

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE

CARLTON NELSON

Claimant,

and

ANACONDA TEACHERS UNION LOCAL #502
MONTANA FEDERATION OF PUBLIC EMPLOYEES
(MFPE),

Respondent.

Case No.: 2021001296

INVESTIGATIVE REPORT

AND

NOTICE OF INTENT TO DISMISS

I. Introduction

On March 3, 2021, Carlton Nelson filed an unfair labor practice complaint, with the Board of Personnel Appeals against the Anaconda Teachers Union Local #502, Affiliated with MFPE. The claim was filed pursuant to Montana Code Annotated, (MCA) Title 39 Chapter 31 Part 402. The charge alleges the Anaconda teachers Union Local #502, failed to bargain collectively in good faith. In his complaint,

Mr. Nelson also indicated he initiated complaints with the National Labor Relations Board. Pursuant to 39-31-405(1) of the MCA, *“Whenever a complaint is filed alleging that a person has engaged or is engaging in any such unfair labor practice the board shall issue and cause to be served upon the person a copy of the complaint and provide the person with the opportunity to respond to all charges. After receipt of response from the charged party, an agent designated by the board for such purposes shall investigate the alleged unfair labor practice”*. As such, the Montana Board of Personnel Appeals retains jurisdiction for Montana public employees and the unfair labor practice as presented.

Jeff Cowee, MFPE Field Consultant for South West Field District #6, filed a timely answer on behalf of the Anaconda Teachers Union Local #502, denying an unfair labor practice was committed.

Dave Luckey was assigned by the Board to investigate the charge and has reviewed the information submitted by the parties and communicated with them as necessary.

II. Findings and Discussion

In his Supplemental information (Exhibit 1), Carlton Nelson (Mr. Nelson) makes clear, he is a member of the Anaconda Teachers Union Local #502 (ATU) and has elected not to pay dues to the union. He has had serious health issues over the last six months that led to chemotherapy and possibly bone marrow transplant. He further explains he has worked closely with the Anaconda School District to create a safe, unrestrictive work environment that allows him to continue to perform his job duties to the best of his abilities.

Mr. Nelson disclosed he is immuno-compromised and, under guidance from his doctor, the Anaconda School District (District) developed a medical 504 plan that outlined his work provisions for the remainder of the school year.¹

Statements indicate Mr. Nelson completed 2 out of 4 of his chemotherapy treatments and then contracted COVID. With the 504 plan, extended absences, and the possibility of additional absences, the classes Mr. Nelson taught were dissolved and students assigned to different teachers or enrolled in online classes to continue science studies.

Ed Dulaney Union Grievance Chair, Brian Tesson Union President, and Ms. Katherine Mattern Union Vice President, met with the Superintendent on January 29, 2021.

Mr. Nelson alleges this meeting was specifically called to discuss the decision made by the district to cancel the physics class he instructed before becoming ill. Mr. Nelson states: "While I'm not privy to the details of this meeting, I did inquire with Supt. Barnes and understood while the union officers did not directly state such, their insinuation was that I be reinstated as the teacher of record and have a long term substitute available under the pretense of what is 'best for the students'".

Mr. Nelson suggests Mr. Dulaney and Mrs. Mattern never approached him about the decision to cancel the classes or ask about his health condition or his 504 plan. As such, he contends making requests from the District is in direct violation of his 504 provisions. He further contends Mr. Dulaney wrote a strongly worded email expressing his dissatisfaction with the current situation.

In an attempt to further explain his position, Mr. Nelson suggests the District has made 504 accommodations in several cases in the past and the Union has never expressed any concern for students in these situations nor has it ever questioned the provisions of an employee unless it was working to establish benefits. Mr. Nelson argues it's the Union responsibility to work for the benefit of its members, including non-dues paying members, to assist in establishing working conditions, not to work against his 504 plan for the Union's gain. As such, he suggests he is being singled out by the Union and therefore they have discriminated against him.

Mr. Nelson identifies that discrimination against persons with disabilities is prohibited by Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1999. The Montana Human Rights Act is listed with reference to Montana Codes Annotated 49-2-303 (b) *"Discrimination in Employment: It is unlawful for a labor organization or joint labor management committee controlling apprenticeships to exclude or expel any person from its membership or from an apprenticeship or training program or to discriminate in anyway against a member or an applicant to an applicant to a labor organization or an employer or employee because of race, creed, religion, color or national origin or because of age, physical or mental disability, marital status or sex when the reasonable demands of the program do not require an age physical or mental disability, marital status ,or sex discrimination".*

Mr. Nelson states MFPE and ATU is legally obligated to represent all members in the work place and because the Union leadership has taken up these charges against him, they have failed to bargain collectively in good faith as provided in 39-31-402 of the MCA,

Unfair labor practice of Organizations (2) *"Prohibits labor organization from refusing to bargain collectively in good faith with a public employer if it has been designated as the exclusive representative of the employee".*

¹ Section 504 of the Rehabilitation Act of 1973 was developed to protect individuals with disabilities or long-term illnesses from discrimination in programs that receive federal funding. 504 plans are the vehicles through which individuals receive accommodations for disabilities or long-term illnesses.

In Jeff Cowee's March 15, 2021 response to the ULP, he acknowledges the January 29, 2021 meeting Brian Tesson, President, requested with Justin Barnes, Superintendent. However, he argues the meeting was requested to discuss a COVID Memorandum of Agreement (MOU) that was signed in August of 2020. Mr. Cowee contends the majority of the meeting was spent discussing the COVID MOU because it included matters covered by the CARES Act which had expired. After some discussion, the parties agreed to carry on with the same terms.

Mr. Cowee agrees the District brought up Mr. Nelson's 504 plan, but discussion was quickly halted when Mr. Tesson told the district the Union did not want to hear of his plan because of confidentiality issues. According to statements provided, Mr. Dulaney and Mrs. Mattern talked with Bob Torkalson, a retired former science teacher about the possibility of substituting full time. Additionally, Mr. Tesson asked about Mr. Nelson as they all knew he was sick and wanted to make sure he had access to the sick leave bank provided for in the collective bargaining agreement. Mr. Cowee said the conversation about the sick leave bank and substitute teacher lasted about ten minutes.

On January 31, 2021, Mr. Tesson sent an email, summarizing the meeting to the people who were present during the January 29th meeting. Mr. Laughlin allegedly responded, indicating the meeting was very productive. (Exhibit 2, page 1). In his response, Mr. Cowee indicates several emails were exchanged between Mr. Tesson, Mr. Laughlin, and Mr. Dulaney regarding the physics classes and if assigning a substitute was a solution to the issue. Mr. Cowee further indicates Mr. Nelson felt Mr. Dulaney's email was derogatory, but argues the e-mail has no mention of Mr. Nelson but instead advocates for the gifted and talented students. (Exhibit 2, page 2)

Pursuant to Montana Code Annotated, (MCA) Title 39 Chapter 31 Part 402, this investigator and the Board of Personnel Appeals is statutorily limited to address the specific details of the Unfair Labor Practice charge.

On April 7, 2021, this investigator interviewed Mr. Nelson. He explained other individuals had been put on 504-work plans and he felt the Union did not object in those cases. As such, He felt that he had been discriminated against by the Anaconda Teachers Union. When asked if he had filed discrimination charges with the Human Rights Bureau, he explained he had not filed to date. When asked if he had contacted The National Labor Relations Board, he also answered he had not. Although it is unclear if Mr. Nelson has filed discrimination charges regarding his 504- work plan, the Rehabilitation act of 1973, or Title II of the Americans with Disabilities Act OF 1990, Mr. Nelson acknowledged at the time of the interview, the meeting of January 29, 2021, had no ill effects on his 504-work plan.

After review of information provided by both parties, signed witness testimony as well as information gathered during interviews, it is found that although Mr. Nelson believed the meeting was called to discuss the decision of the district to cancel the physics classes he previously taught, the e-mail that was sent to Mr. Barnes from Mr. Tesson clearly establishes the meeting was called to order to discuss the terms of the Covid MOU and changes in the CARES Act.(Exhibit 4) It is also found, although Mr. Nelson believed it was the Union's intent to question the District's decision to cancel physics classes and potentially modify the conditions of his 504-work plan, there is no witness testimony or documentary evidence to support his position. Witness statements and emails provided by the union more clearly establish the Union provided solutions to the district outside of any knowledge of the 504-work plan. Documentation provided by the Union further establishes the Union informed the District, Mr. Nelson, as a union member, was eligible to draw from the sick leave bank established by the collective bargaining agreement.² (Exhibit 1) (Exhibit 2 page 1,2), (Exhibit 3, page 1,2)

² By informing Mr. Nelson, as a member he was eligible for the sick leave bank, the Union mitigated potential liability from unfair labor practice charges or discrimination claims.

Through the alleged act of attempting to modify his 504-work plan through the District, Mr. Nelson contends the union has singled him out, bargained against him as a member and failed to represent him equally because he does not pay dues to the union. As such, Mr. Nelson asserts they have failed to bargain collectively in good faith. This investigator finds Mr. Nelson's interpretation of 39-31-402, (2) of the MCA confusing. Simply put, the Union has established, with proof, they met to bargain collectively with the District over a Memorandum of Agreement. There was no refusal, both sides successfully bargained in good faith. Mr. Nelson's interpretation is the Union failed to bargain collectively and fairly on his personal behalf and instead bargained against him. This investigator finds the Union would far more likely have committed an unfair labor practice charge or face confidentiality charges by acknowledging to the District they were completely aware of Mr. Nelson's 504-work plan and consideration for the rest of the bargaining unit members was inconsequential.

Regarding Mr. Nelson's reference to The Montana Human Rights Act and Montana Codes Annotated 49-2-303 (b), When considering the alleged discrimination complaints, § 49-2-512(1), MCA identifies the Montana Human Rights Bureau as the exclusive remedy for discrimination regarding race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, as well as national origin.

Based on information provided by both parties, signed witness testimony as well as information gathered during interviews, it is found that no evidence exists to substantiate the Unfair Labor Practice charges filed against the Anaconda School District.

III. Recommended Order

It is hereby recommended this Unfair Labor Practice charge be dismissed without merit.

Dated this 3rd day of August, 2021

Board of Personnel Appeals

By: Dave Luckey
Dave Luckey

Investigator

NOTICE

Pursuant to 39-31-405 (2), MCA, if a finding of no probable merit is made by an agent of the Board, it may be appealed to the Board of Personnel Appeals. The appeal must be in writing and must be made within 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the Board at the following address:

Board of Personnel Appeals
Attn: Dave Luckey
P.O. 201503
Helena, MT 59620-1503.
FAX: 406-444-4140
Email: dlierdbopa@mt.gov

If an appeal is not filed by the 16th of August the decision to dismiss becomes a final order of the Board.

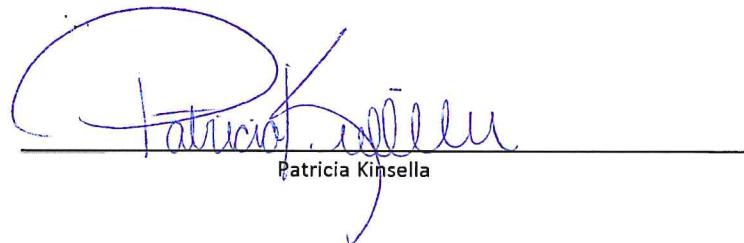
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CERTIFICATE OF SERVICE

The undersigned does certify a true and correct copy of this document was served upon the following on the 3rd day of August, 2021, postage paid and addressed as follows:

CARLTON NELSON
720 W 3RD
ANACONDA MT. 59701

JEFF COWEE
MFPE SOUTH WEST FIELD CONSULTANT
600 NORTH PARK AVE SUITE 200
HELENA MT. 59601



Patricia Kinsella