

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 19-2015:

TEAMSTERS UNION LOCAL NO. 2,)	Case No. 1599-2015
)	
Complainant,)	
vs.)	ORDER RECOMMENDING
)	GRANTING
)	COMPLAINANT'S
ANACONDA-DEER LODGE COUNTY,)	MOTION FOR SUMMARY
)	JUDGMENT
Defendant.)	

* * * * *

I. INTRODUCTION

On February 23, 2015, the Teamsters Union Local #2 (“Union”) filed an Unfair Labor Practice Charge with the Board of Personnel Appeals (“BOPA”) against Anaconda Deer Lodge County ("ADLC"). The charge alleged that ADLC had failed to arbitrate a grievance it filed over the disciplinary action taken against one of its members, Michael McNamara.

ADLC responded to the charge on March 10, 2015 disputing all the bases for the alleged unfair labor practice. On April 17, 2015, BOPA’s investigator issued an Investigative Report and Finding of Probable Merit. Thereafter, the Office of Administrative Hearings issued a Notice of Hearing on behalf of BOPA, appointing the undersigned Hearing Officer, who issued a Scheduling Order after a telephone conference with counsel for the parties, and ADLC filed its Answer to the Charge in compliance with that order.

On July 9, 2015, the Union filed a Motion for Summary Judgment on the grounds that ADLC's failure to arbitrate the McNamara grievance was a violation of the CBA and an unfair labor practice. On July 13, 2015, ADLC filed its own Motion for Summary Judgment arguing in essence that the CBA grievance provision did not require it to arbitrate the McNamara grievance.

II. UNDISPUTED FACTS

1. Anaconda-Deer Lodge County (County) is a public employer as defined by Section 39-31-103 (10) MCA.

2. Erin Foley, is a Business Agent for Union Local No. 2 which is a labor organization as defined by Section 39-31-103 (6) MCA.

3. The Union and Employer entered into a collective bargaining agreement (CBA) with the detention unit of the County covering the period of July 1, 2013 through June 30, 2015.

4. Michael McNamara is employed by the County as a detention officer and is a member of the Union.

5. On or about September 3, 2014, a complaint was filed against Mr. McNamara by a co-employee alleging that Mr. McNamara created a hostile work environment. Mr. McNamara was placed on paid administrative leave pending an investigation.

6. On September 26, 2014, Anaconda-Deer Lodge County suspended William McNamara for three days without pay after it determined he had violated the workplace violence provision of the employer's personnel policy. The three days McNamara was suspended were September 28-30, 2014.

7. The suspension letter specifically refers to Article V: (A) of the CBA, the management rights clause, as a basis for suspending Mr. McNamara. The suspension letter also refers to Article V (b) of the CBA which provides:

b. The retention of these rights does not preclude any employee from filing a grievance.

8. CEO Ternes-Daniels further specifically states in the suspension letter:

“If you disagree with my decision, you are able without penalty, harassment, or retaliation, to file a grievance consistent with language found in Detention Unit’s Collective Bargaining Agreement 2013-2014 [sic] Article XII Grievance Procedure. Enclosed is a copy of the procedure.

9. On September 30, 2014, the Union sent an information request to ADLC officials requesting information relevant to the suspension.

10. On or about October 2, 2014, the Union filed a grievance regarding McNamara's suspension.

11. On October 16, 2014, ADLC sent a letter to the Union asking for clarification about its grievance.

12. On October 22, 2014, the Union responded to the October 16 letter.

13. On October 28, 2014, Chief Executive Ternes-Daniels called the union office to inform them that all relevant documents would be sent out that day or the next.

14. On October 30, 2014, the Union received a two-page letter in the mail with a copy of the collective bargaining agreement and the ADLC personnel manual. On or about that same date the Union filed an unfair labor practice regarding the failure to supply the requested information.

15. On December 30, 2014, the Union received the requested information through BOPA's agent - John Andrew. Subsequently, the investigator for the Board of Personnel Appeals dismissed the ULP. ULP No. 9-2015, Final Order to Dismiss (Jan. 27, 2015).

16. On January 20, 2015, the Union requested to arbitrate the grievance it had filed regarding McNamara's suspension.

17. On January 22, 2015, the Union provided the questions to be arbitrated:

ADLC violated the Collective Bargaining Agreement including but not limited to the following provisions:

1. Article V Management Rights:

The County cannot discipline an employee in violation of state law. That includes statutory law, Constitutional Law, contractual law, and policies of Anaconda Deer Lodge County. The county violated Mr. McNamara's rights under the law, under the constitution and the policies when they suspended him for 3 days without pay. The county

did not have just cause to do so and violated his due process rights as well.

2. Article X. Seniority: ALDC can't infringe upon or terminate an employee's seniority rights without just cause. The county did not have just cause to suspend him for 3 days without pay. Mr. McNamara's seniority rights were violated when he was suspended for 3 days without pay.

3. Article XII: Grievance procedure: The Chief Executive wrote a letter stating for Mr. McNamara to file a grievance consistent with the language found in the Detention Unit's Collective Bargaining Agreement, and has not been given due process since filing the grievance.

The dispute between the parties is over these terms because the ADLC's discipline of Mr. McNamara was in violation of the law and the contract.

18. On January 28, 2015, Erin Foley emailed Don Klepper, ADLC representative asking whether he had received the documentation for arbitration and set a time to pick arbitrators. Klepper responded that he understood the ULP was dropped and that ADLC was concerned that another grievance might be filed by the Union. Foley informed Klepper that there was not an additional grievance filed.

19. On February 2, 2015, Foley emailed Klepper again to inquire about arbitration documentation and to provide her availability for picking an arbitrator.

20. On or about February 3, 2015, Bill Rowe and Foley had a phone conversation with Klepper wherein he stated that ADLC would review the documents and respond.

21. On February 9, 2015, Foley emailed Klepper to inform him she had not heard from ADLC regarding the McNamara grievance.

22. On February 10, 2015, Klepper emailed Foley to inform her that she should be receiving a response from ADLC in the next day or two.

23. On February 17, 2015, Foley and Rowe had a phone conference with Klepper where Klepper indicated that the Union should have received a response by that day.

24. On February 18, 2015, Foley informed Klepper that the Union still had not received a response.

25. Later that day, Foley received the response from ADLC which stated "we have finished our review of the dismissed ULP [regarding the McNamara documents], the CBA and your new grievance and it is our opinion that the grievance is without merit and we are not going to strike arbitrators with the Union. There simply is no attachment point in the contract language you have cited."

26. On February 25, 2015, the Union filed the instant unfair labor practice alleging that ADLC's conduct described in findings 2-27 constituted an unfair labor practice as described in Mont. Code Ann. 39-31-405 (1) and (5).

III. PROPRIETY OF SUMMARY JUDGMENT IN A UNIT CLARIFICATION PROCEEDING

Motions may be made within contested case proceedings before the Board of Personnel Appeals. Admin. R. Mont. 24.16.212. In the event a motion is made, it must state the relief requested and shall be accompanied by affidavits setting forth the grounds upon which the motion is based. Answering affidavits, if any, must be served on all parties. *Id.*

The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials. *Klock v. City of Cascade*, (1997), 284 Mont. 167, 173, 943 P.2d 1262, 1266. Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where "the pleadings . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Peila*, *supra*.

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once a party moving for summary judgment has met the initial burden of establishing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law, the burden shifts to the nonmoving party to establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that the moving party is not entitled to judgment as a matter of law. *Meloy v. Speedy Auto Glass, Inc.*, 2008 MT 122, ¶18 (citing *Phelps v. Frampton*, 2007 MT 263, ¶16, 339 Mont. 330,

¶16, 170 P.3d 474, ¶ P16). If no such countervailing evidence is presented and the motion demonstrates that the movant is entitled to summary judgment, entry of summary judgment in favor of the movant is appropriate. Klock, supra, 284 Mont. at 174-75, 943 P.2d at 1267.

In the instant case, the parties do not dispute the underlying facts, only whether based upon those facts, an unfair labor practice has occurred.

A. The Unfair Labor Practice

The question that must be resolved in determining this unfair labor practice charge is whether grievances that do not involve the interpretation of the collective bargaining agreement are subject to its arbitration clause.

1. Article XII

Article XII of the CBA provides, in most pertinent part:

A. Before filing a written grievance, the employee and/or the union shall discuss the problem with the supervisor and/or the employer within fourteen (14) days of first knowledge that a grievance exists. Any grievance or misunderstanding which cannot be settled between the Employer and the employee must be taken up with the Employer by the Business Representative of the Union, or anyone designated by the Union within thirty (30) days of the alleged infraction.

B. The parties agree that any differences involving the interpretation of this Agreement, which cannot be settled among themselves, may be submitted to arbitration upon request of either party. The written notice to proceed to arbitration must be submitted to the other party within five (5) days after agreement is reached that it cannot be settled between the parties.

C. The party desiring such arbitration shall give to the other party written notice, as specified above, that the matter is to be submitted to arbitration and shall specify the question or questions to be arbitrated. The parties will use the Board of Personnel Appeals, State of Montana, to obtain a list of five (5) names to arbitrate the dispute. The arbitration hearing shall be conducted within forty-five (45) days after the arbitrator is selected, unless the selected arbitrator is unavailable.

The union interprets the CBA's grievance provision as one that culminates in final and binding arbitration. ADLC interprets the same provision to limit arbitration to instances where there is a difference involving the interpretation of the agreement and that processing a grievance does not involve the interpretation of the CBA. Article XII Section (A) provides, in pertinent part:

Any grievance or misunderstanding which cannot be settled between the Employer and the employee must be taken up with the Employer by the Business Representative of the Union . . .

(emphasis added).

This provision clearly contemplates some additional step that will occur after the employer and employee have tried to resolve the grievance between themselves. The only remaining step identified in the CBA is arbitration, which as the ADLC argues appears on its face to be limited to interpretations of the provisions of the CBA.

If "must be taken up" means nothing, ADLC's interpretation may be correct and it need not arbitrate, McNamara's or any other employee's grievance that does not strictly address an interpretation issue.

However, as a result of the filing of the grievance and the related unfair labor practice, an issue regarding the interpretation of the CBA has arisen - does the arbitration provision apply to McNamara's or any other employee's grievances.

Looking at Article XII as a whole leads to the conclusion that it allows arbitration of grievances. If a grievance or misunderstanding that does not involve the interpretation of the CBA, can nonetheless be taken up with the employer by the Union, which can do absolutely nothing to adjust the grievance under ADLC's interpretation of Article XII, that provision is a nullity. The terms of a CBA are to be given an interpretation that gives meaning to all its provisions. *Bonner Sch. Dist. No. 14 v. Bonner Educ. Ass'n*, 2008 MT 9, P39 (Mont. 2008)(We must interpret the CBA in a manner that "give[s] effect to every part if reasonably practicable") See also Mont. Code. Ann. § 28-3-202.

Accordingly, Article XII of the CBA allows all grievances to be arbitrated. That conclusion is supported by the Preamble which states:

The purpose of this Agreement is to promote and improve a means of amicable and equitable adjustment of any and all differences or grievances which may arise between the parties hereto.

ADLC's interpretation of the arbitration clause of the Grievance provision conflicts with the overarching goal of the CBA to adjust any and all differences and grievances. Its interpretation also could result in unnecessary disputes about whether some dispute is about an interpretation or application of the CBA. The Hearing Examiner can see many labor disputes framed at least initially as an interpretation issue in efforts to defeat the limited interpretation ADLC argues for. Moreover, no other provision in the CBA provides a procedure for "amicable and equitable adjustment of any and all differences or grievances."

The Union sought to resolve McNamara's grievance through the arbitration process identified in the CBA, ADLC refused to strike arbitrators. Such a refusal is a failure to bargain in good faith and is an unfair labor practice as defined by Mont. Code Ann 39-31-401(5). See *Savage Pub. Schools v. Savage Edu. Ass'n* (1982), 199 Mont. 39, 647 P.2d 833; *Painters Local 1023 v. M.S.U.*, ULP 1-1975; *International Association of Fire Fighters, Local 521 v. Billings*, ULP 3-1976; *Sutton and Fleming v. Billings City Library*, ULPs 13 & 14-1976.

B. Attorneys' fees

ADLC is correct that the Board of Personnel Appeals has stated it does not award attorney fees because it follows *Thornton v. Commissioner of the Department of Labor and Industry*, 190 Mont. 442, 621 P.2d 1062 (1981). See, e.g., *McCarvel v. Union Local 45* (1983), ULP 24-77; *Billings Firefighters Local No. 521 v. City of Billings*, ULP 27-2004. In *Thornton*, the Montana Supreme Court held attorney fees may not be awarded to the prevailing party in an administrative hearing absent a contractual agreement or specific statutory authority. 190 Mont. at 448, 621 P.2d at 1066.

Here, there is no contractual agreement allowing for an award of attorney fees and the statute cited by the Union does not apply to a ULP, only "civil actions." Mont. Code Ann. § 25-10-711. Even if the statute did apply, it requires a showing that a "suit or defense is frivolous or pursued in bad faith." *Id.* The Union has not met its burden to show ADLC's defense of this ULP is frivolous or pursued in bad faith. Mont. Code Ann. § 25-10-711(b). Accordingly, the Union's request for an award of attorney fees is denied.

IV. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to Mont. Code Ann. § 39-31-405.

2. The Union has demonstrated by a preponderance of the evidence that ADLC's failure to strike arbitrators was an unfair labor practice as alleged in the complaint.

3. It is appropriate to order ADLC to participate in the arbitration of McNamara's grievance.

V. RECOMMENDED ORDER

The hearing officer recommends that:

1. The Union's Motion for Summary Judgment be GRANTED. ADLC's Motion for Summary Judgment be DENIED.

2. The Board order Anaconda Deer Lodge County to strike arbitrators with the Union regarding McNamara's grievance within 30 days of the Board's final order.

DATED this 26th day of August, 2015.

BOARD OF PERSONNEL APPEALS

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Officer