

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 24-0672

DANIELA VACCARO,

Petitioner/Appellant,

v.

THREE FORKS AREA AMBULANCE SERVICE,

Respondent/Appellee.

APPELLEE'S ANSWER BRIEF

On Appeal from the Eighteenth Judicial District Court, Gallatin County
Consolidated Case Nos. DV-16-2023-408 and DV-16-2023-1053
The Honorable Andrew Bruener, Presiding

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INTRODUCTION

The two Human Rights Bureau (HRB) complaints at issue in this appeal concern objectively reasonable decisions by Respondent/Appellee Three Forks Area Ambulance Service (TFA). First, Petitioner/Appellant Daniela Vaccaro, a volunteer Emergency Medical Technician (EMT), claimed that TFA retaliated against her by selecting a *medical doctor* over her to provide Narcan training to the ambulance crew, when she had only recently been certified to provide the training and was clearly the less experienced trainer. Second, she alleged retaliation when a board member asked her to take a Narcan skills test, a general requirement of all EMTs that she had yet to complete, when she returned from vacation. Vaccaro's suggestion that these routine, reasonable actions were retaliatory is not credible, as determined by the investigator in each claim based on substantial credible evidence.

ISSUES

I. Whether the investigator appropriately did not consider or add additional claims made in Vaccaro's rebuttal when Vaccaro made the informed decision to not amend the complaint to include the claims, as explained in the Final Investigative Report.

II. Whether the investigator abused her discretion by not interviewing a witness proposed by Vaccaro, when she admitted the witness did not have firsthand knowledge, and when the witnesses the investigator did interview provided

sufficient credible evidence.

III. Whether the Commission applied the correct legal standard by considering, among other things, if the investigator “acted without conscientious judgment.”

IV. Whether, under the correct legal standard, Vaccaro was substantially prejudiced by board member statements made during the March 24, 2023 Commission meeting when the Commission did not rely on the statements in rendering their decision.

V. Whether the investigator’s determination that Three Forks Ambulance did not retaliate against Vaccaro regarding volunteer communications, after months of inactivity by her, was based on substantial credible evidence.

STATEMENT OF THE CASE

In August 2021, Appellant Daniela Vaccaro (Vaccaro) filed a marital status discrimination claim with the Montana Human Rights Bureau (HRB) against Appellee Three Forks Area Ambulance Service (TFA). Vaccaro and TFA settled that claim in January 2022. (Appellant’s App. 13.) Vaccaro’s present appeal stems from subsequent claims of retaliation that Vaccaro filed against TFA with the HRB in 2022 and 2023. (Admin. Rec. HRB Charge No. 0220495 at 2 (hereafter Admin. Rec. 1).)

Vaccaro’s first retaliation claim, filed on July 20, 2022, alleged that TFA

retaliated against Vaccaro for filing the marital status discrimination claim by preventing her from providing training. (Admin. Rec. 1 at 2, 4.) The HRB found no reasonable cause to believe unlawful retaliation occurred and dismissed the case. (Admin. Rec. 1 at 4.) Vaccaro filed an Objection with the Montana Human Rights Commission (Commission). (Final Agency Decision, HRB Case No. 0220495 at 1 (hereinafter FAD 1).) The Commission considered the matter on March 24, 2023, determined that the HRB did not abuse its discretion in considering the matter, and affirmed the dismissal. (FAD 1 at 1-2.) Vaccaro sought judicial review of that final agency decision. (Order on Judicial Review at 1-2.)

Vaccaro's second retaliation claim, filed January 24, 2023, alleged TFA retaliated against Vaccaro for filing the previous marital status discrimination claim, and for filing her first retaliation claim, by requiring her to submit to a skills test, engaging her in a verbal argument, and excluding her from company meetings and communications. (Admin. Rec. HRB Charge No. 0230107 at 2-3, 5 (hereafter Admin. Rec. 2).) The HRB found no reasonable cause to believe unlawful retaliation occurred and dismissed the case. (Admin. Rec. 2 at 5.) Vaccaro filed an Objection with the Commission. (Final Agency Decision, HRB Case No. 0230107, p. 1 (hereafter FAD 2).) The Commission considered the second claim on September 22, 2023, determined that the HRB did not abuse its discretion, and affirmed the dismissal. (FAD 2 at 1-2.) Vaccaro also sought judicial review of that final agency

decision. (Order on Judicial Review at 1-2.)

The district court consolidated Vaccaro's two requests for judicial review because the cases addressed related claims of alleged mistreatment and retaliation. (Order on Judicial Review at 1-2.) Ultimately, the district court agreed with the Commission that the HRB did not abuse its discretion in either case and affirmed the dismissals. (Order on Judicial Review.) Vaccaro now appeals the district court's Order on Judicial Review.

STATEMENT OF FACTS

TFA operates a nonprofit volunteer ambulance service in and around Three Forks, Montana. (Admin. Rec. 1 at 39.) TFA is governed by a five-member volunteer Board, which included Kim Todd, Barbara Mutter, and Brent McDonald. (*Id.* at 2, 5-8, 39.) TFA's medical director is Dr. Bret Birrer, who is an emergency medicine physician at Bozeman Health Deaconess Hospital. (*Id.* at 6, 39.) Dr. Birrer also serves as the medical director for twenty other fire and emergency medical response agencies in and around Gallatin County. (*Id.* at 6, 39-40.)

In February 2021, Vaccaro completed her EMT licensing, and she began volunteering, without pay, as a probationary EMT with TFA. (Admin. Rec. 1 at 40.) Vaccaro's husband has also volunteered with TFA, as both an EMT and a board member. (*Id.* at 9, 40.) Vaccaro was dismissed from her probationary EMT volunteer status with TFA on June 30, 2021. (*Id.* at 40.) Following her dismissal, Vaccaro filed

a marital status discrimination claim against TFA. (*Id.* at 40.) In January 2022, Vaccaro and TFA resolved that claim and agreed to a Voluntary No-Fault Resolution Agreement. (Appellant’s App. 13.) Vaccaro then resumed her volunteer EMT position at TFA. (Appellant’s App. 13; Admin. Rec. 1 at 40.)

I. The HRB Investigator finds no reasonable cause regarding Vaccaro’s training claim (retaliation claim 1) because Vaccaro failed to demonstrate that she was the more qualified candidate to present training on Narcan.

About six months after Vaccaro resumed her volunteer EMT position, in July 2022, she filed her first retaliation claim. She alleged that TFA retaliated against her (for filing the marital status discrimination claim) by not selecting her to provide a Narcan training to other EMTs. (Admin. Rec. 1 at 2.) The facts underlying this claim are detailed in the HRB Investigator’s Final Investigative Report.

Not long after Vaccaro returned to her volunteer EMT position, in February 2022, Vaccaro’s husband corresponded by email with Dr. Birrer, indicating that he and Vaccaro were interested in presenting Narcan training to the rest of the EMT group. (*Id.* at 7.) Initially, Dr. Birrer was amiable to having either Vaccaro or her husband present the Narcan training. (*Id.* at 13.) However, Dr. Birrer was not aware of Vaccaro’s limited experience at the time (she had not administered Narcan in the field), was not aware that Vaccaro was not endorsed to administer Narcan, and he also was not the decision-maker regarding training assignments. (*Id.*) Rather, those decisions were left to Mutter and Todd. (*Id.*)

Ultimately, Mutter and Todd decided to have Dr. John Andrews provide Narcan training at the same time he provided an annual blood borne pathogens training on April 4, 2022. (Admin. Rec. 1 at 11, 13.) Dr. Andrews is a retired critical care physician, licensed EMT, and serves as the medical director for a different rural fire district. (*Id.* at 13.) Combining the trainings allowed the volunteer EMTs to receive both trainings during the same session. (*Id.* at 13.) Considering these facts, the HRB Investigator determined that it was reasonable and appropriate for Mutter and Todd to have chosen Dr. Andrews as the trainer over either of the Vaccaros: “From an administrative standpoint, Dr. Andrews was clearly the more qualified trainer and utilizing him for a combined training session was convenient for volunteers.” (*Id.* at 13.)

The HRB Investigator considered additional arguments as well as comparative evidence that of sixteen trainings provided to TFA volunteers from January 2021 to January 2022, there was only one instance in which an EMT assisted in a training. (*Id.* at 10-11, 13-14.) The HRB Investigator ultimately determined that Vaccaro had failed to demonstrate that she was the more qualified candidate to present on Narcan. (*Id.* at 13-14.)

During the investigation, the HRB Investigator and Vaccaro reviewed Vaccaro’s potential witnesses. (Admin. Rec. 1 at 11.) Vaccaro had proposed eight potential witnesses, including her husband. In reviewing the list of potential

witnesses, Vaccaro informed the investigator that only her husband could provide firsthand information related to her allegations—none of the other witnesses observed events directly related to her complaint. *Id.* Because the other witnesses did not have firsthand information, the HRB Investigator interviewed only Vaccaro’s husband and explained the reasons for omitting the other witnesses in the Final Investigative Report. *Id.*

Also during the investigation, Vaccaro submitted rebuttal and attachments totaling seventy-five pages. (HRB Admin. Rec. 1 at 11.) The investigator reviewed all seventy-five pages, noting relevant information within the Final Investigative Report, but also observing that most of the documents were not relevant to Vaccaro’s claim and alleged additional adverse actions. (*Id.*) The investigator explained to Vaccaro that if she wanted the additional allegations investigated, she would need to amend her complaint. (*Id.*) Vaccaro opted not to amend. (*Id.*)

Based on these facts, the investigator determined that although Vaccaro could establish a disputable presumption of retaliation based on timing, TFA was able to overcome that presumption, and that there was no reasonable cause to believe unlawful retaliation occurred. (Admin. Rec. 1 at 4, 12-14.)

II. The HRB Investigator finds no reasonable cause regarding Vaccaro's skills test claim (retaliation claim 2) because the evidence supported TFA's version of events leading to a conclusion that there was no unlawful retaliation.

Vaccaro filed her second retaliation claim on January 24, 2023, just a few days after the first retaliation claim's final investigative report was issued. (Admin. Rec. 2 at 2-3.) She alleged that TFA retaliated against her after she filed her martial discrimination claim, and after she filed her first retaliation claim, by requiring her to submit to a skills test, engaging her in a verbal argument, and excluding her from company meetings and communications. (*Id.* at 2-3, 5.)

Like the first retaliation claim, the facts underlying this claim are detailed in the Investigator's Final Investigative Report. Vaccaro alleged that on August 1, 2022, TFA requested that she complete a skills test to demonstrate that she was proficient in administering Narcan. (Admin. Rec. 2 at 5.) When she refused to complete the skills test, she alleged that TFA Board Members yelled at her and acted aggressively towards her. (Admin. Rec. 2 at 5-6.) After the skills test incident, Vaccaro told TFA that she was not available to take calls for the next several weeks because she needed to help a family member. (Admin. Rec. 2 at 6.) Vaccaro alleged that once she finished her leave, TFA did not respond to her request to resume service and stopped sending her training emails and other company communications. *Id.*

The investigator evaluated the evidence collected during their investigation and determined that there was no reasonable cause to believe retaliation occurred. (Admin. Rec. 2.) While TFA did request that Vaccaro complete a Narcan skills test, that request was not retaliatory because the medical director (Dr. Birrer), not the Board, had requested that the skills test be completed; other EMTs were required to perform the skills test (showing that Vaccaro was not singled out to take the test); and the timing of TFA's request was reasonable, as it requested that Vaccaro take the test after she returned from vacation. (*Id.* at 16.)

The investigator collected information from multiple witnesses, including Vaccaro and her husband, regarding board members' behavior towards Vaccaro after she refused to take the skills test. (Admin. Rec. 2 at 16-17.) The investigator evaluated this information, assessed witness credibility, and ultimately determined that the Board Members did not act aggressively or improperly towards Vaccaro. (*Id.*)

Regarding Vaccaro's allegation that TFA retaliated against her by cutting her off from trainings and communication, the investigator noted that Vaccaro admitted to taking a leave of absence after the meeting and that Vaccaro told TFA she only wanted to attend trainings if the board members were not present. (Admin. Rec. 2 at 17.) Because board members were present at trainings, Vaccaro effectively removed herself from being included in trainings. (*Id.*)

Concerning TFA communications, the investigator analyzed numerous communications from the fall of 2022, and ultimately noted that Vaccaro appeared to have avoided TFA’s instructions, that Vaccaro failed to schedule herself as requested, and that it did not appear that TFA had ceased communications with Vaccaro because she was still receiving calendar notifications from them as of the last day she tried to communicate with them. (Admin. Rec. 2 at 17.)

Given these facts, the Investigator determined that although Vaccaro could establish a disputable presumption of retaliation based on timing, TFA was able to overcome that presumption, and found no reasonable cause to believe unlawful retaliation occurred. (Admin. Rec. 2 at 17.)

STANDARD OF REVIEW

The Montana Supreme Court reviews “a district court’s order affirming or reversing an agency’s findings of fact for clear error and an agency’s interpretation and application of the law de novo for correctness.” *Qlarant Integrity Sols., LLC v. Guthneck*, 2025 MT 55, ¶ 13, 421 Mont. 163, 565 P.3d 1209. “A court may not substitute its judgment for that of the agency on questions of fact.” *Norval Elec. Coop. v. Lawson*, 2022 MT 245, ¶ 22, 411 Mont. 77, 523 P.3d 5 (internal quotation omitted).

“As such, courts are limited to reviewing the entire record to determine whether the agency’s findings of fact are clearly erroneous and whether its

determinations of law are correct.” *Id.* (internal quotation and citation omitted). A hearing officer’s findings, especially regarding witness credibility, are entitled to “great deference.” *Id.* (citation omitted). Likewise, the “fact-finder is uniquely in the best position to judge the credibility of witnesses” and, accordingly, the investigator’s determinations “regarding the credibility of witnesses and the weight to be accorded their testimony” are afforded deference. *See Ditton v. DOJ Motor Vehicle Div.*, 2014 MT 54, ¶ 33, 374 Mont. 122, 319 P.3d 1268 (citations omitted).

Clear error exists only if “substantial credible evidence fails to support the findings of fact, if the district court misapprehended the evidence’s effect, or if [the Court has] a definite and firm conviction that the district court made a mistake.” *Boyne USA, Inc. v. Spanish Peaks Dev., LLC*, 2013 MT 1, ¶ 28, 368 Mont. 143, 292 P.3d 432. Substantial credible evidence is “[e]vidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.*, ¶ 29. To that end, the Court will affirm a district court’s order upholding an agency’s findings of fact if the findings are supported by evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*

SUMMARY OF THE ARGUMENT

The HRB Investigators’ conclusions were rooted in substantial credible evidence, and their determinations as fact finders were appropriately afforded deference. This Court has made clear that it will not substitute its judgment for that

of the investigator, and that it will overturn the findings below only if substantial credible evidence fails to support the findings of fact or there is an error of law.

Here, as to each issue raised, the final determination was supported by the law and substantial credible evidence. The investigator investigating Vaccaro's first retaliation claim appropriately handled additional allegations and witness interview decisions. These process decisions were within the investigator's discretion, and were based on Vaccaro's statements during her discussions with the investigator as detailed in the Final Investigative Report. It was appropriate for the Commission and district court to rely on the investigator's recitation of these discussions.

For its part, the Commission applied the correct standard of review in reviewing the HRB's investigations, including a review of whether the investigator "acted without conscientious judgment" under the abuse of discretion standard. Likewise, under the correct legal standard, parties (or their representatives) may make statements in a Commission hearing, and, in any case, the brief statements by two board members were not relied on by the Commission. Finally, the investigator relied on substantial credible evidence—including Vaccaro's announced leave and conveyed preference to not attend trainings with board members present—to determine TFA did not "cut off" communication with Vaccaro nor retaliate regarding volunteer communications. As such, this Court should affirm the district court's Order on Judicial Review.

ARGUMENT

Vaccaro, on appeal, fails to show that either the HRB Investigators or the Commission committed legal error or relied on insufficient evidence. The district court correctly upheld the findings and this Court should affirm.

I. The investigator appropriately offered Vaccaro the opportunity to amend her first retaliation claim to add additional alleged adverse actions—Vaccaro declined.

Vaccaro argues that the HRB failed in its duty to “offer assistance” to her as a complainant because the complaint “drafted by the HRB” left out some additional allegations. Opening Br. at 19. The complaint, though, was annotated and verified by Vaccaro. (Admin. Rec. 1 at 2.) Vaccaro’s argument omits the fact that Vaccaro made an informed choice not to include these allegations either in her initial complaint or by amending her complaint. Vaccaro’s attempt to blame the investigator for not addressing additional allegations, when she affirmatively chose not to amend, asks this Court to substitute its judgment on a matter of fact regarding discussions between the investigator and Vaccaro.

As explained in the Final Investigative Report: “Vaccaro’s rebuttal and attachments ... alleged additional adverse actions.” (Admin. Rec. 1 at 11.) These additional allegations were not addressed, however, because the “investigator explained to Vaccaro that she would need to amend her complaint for those allegations to be investigated ... she opted not to amend.” *Id.* As such, even if she

did have a right to amend her complaint this late in the process, Vaccaro knowingly waived her right to amend the complaint to allege the additional allegations referenced for the first time in her rebuttal.¹

Despite this knowing waiver, Vaccaro now seeks a second bite at the apple, claiming that the Commission erred by not remanding the first claim to the HRB “to consider the factual allegations left out of [the] first complaint[.]” Opening Br. at 19-21. But whether Vaccaro chose not to amend her complaint to include these additional allegations, as explained in the Final Investigative Report, is an issue of fact. Vaccaro thus asks this Court to “substitute its judgment for that of the agency on questions of fact.” *See Norval Elec.*, ¶ 22.

This Court should not do so, as this factual finding is entitled to “great deference.” *Id.* Indeed, the investigator is entitled to additional deference here because she is recounting facts directly known to her: the discussions she had with Vaccaro regarding the additional allegations. The Commission did not err by relying on the investigator’s statement in the Final Investigative Report that Vaccaro knowingly opted not to include these additional allegations.

¹ Vaccaro’s allegation that she was told when drafting her complaint “that HRB would consider [her] remaining allegations at a later time,” Opening Br. at 19, even if true, is not relevant because she *was* later provided an option to amend her complaint to include the remaining allegations: she just chose not to.

II. The investigator appropriately exercised her discretion by not interviewing an additional witness listed by Vaccaro who, according to Vaccaro, did not have relevant firsthand knowledge.

Vaccaro claims she “asked the HRB to interview Sue Foreman” who she now claims “was the only independent witness” to the facts regarding the first HRB retaliation claim. Opening Br. at 21. This allegation fails for two reasons: Vaccaro admitted Foreman did not have direct knowledge of the events, and any information Foreman might have relayed would not affect the determinative issue: whether it was reasonable to select a medical doctor to provide the Narcan training.

The investigator explained in the Final Investigative Report that she reviewed Vaccaro’s list of eight potential witnesses (including Foreman) with Vaccaro. (Admin. Rec. 1 at 11.) Vaccaro “acknowledged only one of those proposed witnesses, her husband, could provide information related to her complaint.” *Id.* The investigator specifically asked Vaccaro “if her additional witnesses could provide firsthand knowledge of the allegations,” and she responded that “Vince Vaccaro [was] her preferred witness as the remaining seven witnesses observed events not directly related to her complaint.” Taking Vaccaro at her word, the investigator then “interviewed Vince Vaccaro.”²

² Vaccaro did not list Sue Foreman as a witness in the second investigation. The investigator there explained that the only additional witnesses suggested by Vaccaro were “Grace Grizzle and Halle Rogers.” (Admin. Rec. 2 at 15.) The investigator contacted both, though neither provided information. (*Id.*) “No other information or witnesses were omitted from the [second] investigation.” (*Id.*)

Vaccaro does not dispute this recitation. Instead, referencing Admin. R. Mont. 24.8.212, she implies that the investigator's decision not to interview Foreman violated the duty to conduct a fair and impartial investigation despite Vaccaro's admission that Foreman did not have direct knowledge of the relevant events. While the investigator does have a duty to conduct the investigation "in a fair and impartial manner," Rule 24.8.212, and while the rule contemplates the HRB conducting "personal interviews to obtain information," neither the rule nor authorizing statutes require the investigator to interview every suggested witness. It was reasonable and well within the investigator's discretion to not interview a witness noted by the charging party as not having firsthand information.

Moreover, whatever information Sue Foreman might have conveyed would likely not be relevant, and certainly would not be determinative, to the dispositive issue in the first claim—TFA's decision to have a medical doctor conduct the Narcan training. *See* Opening Br. at 9-10 (alleging Foreman witnessed board member "threats made to" Vaccaro). As concluded by the district court, interviewing a witness who might, at most, corroborate "the discussion on Narcan training at a meeting ... does not change the overall conclusion that disallowing a volunteer to train other volunteers under the circumstances here does not credibly support a claim of retaliation." Order on Judicial Review at 8.

Vaccaro thus asks this Court to inappropriately “substitute its judgment for that of the” investigator. The investigator was well within her discretion to not interview Foreman when Vaccaro acknowledged Foreman did not have direct knowledge of the relevant events. Vaccaro’s conclusory statements to the contrary are insufficient to overcome the investigator’s discretion, especially when Foreman’s potential testimony did not directly relate to TFA’s decision to choose a medical doctor over Vaccaro to provide Narcan training. Ultimately, the finding of no retaliation was supported by substantial credible evidence, including the interview of Vince Vaccaro and three others. The district court and the Commission thus correctly upheld the Final Investigative Report and dismissal.

III. The Commission applied the correct abuse-of-discretion standard of review, including whether the investigator acted “without conscientious judgment.”

The Commission’s Final Agency Decisions explain that the Commission reviews the HRB’s decision to dismiss a complaint using an “abuse of discretion standard” as follows:

- a. Did the investigator act arbitrarily, without conscientious judgment? I.e., was the decision random, unreasonable, or seemingly not based on the existing record?
- b. Did the investigator’s findings of fact exceed the bounds of reason resulting in a substantial injustice?
- c. Did the investigator correctly apply the law to the facts of the case?

Section 49-2-511(2), MCA, Admin. R. Mont. 24.9.121.

(FAD 1 at 1; FAD 2 at 1.)

The Commission's abuse of discretion standard, as detailed, is legally authorized. Vaccaro, however, takes issue with the Commission's use of the phrase *acting without conscientious judgment* in subsection (a). She asserts that standard of review is improper under § 2-4-704(2)(a), MCA, and was wrongly added to Vaccaro's "burden of proof" on appeal to the Commission. Opening Br. at 22-23. It is Vaccaro, however, who cites to an inapt standard.

Specifically, Vaccaro's reliance on § 2-4-704, MCA, in support of this argument, is misplaced. Section 2-4-704, MCA, is found in Montana's Administrative Procedure Act ("MAPA") and provides the standard of review that is utilized during a *district court's judicial review* of an administrative matter. The statute does not set forth the standard of review that *the Commission* must utilize in reviewing HRB decisions. Instead, the Commission reviews an HRB decision to dismiss a complaint under an abuse of discretion standard, as set forth in both statute and administrative rule. *See* § 49-2-511(2)(a), MCA ("The Commission shall consider the objection in an informal hearing and review the department's findings for an abuse of discretion."); Mont. Admin. R. 24.9.121(5) ("The Commission will review an objection to the Human Rights Bureau's decision to dismiss a complaint under an abuse of discretion standard."). Likewise, this Court consistently describes an abuse of discretion as "an erroneous conclusion or application of law;" *acting*

“*arbitrarily, without conscientious judgment;*” and exceeding “the bounds of reason, resulting in substantial injustice.” *State v. Pelletier*, 2020 MT 249, ¶ 12, 401 Mont. 454, 473 P.3d 991 (citing numerous cases) (emphasis added).

The Final Agency Decisions thus accurately describe the Commission’s abuse-of-discretion standard of review, § 49-2-511(2)(a), MCA; Admin. R. Mont. 24.9.121(5), and correctly detail how the Court has consistently defined that standard, including a consideration of whether the investigator acted “arbitrarily, without conscientious judgment,” *see, e.g., Pelletier*, ¶ 12. The Commission recited and utilized the correct standard of review in both cases. Vaccaro’s argument to the contrary, relying on MAPA’s inapposite standards of judicial review, fails.³ Additionally, and independently, the argument also fails because Vaccaro does not explain how the application of this standard by the Commission prejudiced her or

³ To the extent Vaccaro’s argument is construed as also asserting that the District Court applied the incorrect standard of review, that position is not supported by the record. The District Court’s Order on Judicial Review articulates MAPA’s standards of judicial review, Order at 7; determines for one retaliation claim that “there is nothing in the record to show that the Commission decision was comprised by any of the criteria for reversal and/or remand in MCA 2-4-704,” *id.* at 8; determines for the other retaliation claim that “these disagreements do not implicate the reversal criteria in 2-4-704,” *id.* at 9; and concludes overall that, the “Court finds no basis under MAPA, and MCA 2-4-704 specifically, for reversing, amending, or remanding [either of the Commission’s determinations],” *id.* The District Court’s use of MAPA’s judicial review standards was statutorily appropriate and is fully supported by the Order.

resulted in substantial injustice (other than simply claiming (incorrectly) that it is the wrong standard).

IV. The TFA Board Member statements during the March 24, 2023 Commission meeting were authorized and did not prejudice Vaccaro.

The Commission’s consideration of Vaccaro’s first retaliation claim on March 24, 2023, lasted for over an hour. (FAD 1, p. 1.) The Commission heard argument from the parties (8:38 – 29:09), asked questions of the parties (29:15 – 1:05:32), and finished with a deliberation and unanimous vote to overrule Vaccaro’s objections and dismiss her complaint (1:06:10 – 1:17:40). (Audio Recording, March 24, 2023.) TFA’s counsel argued on behalf of TFA, and two TFA Board Members also made statements to the Commission during the question-and-answer portion of the argument. (Audio Recording at 17:20 – 25:54; 49:44 – 51:07; 54:29 – 55:34.) The board member statements were brief: the first board member spoke about a flyer for 1 minute, 23 seconds; and the second board member spoke about a January 2022 meeting for 1 minute, 5 seconds. (Audio Recording at 49:44 – 51:07; 54:29 – 55:34.)

When TFA was asked another question following the board members’ statements, Commission Chair Peter Damrow asked counsel to limit TFA’s responses to herself and not open the floor for further comment, “out of fairness to the charging party [who was] there by herself.” (Audio Recording at 55:52.) Counsel for TFA later apologized, citing the administrative rule allowing for questions of both parties and their representatives, and stating that she misunderstood the rule.

(Audio Recording at 1:05:40.) Chair Damrow responded, “That’s fine, counsel, thank you. I just like to keep these proceedings moving as efficiently as possible.”

(Audio Recording at 1:05:57.)

Vaccaro asserts on appeal that the board member statements warrant reversal for multiple reasons. First, she asserts that the statements violated § 2-4-612(4), MCA, which requires all testimony be under oath. (Opening Br. at 4, 24.) She also asserts that the statements violated § 2-4-604(1)(a), MCA, which she claims “requires that only counsel present to the Commission.” Opening Br. at 25. Neither of these statutes, however, are applicable to Commission meetings.

When the Department of Labor and Industry considers a retaliation claim, there are three possible stages of agency examination: (1) an investigation by an HRB investigator, § 49-2-504(1), MCA; (2) a contested case hearing, overseen by a hearings officer, § 49-2-505(1)-(3), MCA; and (3) the Commission’s review, § 49-2-504(7)(b)(i), MCA (of an investigation); § 49-2-505(4)-(5), MCA (of a contested case hearing). *See also* Admin. R. Mont. 24.9.102 (detailing the Department’s and the Commission’s responsibilities). At each stage, there are administrative rules and statutes that guide the agency’s actions. The two statutes that Vaccaro relies on, §§ 2-4-612(4), MCA, and 2-4-604(1)(a), MCA, are housed in MAPA’s statutes governing contested case hearings. *See* MCA, Title 2, Chapter 4, Part 6, “Contested Cases.” While these statutes establish procedures for contested case hearings, they

have no bearing on Commission meetings.

Further, § 2-4-604(1)(a), MCA, even if applicable, does not stand for the proposition that “only counsel” can present to the Commission, as Vaccaro argues. Opening Br. at 25. That statute provides that “affected persons or parties or their counsel” may provide information *to a hearings officer during a contested case hearing*. § 2-4-604(1)(a), MCA. When it comes to argument in front of the Commission, however, it may be appropriate for a party to speak. Per administrative rule, during “oral argument, and subject to the rule of the Commission chair, any member of the Commission may pose questions *to a party* or his or her representatives.” Admin. R. Mont. 24.9.125(3) (emphasis added). Here, Chair Damrow limited additional board member statements “out of fairness to the charging party [who was] there by herself” and to keep the “proceedings moving as efficiently as possible.” (Audio Recording of Commission Meeting, 55:52; 1:05:57.)

Vaccaro also argues that the board member statements violated § 49-2-205, MCA, which requires the Commission to “maintain the highest standards of objectivity and impartiality.” (Opening Br., p. 24.) But she does not explain how these statements might have violated the Commission’s objectivity or impartiality. On the contrary, it is unlikely the Commission was improperly influenced by two and a half minutes of statements during a meeting that lasted over an hour. There is nothing in the record demonstrating that the Commission relied on the statements in

affirming the HRB's decision. (*See* Audio Recording at 1:06:10 – 1:17:40 (deliberating with no reference to the board member statements).) Notably, Vaccaro fails to explain how the statements impacted her case, beyond arguing that they were procedurally inappropriate. *See* Opening Br. at 11-12, 24-25 (providing no detail regarding the statements); 24 (citing § 2-4-704(2)(a)(iii), MCA.) As such, Vaccaro's suggestion of impartiality or harm is pure conjecture.

In any case, even assuming that allowing these short statements amounted to procedural error (it did not, as explained above), MAPA does not require that an agency decision be reversed upon any procedural lapse. Instead, MAPA provides a court discretion to reverse or modify an agency decision only when “substantial rights of the appellant have been prejudiced” due to “unlawful procedure.” Sec. 2-4-704(2)(a)(iii), MCA (providing that a district court “*may* reverse or modify” the Commission's decision “if substantial rights of the appellant have been prejudiced” due to “unlawful procedure”) (emphasis added).

The District Court considered the board member statements and noted that “[t]he impropriety of the Board member statements at the hearing was recognized by the Commission legal counsel and counsel for the TFAA was appropriately admonished.” Order on Judicial Review at 6. The District Court further concluded that it “does not appear that these statements prejudiced Vaccaro in any material way.” *Id.*

As noted, Vaccaro has failed to show, or even argue, that these statements resulted in prejudice or were considered by the Commission. Under these circumstances, the District Court correctly concluded that the statements did not prejudice Vaccaro, and its decision should be affirmed.

V. The investigator’s determination that TFA did not retaliate against Vaccaro regarding volunteer communications is supported by substantial credible evidence.

Vaccaro’s second retaliation claim alleged that TFA retaliated against her by cutting her off from crew communications, and that TFA’s rationale, that Vaccaro was inactive, was “pretext.” Opening Br. at 25. The investigator, however, determined that Vaccaro was the one who effectively “ceased communication” with TFA.⁴ TFA’s actions—or more accurately inaction—were thus reasonable and nonretaliatory, supporting a finding of no reasonable cause. (Admin. Rec. 2 at 17.)

The investigator’s finding regarding the communication claim is supported by substantial credible evidence: (1) Vaccaro admitted to taking a leave of absence; (2) she told TFA she was only interested in attending trainings if board members were not present; (3) despite receiving an email asking volunteers to sign up on a Google

⁴ Vaccaro claims TFA “does not deny that it removed Dani from crew communications in October of 2022.” Opening Br. at 25. This is incorrect. (*See* Admin. Rec. 2 at 75, 80-81.) Further, the investigator determined Vaccaro was still receiving calendar communications in November of 2022. (*Id.* at 17.)

calendar, Vaccaro did not sign up for shifts; (4) Vaccaro was on the calendar as of her November 7, 2022 email, and she “chose not to respond to the training invite despite the email providing clear instructions for all the volunteers to attend”; and (5) “she did not make any attempts, beyond her November 7, 2022 email, to return to TFA despite knowing the crew met on the first Monday of every month.” (Admin. Rec. 2 at 17.) In sum, Vaccaro “avoided instructions to participate in TFA events and did not schedule herself to volunteer as requested by TFA.” (*Id.*) The lack of communication was based on Vaccaro’s actions, including her decision to not attend trainings with board members present, to which TFA reasonably responded.

Vaccaro, on appeal, does not directly dispute these facts, instead claiming she did try to remain involved and that the investigator should have relied on “email evidence” she submitted that she did not have an “unlawful motive.” Opening Br. at 27. But TFA does not have to show an “unlawful motive” on Vaccaro’s part.

Her appeal thus boils down to her belief that the investigator should have come to a different determination. She does not argue and cannot show, however, that substantial credible evidence fails to support the investigator’s no cause finding. That there may be other evidence that supports Vaccaro, or even is contradictory, is not dispositive. The weight given to specific evidence, including Vaccaro’s testimony, is within the investigator’s discretion as fact finder. *See Norval Elec. Coop.*, ¶ 22 (court should not substitute its judgment for that of the investigator on

fact issues); *Ditton*, ¶ 33 (witness “credibility” and “weight” within discretion as fact finder). As such, the district court and the Commission correctly upheld the investigator’s findings.

CONCLUSION

The no cause findings in both HRB claims were based on substantial credible evidence, the credibility determinations were within the investigators’ discretion, and the legal determinations were supported by applicable law and correct. As such, this Court should affirm the district court’s Order on Judicial Review.

DATED this 26th day of June, 2025.

/s/ J. Stuart Segrest
J. STUART SEGREST
Attorney for Appellee

Certificate of Compliance

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Answer Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 5,892 words, excluding certificate of service and certificate of compliance.

Dated this 26th day of June, 2025.

/s/ J. Stuart Segrest

J. STUART SEGREST

CERTIFICATE OF SERVICE

I, J. Stuart Segrest, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-26-2025:

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