

Those agreed-upon deadlines were set forth in a Scheduling Order issued on March 15, 2017.

On June 9, 2017, DCC moved for summary judgment on the basis that there are no genuine issues of material fact concerning the claimants' claim and that, because they were not "permanent employees" entitled to holiday pay and annual leave, their claims should be dismissed. The Hearing Officer requested the parties present oral argument on the motion.

The Hearing Officer issues the following order granting Respondent's motion after considering all arguments, exhibits, and statements supplied by the parties.

II. UNCONTESTED FACTS

1. DCC is a community college district in Dawson County, Montana, and was organized under Montana law, Mont. Code Ann. § 25-15-101 et seq. DCC is under the supervision and control of the Board of Regents. Mont. Code Ann. § 20-15-103.

2. Each year, DCC's calendar for the subsequent academic year is set by a committee composed of faculty, staff, and administration to accommodate accreditation requirements in federal regulation that define credit hours and are incorporated in the policy of the regional accrediting association for colleges and universities, the Northwest Commission on Colleges and Universities. To comply with accreditation requirements, each semester includes approximately 15 weeks, or 75 instructional days, plus special duty days.

3. Accreditation standards and Board of Regents requirements for faculty in two-year degree programs also require that required credit hours be taught by a qualified instructor. For transfer programs, qualified instructors must have at least a Master's degree in a related field. For faculty in career or technical programs, qualified instructors must have at least three years' experience in the occupation. In a rural community such as Dawson County, Montana, finding qualified substitute instructors so that the College meets accreditation standards is difficult. Failure to provide the required credit hours would result in students losing their eligibility for federal financial aid, which is relied upon by many students.

4. Claimant Gretchen J. Bederman ("Bederman") was employed as a faculty member of DCC. Bederman signed her first employment contract with the DCC in August 2006. Bederman was awarded continuous tenure status during the 2012-2013 academic year. Since then, Bederman was awarded an "employment contract" or "letter of appointment" as a "Full-time, Tenured Faculty Member" each academic year, until her employment ended May 13, 2016. The 2013-2014

academic year was claimant's 8th academic year at DCC, the 2014-2015 academic year was her 9th, and the 2015-2016 academic year was her 10th.

5. Claimant Aaron D. Carroll ("Carroll") was employed as a faculty member of DCC. Carroll signed his first employment contract with DCC in August 2011. Carroll was placed on paid administrative leave from December 22, 2015 through the end of that academic year, May 13, 2016. He was also on paid administrative leave for his position as a half-time, non-tenured faculty member during the 2016-2017 academic year. As of May 12, 2017, Carroll was no longer an employee of DCC. Carroll was awarded an "employment contract" or "letter of appointment" as a "Full-time, Non-Tenured Faculty Member" every academic year since 2011, until he was awarded a half-time contract for the 2016-2017 academic year. The 2013-2014 academic year was Carroll's 3rd year at DCC, the 2014-2015 academic year was his 4th, and the 2015-2016 academic year was his 5th.

6. Claimant Holly Dershem-Bruce ("Dershem-Bruce") is a current, full-time faculty member of DCC. Dershem-Bruce signed her first employment contract with DCC in August 1991. Dershem-Bruce was awarded continuous tenure status during the 1998-1999 academic year. Since then, Dershem-Bruce has been awarded an "employment contract" or "letter of appointment" as a "Full-time, Tenured Faculty Member" each academic year. The 2013-2014 academic year was Dershem-Bruce's 23rd academic year at DCC, the 2014-2015 academic year was her 24th, and the 2015-2016 academic year was her 25th.

7. Claimant Rudy J. Stulc, Jr. ("Stulc") was employed as a faculty member of DCC. Stulc signed his first employment contract with DCC in August 2001. Stulc was awarded continuous tenure status during the 2008-2009 academic year. Since then, Stulc was awarded an "employment contract" or "letter of appointment" as a "Full-time, Tenured Faculty Member" each academic year until the end of his employment, May 13, 2016. The 2014-2015 academic year was Stulc's 14th academic year at the DCC, and the 2015-2016 academic year was his 15th.

8. The claimants worked for DCC subject to a collective bargaining agreement (the "Master Agreement") currently in effect between the DCC Board of Trustees and the Glendive Federation of Teachers, Local #3402, and received annual contracts from DCC for the academic year. DCC's academic year is composed of a fall semester and a spring semester, separated by a winter break. To comply with accreditation requirements, each semester includes approximately 15 weeks or 75 instructional days, plus special duty days. The minimum full-time faculty workweek is 35 hours per week.

9. Each of the claimants' contracts provided that they were employed for a specified term. During the relevant, two-year lookback period (Mont. Code Ann. § 39-3-207(2)), the claimants were each employed as a "Full-Time Faculty Member" under two (Stulc) or three (Bederman, Carroll, Dershem-Bruce) consecutive contracts, each of which provided for a specific "TERM OF AGREEMENT" or "TERM OF CONTRACT" equivalent to the academic year, which spans roughly 8.5 months. The 2013-2014 academic year contract ran from August 22, 2013 to May 9, 2014, the 2014-2015 academic year from August 21, 2014 to May 15, 2015, and the 2015-2016 academic year from August 20, 2015 to May 13, 2016. The contracts did not except or exclude any days within the academic year from the stated terms of employment.

10. The exact number of "duty" (instructional) days and "special duty" (in-service) days fluctuates slightly from year-to-year, but faculty's salaries change based on the salary schedule in the Master Agreement, not on the number of duty days or special duty days in the year. Recent academic years have ranged from 160 to 162 duty days. Section 9.10 of the Master Agreement allows for up to an additional six (for returning faculty) or eight (for new faculty) "special duty days" between August 15 and May 1 of each year. Special duty days do not fall on Saturday, Sunday, or legal holidays. Regardless of the number of duty or special duty days in the term, the claimants received their salaries "for term of appointment" each year pursuant to the salary schedule contained in the Master Agreement.

11. Unless there is a holiday or break, full-time faculty are expected to work most weekdays during the academic year, with Saturday and Sunday being their regularly scheduled days off. Under the Master Agreement, each full-time faculty member earns 10 days of sick leave per academic year, which accumulates from year-to-year. Also under the Master Agreement, faculty earn three to five days of personal leave per academic year, but must give two days' written advance notice of their intent to take personal days off. Absent extenuating circumstances, personal leave cannot be taken on either special duty days or scheduled advising and registration days. Faculty may also be eligible for bereavement leave, maternity/paternity leave, leave for the regular academic year or to attend school, military leave without pay, and leave for union business.

12. In addition to sick and personal days, DCC faculty receive several break days, such as for fall break, winter break, and spring break. No classes covered under the annual academic-year full-time faculty member contracts are held during these breaks, and faculty are not expected to work and have no assigned duties during break days. Total break days have ranged between 22 and 24 days in recent academic years. Faculty also receive eight holidays.

13. Faculty salaries are based on a salary schedule in the Master Agreement. Faculty members may elect to divide their annual salary into 18 or 24 installments. DCC calculates a “daily rate” or “hourly rate” for the purpose of determining faculty’s service credits for the Teacher’s Retirement System (“TRS”) and certain other, limited purposes based on the number of duty days and special duty days and a 35 hour workweek. However, salary payments to the claimants for pay periods with holidays or break days were the same as payments to them for pay periods without holidays or break days.

14. Section 7.3 of the Master Agreement provides that the DCC administration, at its discretion, may deduct one full day’s salary or portion thereof for each partial or full absence from the monthly amount owed to any full-time faculty member whose absence from campus or failure to meet regularly scheduled classes is not properly excused or authorized under the Master Agreement.

III. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila*, 249 Mont. 272, 280-81, 815 P.2d 139, 144-45 (1991). “The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Rule 56(c), Mont. R. Civ. P.

The moving party “must show a complete absence of any genuine issue as to all facts shown to be material in light of the substantive principle that entitles that party to a judgment as a matter of law.” *Bonilla v. University of Montana*, 2005 MT 183, ¶ 11, 328 Mont. 41, 116 P.3d 823. A “material” fact is one capable of affecting the substantive outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is “genuine” if there is enough evidence for a reasonable trier of fact to return a verdict for the non-movant. See *Scott v. Harris*, 550 U.S. 372, 380 (2007). The inquiry is essentially “. . . whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 251-52.

“The party opposing summary judgment must come forward with evidence of a substantial nature; mere denial, speculation, or conclusory statements are not sufficient.” *McGinnis v. Hand*, 1999 MT 9, ¶ 18, 293 Mont. 72, 972 P.2d 1126 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262 (1997)). “Material issues of fact are identified by looking to the substantive law which governs

the claim.” *Glacier Tennis Club at the Summit v. Treweek Constr. Co.*, 2004 MT 70, ¶ 21, 320 Mont. 351, 87 P.3d 431; see also *Anderson*, 477 U.S. 242 at 248; *Bonilla*, ¶¶ 11, 14.

A. The Claimants Fail to Present Any Disputed Issues of Material Fact

DCC’s motion for summary judgment identified a number of facts that it claimed were both undisputed and material for purposes of adjudicating the claimants’ action herein. DCC supported those facts with citations to the applicable record. At this point, the burden shifted to the claimants to demonstrate a genuine issue of material fact existed, which they have failed to do.

The claimants dispute three paragraphs of the affidavit of Kathleen Zander, DCC Vice President of Administration. Specifically, they dispute the following:

1. In Paragraph 11 of Kathleen Zander’s Affidavit, she states “the exact number of duty days fluctuates slightly from year to year, but faculty’s salaries do not change based on the number of duty and special duty days in the year.”
2. In Paragraph 19 of Kathleen Zander’s Affidavit, she states that “the College calculates a ‘daily rate’ or ‘hourly rate’ for the purpose of determining faculty’s service credit for the Teacher’s Retirement System and some limited purposes based upon the number of days and special duty days and a 35 hour workweek.”
3. In Paragraph 16 of Kathleen Zander’s Affidavit, she states “the College follows the Board of Regents’ policy that full-time faculty do not earn annual leave credits.”

In order to overcome summary judgment, the claimants must present evidence of a substantial nature, not merely offer denials and conclusory statements. *McGinnis*, ¶ 18. The claimants presented nothing, however, to factually contradict these statements.

The primary items cited to are the affidavit of Maggie Copeland (“Copeland”) of MEA-MFT and statements made by John Andrew (“Andrew”) while working at the Department’s Labor Standards Bureau. Copeland is the claimants’ own union representative, and her interpretations are in no way binding. Andrew’s professional opinion while working at the Labor Standards Bureau is likewise just that—a non-binding opinion. Moreover, Andrew’s 2001 letter to Copeland is replete with equivocations: “Please bear in mind that I have not done extensive research. . . .”;

“We do not have rule making authority, nor are our views binding. . . .” Neither of those individuals could testify as to the ultimate legal issues in this matter. The facts here speak for themselves, and regardless of what capacity Copeland and Andrew offered their opinions, only the Hearing Officer can fully consider the arguments presented by the parties and apply the law to the undisputed facts.

The claimants also point to Zander’s memo regarding liability concerns as evidence that their interpretations are correct. As with both Copeland and Andrew, the concerns expressed by Zander are not binding admissions and have no bearing on the ultimate legal issues. The fact that Zander’s job required that she concern herself with DCC’s potential legal exposure does not make such things actual obligations.

Furthermore, as stated above and without any factual basis, the claimants also assert that the only rational explanation for the 2017 amendment to section 2-18-601(6) is that the legislature intended to exclude a previously-covered group. This assertion is again backed only by speculation and conclusory statements. Rather than attempt to contradict any of DCC’s interpretation of the applicability of the pre-2017 version of section 2-18-601(6), the claimants again point to the statements of Copeland and Andrew. For the reasons already given, neither of those individuals’ statements are sufficient to establish a material dispute.

B. DCC is Entitled to Summary Judgment as a Matter of Law

1. The Claimants’ Collective Bargaining Agreements Do Not Allow for Additional Holiday Pay or Vacation Accrual.

The Montana Supreme Court has determined that [Section 2-18-611, MCA]:

[M]akes it clear from the outset that no absolute right to earn or exercise vacation leave credits exists; any entitlement to earn or exercise vacation leave credits is purely a matter of statute. Indeed, the legislature further conditioned the exercise of vacation leave benefits in Section 2-18-616, MCA, by providing that the dates when vacation leave can be taken are to be determined by agreement between the State and the employee. *Stuart v. Dep’t of Soc. & Rehab. Servs.*, 256 Mont. 231, 235, 846 P.2d 965, 968 (1993).

The dates when employees’ annual vacation leaves are granted must be determined by agreement between each employee and the employing agency with regard to the best interest of the state or any county or city of the state as well as the best interests of each employee. Mont. Code Ann. § 2-18-616.

The terms or provisions of the employment agreement determine whether an employee is employed for a specified term. See *Marsden v. Blue Cross & Blue Shield*

of Mont., Inc., 2012 MT 306, ¶ 15, 368 Mont. 34, 291 P.3d 1229. “Where a contract’s terms are clear and unambiguous, a court must apply the language as written.” Wurl v. Polson Sch. Dist. No. 23, 2006 MT 8, ¶ 16, 330 Mont. 282, 127 P.3d 436 (citing State v. Asbeck, 2003 MT 337, ¶ 18, 318 Mont. 431, 80 P.3d 1272; King Res., Inc. v. Oliver, 2002 MT 301, ¶ 21, 313 Mont. 17, 59 P.3d 1172).

DCC and the claimants are parties to a series of collective bargaining agreements (agreements) that govern much of the employee-employer relationship. Under those master agreements, the claimants signed individual annual contracts of employment with DCC. The claimants argue that the academic calendar and calculation of hourly or daily rates of pay support their contention that they were not employed for a “term,” but this contention ignores the plain language of their employment agreements. See Wurl, ¶ 16. Pursuant to the language in the claimants’ contracts, their “TERM OF AGREEMENT” or “TERM OF CONTRACT” included all the days within each term, including weekends, holidays, break days, and duty and special duty days. Neither the daily rate calculation nor the academic year calendar change the terms of the claimants’ employment agreements or exclude holidays and break days from the specified terms of employment.

Furthermore, under the claimants’ agreements, break days and holidays do not interrupt the term of employment, sick leave continues to accrue during holidays and breaks, and employee health benefits also continue throughout the contract term, including over breaks. DCC does not require faculty to work on holidays and break days, and if they do work such days, they are paid for that work under separate contracts. These days cannot be ignored when considering claimants’ leave time, even if they are excluded when counting claimants’ working hours. Pursuant to their agreements, the claimants were employed for academic-year terms, not specified days, and their annual salary was for the entire term of each contract.

The claimants are attempting to reap the benefits of leave time granted both by statute and under their contracts. They cannot, however, receive the benefit of both—their leave time is controlled either by statute or contract, but not the two combined. See Montana Operations Manual “Annual Vacation Leave Policy” (“any collective bargaining agreement providing greater annual-leave benefits supersedes this policy”). See also Teamsters, Chauffeurs, Warehousemen & Helpers v. Cascade Cty. Sch. Dist., 162 Mont. 277, 282, 511 P.2d 339, 342 (statutory benefits are reduced by the vacation benefits received under contract negotiations or administrative regulations; overruled on other grounds by Talley v. Flathead Valley Cmty. Coll., 259 Mont. 479, 486, 857 P.2d 701, 705 (1993) (trustees of the community colleges have been given power by the legislature to establish the conditions of employment of their staff and instructors pursuant to Mont. Code Ann.

§ 20-15-225(1)(h))). Thus, under their agreements and as a matter of law, the claimants are not entitled to additional holiday pay under section 2-18-603, MCA or annual vacation leave benefits under sections 2-18-611 and -612, MCA.

2. The Claimants Are Not Permanent State Employees Entitled to the Annual Leave Benefits.

Section 2-18-611, MCA, provides, in pertinent part:

(1) Each permanent full-time employee shall earn annual vacation leave credits from the first day of employment.

To understand who is and is not a permanent full-time employee entitled to vacation leave requires a somewhat tortuous journey through Title 2 Chapter 18 which ultimately ends with the conclusion that DCC faculty are not eligible to receive annual leave benefits under its provisions. DCC does not dispute that the claimants overcame the first obstacle to the determination—they were “employees” of the state of Montana as that term was defined in section 2-18-601(6), MCA (2015).¹ Rather, it correctly argues that, in relevant part, the annual leave statutes only apply to “permanent” and “temporary” employees. Mont. Code Ann. § 2-18-611(1), (3), (5); Mont. Code Ann. § 2-18-601 (2015). Although section 2-18-101, MCA, states that it only applies to “parts 1 through 3 and part 10 of this chapter,” section 2-18-601, MCA, specifically refers to section 2-18-101, MCA, for the definition of “permanent” and “temporary” employees and thus must control the more general provision. See Mont. Code Ann. § 1-2-102. In contrast, the holiday leave statutes apply to “full-time” and “part-time” employees, which terms are defined in section 2-18-601 and thus are subject only to the exceptions in section 2-18-601’s definition of “employee.”

Section 2-18-101, MCA, defines both “permanent” and “temporary” employees as “an employee who . . .” meets certain status qualifications. Mont. Code Ann. § 2-18-101(17), (26) (2015).² Section 2-18-101, MCA, by reference to section 2-18-103, MCA, explicitly excepts from the definition of “employee” all “academic and professional administrative personnel with individual contracts under the authority of the board of regents of higher education.” Mont. Code. Ann.

¹ Community college faculty were not, until the 2017 legislative session, either explicitly included in or excluded from the definition of a state “employee.” See Mont. Code Ann. § 2-18-601(6) (2015); Mont. Code Ann. § 2-18-601(6) (2017). With the 2017 changes, however, community college employees are now expressly excluded.

² Section states that it only applies to “parts 1 through 3 and part 10 of this chapter. . . .” Mont. Code. Ann. § 2-18-101. The term “employee,” however, is not defined in part 6.

§§ 2-18-101(11)(a), 2-18-103(8). If one relies solely on a single provision in Chapter 18 to determine whether claimants are entitled to annual leave instead of reading it as a whole, one can reach a premature and incorrect conclusion. Individual sections of an act must be interpreted in such a manner as to ensure coordination with the other sections of an act. Boettcher, ¶ 19 (citing *Howell v. State*, 263 Mont. 275, 286, 868 P.2d 568, 574 (1994)), Mont. Code Ann. 1-2-101. Interpreting the statutes in *pari materia* inevitably leads to the conclusion that the claimants are not entitled to annual vacation leave under the existing statutory framework.

3. Rippey is distinguishable.

The claimants did not meaningfully dispute DCC's argument and the Hearing Officer's conclusions as stated above, but instead rely on the Montana Supreme Court's decision in *Rippey v. Board of Trs.* to support their position. In *Rippey*, a community college professor was terminated from his teaching position at the college, and filed an action seeking payment of accumulated unused sick leave. *Rippey v. Bd. of Trs.*, 210 Mont. 396, 397, 682 P.2d 1363, 1363-64 (1984). The Court found that the plain and ordinary meaning of "school teachers," who were excluded from the State's sick leave plan under section 2-18-601(2), MCA, did not encompass higher education faculty, including a community college faculty member. *Id.*, 210 Mont. at 400, 682 P.2d at 1365. The professor was therefore a State "employee" for purposes of entitlement to payment for accumulated sick leave. *Ibid.*

Rippey is inapplicable here because the Court in *Rippey* relied on the definition of "employee" found in section § 2-18-601(6), MCA, and not "permanent employee" which as discussed above excludes the claimants. The 1983 statute was driven by the definition of the term "employee." In 1997, section 2-18-611, MCA, was amended to use the term "permanent employee" as defined in section 2-18-101, MCA. The Court reviewed the school teacher exemption in the definition of "employee," concluded *Rippey* was not a school teacher, and concluded *Rippey* was entitled to be paid for his unused sick leave. In this case, we are not interpreting section 2-18-601(6), MCA, and DCC is not defending on the basis the claimants are school teachers.

4. The 2017 Amendment to Mont. Code Ann. § 2-18-601(6) Does Not Mean Claimants were Previously Entitled to Annual Leave Under Chapter 18.

The claimants also stake their claims upon a 2017 amendment to section 2-18-601(6), MCA, that specifically excluded "members of the instructional or scientific staff of a community college" from the definition of employee. 2017 Mont. Laws Ch. 370. They argue, without proof, that the only rational explanation for the

amendment is that the legislature intended to exclude the benefits for community college faculty that were previously available to them. Regarding the former, there is no doubt the latter has not been proven. The 2017 Legislature made clear that at the first eligibility threshold - the definition of “employee” in section 2-18-601(6) MCA, - the claimants and their colleagues would not be eligible for annual leave. However, not every change of phraseology indicates a change of substance and intent—the change may be made to express more clearly the same intent or to improve the diction. *State ex rel. Rankin v. Wibaux Cnty. Bank*, 85 Mont. 532, 540, 281 P. 341, 344 (1929). Rep. Doane, the bill’s sponsor, made clear that his intent was to clarify the existing status of community college faculty. (Ex. 7 Resp. Aff-d. Kathleen Zander). Indeed it does, with the change one no longer has to travel through the majority of Section 18 to reach the same conclusion. As discussed below, the claimants offer no support for their position that the 2017 amendment proves community colleges were not previously excluded from the annual leave statutes.

Furthermore, in light of the following analysis, the purpose of the amendment is irrelevant to this decision.

Prior to 1971, community colleges operated under the same statutes as high school districts, and were under the supervision of the state superintendent of public instruction. *Rippey*, 210 Mont. at 398, 682 P.2d at 1364 (citations omitted). In 1971, the Montana Legislature established community colleges as separate governmental organizations, and placed them under the “supervision and coordination” of the Board of Regents. *Id.*, 210 Mont. at 397-98, 682 P.2d at 1364; Mont. Code Ann. § 20-15-103. “Montana law specifically designates that community college districts are under the control of the Board of Regents and that community college trustees have the power to set conditions of employment for their faculties.” *Talley*, 259 Mont. at 486, 857 P.2d at 705; Mont. Code Ann. § 20-15-225(1)(h). As such, while DCC is not part of the university system, it is a community college district organized under sections 20-15-101 et seq, MCA. *Rippey*, 210 Mont. at 397-98, 682 P.2d at 1364. It is the Montana Board of Regents’ policy that faculty members who are appointed on academic-year contracts do not accrue vacation leave credits. See Mont. Bd. of Regents, Policy and Procedures Manual, Policy 801.14.1.

Pursuant to Montana law, the DCC Board of Trustees manages and controls the certain aspects of the college with the supervision of the Montana Board of Regents. See DCC Board Policy BP 1-6. DCC’s individual Board policies only specifically provide vacation leave for administrators on 12-month contracts. See DCC Board Policy BP 2-1. Neither the Master Agreement nor the claimants’ individual contracts provide for vacation leave. Because they fall under the exception for academic and administrative personnel with individual contracts under the

authority of the Board of Regents, because there are no exceptions applicable to the claimants, and because the Board of Regents' policy does not let faculty accrue vacation leave, the claimants were—and now explicitly are—excepted from the annual leave statutes. Mont. Code Ann. §§ 2-18-101(11)(a), 2-18-103(8).

5. Acceptance of the Claimants' Argument Would Lead to Absurd Results.

The claimants' argument that they are paid for working a certain number of days and not for an academic year, when taken to its logical conclusion, would lead to absurd results. A court must interpret a statute “as a part of a whole statutory scheme and construe it so as to forward the purpose of that scheme’ and ‘to avoid an absurd result.’” *Hous. Lakeshore Tract Owners Against Annexation Inc. v. City of Whitefish*, 2017 MT 62, ¶ 10, 387 Mont. 83, 391 P.3d 86 (quoting *Eldorado Coop Canal Co. v. Hoge*, 2016 MT 145, ¶ 18, 383 Mont. 523, 373 P.3d 836 (other citations omitted); see also Mont. Code Ann. § 1-3-233 (“Interpretation must be reasonable”).

The claimants seek a result that would let them retain all the benefits of their contracts while stacking additional leave to a point that over a quarter of their term of employment would be consumed by leave. Pursuant to their employment contracts, claimants receive 22 to 24 paid break days; three personal days; and two more days off at Thanksgiving. Were the claimants permanent long-term, full-time state employees, they would be entitled to eight holidays and, when prorated for a partial-year contract, 11 to 13 vacation days, totaling 19 to 21 weekdays off. See Mont. Code Ann. §§ 2-18-603, -611, -612. In other words, they would receive 44 to 53 weekdays off each year.

Additionally, the statutes have to be twisted to accommodate for community college faculty. For example, the accrual statute provides that “an employee of a school district, a school at a state institution, or the university system must be credited with 1 year of service if the employee is employed for an entire academic year.” Mont. Code Ann. § 2-18-612(2)(a) (emphasis added). All other state agencies, however, have to calculate years of employment by crediting an employee with 80 hours of service for each biweekly pay period in which the employee is in a pay status. . . . See Mont. Code Ann. § 2-18-612(2)(b). Applying the statute as written, because DCC's faculty would be working a certain number of days and not an academic year, they would not earn additional vacation leave credits even though other academic-year employees do.

Furthermore, because faculty experience a break in service every summer, they would not even be eligible to take vacation leave until late February each year. Mont. Code Ann. 2-18-611(5). For the 2015-2016 academic year, faculty members

received 23 paid break days and eight vacation days. If they were entitled to annual leave under Title 2, they could, depending on their longevity, receive 11 to 18 days of annual leave that would have to be taken between February 22, 2016 and May 13, 2016. Presuming they had already used their three personal days and did not get sick, they would have 54 work days remaining to use up their annual leave, meaning they would be absent between 20 and 33 percent of the time. See, Mont. Code. Ann. §§ 2-18-601(2), -601(4), -611(1). Taking the even more absurd under the claimants' theory of only working for a certain number of days would be the result of the winter break being a second "break in service." Were that the case, the claimants would never work long enough to be able to use any of their annual leave.

If the faculty were out on vacation for much of the spring—the logical result of the claimants' argument—the school would be at significant risk of losing its accreditation and its students' eligibility for federal financial aid. As DCC argues, finding qualified substitutes for vacation leave days on top of sick leave days and personal leave days would be extraordinarily difficult and costly, particularly in a rural community such as that served by DCC. This result would again be absurd.

IV. ATTORNEY'S FEES

The claimants seek attorney's fees for pursuing this claim. Attorney's fees are not available in this administrative proceeding. Mont. Code Ann. § 39-3-214; see also *Chagnon v. Hardy Construction Co.*, 208 Mont. 420, 680 P.2d 932 (1984) and *Thornton v. Commissioner*, 190 Mont. 442, 621 P.2d 1062 (1980) (attorney's fees are not recoverable in an administrative proceeding because it is not a "case at law"). Mont. Code Ann. 39-3-214.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction over these claims. Mont. Code Ann. § 39-3-216.
2. There are no disputes of material fact.
3. DCC is entitled to judgment as a matter of law.

VI. ORDER

IT IS THEREFORE ORDERED THAT:

The complaints of Gretchen J. Bederman, Aaron D. Carroll, Holly A. Dershem-Bruce, and Rudy J. Stulc, Jr. are DISMISSED.

DATED this 13th day of September, 2017.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

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

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702.