

1 Department of Labor and Industry  
2 Board of Personnel Appeals  
3 PO Box 201503  
4 Helena, MT 59620-1503  
5 (406) 444-2718  
6  
7

8 STATE OF MONTANA  
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 26-2015

13 LORI ABLY,	)	
14 Complainant,	)	
15 -vs-	)	INVESTIGATIVE REPORT
16	)	AND
17 HELENA SCHOOL DISTRICT NO. 1,	)	NOTICE OF INTENT TO DISMISS
18 Defendant.	)	
19	)	
20	)	

21  
22 **I. Introduction and Background**

23  
24 On March 20, 2015, Lori Ably filed a complaint against Helena School District 1,  
25 hereinafter District. The complaint was not filed by her exclusive bargaining  
26 representative, the Association of State, County and Municipal Employees, Montana  
27 Council 9, Local 2774, hereinafter AFSCME or Local 2774. The complaint alleges that  
28 the District failed to remove a letter from Ms. Ably's personnel file and in doing so her  
29 rights were violated. Although not clear on its face, in Section 8 of the Board of  
30 Personnel Appeals complaint form, two sections of Montana law 39-31-401,(5) MCA  
31 and 39-31-402(1), MCA are circled, seemingly by Ms. Ably. Both sections of law  
32 address a refusal to bargain in good faith. Since the letter in question was part of a  
33 grievance, the processing of grievances is integral to good faith bargaining so the  
34 circled statutes seem applicable to this situation. The District has been served with the  
35 complaint and in answer filed by Bill Rasor, District Human Resource Services  
36 Administrator, the District denied committing an unfair labor practice. It is noted that in  
37 a separate matter currently under investigation by the Board, Ms. Ably has indicated  
38 she has filed a complaint or complaints with the Montana Human Rights Commission  
39 and/or the Equal Employment Opportunity Commission and that, per her unfair labor  
40 practice complaint, "Further, Ably has also filed Title VII violation with the employer with  
41 the EEOC in that the employer's failure to remove the reprimand constituted retaliatory  
42 discrimination against her."  
43  
44

45  
46 John Andrew was assigned by the Board to investigate the charge and has  
47 communicated with the parties in the course of the investigation.  
48  
49  
50

1  
2 **II. Findings and Discussion**  
3

4 Lori Ably was hired by the District as a substitute custodian on June 18, 2009. She  
5 became a full time custodian on August 12, 2011. Ms. Ably is a member of the  
6 AFSCME bargaining unit of custodial and maintenance workers. The collective  
7 bargaining agreement between AFSCME and the District has been in effect, and is  
8 currently in effect, between the parties for the period of this complaint. The agreement  
9 contains a grievance procedure, which includes final and binding arbitration.  
10 The grievance filed by Ms. Ably addresses a visit to Ms. Ably's worksite by Tom Foley of  
11 the District Human Resources Office, as well as a letter given to Ms. Ably by Mr. Foley  
12 on July 8, 2014. The letter was titled "letter of requirement" and addresses concerns of  
13 the District pertaining to absences by Ms. Ably from her job. The letter also requests  
14 medical certification for future absences, advises of potential consequences for non-  
15 compliance, and advises Ms. Ably of applicable FMLA provisions. The letter also  
16 provides:  
17  
18

19           This Sick Leave Letter of Requirement will remain in effect for a period of six (6)  
20 calendar months, at which time the frequency and nature of your absences will  
21 be reviewed. You will be formally notified thirty (30) days prior to the annual  
22 anniversary date of this memorandum if these requirements will be continued.  
23  
24

25 As indicated, the letter resulted in the grievance of July 10. Upon his return to the office  
26 from vacation Mr. Rasor requested an extension to respond to the grievance and then  
27 responded to the grievance on July 21, 2014. The response was addressed to Michael  
28 Bingham, Local 2774 President, denying any contract violation by the District. The  
29 letter concluded by saying in part:  
30

31           Ms. Ably's letter of requirement was not a disciplinary action; rather the letter was  
32 intended to serve notice to Ms. Ably of her excessive absenteeism and  
33 requirements regarding her leave usage in the future.  
34  
35

36 Under the collective bargaining agreement provision is made for a grievance committee  
37 within Local 2774. That committee is to review grievances and determine whether or  
38 not the grievance is justified. If a grievance is denied, provision is made for appeal to  
39 the local as a whole, and if determined justified additional provisions define all  
40 subsequent steps in the grievance procedure. In the instance of Ms. Ably's grievance,  
41 the committee, comprised of unit members Mike Garcia, Connor Shanahan, and Joe  
42 Valvoda, met and reviewed the grievance. The committee agreed that the grievance  
43 centered around issues largely extrinsic to the bargaining agreement, that other  
44 potential remedies to those issues could be utilized, and that the grievance should not  
45 move forward. This recommendation was then brought to the body where the  
46 reasoning was explained. The body voted to not process the grievance further. Ms.  
47 Ably was in attendance at this meeting of the body and, according to one committee  
48 member who also attended, seemed to accept the decision, although Ms. Ably did want  
49  
50

1 Timm Twardoski, AFSCME Executive Director, to work with the District to remove the  
2 letter of requirement from her personnel file.  
3

4 Even prior to the action taken by the grievance committee and the body, AFSCME  
5 advised Ms. Ably that it had consulted with its counsel over her grievance. As seen by  
6 the investigator, the grievance is very broad in its sweep and there are allegations and  
7 contentions likely not subject to the grievance procedure and, again in the view of the  
8 investigator, subject to remedy in other forums. Thus, as part of its due diligence in  
9 handling the grievance AFSCME conferred with counsel. As a result of this, and as  
10 early as August 13, 2014, AFSCME advised Ms. Ably that all remedies she was seeking  
11 should be done through her pending human rights complaint and not through the  
12 grievance procedure. Nonetheless, and even given the recommendation of counsel,  
13 the recommendation of the grievance committee, and the vote of the body, AFSCME  
14 continued to discuss the grievance with the District. The result of this was a proposal  
15 made by the District (apparently in October of 2014) to remove the letter of requirement  
16 from Ms. Ably's personnel file. The text of the proposed settlement agreement between  
17 the Local and the District is:  
18  
19

#### 20 21 Grievance Settlement for Lori Ably Grievance. 22

23  
24 Lori Ably, AFSCME Local 2774 (Union) and Helena School District #1 (District) agree to  
25 the following terms and conditions as a mutually acceptable resolution to the grievance  
26 filed by Lori Ably dated July 10, 2014.  
27

28 1. The District will remove the letter dated July 8, 2014 entitled "Sick Leave  
29 Usage Letter of Requirement" from Ms. Ably's personnel file.  
30

31 2. Ms. Ably acknowledges that she must follow the procedures for requesting any  
32 type of leave that are outlined in the Collective Bargaining Agreement between  
33 the District and the Union. This specifically includes submitting a written request  
34 for "Leave Without Pay" and having that request approved by the appropriate  
35 manager prior to the leave occurring. It is also understood that the District may  
36 request medical documentation for any absence from any union member should  
37 the District have sufficient information to suspect any abuse of leave.  
38

39 3. Ms. Ably must provide any current (within the last two years) medical  
40 documentation that will corroborate her claim of suffering from a handicap. Ms.  
41 Ably will also provide current written documentation of any need for a reasonable  
42 accommodation provided by a medical doctor as recognized by the America  
43 Medical Association. Failure to provide any of the above documentation by  
44 October 1, 2014 will be considered by all parties of this agreement as clear  
45 evidence that Ms. Ably does not have a handicap.  
46  
47  
48  
49  
50

1 As can be clearly seen, the offer conditioned removal of the letter of requirement on  
2 acceptance of the settlement proposal. Ms. Ably rejected the offer.  
3

4 All of the above in mind, the investigator finds that the District was well within its rights  
5 to document the absences of Ms. Ably and to document its concerns in the manner it  
6 saw fit, up to and including placing the letter of requirement in her personnel file. To  
7 have not done so would be an error on the part of the District and would bring into  
8 question any further actions it deemed necessary to address its concerns with  
9 absenteeism. What the District did is fundamental to the rights afforded to the District  
10 as well as to Local 2774 and any employee under its contract with the District.  
11 Moreover, as this case progressed, the grievance procedure was followed by both  
12 AFSCME and the District, including the meeting of the grievance committee and the  
13 vote of the body to not move the grievance forward. Very simply, the District and the  
14 Union lived up to their obligations to one another and to Ms. Ably. In the case of the  
15 letter, the union, again, lived up to its obligation to Ms. Ably, but she chose not to accept  
16 the offer. For this reason, the letter remained in the file until the time she discovered it,<sup>1</sup>  
17 and it remains in the file as specified in the letter. In short, Ms. Ably did not prevail in  
18 her position on the grievance, and her rejection of the settlement offer ensured the letter  
19 would remain in her file.  
20  
21

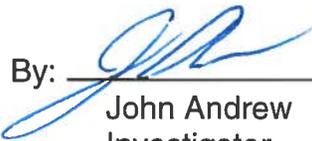
22  
23 Given all of the above, there is no substantial evidence offered by Ms. Ably to support  
24 her position that an unfair labor practice occurred.  
25

26 **III. Recommended Order**  
27

28 It is hereby recommended that Unfair Labor Practice Charge 26-2015 be dismissed as  
29 without merit.  
30

31 DATED this 14<sup>th</sup> day of April 2015.  
32  
33

34  
35 BOARD OF PERSONNEL APPEALS

36  
37 By:   
38 \_\_\_\_\_  
39 John Andrew  
40 Investigator  
41

42  
43 NOTICE  
44

45 Pursuant to 39-31-405 (2), MCA, if a finding of no probable merit is made by an agent of  
46 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss  
47  
48

49 <sup>1</sup> The investigator notes that charges are subject to a 6 month statute of limitations, 39-31-404, MCA, and  
50 although arguments exist for the timeliness of this charge, none were raised so the discovery of the  
document by Ms. Ably will be used to toll the statute, thus making it timely.

1 may be appealed to the Board. The appeal must be in writing and must be made within  
2 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the  
3 Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to  
4 dismiss becomes a final order of the Board.  
5  
6  
7  
8

9 SPECIAL NOTE:

10 The investigator notes that the collective bargaining agreement is between the exclusive  
11 bargaining representative and the District. Ms. Ably filed her unfair labor practice  
12 charge directly. The Local did not bring the complaint. Nonetheless, since the charge  
13 concerns the collective bargaining agreement and the Union grievance procedure a  
14 copy of this Notice of Intent to Dismiss will be sent to AFSCME Local 2667 as well.  
15  
16  
17  
18  
19  
20  
21  
22

23 \*\*\*\*\*

24 CERTIFICATE OF MAILING

25 I, Windy Knutson, do hereby certify that a true and correct copy  
26 of this document was mailed to the following on the 14<sup>th</sup> day of April  
27 2015, postage paid and addressed as follows:  
28  
29  
30  
31

32 LORI ABLY  
33 4733 TRONRUD DRIVE  
34 HELENA MT 59602  
35

36  
37 BILL RASOR  
38 HELENA SCHOOL DISTRICT NO 1  
39 PO BOX 5417  
40 HELENA MT 59604 5417  
41

42 MIKE BINGHAM PRESIDENT  
43 LOCAL 2774  
44 C/O AFSCME  
45 PO BOX 5356  
46 HELENA MT 59604  
47  
48  
49  
50