19 proves that the Union acted in bad faith or in an arbitrary or discriminatory
20 manner, however, the plaintiff must also prove that the Union's actions tainted
21 the grievance procedure such that the outcome was more than likely affected by
22 the Union's breach. *Black*, 15 F.3d at 585. Moreover, the impact of the Union's
23 breach on the outcome of the grievance proceeding must have been substantial:
24 to establish a breach of fair representation, the plaintiff must meet the onerous
25 burden of proving that the grievance process was "seriously flawed by the union's
26 breach of its duty to represent employees honestly and in good faith and without
27 invidious discrimination or arbitrary conduct. "
28
29
30

31 Federal precedent interpreting Section 10(c) of the National Labor Relations Act leads
32 to the conclusion §39-31-406(4) of the Act prohibits the imposition of punitive damages
33 by the Board of Personnel Appeals, *Gurley v. Hunt* ,287 F3d 728, 169 LRRM 3039, (8th
34 CA 2002):
35
36

37
38 ... , the NLRB is not authorized to award this type of relief. See 29 U.S.C.
39 §160(c); *Shepard v. NLRB*, 459 U.S. 344, 351-52;112 LRRM 2369 (1983) ("The
40 Board is not a court; it is not even a labor court 'Congress did not ...
41 authoriz[e] the Board to award full compensatory damages for injuries caused by
42 wrongful conduct.' ") (citations omitted.....The only damages available in a claim
43 for a breach of the duty of fair representation are make-whole damages,
44 *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 49; 101
45 LRRM 2365](1979), which the NLRB had already awarded to the plaintiffs in
46 *DeSantiago*. See *DeSantiago*, 914 F.2d at 130.
47
48
49
50

1 The Supreme Court has determined punitive damages are not appropriate in Duty of
2 Fair Representation cases, *International Brotherhood of Electrical Workers v. Foust*,
3 442 U.S. 42, 101 LRRM 2365 (1979):
4

5
6 Acknowledging the “essentially remedial” objectives of the National Labor Relations
7 Act, this Court has refused to permit punitive sanctions in certain unfair labor
8 practice cases, see, e.g., *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10–12, 7 LRRM
9 287 (1940); *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655, 47 LRRM 2900
10 (1961), and in actions under §303 of the Labor Management Relations Act, 29
11 U.S.C. §187, *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260–261, 56 LRRM 2225
12 (1964). Like the NLRA, the Railway Labor Act is essentially remedial in purpose.
13 See supra, at 5; 45 U.S.C. §151a; *Virginian R. Co. v. System Federation No. 40*, 300
14 U.S. 515, 542–548, 1 LRRM 743 (1937); *International Association of Machinists v.*
15 *Street*, 367 U.S., at 759–760; see also *Republic Steel Corp. v. NLRB*, supra, at 10–
16 11. Because general labor policy disfavors punishment, and the adverse
17 consequences of punitive damage awards could be substantial, we hold that such
18 damages may not be assessed against a union that breaches its duty of fair
19 representation by failing properly to pursue a grievance. Accordingly, we reverse the
20 judgment below insofar as it upheld the award of punitive damages.
21
22

23 The Board of Personnel Appeals has no authority to assess punitive penalties, ULP 17 -
24 75, *Billings Education Association v Billings School District No. 2*, final order November
25 3, 1976¹¹:
26
27

28
29 We therefore reverse the Hearing Examiner’s award of one day’s pay to the
30 Complainants as being outside the authority of this Board to make such an award
31 on a punitive basis.
32

33 The Complainant’s May 6, 2013 charge alleging the Defendant failed its duty of fair
34 representation failed to establish either of twin prerequisites. The Complainant provided
35 insufficient grounds to support his allegations the Defendant’s actions were arbitrary,
36 discriminatory or in bad faith. Nor did the Complainant establish the Defendant’s action
37 caused injury. See *Vaughn v. Air Line Pilots Association, International*, 604 F.3d 703,
38 188 LRRM 2641 (2d Cir. 2010):
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47 ¹¹ http://erd.dli.mt.gov/ulp-category-listing/cat_view/13-labor-standards/21-ulp-decisions/93-1975.html
48 affirmed on other grounds: *Board of Trustees Billings School District No. 2 Yellowstone County,*
49 *Montana vs. State Of Montana Ex Rel Board Of Personnel Appeals and Billings Education Association*,
50 185 M 104, 604 P2d 778, 36 St. Rep. 2311, 103 LRRM 2285, (1979)

1 To prove that a union has breached its duty of fair representation, the challenging
2 members must establish two elements. *First*, they must prove that the union's
3 actions or inactions "are either 'arbitrary, discriminatory, or in bad faith.'" *Id.* at
4 67. *Second*, the challenging members must "demonstrate a causal connection
5 between the union's wrongful conduct and their injuries." *Spellacy*, 156 F.3d at
6 126; *see also Sim v. New York Mailers' Union No. 6*, 166 F.3d 465, 472-73; 160
7 LRRM 2336 (2d Cir. 1999).
8

9
10 The Complainant's May 6, 2013 charge and the subsequent investigation provide
11 insufficient substantial evidence and/or legal foundation to justify a finding of probable
12 merit.
13

14
15 **IV. DETERMINATION**
16

17 Based on the foregoing, the record does not support a finding of probable merit to the
18 charge and this matter must be dismissed.
19

20 Dated this tenth day of July 2013.
21

22
23 BOARD OF PERSONNEL APPEALS
24

25
26
27
28 Arlyn L. Plowman, Investigator
29

30 ARM 24.26.680B(6) provides: As provided for in 39-31-405(4), MCA, if a finding of no
31 probable merit is made, the parties have ten (10) days to accept or reject the Notice of
32 Intent to Dismiss. Written notice of acceptance or rejection is to be sent to the attention
33 of the Investigator at PO Box 201503, Helena MT 59620-1503. The Dismissal
34 becomes the final order of the board unless either party requests a review of the
35 decision to dismiss the complaint.
36

37 * * * * *

38 **CERTIFICATE OF MAILING**

39 I Windy Knutson do hereby certify that a true and correct copy of this document was
40 mailed to the following on the tenth day of July 2013:
41

42 James Swofford
43 32546 Hookset Lane
44 Bonner, Mt 59823- 9530
45

46 Richard A Larson, Esq.
47 P.O. Box 1152
48 Helena, Mt 59624-1152
49

50 Cc: John Ferguson, Esq