

1 Department of Labor and Industry  
2 Board of Personnel Appeals  
3 PO Box 201503  
4 Helena, MT 59620-1503  
5 (406) 444-0032  
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7

8 STATE OF MONTANA  
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 24-2014

13 WAYNE BENSON, )  
14 Complainant, )  
15 -vs- )  
16 )  
17 FEDERATION OF PUBLIC HEALTH AND )  
18 HUMAN SERVICES LOCAL MEA- )  
19 MFT4573, MEA-MFT, NEA, AFT, AFL-CIO; )  
20 ERIC FEAVER, PRESIDENT MEA-MFT; )  
21 JILL COHENOUR, PRESIDENT )  
22 FEDERATION OF PUBLIC HEALTH AND )  
23 HUMAN SERVICES, MEA-MFT LOCAL )  
24 4573; BRIAN EHLI, MEA-MFT SW1 )  
25 FIELD CONSULTANT, )  
26 )  
27 Defendant/s. )

INVESTIGATIVE REPORT  
AND  
NOTICE OF INTENT TO DISMISS

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29 **I. Introduction**

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31 On June 4, 2014, Wayne Benson filed an unfair labor practice charge with the Board of  
32 Personnel Appeals alleging that the above named defendant/s committed an unfair  
33 labor practice by, as best can be discerned, breaching its obligation to fairly represent  
34 him in dealings with his employer, the State of Montana, Department of Public Health  
35 and Human Services (DPHHS). An answer denying that the above named defendant/s  
36 committed an unfair labor practice was filed by Karl Englund, attorney at law.  
37

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39 John Andrew was assigned to investigate the complaint, has reviewed the submissions  
40 of the parties, and has communicated with the parties in the course of investigating the  
41 charge.  
42

43 **II. Findings and Discussion**

44  
45 An initial issue to be addressed in this case is which individuals/entities are the proper  
46 defendant/s in this matter. Although there are other and apparently related issues, this  
47 case is essentially about the duty of fair representation. Counsel for the Defendant/s  
48 has ably pointed out that in such cases there is ample precedent for the proposition that  
49 it is the union, not individuals or individual union officials, who should be the proper  
50 party in this charge. The investigator concurs and further notes that although Montana

1 law, 39-31-402, MCA, refers to a labor organization or its agents, that does not tie to the  
2 question of fair representation as it is the union that is the exclusive bargaining agent,  
3 with whom the employer negotiates and contracts, not the individual members, officers  
4 and agents of the union. The view of the investigator is that this case is brought against  
5 the Federation of Public Health and Human Services, Local 4573, MEA-MFT, NEA,  
6 AFT, AFL-CIO, (Local 4573), and that other named defendants should be dismissed  
7 from this charge.  
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10 Because of numerous reorganizations and changes over the years it is difficult to  
11 determine when, and how, the current Local 4573 arrived at its current composition.  
12 Parts of it are most likely Board certified, parts are employer recognized, parts are the  
13 result of unit clarification petitions and parts of it are the result of agreements reached  
14 between management and exclusive bargaining representatives over the passing of  
15 time. Regardless of how it reached its current form, however, it is accurate to say that  
16 there is a long and stable bargaining relationship between DPHHS and Local 4573 with  
17 the current contract in force until June 30, 2015.  
18

19  
20 The overall bargaining unit is one of the larger bargaining units in state government and  
21 is very diverse in nature. Reflective of this, the current collective bargaining agreement  
22 includes pay schedules designated A-J representing distinct functional and/or  
23 organizational divisions within DPHHS. Within these pay schedules, bargaining unit  
24 members run the gamut from blue collar to computer application engineer. Within the  
25 rank and file, state pay bands 2-7 are represented in the pay schedules. While many of  
26 the members of the unit are based in Helena, numerous others are dispersed across  
27 the state. In Wayne Benson's case, he works in the Child Support Enforcement  
28 Division.  
29

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31 The current President of Local 4573 is Jill Cohenour. She has held that position for  
32 many years.  
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34  
35 There are several elements to the complaint. A scanned version of the complaint  
36 appears below:

- 37  
38 1) Jill Cohenour, unelected, was not authorized to represent, negotiate, or sign the collective bargaining agreement for Local 4573 on December  
39 11, 2013, and has done so in violation of Article IV, Sec. 1, Constitution and Bylaws Local 4573. In doing aforementioned, Jill Cohenour has  
40 invalidated the current collective bargaining agreement for Local 4573. The collective bargaining agreement is not in accordance with the  
41 provisions of Title 39, Chapter 31 Collective Bargaining for Public Employees. See Montana Code Annotated 39-31-305 and 39-31 -306. Eric  
42 Feaver, MEA-MFT President and Brian Ehli, MEA-MFT SW Field Consultant violated the same.  
43 2) All prior collective bargaining agreements in which Jill Cohenour was unelected, but nonetheless represented, negotiated for, and I or signed  
44 on behalf of Local 4573 since 1996 are not in compliance with the provisions of Title 39, Chapter 31 of Montana Code Annotated The Montana  
45 Collective Bargaining Act. The collective bargaining agreements are invalid and should be treated as a continuing violation in which members  
46 were only recently made aware.  
47 3) By representing, negotiating, and signing agreements on behalf of Local 4573, unelected, Jill Cohenour has violated Montana Code Annotated  
48 39-31-201, 39-31-305, and 39-31-402, with further violations of MEA-MFT, NEA, AFT, ALF-CIO Governance Documents and possible  
49 standards of affiliation.  
50 4) By allowing Jill Cohenour, unelected, to represent, negotiate for, and sign the collective bargaining agreements for Local 4573, MEA-MFT has  
violated Montana Code Annotated 39-31-201, 39-31 -305, and 39-31-402, with further violations of MEA-MFT, NEA, AFT, ALF-CIO  
Governance Documents and possible violations of standards of affiliation.  
5) By allowing Jill Cohenour to represent, negotiate for, and enter collective bargaining agreements on behalf of Local 4573 and by allowing  
MEA-MFT to act outside of the scope of its Constitution, the respondents NEA, AFT, and ALF-CIO fail to establish or maintain standards that  
ensure local union affiliates act with consistency and ensure local members are not subjected to arbitrary collective bargaining in violation of the  
Montana Code Annotated Title 39, Chapter 31 Collective Bargaining for Public Employees.

- 6) Ratification of the present collective bargaining agreement for Local 4573 is invalid. An email titled tentative" agreement was the only information received for review. Members were not provided the entire collective bargaining agreement to review for changes. On December 13, 2013, the collective bargaining agreement was found online through the State website. It is dated December 11, 2013, signed by Jill Cohenour. It includes changes not voted on or submitted to members.
- 7) A memorandum of agreement related to the DPHHS Recruitment and Selection Manual was removed from the collective bargaining agreement of December 11, 2013, without notification to members and without member vote.
- 8) The collective bargaining agreement Local 4573 violates the State, DPHHS pay plans and State policy (Classification Manual) in effect at the time of signature.
- 9) The collective bargaining agreement Local 4573 violates Montana Code Annotated 2-18-301. The Organization has not ensured members' pay has been administered on the basis of 2-18-301(4), and has contributed to or caused internal inequity.
- 10) The Organization has not ensured members' pay is based on the biennial salary survey guaranteed to state employees in Montana Code Annotated 2-1 8-301 (6).
- 11) The Organization has violated its own Constitution and Bylaws Article II Objectives by failing to do more than surface bargain for members' requests for improved wages and by failing or refusing to request budgetary documents from the employer in order to adequately do so.
- 12) The Organization has failed to represent employees without discrimination in violation of Montana Code Annotated 39-31-205.
- 13) The Organization has failed to bargain at the request of members in violation of Montana Code Annotated 39-31-402 by failing to do more than surface bargain for members' pay progression and equity guaranteed under 2-18-301 (4) and 2-18-301(6).
- 14) The Organization has failed to bargain at the request of members in violation of Montana Code Annotated 39-31-402 as it did not advise all members that an email directed to management was required in order to ensure continued negotiation for progressive pay and equity guaranteed under 2-18-301 (4) and 2-1 8-301 (6).
- 15) MEA-MFT Representative for Local 4573, Brian Ehli required a minimum of 500 members during 2013 negotiation to submit emails to management in order to ensure continued negotiation for progressive pay and equity guaranteed under Montana Code Annotated 2-1 8-301 (4) and 2-1 8-301 (6).
- 16) The Organization did not advise all members that ratification of the collective bargaining agreement would include an outdated pay schedule attached to the present collective bargaining agreement Local 4573 in violation of Montana Code Annotated 39-31-405.
- 17) The Collective Bargaining Agreement includes Memorandum of Agreement #2, which includes a deadline of March 31, 2014. The deadline has not been met. The Organization has violated the terms of its own collective bargaining agreement.
- 18) Election of officers in March 2014 was in violation of Article IV, Sec. 7, Constitution and Bylaws Local 4573, in that the envelope for the ballot required signature in order to be counted. Article IV, Sec. 7, Constitution and Bylaws Local 4573 states all elections shall be conducted by secret ballot.
- 19) The Montana Administrative Procedure Act is applicable to the Montana Collective Bargaining Act and all rights to due process are maintained.
- 20) I affirm and restate the above charges and further allege that each and every act above has violated the Montana Collective Bargaining Act.

Before addressing the merits of the complaint an overview of the duty of fair representation seems in order. In doing so, federal precedent will be used since the Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using Federal Court and National Labor Relations Board (NLRB) precedent as guidelines in interpreting the Montana Collective Bargaining for Public Employees Act, State ex rel. Board of Personnel Appeals vs. District Court, 183 Montana 223 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 vs. State ex rel. Board of Personnel Appeals, 185 Montana 272, 635 P.2d 185, 119 LRRM 2682; and AFSCME Local No. 2390 vs. City of Billings, Montana 555 P.2d 507, 93 LRRM 2753.

As set down by the U.S. Supreme Court in Vaca v Sipes 386 U.S. 171, 64 LRRM 2369 (1967) and as subsequently followed by the Board of Personnel Appeals in Ford v University of Montana, 183 Mont. 112, 598 P.2d 604 (1979) the role of the Board in an alleged breach of the duty of fair representation is to determine whether the actions of a union, or lack of action, in some way are a product of bad faith, discrimination or arbitrary in nature. In the case of processing grievances the arbitrary action of a union can be considered as well. However, in the instant matter there are no grievances at issue. Rather, much of the case centers around the whether Local 4573 really was a legal exclusive bargaining representative and whether or not Local 4573 fairly represented Mr. Benson in the negotiation process. Regarding the bargaining process, since this is a question centering on the judgment exercised by Local 4573 in the course of bargaining arbitrariness is not one of the standards by which the duty to fairly represent is judged. Rather, Mr. Benson must prove that the actions of Local 4573

1 constituted bad faith or were discriminatory in some manner. Further, it is noted that in  
2 carrying out its obligation to fairly represent bargaining unit members that duty does not  
3 limit the legitimate right of the union to exercise broad discretion in performing its duties,  
4 be they negotiation or contract administration, because "union discretion is essential to  
5 the proper functioning of the collective bargaining system." See, for instance,  
6 International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979).  
7 The above standards in mind, and as was done in the Answer filed to this complaint, the  
8 investigator will address the allegations of Mr. Benson in the order filed.  
9

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11 A major component of the complaint, numbers 1-5, center around the fact that Local  
12 4573 did not conduct a regular election of officers and union officials as required in the  
13 Local's Constitution and Bylaws. In fact, Ms. Cohenour has served as President of the  
14 Local since sometime in the early 2000's without elections, other than the first one that  
15 placed her in office. It was not until the spring of 2014 that elections were held in the  
16 Local and a new Constitution and Bylaws adopted. The contention of Mr. Benson is  
17 that as a result of this failure to follow its governing rules the contracts entered into  
18 between the State of Montana and Local 4573, including the most recent one, are  
19 invalid. Since it is unclear precisely when the last election prior to the most recent one  
20 was held, this would mean that approximately 7 contracts are null and void.  
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23 Is a failure to hold regular elections a breach of the duty of fair representation and, thus,  
24 an unfair labor practice? If it is, and as offered by Mr. Benson, the result would be that  
25 over an approximate 14 year period some seven collective bargaining agreements,  
26 including the most recent one would be nullified. This would include everything  
27 negotiated over those years between the State of Montana and Local 4573 including  
28 pay raises, insurance contributions, grievances that were processed, and all the working  
29 conditions subject to those negotiated contracts. Of all these contracts brought into  
30 question by Mr. Benson, his position is mitigated by the fact that there is a six month  
31 time period in which to file an unfair labor practice complaint (39-31-404, MCA). But, it  
32 has to be noted that if somehow that were held to not be the case, the result would be  
33 potential and significant financial chaos for the State and all the employees in the  
34 bargaining unit. Even for the most recent election conducted, and the most recent  
35 contract ratified, the effect of nullifying that bargaining agreement would still be  
36 significant with open questions as to whether or not the most recent pay arrangement  
37 should have been implemented, and, for instance, whether the negotiated upcoming  
38 pay increase would be implemented as well.  
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41 The fact that elections were not held is something not lightly passed over by the Board.  
42 However, based on discussions the investigator has had with Mr. Benson, other  
43 members of Child Support Enforcement, Ms. Cohenour and Mr. Ehli it is clear that  
44 although elections were not held it is not as though the Local, over the period of time  
45 when there were no elections, was not actively soliciting officers, officials, bargaining  
46 team members etc. The Local was doing that with varying degrees of success, but it  
47 certainly cannot be said that the Local was operating in a vacuum. There were clearly  
48 attempts to communicate with members, involve them in the process, and negotiate  
49 bargaining agreements. As of the date this recommendation is written, it is equally clear  
50

1 that with the adoption of a new Constitution and Bylaws, coupled with a full slate of  
2 elected officers, the Local is doing what is necessary to adhere to its governing rules, as  
3 a local and as an affiliate of MEA-MFT. In short, the fact is the State of Montana  
4 negotiated in good faith with an exclusive bargaining representative over all these years  
5 and each year the tentative agreements, including the one covering the current  
6 biennium, were presented to the unit for approval, and they were approved. The  
7 investigator is aware of no authority that a failure to hold elections is an unfair labor  
8 practice, and in terms of any authority the Board has over the obligation to hold regular  
9 elections, the Local has recognized the mistake made and has taken affirmative action  
10 to prevent similar occurrences in the future.  
11

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13 Concerning allegation numbers 6 and 7, the investigator is aware of no requirement that  
14 a union has to provide a complete copy of a newly negotiated collectively bargained  
15 agreement or a complete copy of all that is agreed to in a tentative agreement submitted  
16 to the body for ratification. In fact, Local 4573 did provide sufficient information on the  
17 substance of the tentative agreement reached for the most recent negotiation. Beyond  
18 this, it is apparent from interviews with Mr. Benson and others that the Local made it  
19 clear that if there were questions about the tentative agreement they could be  
20 addressed to bargaining team members. In fact, Child Support Enforcement, for this  
21 most recent bargain, was represented by three employees on the bargaining team all of  
22 whom could have addressed concerns had they been raised. As it turns out, the  
23 tentative agreement was approved by a substantial margin. There simply is no merit to  
24 this portion of the complaint.  
25

26  
27 Items 8-14, item 16, item 17, and to a lesser degree item 15 all deal with pay inequities  
28 perceived primarily by the members of the unit employed in the Child Enforcement  
29 Division. Put simply, many in Child Support Enforcement are dissatisfied with their pay  
30 arrangement and filed a complaint against the employer concerning how their pay is  
31 determined. A hearing concerning all these pay issues was conducted by a Board  
32 agent and the Board issued a decision addressing many if not all of the concerns  
33 covered in the instant matter. That case, Ron Mashek et al., Compliance Specialists,  
34 Department of Health and Human Services, Child Support Enforcement Division, is  
35 currently on appeal to the District Court, DDV 2014-468. This pending unfair labor  
36 practice charge against Local 4573 is essentially the same complaint filed against the  
37 State of Montana, and now filed against the union. In Mashek et al. the Board found no  
38 merit to the allegations of statutory violations by the employer, and thus, by implication,  
39 Local 4573. Because of that decision the investigator will find the same as applied to  
40 Local 4573. Ultimately, it is the courts that will determine the merits of the pay issue,  
41 but there is nothing before the investigator to demonstrate that what transpired in  
42 negotiations was done in bad faith by Local 4573. Specifically, as to allegation 12,  
43 discrimination, there was no form of discrimination in the context of an unfair labor  
44 practice. The "discrimination" as alleged in the complaint is based on a perception of  
45 unfair distribution of pay and pay arrangements when comparing one division and what  
46 it received versus what another division received. There was no form of discrimination  
47 as relates to the collective bargaining act. Absent bad faith and discrimination on the  
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50

1 part of Local 4573 there is no merit to the allegation that Mr. Benson was not fairly  
2 represented.  
3

4 Concerning the final allegation in the complaint, item 18, the investigator reviewed this  
5 element and finds that the integrity of the election process was preserved. The  
6 signature that was required was on the outside of the ballot envelope. Signatures were  
7 required to verify who voted and that the person was eligible to vote. Actual ballots did  
8 not contain any identifying feature and actual ballots were co-mingled with other ballots  
9 to ensure confidentiality. There were no irregularities the investigator could find, and  
10 there certainly was no breach of the duty of fair representation.  
11

12  
13 **III. Recommended Order**  
14

15 It is recommended that unfair labor practice charge 24-2014 be dismissed as without  
16 probable merit.  
17

18 DATED this 6<sup>th</sup> day of August 2014.  
19

20 BOARD OF PERSONNEL APPEALS  
21

22  
23  
24 By: \_\_\_\_\_

  
25 John Andrew  
26 Investigator  
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2 NOTICE  
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4 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of  
5 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss  
6 may be appealed to the Board. The appeal must be in writing and must be made within  
7 10 days of the mailing of this Notice. The appeal is to be filed with the Board at P.O.  
8 Box 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to dismiss  
9 becomes a final order of the Board.  
10

11  
12 CERTIFICATE OF MAILING  
13

14 I, Windy Knutson, do hereby certify that a true and  
15 correct copy of this document was mailed to the following on the 7th day of  
16 August 2014 postage paid and addressed as follows:  
17

18 KARL ENGLUND  
19 ATTORNEY AT LAW  
20 PO BOX 8358  
21 MISSOULA MT 59807  
22

23  
24 WAYNE BENSON  
25 PO BOX 1832  
26 EAST HELENA MT 59635  
27

28 ERIC FEAVER  
29 MEAMFT  
30 1232 EAST SIXTH  
31 HELENA MT 59601  
32

33 JILL COHENOUR  
34 LOCAL 4573  
35 1232 EAST SIXTH  
36 HELENA MT 59601  
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38  
39 BRIAN EHLE  
40 MEAMFT  
41 1232 EAST SIXTH  
42 HELENA MT 59601  
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