

1 Department of Labor and Industry
2 Board of Personnel Appeals
3 PO Box 201503
4 Helena, MT 59620-1503
5 (406) 444-0032
6
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8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 16-2015

11 LORI A. ABLY,)
12 Complainant,)
13 -vs-)
14 AMERICAN FEDERATION OF STATE,)
15 COUNTY, AND MUNICIPAL)
16 EMPLOYEES COUNCIL 9, LOCAL 2774,)
17 Defendants.)
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INVESTIGATIVE REPORT
AND
NOTICE OF INTENT TO DISMISS

23 **I. Introduction**

24
25 On January 29, 2015, Lori Aibly filed an unfair labor practice charge with the Board of
26 Personnel Appeals alleging violations of Montana Code Annotated sections 39-31-402
27 and 39-31-201 by the American Federation of State, County, and Municipal Employees,
28 Council 9, Local 2774, hereinafter AFSCME or Local 2774.¹ An answer to the
29 complaint was filed in timely manner by Timm Twardoski, Executive Director of
30 AFSCME Council 9, denying the charge.
31

32
33 John Andrew was assigned by the Board to investigate the charge and has
34 communicated with the parties in the course of the investigation.
35

36 **II. Findings and Discussion**

37
38 Lori Aibly began her employment with Helena School District No. 1 as a substitute
39 custodian on June 18, 2009. She became a full time custodian on August 12, 2011.
40 Ms. Aibly is a member of the AFSCME bargaining unit of custodial and maintenance
41 workers employed in various schools and administrative offices throughout the District.
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47 ¹ Ms. Aibly's charge also cited alleged violations of "U.S. Title VII and ADA laws." The Board of Personnel
48 Appeals does not have jurisdiction to process claims under Title VII of the Civil Rights Act of 1964 or the
49 Americans with Disabilities Act. Ms. Aibly has been informed that discrimination claims under those
50 federal laws can be filed with the Montana Human Rights Bureau or the Equal Employment Opportunity
Commission.

1 The allegations from Ms. Ably's charge read as follows:
2

3 My rights as a married handicapped female to run for union office were interfered
4 with by Union Officers & members who led the union body to believe I could not
5 be nominated (1) in my absence (in violation of union election rules) and (2) as a
6 result of my MARITAL STATUS.
7

8 (Emphasis contained in the original.)
9

10 39-31-205 Montana Code Annotated prohibits labor organizations from discriminating
11 against members for the purpose of collective bargaining.
12

13 Ms. Ably's claim centers around two primary contentions with the first being that Local
14 2774 did not follow proper protocol in various aspects of its election processes and
15 associated responsibilities. If this is shown to be the case, Ms. Ably's second
16 contention is that Local 2774 violated 39-31-402, MCA in that it did not fairly represent
17 her interests. As part of this contention Ms. Ably asserts that Local 2774 discriminated
18 against her because of her marital status and her disability, a violation of 39-31-205,
19 MCA, and thus, not only a violation of that law, but 39-31-201, MCA and 39-31-402,
20 MCA as well.²
21
22

23 Prior to addressing the specifics of this case some overall background is in order. Lori
24 Ably has many issues with her employer, Helena School District No. 1, as well as
25 AFSCME Local 2774. The issues include allegations against individual personnel within
26 each of these organizations manifested in unfair labor practice charges being filed
27 against each organization and individuals within each of the two organizations. As
28 understood by the investigator, these issues also include allegations of discrimination by
29 the District, as well as AFSCME. In that regard, Ms. Ably has indicated discrimination
30 complaints were filed against AFSCME and the District on the state and federal levels.³
31
32

33 As relates to the election process, Local 2774 is governed by the AFSCME international
34 constitution, as well as its own constitution. There are no by-laws per se for Local 2774,
35 but like other labor organizations, the Local 2774 constitution includes provisions
36 consistent with adopted by-laws. The constitution took effect in the mid 1970's (as best
37 as can be discerned) and is currently in effect. The constitution conforms with the
38 requirements of 39-31-206, MCA in that it provides, amongst other things, for
39 democratic organization and procedure.
40
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42 In addition to the local constitution, there are safeguards provided by the AFSCME
43 international. The international organization provides mechanisms for individuals to
44

45 _____
46 ² The BOPA does not enforce Title VII or the ADA, but the issue of discrimination in the form of an alleged
47 violation of 39-31-205, MCA is properly before the Board.

48 ³ In hopes of further understanding her complaint against Local 2774, the investigator requested Ms. Ably
49 provide a copy of the complaint she indicates she filed against AFSCME. Ms. Ably agreed to provide a
50 copy but discovered she did not have one. She did confirm that the complaint alleges gender/marital
status discrimination by Mr. Twardoski.

1 utilize if they believe election processes and safeguards are inadequate in local units.
2 Ms Ably contends she attempted to utilize some of these processes but was blocked by
3 Mr. Twardoski. No demonstrable example of exactly how Mr. Twardoski blocked her
4 efforts has been provided to the investigator. It is noted that in some of her e-mail
5 communication Ms. Ably copied an AFSCME official in Nevada. In fact, Ms. Ably seems
6 to have exercised her rights to some of these safeguards but it is difficult to tell to what
7 extent other than to say, as will be further discussed, that she has filed an internal
8 protest and efforts seem to be in process to address her concerns, including the
9 scheduling of a meeting of the membership of Local 2774. This ongoing effort on Ms.
10 Ably's part is significant as it may resolve some of her issues, separate and apart from
11 whatever role the Board of Personnel Appeals might play in these various complaints.
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14 Concerning the heart of her complaint, at a regularly scheduled meeting of Local 2774
15 on June 18, 2014, Ms. Ably was nominated for Local President by Delmar Anderson.
16 The nomination was seconded by Irv Grant. Ms. Ably did not attend this meeting. Mike
17 Bingham was also nominated for the presidency. Other candidates were nominated for
18 other positions without opposition. Betty Shanahan and Betty Riley moved that
19 unopposed candidates be elected by acclamation. The motion passed leaving only the
20 presidency in question. Discussion ensued amongst the body at this meeting. Part of
21 the discussion centered around the identity of Ms. Ably's spouse, a supervisor in the
22 Helena School District. The identity of Ms. Ably's spouse concerned members of the
23 body as, to many, there would be a conflict of interest, or better put, a possible division
24 of loyalty, if an elected officer had a spouse who was a supervisor in the District. It is
25 understandable that such concerns were raised about Ms. Ably's spouse, as divided
26 loyalties can pose problems not only for the member, but for the member's spouse as
27 well. Ultimately, as will be discussed later, this issue became moot.
28
29

30 In addition to the concern of spousal identity another issue arose during the June
31 meeting, namely whether a person could be nominated and eligible for office if not in
32 attendance at the nomination meeting. On three occasions during the pendency of this
33 case the investigator asked Ms. Ably for times and days when she could be available to
34 discuss her case so it could be better understood. No dates were provided, but on April
35 30, 2015, Ms. Ably called the investigator to discuss her complaint. During the course
36 of the conversation Ms. Ably confirmed that most recent, unrequested e-mails she sent
37 to the investigator were directly related to the issues complained of in her charge. The
38 investigator discussed the case with her and asked that she furnish any additional
39 information she wished to have considered. Although lengthy, the section of one e-mail
40 forwarded to the investigator defines Ms. Ably's issues with processes used by Local
41 2774, in the past, and to the present. It is cited for convenience sake and comes from
42 an e-mail from Ms. Ably addressed to Timm Twardoski dated January 22, 2015. In
43 relevant part the e-mail reads:
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**NOTICE OF PROCEDURAL CHALLENGE AND PROTEST
2014 Local 2774 ELECTIONS**

1
2 **KNOW ALL MEMBERS BY THESE PRESENTS THAT;**
3 **I Lori Ably do hereby pose Challenge and Protest.**
4

5 **That, during the meeting of January 19, 2015 and after a failure to hold**
6 **elections for the AFSCME Local 2774 of Montana Council 9, the executive**
7 **director stood before the members present to say there was a question as**
8 **to my eligibility as a candidate for President based on:**
9

10 **1-my absence from the meeting at which nominations were held as well as**
11 **2-with respect to my "marital status".**
12

13 In so doing the Local 2774 Officials, allegedly misrepresented the legal foundation,
14 claiming "past practice" as overriding the specific *written* procedures in the AFSCME
15 Constitution, which it cannot do without a vote of the body and without such
16 alterations thereby becoming a *part of the constitution and or the local bylaws*.
17

18 Please note here that this Challenger, in the instant case, has requested copies of
19 the bylaws and the local constitution on several occasions. All such requests have
20 gone unacknowledged or ignored. Nothing has been provided in response to said
21 requests. This Challenger seeks instant remedy.
22

23 **Per AFSCME Appendix D - Elections Code:**

24 *Local union elections may be conducted at the same meeting as nominations, at the*
25 *following meeting, or by referendum, as provided in the local union constitution*
26

27 ***Local unions may not establish eligibility requirements, which include:***

28 ***2. Physical presence or written notice of acceptance of a nomination at***
29 ***the nomination meeting.***

30 According to the AFSCME constitution, candidates for office must be elected by *specific*
31 *guidelines*, and to wit and more importantly, to the recollection of the Challenger this
32 did not occur when Mr. Bingham became president. Moreover, and recently in official
33 vote on an MOU, voting was performed via the "Election" guidelines for ballot voting,
34 setting precedence and establishing the membership's new belief and reliance on
35 formal balloting methods.

36 **AFSCME ELECTION MANUAL**, page 6

37 (<http://www.afscme.org/news/publications/afscme-governance/pdf/Election->
38 [Manual.pdf](http://www.afscme.org/news/publications/afscme-governance/pdf/Election-))
39

40 The above is cited as it gets to the crux of Ms. Ably's case. As previously stated, Local
41 2774 does not have separate by-laws. It has a constitution that contains what might also
42 be considered to be by-laws. There is nothing wrong with that approach and, as such,
43 Ms. Ably has a copy of the Local 2774 constitution. She just deems that what was
44 provided is unacceptable.
45

46 The link provided by Ms. Ably in her January 25 e-mail is to an election manual
47 prepared by the AFSCME international. Unlike the international constitution, the
48 manual is not binding on AFSCME locals. It provides guidelines, and may or may not
49 be entirely consistent with the international constitution. In its preamble the manual
50 provides:

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3 This manual represents an attempt to spell out, in uncomplicated
4 terms, the requirements that AFSCME local unions must meet in
5 conducting elections. We have taken the requirements spelled out
6 in the AFSCME Constitution and included them here, with wording
7 approved by the International Executive Board.
8

9 The International Union Constitution — and not this manual —
10 is the last word on whether an election is valid. The union has its
11 own Judicial Panel to investigate alleged irregularities in local union
12 elections and to apply the appropriate provisions of the Constitution.
13 This manual does not affect that procedure, nor does it deal
14 with provisions that may exist in local union constitutions. Since
15 councils have different procedures involving delegate voting, council
16 elections are not covered in this manual.
17

18 Later in this same manual, nominations are discussed, the nomination process is
19 discussed, and the physical presence of a nominee at the nominating process is
20 discussed⁴ with the manual making it clear that ultimately the international constitution
21 controls the process for candidates “eligible for office.” The manual also recognizes the
22 viability of “local union constitutions” and steers clear of applying such local provisions.
23
24

25 In her January 25 e-mail, Ms. Aply also cites AFSCME Appendix D – Elections Code,
26 the link to which is: [http://www.afscme.org/news/publications/afscme-
27 governance/afscme-constitution/appendix-d-elections-code](http://www.afscme.org/news/publications/afscme-governance/afscme-constitution/appendix-d-elections-code). If one opens this link it is to
28 an appendix to the AFSCME international constitution. There is no mention of the
29 presence or absence of nominees in this election code. What is mentioned is the
30 process for election protests and challenges. In short, to support her position Ms. Aply
31 has taken portions of different documents to make her points, but nothing the
32 investigator was pointed to, or that he could find in the actual international constitution,
33 prohibited a local from having a procedure that barred absentee nominees from being
34 eligible for office.
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37 Given the above, the investigator spoke to several who attended the June meeting
38 since nothing in the Local 2774 constitution or in an AFSCME international constitution
39 reviewed by the investigator addresses the issue of absentee nominations. Deferral to
40 practice of the local seems appropriate as occurred in this case.⁵ At least one person
41 believed that in the June meeting it was decided that the issue was resolved and Lori
42 Aply’s nomination was not valid. Another individual believed individuals could be
43 nominated if not present. The minutes of the June meeting shed no real light on the
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46 ⁴ The language referring to “physical presence” cited by Ms. Aply is taken from page 8 of the election
47 manual, not from the International Constitution, or appendix D to the International Constitution.

48 ⁵ Ms. Aply believes Mr. Twardoski in some fashion exercises undue influence in Local 2774 matters. Her
49 opinion notwithstanding, in addition to his duties as executive director, Mr. Twardoski serves as field staff
50 for the Helena area so his presence is understandable. On the question of nominations, in the view of the
investigator, Mr. Twardoski clearly deferred to local practice.

1 situation. From June forward, it is not until the January 19, 2015 minutes that the
2 election issue is again addressed by the body. The January minutes reflect the
3 understanding of one individual that the issue of being present for the nomination was
4 decided long ago, and that consistent with past practice absentee nominations were not
5 acceptable. Another individual interviewed by the investigator, a female with over 20
6 years with the District and considerable union involvement, indicated that, in fact,
7 attendance at the meeting was mandatory for nominees, and it had been that way for
8 many years. The reasoning was that if someone were nominated in their absence,
9 unopposed and voted in by acclamation, and then declined to serve, the actions were
10 pointless and would need to be repeated. Moreover, as pointed out by this person, if a
11 nominee were not present, there would be no ability for members to ask questions of
12 the nominee.⁶ Overall, and although there was conflicting evidence, the majority of
13 what the investigator discovered established that presence at the nomination meeting
14 was a requirement to be a valid candidate. Beyond this, there are valid reasons for the
15 practice, none of which had anything to do with whether or not a candidate, including
16 Ms. Ably, happened to be a member of a protected class. The investigator has to
17 conclude that since the January minutes reflect some of this, and most importantly that
18 they reflect that the majority, by acclamation⁷, accepted Mr. Bingham as president, the
19 practice was the will of the body. In short, a democratic process was utilized by Local
20 2774 in its election process and any discrimination based on spousal identity rendered
21 moot by operation of the nomination practice of Local 2774.⁸
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25 Before turning to the allegation of the breach of the duty of fair representation other than
26 how it relates to elections, it has to be noted that information provided to the investigator
27 by Ms. Ably often addresses events occurring more than 6 months prior to the filing of
28 her unfair labor practice charge. It is also noted that since Ms. Ably filed a charge
29 against the District while her complaint against Local 2774 was pending, some of the
30 information provided by Ms. Ably overlaps from one charge to the other. The
31 investigator has had each of the complaints in mind when preparing this report, but
32 specifically notes that under 39-31-404, MCA, some of Ms. Ably's complaints as they
33 might relate to the fair representation question may well be time barred.
34
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36 A union violates its duty of fair representation to the employees it represents only if its
37 actions are "arbitrary, discriminatory or in bad faith . . ." Vaca v. Sipes, 386 U.S. 171,190
38 [64 LRRM 2369] (1967). To determine if the duty to fairly represent has been breached
39 each element in the three part standard must be examined, Airline Pilots Ass'n, Int'l v.
40

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42 ⁶ In this regard, the investigator thought, for instance, had Ms. Ably been present for the June meeting the
43 membership could have asked her if divided loyalties/conflict of interest were an issue for either Ms. Ably
44 or her husband. Of course, however, Ms. Ably was not in attendance.

45 ⁷ Ms. Ably also asserts that a grievance committee was formed without an election. While this may be the
46 case, nothing in the Local 2774 constitution refers to election of a grievance committee.

47 ⁸ To be sure, Ms. Ably is correct that minutes could be more thorough and that some of the election
48 process should be captured in written format, but the fact that there are deficiencies in this regard does
49 not rise to the level of unfair representation of Ms. Ably. If this remains an issue there are internal
50 mechanisms, including going to the international and the judicial panel for resolution, Ms. Ably can utilize,
but, again, there is no established breach of the duty of fair representation.

1 O'Neill, 499 U.S. 65, 77 [136 LRRM 2721] (1991). The Board of Personnel Appeals has
2 adopted the Vaca standard and in Ford v. University of Montana and Missoula
3 Typographical Union No. 277, 183 MT 112, 598 P.2d 604, (Mont 1979) the Montana
4 Supreme Court in reviewing an unfair labor practice charge brought before the Board
5 held:
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8 In short, the Court has to find that the Union's action was in some way a product
9 of bad faith, discrimination, or arbitrariness. The mere fact that Bonnie Ford
10 disagrees with the decision of the Union [in determining that her grievance was
11 without merit] is not sufficient basis for a finding of breach of the duty of fair
12 representation absent these factors.
13

14 Nothing presented by Ms. Ably concerning discrimination or election process rises to
15 the level of a breach of the duty of fair representation. In regards to handling
16 grievances, one has to look to the unfair labor practice charge filed against the District
17 to see dissatisfaction on the part of Ms. Ably with how Local 2774 handled a grievance.⁹
18 The investigator has recommended that matter be dismissed but as pertains to Ms.
19 Ably's charge against Local 2774, nothing presented to the investigator in that matter
20 demonstrates any failure of the local to not fairly represent Ms. Ably in that grievance.
21 Included in that assessment is a recognition that as part of that charge the issue of Ms.
22 Ably's disability surfaced. Nowhere was there evidence in that case, or in the one
23 against the local for that matter, where there is any indication Ms. Ably's disability –
24 PTSD – played any part in decisions made by the local concerning her grievance.
25 There was no discrimination¹⁰ by the local. There was no bad faith. There was no
26 arbitrariness on the part of the local.
27
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29 The burden is on the complainant in an unfair labor practice to come forward with
30 substantial evidence that there is probable merit to a complaint. Lori Ably has failed to
31 sustain that burden.
32

33 **III. Recommended Order**

34 It is hereby recommended that the complaint of Lori A. Ably against AFSCME Local
35 2774 be dismissed.
36
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40 DATED this _____ day of _____ 2015.
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47 ⁹ The charge against the District is discussed by the investigator in an attempt to give full consideration to
48 Ms. Ably's complaint that she was not fairly represented.

49 ¹⁰ The investigator also notes that gender allegations appear in the instant charge. It is noted that Kaye
50 Stone was president from 2005-2006, that other women have held, and do hold, office in Local 2774,
including Ms. Ably serving on the Labor Management Committee in 2014 and to the present.

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BOARD OF PERSONNEL APPEALS

By: _____
John Andrew
Investigator

NOTICE

Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss may be appealed to the Board. 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 P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to dismiss becomes a final order of the Board.

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:

LORI ABLY
4733 TRONRUD DRIVE
HELENA MT 59602

MIKE BINGHAM
AFSCME LOCAL 2774
C/O PO BOX 5356
HELENA MT 59604

EXECUTIVE DIRECTOR TIMM TWARDOSKI
AFSCME COUNCIL 9
PO BOX 5356
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