

1 Department of Labor and Industry
2 Board of Personnel Appeals
3 PO Box 201503
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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 11-2015

12
13 RUBY FARABAUGH, SANDRA)
14 BRISTOW, MIKE SCHMIDT, REBEKAH)
15 TITECA, KYLE HERRIN AND STEVEN)
16 MULLENS, LEVI JAKOVAC,)
17 Complainants,)
18 -vs-)
19)
20 FEDERATION OF MONTANA STATE)
21 PRISON EMPLOYEES, LOCAL 4700,)
22 MEA-MFT,)
23 Defendant.)
24

INVESTIGATIVE REPORT
AND
NOTICE OF INTENT TO DISMISS

25 **I. Introduction**

26
27 On December 22, 2014, Ruby Farabaugh filed a complaint against “MEA-MFT Local
28 4700”. The captioning in this matter is hereby changed to reflect the full name of the
29 exclusive bargaining representative, namely the Federation of Montana State Prison
30 Employees, Local 4700, MEA-MFT, hereinafter referred to as Local 4700 or Union.
31

32
33 Ruby Farabaugh is a corrections officer at the Montana State Prison (MSP) in Deer
34 Lodge. The basis of her complaint is that the Union bargained in bad faith. Ms.
35 Farabaugh specifically alleged a violation of 39-31-305, MCA. Additional complaints
36 were filed by correctional officers Bristow, Schmidt, Titeca, Herrin, Mullens and
37 Jakovac. The complaints against Local 4700 are similar in nature and have been
38 served on the defendant. Since the complaints are substantially the same, they have
39 been consolidated in one charge. Local 4700 is represented in this matter by Karl
40 Englund. Mr. Englund has filed an answer on behalf of the Union denying that an unfair
41 labor practice was committed.
42

43
44 John Andrew was assigned to investigate the complaint and has reviewed the
45 submissions of the parties and has communicated with the parties in the course of
46 investigating the charge.
47

48 **II. Findings and Discussion**

49
50 The gist of these complaints is that step increases, allegedly promised to be in addition

1 to 5% wage increases, were not received by all bargaining unit members in the second
2 year of the bargaining agreement with anniversary date of hire, as argued by the
3 complainants, improperly determining whether or not steps would be received in
4 addition to the 5%. Additionally, some of the complaints allege that terms of the
5 tentative agreement voted on by unit members were changed after ratification. The
6 charges also allege that officers of Local 4700, as well as MEA-MFT staff,
7 misrepresented terms of the tentative agreement to bargaining unit members for the
8 purpose of obtaining a favorable ratification vote.
9

10 In the body of this report the investigator will attempt to identify the issues brought
11 forward by the complainants in the course of talking with all but one of them, but before
12 doing so some background information about this unit is in order. Correctional officers
13 at the Montana State Prison have been represented for collective bargaining purposes
14 by several labor organizations, most recently Local 4700, MEA-MFT, over a period of
15 several decades. There is a long and stable, albeit at times contentious, bargaining
16 relationship that has existed between management and labor over this extensive time
17 period. The unit currently consists of approximately 480 employees, with all positions
18 seldom filled at any given point in time. The unit is described in the recognition clause
19 of the current bargaining agreement as:
20

21 “. . . all employees of the Montana State Prison and Montana Correctional
22 Enterprises classified as correctional officers, correctional technicians,
23 maintenance workers, mental health technicians, psychology specialists, food
24 service workers, registered nurses, licensed practical nurses, infirmary aides,
25 and all other employees who are not supervisory . . .”
26

27 This is a large unit with members in a wide range of occupations. As would be the case
28 with any similarly diverse unit, the interests of bargaining unit members are not
29 necessarily similar in nature. In addition to the size and composition of the unit, the
30 operation of the MSP is 24/7 with many of the unit members commuting to Deer Lodge
31 from residences in Butte, Anaconda, Helena, Missoula and other outlying areas.
32

33 Because of issues related to an inability to fill vacant positions, mandatory overtime has
34 been the norm at MSP. Low wages and turnover have been, and continue to be, an
35 ongoing issue. Actions have been taken to address wages at MSP in general, and in
36 chronically troubled areas in particular. Individual and group reclassification has
37 occurred at MSP as part of this process. Although it is accurate to say pay has
38 improved overall at MSP, it also seems accurate to say that there is a general tenor in
39 the workforce of a lack of fairness in the apportionment of the limited funds available to
40 the MSP. This sense of fairness is aggravated by a complex and at times difficult to
41 understand compensation structure coupled with the reality of how much funding is
42 appropriated by the legislature to fund the MSP.
43

44 All of the above, in the view of the investigator, make it a difficult task not only to
45 negotiate collective bargaining agreements but also to convey the terms of the same to
46 the membership in a consistent manner, free from error or misinterpretation - deliberate
47 or otherwise – by both union and management. Contract administration for both the
48 Union and MSP can be difficult.
49

50 Mindful of the discussion above, and focusing on the individual complaints, all are rather

1 vague in nature. In part, they all allege “bad faith bargaining.” Allegations of
2 misrepresentation of contract terms by Local 4700 officers and officials as well as by
3 MEA-MFT staff also form the basis of the complaints. All things considered, the
4 substance of the complaints as determined by the investigator, and as addressed by
5 counsel for the defendant, is best defined as an assertion that Local 4700 breached
6 its obligation to fairly represent bargaining unit members.
7

8 Although categorized as a failure to bargain in good faith there are no allegations of a
9 failure to bargain in good faith between Local 4700 and the State of Montana. In fact,
10 the terms of the collective bargaining agreement were negotiated in good faith between
11 the State and Local 4700. As relates to the compensation issue at the heart of this
12 complaint, the terms of agreement have been implemented exactly as agreed to at the
13 table. From that point forward the complaints take two forms. One centers on a
14 memorandum of understanding (MOU) between Local 4700 and the MSP dated
15 February 4, 2009. The second focuses on representations allegedly made by Union
16 officials, the result of which, according to the complainants, resulted in a tentative
17 agreement being ratified. The contention seems to be that ratification would not have
18 occurred had voters been properly advised of the content of the negotiated agreement.
19 Ancillary to this is the allegation that what became the final contract, in reality, was not
20 what members voted on.
21

22 Addressing the assertion that the final contract contained provisions other than those
23 presented to the bargaining unit, and voted thereon, there simply is no evidence this is
24 the case. The agreement between the MSP and Local 4700 was implemented as
25 agreed upon, and as represented to the bargaining unit. The investigator can find no
26 basis for this portion of the complaint.
27

28 The assertion concerning the MOU is that this document is the basis for a “promise”
29 made that step movement would be in addition to base pay and that in the course of
30 negotiating the contract for the 2015 biennium this promise was breached. In addition,
31 several complainants assert that management representatives at the time of hire, and
32 later as well, reinforced the notion that step movement, in addition to base movement,
33 would be paid each year for a five year period. Representations allegedly made to the
34 contrary, the MOU is exactly what it purports to be – an agreement covering the
35 planning process for the 2013 biennium. This document, incorporated as part of the
36 executive planning process, simply states that the Union and the MSP would commit to
37 requesting funding for stipend payment in the 2013 biennium. Put another way, the
38 MSP would *not* agree to pay the same without funding from the legislature. Both sides
39 followed through on this commitment and as recognized by MSP and the Union, the
40 funding for the same was not present in the 2015 biennium, thus resulting in pay being
41 handled in the fashion it was. What funding was provided was spent and the MOU is
42 not binding on the 2015 biennium in terms of committing to what is requested by the
43 complainants. It is insightful in another regard though, since, as in 2013, the MSP took
44 the same position as it did in 2015, namely that stipends/steps would not be paid,
45 absent them being funded by the legislature.
46

47 Moving to the vote on the agreement for the 2015 biennium, Local 4700 asserts that
48 whatever representations the complainants allege to have been made, any such
49 statements had to have been made on or about the time voting concluded. The record
50 shows that voting concluded on May 19. Local 4700 therefore argues that more than

1 six months have passed and therefore any complaint relating to these alleged
2 representations is time barred under 39-31-404, MCA. Although there is merit to this
3 defense, the actual implementation of the new pay rates did not occur until well within
4 the six month time period prior to the filing of the complaints. To that extent the
5 investigator will give the benefit of doubt to the claimants and view this as a continuum
6 of events with the complaints thus being timely. That said, in interviewing the
7 complainants, many relied on representations allegedly made by management, in
8 conjunction with the MOU, as the major basis for their complaints. As previously
9 determined, the MOU has no bearing on the pay rates for the 2015 biennium other than
10 it made it clear the MSP would not pay for things not funded by the legislature.
11 Similarly, any representations management may or may not have made have no
12 bearing on the issue before the investigator. To that extent there is no merit to the
13 complaint.
14

15 As to the representations that may or may have not been made by union officials
16 concerning the vote on the tentative agreement, the documents provided to the body for
17 ratification speak for themselves in terms of content. It's particularly interesting to note
18 that one complainant has said that after reading the tentative agreement language and
19 after deciding to send out ballots, the complainant recognized what it said – that, steps
20 were not an automatic addition above and beyond the 5%. This was confirmed to the
21 complainant by other more experienced members, but according to the complainant,
22 then countered by union officials. Nonetheless, advice received by the complainant was
23 to make others aware of the content of the agreement. Regardless of what union
24 officials may or may not have said, the tentative agreement reflects that given what
25 funds were appropriated Local 4700 and MSP agreed in a method that allocated the
26 available resources in a manner that benefited the majority of workers in the bargaining
27 unit. As a result of this, some members, because of their hire date, and coupled with
28 their market based pay plan, did not realize steps in addition to the 5%. That is what
29 sometimes happens in the course of the give and take of collective bargaining. Some
30 may benefit, or be perceived to have benefited more than others as was the case at
31 MSP, but nothing presented to the investigator rises to the level to say that an unfair
32 labor practice was committed by Local 4700 officials or representatives of MEA-MFT as
33 a result of this outcome in bargaining.
34

35 The above is not to say that officials should not be held accountable for things that
36 might have been said. However, even if told that grievances would be filed over the pay
37 issue, as some complainants have alleged, it is hard to see any merit to such a
38 grievance having merit given that what was agreed to at the table has been carried out.
39 Perhaps, in hindsight, this was recognized by officials who may have made such a
40 statement. Regardless, a change in thinking as to whether a grievance will or will not
41 be filed does not constitute an unfair labor practice given what the investigator has
42 reviewed in this complaint. Beyond this though, had Union officials told members that
43 they would grieve the pay issue and then did not, there are democratic methods internal
44 to any union to address what could be deemed unacceptable conduct by elected
45 officers. However, in the instant matter, any such conduct, if it occurred, does not rise
46 to the level where the Board of Personnel Appeals should intervene.
47

48 In terms of any representations that may have been made by any MEA-MFT personnel,
49 the investigator simply is not in a position to determine what may or may not have been
50 Said, or the context in which it may or may not have been said. What is clear is that

1 had members been told that steps would be in addition to percentage adjustments, in
2 fact, that was the case for everyone in the first year. It was also the case for some in
3 the second year as well, but in further fact it was not the case for all in the second year
4 as a result of what was negotiated and what the market based pay plan allowed for. So,
5 again assuming the statement alleged was actually made, there is some truth to it, and
6 some falsehood to it. Whether any such falsehood was deliberate, unintentional, or
7 merely driven by the context in which it was made, is largely immaterial as ultimately it
8 is highly unlikely the vote – 216 to 84 - would have been any different in outcome.
9 Then, even if the vote were not for ratification, and given the available funding and the
10 position of MSP, it is equally unlikely steps ever would have been paid to the entire unit.
11

12 **III. Recommended Order**

13
14 The role of the investigator is to determine whether or not probable merit exists to
15 warrant a hearing on an unfair labor practice charge. All things considered, the
16 investigator does not find substantial evidence to support the complaint and therefore
17 recommends that unfair labor practice charge 11-2015 be dismissed.
18

19
20
21 DATED this 26th day of February 2015.

22
23 BOARD OF PERSONNEL APPEALS

24
25
26 By: _____
27 John Andrew
28 Investigator

29 NOTICE

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

I, _____, do hereby certify that a true and correct copy of this document was mailed to the following on the _____ day of 2015 postage paid and addressed as follows:

RUBY FARABAUGH
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DEER LODGE MT 59722

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STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 11-2015

RUBY FARABAUGH

Petitioner,

- vs -

FEDERATION OF MONTANA STATE
PRISON EMPLOYEES, LOCAL 4700,
MEA-MFT

Respondent.

FINAL ORDER

BACKGROUND AND PROCEDURAL HISTORY

On December 22, 2014, Ruby Farabaugh filed an unfair labor practice charge against MEA-MFT, Local 4700. Farabaugh alleged that union representatives failed to bargain in good faith by misleading members as to the terms of a negotiated contract in order to obtain the necessary votes to ratify the contract. Specifically, Farabaugh alleged: 1) union representatives orally informed Farabaugh that she would receive a step raise when, in fact, she did not; 2) union officials were unable to provide minutes from the meeting in which Farabaugh was misinformed about the step raise; and, 3) changes were made to the terms of the contract after it was ratified by members.

MEA-MFT, Local 4700 responded to the charge denying any violation of the law. Board agent John Andrew conducted an investigation. He recast the claim as alleging a violation of the union's duty of fair representation, found no probable merit to the claim and issued notice of intent to dismiss.

Farabaugh filed a timely appeal with the Board of Personnel Appeals (Board) pursuant to § 39-31-405(2), MCA. The parties briefed the issues and presented oral argument before the Board on May 21, 2015. Farabaugh appeared pro se and attorney Karl Englund appeared on behalf of MEA-MFT, Local 4700.

STANDARD OF REVIEW

When reviewing a board agent's notice of intent to dismiss, the Board is bound by § 24.26.680B(4), ARM:

In considering a request to review a notice of intent to dismiss, the board will consider the record as prepared by the board's agent in reaching his or her decision of no probable merit, any report detailing the investigation and analysis of the board's agent, and any argument set forth by interested parties. At the discretion of the board, the board will allow interested parties to present oral argument. Following consideration, the board will determine whether the investigator erred in concluding that there was not substantial evidence to support a determination of probable merit or the investigator's determination was based on an error of law.

DISCUSSION

Upon a thorough review of the record, the board agent's investigative report and arguments set forth by the parties, the Board finds in favor of MEA-MFT, Local 4700.

Farabaugh has failed to show the board agent erred in concluding that there was not substantial evidence to support a determination of probable merit or that the board agent's determination was based on an error of law. The board agent properly treated the claim as one involving the union's duty of fair representation, rather than a failure to bargain in good faith. The failure to bargain in good faith is a claim that can be lodged by a union against an employer, or vice versa. Nevertheless, the board agent properly determined Farabaugh's claim to be without merit.

ORDER

Pursuant to § 39-31-405, MCA and § 24.26.680B(4), ARM the Board upholds the board agent's decision to dismiss the complaint. The complaint is hereby DISMISSED.

DATED this 21st day of May 2015.

BOARD OF PERSONNEL APPEALS

By: 
Anne L. MacIntyre, Presiding Officer
Moore, Reardon, Nyman and Johnson concurred.

NOTICE: You may be entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for judicial review with the district court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

CERTIFICATE OF MAILING

I, Quidy Knutson, do hereby certify that a true and correct copy of this document was mailed to the following on the 29th day of May 2015:

Ruby Farabaugh
219 Kohrs Street
Deer Lodge, MT 59722

Karl Englund
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