Department of Labor and Industry
Board of Personnel Appeals
PO Box 201503
Helena, MT 59620-1503
(406) 444-2718

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 17-2010

RODNEY E. WILLIAMS Complainant, -vs- MONTANA FEDERATION OF STATE PRISON EMPLOYEES LOCAL 4700, MEA-MFT, AFL-CIO Defendant,	))))))))	INVESTIGATIVE REPORT AND FINDING OF PROBABLE MERIT

I. Introduction

On December 23, 2009, Rodney D. Williams, a Correctional Officer (CO) at the Montana State Prison (MSP) filed an unfair labor practice charge with the Board of Personnel Appeals against the Montana Federation of State Prison Employees Local 4700, MEA-MFT, AFL-CIO, hereinafter MFSPE or Local 4700, alleging that Local 4700 failed to properly process a grievance, a breach of the duty of fair representation and a violation of 39-31-402 MCA. CO Williams is not represented by counsel.

Larry Nielson, MEA-MFT, Field Representative, filed a response to the charge on behalf of Local 4700. The response denied any violation of Montana law by Local 4700.

John Andrew was assigned by the Board to investigate the charge and has communicated with the parties in the course of the investigation.

II. Discussion

This matter finds its roots in a labor management meeting of April 28, 2008, wherein an agreement was made between MSP and Local 4700 regarding procedure and protocol for firearms qualification. The agreement was captured in a memorandum of understanding dated May 27, 2008. Local 4700 contends that this memorandum was distributed to bargaining unit members and, additionally, a copy of the agreement was in the book used by officers to sign up for firearms requalification. The portion of the agreement relevant to this charge provides:

> Any officer who fails to attend the assigned mandatory training without making previous arrangements with the Shift Commander will receive a written warning consistent with the 'no call-no show' past practice, and will be rescheduled.

CO Williams denies ever being advised of the change and he further denies seeing the letter in the requalification book.

CO Williams was scheduled for requalification to take place on May 5, 2009. He was unable to attend requalification on that date because of weather conditions. According to CO Williams, he did not notify his shift commander of his inability to attend because he was not aware of the new agreement reached between MSP and Local 4700. The failure of CO Williams to notify the shift commander resulted in a written letter of warning.

Upon receiving the warning letter CO Williams contends that he discussed the matter with his immediate supervisor as per the grievance procedure in the collective bargaining agreement. Exactly when this oral conversation occurred is not clear, but there is no reason to doubt the conversation occurred. From that point on, and although he did not use the exact grievance form utilized by Local 4700, it is clear that CO Williams did advance his grievance beyond the oral stage. Specifically, a Step 2 document supplied by CO Williams dated May 25, 2009, clearly lays out the nature of the grievance and all the elements required in the grievance form utilized by Local 4700. Even if he did not meet the substance of the form, and, in actuality he did, CO Williams certainly met the spirit of the grievance form. This Step 2 paperwork purports to have been copied to Tom Burgess, MEA-MFT Field Representative; CO Bruce Straughn, Local 4700 President; CO Sean Curran, third shift shop steward; and, CO Henry Villa, Local 4700 Steward Committee Chair.

It is apparent that an adverse decision was received at Step 2 as the next document offered by CO Williams purports to be a June 23, 2009, Step 3 letter advancing the grievance to Mike Ferriter, Department of Corrections Director. This Step 3 grievance letter is copied to Mr. Burgess as well as CO Straughn and CO Villa. According to CO Williams an adverse decision to Step 3 was received on July 6, 2009. CO Williams contends that he advised the Steward Council, as well as the Executive Board of Local 4700 that the Step 3 response was unacceptable and he desired to proceed to Step 4.

The contention of CO Williams is that it was not until November 30, 2009, that he heard from Steward Council Chair Villa that the E-Board and Steward Council had determined to not advance the grievance to arbitration.

On December 8, 2009, CO Williams wrote to Cynthia Davenport, MSP Human Resource Director, requesting an extension on the timeline to proceed to Step 4. The request was denied by Warden Mahoney by letter dated December 14, 2009. Warden Mahoney denied the request citing a failure to request that the grievance move to Step 4, something that according to the collective bargaining agreement was to have been

done within 15 days of the Step 3 response of the Director of the Department of Corrections.

As a result of the above CO Williams contends that Local 4700 failed to process his grievance in a timely manner resulting in a warning letter remaining in his file and clouding his record. He further contends the letter should never have been in his file; should not still be in his file; and its presence has been adverse to promotions and has resulted in wage loss. CO Williams contends that in failing to process the grievance in a timely manner Local 4700 was arbitrary and acted in bad faith by not requesting a time extension to assess the grievance.

There is a great deal of latitude afforded a labor organization in determining whether or not to process grievances up to and including final and binding arbitration and there is a considerable burden on a grievant to show that the obligation of fair representation has been breached. There is abundant case law in this regard and will not be cited. In this case the core issue is whether or not Local 4700 essentially dropped the ball to the detriment of CO Williams. Hand in hand with this is the question of whether, if the ball were dropped, what is the remedy for CO Williams. To be certain, mental anguish, a remedy requested by CO Williams has never been requested of the Board of Personnel Appeals and certainly is something outside of available remedies to the Board, but if there was a wage loss, and promotion opportunities missed causing that wage loss, that is in the realm of a remedy. Merely saying the disciplinary letter in question will disappear in May of 2010, as offered by Local 4700, is not sufficient. There is substantial evidence, albeit conflicting, to bring to question whether or not Local 4700 properly processed the grievance of CO Williams. An evidentiary hearing is in order.

III. Recommended Order

The role of the investigator is to determine whether there is probable merit to the alleged unfair labor practice charge. There is substantial evidence to support the charge of the Complainant. Accordingly, pursuant to Section 39-31-405, MCA, probable merit is found, and the Board will be issuing a notice of hearing.

DATED this 27th day of January 2010.

BOARD OF PERSONNEL APPEALS

By: _____
John Andrew
Investigator

NOTICE

ARM 24.26.680B (6) provides: As provided for in 39-31-405 (4), MCA, if a finding of probable merit is made, the person or entity against whom the charge is filed shall file an answer to the complaint. The answer shall be filed within ten (10) days with the Investigator at PO Box 201503, Helena MT 59620-1503

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CERTIFICATE OF MALING

I, Wendy Knutson, do hereby certify that a true and correct copy of this document was mailed to the following on the 27th day of January 2010, postage paid and addressed as follows:

RODNEY DALE WILLIAMS
701 4TH STREET
DEER LODGE MT 59722

LARRY NIELSON
MEA MFT
1232 EAST 6TH AVENUE
HELENA MT 59601

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 17-2010:

RODNEY D. WILLIAMS,	)	Case No. 1059-2010
	)	
Complainant,	)	
	)	
vs.	)	**ORDER**
	)	**RECOMMENDING DISMISSAL**
MONTANA FEDERATION OF STATE PRISON EMPLOYEES LOCAL 4700, MEA-MFT, AFL-CIO,	)	
	)	
Defendant.	)	

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On December 23, 2009, Rodney D. Williams filed an unfair labor practice charge against the Montana Federation of State Prison Employees Local 4700, MEA-MFT, AFL-CIO with the Board of Personnel Appeals. In his complaint he alleged that the union failed to properly process his grievance with the prison, a breach of the union's duty of fair representation in violation of Mont Code Ann. § 39-31-402.

The board's investigator issued his investigative report and finding of probable merit on January 27, 2010. The matter was transferred to the Hearings Bureau on that same date. On January 28, 2010, the Hearings Bureau issued a Notice of Hearing and Telephone Conference to the parties. A scheduling conference was held on February 11, 2010 where the parties agreed to a May 11, 2010 hearing date. The parties also agreed to hold a pre-hearing conference on April 30, 2010.

At the pre-hearing conference, Williams asked whether a non-attorney could represent him at the hearing. The Hearing Officer informed him that the non-attorney could assist him, he would not be allowed to examine witnesses, argue, assert objections, or otherwise act as an attorney in this matter as doing so would be the practice of law that neither the Hearing Officer nor Mr. Larson could be involved with and be in compliance with the Montana Rules of Professional Conduct Rule 5.5(b).

At the pre-hearing conference, Williams was also advised that it in order for him to prevail in this matter and for him to be awarded the damages he claimed, it would be his burden to prove that the union committed an unfair labor practice, that he would have prevailed in his level 4 grievance, that he would have been promoted to sergeant had the union not committed the unfair labor practice, and that he suffered medical and emotional injuries as a result of the union's failure to timely process his grievance.

The hearing in this matter convened on May 11, 2010 at the state prison in Deer Lodge. The complainant represented himself without the aid of his assistant who was unavailable. The union was represented by Rick Larson, attorney at law. The parties stipulated to the admission of Complainant's Exhibits 3, 4, 7 & 9 and Defendant's Exhibits A-E. Upon Defendant's motion, the administrative record comprised of the complaint, the defendant's answer, and the investigative report were admitted into the hearing record. Prior to the beginning of testimony in this matter, the complainant was reminded of his evidentiary burdens as described above. Complainant's son and fellow prison guard Ronnie Williams testified under oath. Complainant did not testify or offer any other witnesses in support of his complaint.

At the conclusion of Williams' case, counsel for the union moved to dismiss the complaint based on a failure of Williams to meet his burden of proof. After some discussion and a review of the evidence offered by Williams, the Hearing Officer found that Williams did not prove or offer any proof that the union committed an unfair labor practice or that Williams was damaged in any way by the union. Accordingly, the Hearing Officer granted the motion and the hearing was concluded.

RECOMMENDED ORDER

Based on the foregoing, the Hearing Officer recommends that Unfair Labor Practice No. 17-2010 be DISMISSED.

DATED this 13th day of May, 2010.

BOARD OF PERSONNEL APPEALS

By:

DAVID A. SCRIMM
Hearing Officer

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

Rodney D. Williams
701 4th Street
Deer Lodge, MT 59722

Richard Larson
Attorney at Law
P.O. Box 1152
Helena, MT 59624

DATED this 13th day of May, 2010.

Sandy Duncan