

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF CLASSIFICATION APPEAL NO. 1-2002

THOMAS M. ELLERHOFF, ADMINISTRATIVE) Case No. 1609-2002

OFFICER, DEPARTMENT OF ENVIRONMENTAL)

QUALITY,)

Appellant,)

vs.)

FINDINGS OF FACT;

CONCLUSIONS OF LAW;

STATE PERSONNEL DIVISION)

AND RECOMMENDED ORDER

DEPARTMENT OF ADMINISTRATION,)

Respondent.)

I. INTRODUCTION

On December 21, 2001, Thomas M. Ellerhoff appealed a decision of the Department of Environmental Quality denying a request to pay him at the maximum salary for his pay grade. On May 31, 2002, he filed exceptions to a preliminary decision and recommended order by Paul Melvin, Board investigator, denying his appeal. Anne L. MacIntyre, Hearing Officer for the Board, conducted a contested case hearing on the appeal on August 13, 2002. Ellerhoff represented himself at the hearing and Ronald J. Wilson represented the Department of Administration. Ellerhoff, Wilson, and John McEwen testified at the hearing. Exhibits J-1 through J-17 and Appellant's exhibit 1 were admitted without objections.

II. ISSUE

The issue in this case is whether the pay plan rules have been properly applied to Ellerhoff's position.

III. FINDINGS OF FACT

1. Thomas M. Ellerhoff has been employed by the State of Montana as an administrative officer since 1975. Until 1995, he worked for the Department of Health and Environmental Services (DHES). In 1995, due to a legislative reorganization, he became an employee of the Department of Environmental Quality (DEQ).

2. Ellerhoff's position at DHES was in pay plan 060. He was classified as administrative officer V, grade 17. His rate of pay was at or above the market rate for the grade. Until 1994, he

worked in the Environmental Sciences Division. For the last several years of his employment at DHES, following a department initiated reorganization, he worked in the director's office. His work in the director's office related to the four divisions of DHES which had comprised the Environmental Sciences Division prior to the reorganization.

3. The DHES director's office had one other administrative officer V position (position no. 00103), also classified at grade 17. During Ellerhoff's tenure with DHES, three individuals occupied the other position in succession. All three were paid at the maximum salary for the grade 17 pay scale. Ellerhoff knew these employees were paid a higher salary than he was, but did not question the difference, reasoning that it was justified because the other position performed work for the director rather than the divisions.

4. In 1995, DHES was eliminated by the legislative reorganization and Ellerhoff was transferred to the director's office of DEQ, a new department created in the reorganization. He became the only administrative officer in the DEQ director's office. He performed work comparable to that which had been performed by the incumbent in position no. 00103 at DHES. He believed he should be compensated at a salary comparable to the employees who had worked in position 00103.

5. DEQ used the position description from Ellerhoff's position at DHES as the basis for his classification following the reorganization. Ellerhoff became aware of this in 1998 and began an effort to have his position description rewritten to reflect his new duties, which were more like those performed by position 00103 at DHES. A new position description was completed in December 2000. The position remained classified at grade 17.

6. Ellerhoff decided not to appeal his classification, but instead attempted to negotiate a raise to the maximum on the grade 17 pay scale, comparing himself to the DHES administrative officers who had been paid the maximum for grade 17. He discussed this with Jan Sensibaugh, director of DEQ, on November 30, 2001. She told him that she could not increase his pay without a pay exception, and that the governor's office was not granting pay exceptions.

7. Ellerhoff never gave DEQ any reason to believe that he would leave employment unless he received a pay raise.

8. Ellerhoff filed a wage appeal on December 6, 2001. DEQ denied his appeal on December 14, 2001, on the ground that he had not stated an appealable issue under ARM 24.26.508. His step 2 appeal to the State Personnel Division was denied on February 6, 2002, resulting in this appeal to the Board.

9. Ellerhoff's position remained in pay plan 060 from the time he transferred to DEQ until he filed his appeal.

IV. DISCUSSION

Title 2, chapter 18, part 3, MCA, establishes the framework for determining state employee compensation. The Department of Administration has adopted rules to implement the provisions

of part 3. These rules are known as the Pay Plan 060 rules and are set out at policy no. 3-0505 of the Montana Operations Manual. The statutes and rules collectively are referred to as the pay plan rules. An employee who is aggrieved by the operation of the statutes or rules governing the compensation determination can file a grievance with the Board pursuant to §2-18-1011, MCA.

Ellerhoff has not established a violation in the operation of the pay plan rules. The rules provide that Ellerhoff's base salary in FY02 was to be set at the same level as it was in FY01, plus 4%. § 2-18-303(1)(d), MCA. The statute does not allow an existing employee to receive a higher salary, except "to mitigate problems associated with difficult recruitment, retention, transfer, or other exceptional circumstances." § 2-18-303(8), MCA.

Ellerhoff was transferred to DEQ in a management initiated transfer. The pay plan rule governing the compensation for employees in pay plan 060 who transfer in a management initiated transfer is Rule 1808. It states:

In a management-initiated reassignment, or management-initiated transfer without a grade change, the employee's base salary will not change.

Ellerhoff does not contend that the Department failed to pay his FY01 base salary plus 4%, or that the Department failed to maintain his base salary in the transfer. Ellerhoff filed this grievance because DEQ refused to increase his pay to the maximum level for his grade. He believes he should have been compensated at the same salary level as the DHES position 00103 employees beginning with his transfer to DEQ in 1995. He also maintains that, as a matter of fairness, employees performing the same duties should be paid the same salary.

There is no objective way to determine what is "fair" in employee compensation. Many employees in state government performing the same or similar duties receive different salaries. A myriad of factors contribute to this fact, including longevity, market factors, transfers within and between agencies, whether an employee is hired directly to a position or promoted from within, and so on. The benchmark of the current state government pay system for attempting to insure that employees performing the same work are compensated in a comparable way is the classification system. In Ellerhoff's case, his position had the same classification as position 00103 at DHES. Thus, the pay system recognized that he was performing comparable work to those employees.

Ellerhoff's fairness arguments also relate to the increased complexity and significance of his duties, compared to his former position at DHES. He believes that the position 00103 employees received a higher salary to perform those duties, and that he should be similarly compensated. However, the pay system also addresses issues of complexity and significance through the classification process. They are not factors in pay exceptions. Again, Ellerhoff's position was classified at the same grade as the position 00103 employees. This proceeding is not an appeal of his classification. It is an appeal to determine whether the pay plan rules were properly applied.

Under the pay plan rules, agencies have narrowly limited discretion to modify the pay of existing employees. As noted above, pay levels are set by statute, but the legislature has granted the Department the authority to develop programs to address difficult recruitment, retention,

transfer, or other exceptional circumstances. The authority established by this section is the only basis for individual pay exceptions or negotiations. The Department has implemented this authority by adopting Rules 1827 through 1829. Rule 1827 delegates to agency heads the discretion to grant a certain number of retention exceptions. This is the only discretion available to departments in setting pay for existing employees, absent a change in classification.

In his discussions with management, Ellerhoff gave no indication that he would leave employment with DEQ unless he received a raise. Without some basis to believe that it needed to raise his pay in order to retain Ellerhoff, it would not have been proper for DEQ to grant a pay exception.

The evidence does not establish that DEQ abused its discretion in refusing to grant Ellerhoff a pay exception. There is no evidence that employees situated similarly to him received pay exceptions. Even assuming differential treatment by several different directors at DHES over a number of years to be a valid basis to establish abuse of discretion in the treatment of Ellerhoff by DEQ years later, the record contains no evidence to establish the reasons DHES paid the position 00103 employees at the maximum for the grade. The record does not even establish that their salary levels resulted from pay exceptions. There are a number of reasons these employees could have received the maximum for the grade, other than a pay exception. For example, the evidence relating to one of the employees, Exhibit J-16, is a position register from FY90 which shows the incumbent in position 00103 at grade 17, step 13. The former step and grade pay system was eliminated by amendment of § 2-18-312, MCA, in 1991. In that system an employee could reach step 13, the maximum for the grade, simply by time in service. It is likely therefore, that the employee in question reached the maximum for the grade due to time in service, and not due to any pay exceptions or negotiations. Thus, the facts regarding this employee do not support Ellerhoff's argument that he should be paid the maximum for the grade.

Ellerhoff also testified that the reason given to him by the DEQ director for declining his request for a pay exception was that the governor's office was not granting pay exceptions. Although Personnel Division Administrator McEwen testified he was not aware of any directive from the governor's office to deny pay exceptions, it seems clear that the administration was discouraging them. However, Ellerhoff did not establish his eligibility for a pay exception in the first instance, i.e. the likelihood that he would leave employment if not granted a raise. In any event, the statement that the governor's office was not granting pay exceptions does not establish that the DEQ director abused her discretion in denying Ellerhoff's request.

In summary, Ellerhoff's appeal is based on a mistaken belief that agencies have the ability to negotiate employee pay in a broader manner than the authority granted to them under the law. In his case, DEQ had the ability to bring his salary to the maximum for the grade only if it believed it needed to do so to retain him as an employee. Without a showing of a need to retain him, it properly denied his request.

V. CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter based on § 2-18-1011, MCA.

2. Thomas Ellerhoff is not aggrieved by the manner in which his compensation has been determined. § 2-18-1012, MCA.

VI. RECOMMENDED ORDER

The appeal of Thomas Ellerhoff should be denied.

DATED this 27th day of August, 2002.
BOARD OF PERSONNEL APPEALS

By: /s/ ANNE L. MACINTYRE
Anne L. MacIntyre, Chief
Hearings Bureau
Department of Labor and Industry

NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than September 20, 2002. This time period includes the 20 days provided for in ARM 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518