

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF WAGE APPEAL NO. 1-2006:

CANDACE F. WEST, ATTORNEY)	Case No. 994-2006
SUPERVISOR, LEGAL SERVICES)	
DIVISION, CIVIL BUREAU, MONTANA)	
DEPARTMENT OF JUSTICE,)	
)	
Appellant,)	
)	
vs.)	
)	
STATE PERSONNEL DIVISION,)	
DEPARTMENT OF ADMINISTRATION,)	
)	
Respondent.)	

* * * * *
**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
RECOMMENDED ORDER**
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I. INTRODUCTION

On July 25, 2005, Candace F. West filed a step 1 wage appeal concerning the salary paid to her by the Department of Justice following a promotion. On August 19, 2005, the Department of Justice responded to the appeal, denying it had failed to follow the pay plan rules in setting West's compensation, and returned the appeal to West. On August 31, 2005, West filed a step 2 wage appeal with the State Personnel Division. On October 3, 2005, the State Personnel Division responded to the appeal, denying it. On October 21, 2005, West filed this step 3 wage appeal with the Board of Personnel Appeals.

On November 8, 2005, Jennifer Jacobson, an agent for the Board, ruled that the appeal was complete and that the Board would not conduct a preliminary investigation. Jacobson transferred the case to the Hearings Bureau for a hearing on the appeal.

Hearing Officer Anne L. MacIntyre conducted the hearing on January 10, 2006. Appellant West represented herself. Norman C. Peterson, Agency Legal Services Bureau, represented the respondent, State Personnel Division. At commencement of hearing, the hearing officer denied respondent's motion to dismiss on the pleadings. The motion was based on respondent's contention that under Pay Plan Rule 1816 and Classification Plan Rule 1723, West should not have been paid retroactive pay prior to April 12, 2005, and thus had been compensated more than allowed by the pay plan rules. As will be discussed *infra*, respondent's argument misconstrues Classification Plan Rule 1723.

Pursuant to pre-hearing stipulations of the parties, the administrative file compiled at Steps 1 and 2 of the appeal process was admitted into evidence, including all attachments and the hearing officer took official notice of all applicable pay plan rules, Montana statutes, administrative rules, policies, and guidelines.

At the hearing, Barbara Harris, Ron Wilson, Candace West, Galen Hollenbaugh, Larry Fasbender, Lynn Long, and Randy Morris testified. Exhibits 1 - 8, A - E, G, and I - K were admitted by stipulation. Exhibits 9 and 10 were admitted without objection.

The parties filed post-hearing briefs on January 31, 2006. At that time, the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether Candace F. West, Attorney Supervisor, has been properly compensated in accordance with Mont. Code Ann. parts 1 - 3, Chapter 18, Title 2 and the applicable pay plan rules adopted by the Department of Administration.

III. FINDINGS OF FACT

1. In mid-December, 2004, the Department of Justice, Office of Attorney General, decided to reorganize the Legal Services Division. The office's solicitor resigned following his election to the Supreme Court. The Attorney General decided not to fill the position and to assign the responsibilities of the solicitor to the chief criminal counsel and the chief civil counsel. In turn, the office reassigned some of the management responsibilities of the chief counsel positions to two newly created bureau chief positions, the civil services bureau chief and the prosecution services bureau chief.

2. Galen Hollenbaugh, deputy chief of staff for the Department, asked the appellant, Candace West, then an attorney in the Legal Services Division, if she would be interested in a promotion to the position of civil services bureau chief. The Department made a similar offer to Barbara Harris for the prosecution services bureau chief position.

3. West accepted the promotion, with new duties, and the new position was announced to the staff on December 16, 2004.

4. Larry Fasbender, chief of staff, told West the promotion would commence at the beginning of 2005. Neither Hollenbaugh nor Fasbender told West what the salary for the position would be because the position had to be submitted for reclassification in order to reflect the new duties and responsibilities West would have as a supervisor and manager in the Legal Services Division. Harris accepted a promotion to the prosecution services bureau chief under similar terms and conditions, without a specific discussion of pay.

5. The Department completed a job profile or position description to reflect the changes in duties and responsibilities for West's position in early January 2005. West signed the

profile on January 6, 2005. It was approved for the Department by Chris Tweeten, chief civil counsel and West's immediate supervisor, and Hollenbaugh on January 10, 2005. West commenced work under the revised position description on or about the same date.

6. After signing it, Hollenbaugh submitted the job profile to the Department's human resource office for reclassification. He anticipated that the position would be classified as a grade 20 in Pay Plan 060, which would result in a salary increase for West. He told West several times that, although the base pay rate for her promotion had not yet been set, her pay increase would be retroactive to when she commenced the bureau chief duties of the new position.

7. West continued to receive her base pay rate (\$25.466422) at her former grade 19, attorney specialist position, from January 8, 2005 through June 2005. As of February 28, 2005, the reclassification was not complete. West and Harris wrote a letter to Attorney General Mike McGrath requesting that their salaries be set at the same level as the salary of Jim Scheier, another bureau chief in the Legal Services Division. They received no response to the letter.

8. The Department completed the classification process on or about April 12, 2005, assigning grade 20 to the position. Steve Barry, the Department's human resource officer, signed the completed job profile on April 14, 2005; Fasbender signed it on April 15, 2005. Between the submission of the job profile for classification and the completion of the process, the Department modified the job profile by assigning several additional attorneys to West's supervision.

9. In early May, Harris's immediate supervisor informed West and Harris it appeared that the retroactive pay for their positions would have to be incremental for budget reasons. By mid-May 2005, the Department had not yet set the salaries for the reclassified bureau chief positions. On May 19, 2005, West wrote a memo to Hollenbaugh asking for confirmation of her promotion date and pay status. In the memo, she stated it had been her understanding that her rate of pay would be established at the same base pay rate as Scheier. She also stated that she had learned that Anna (presumably another Department employee) had been asked to prepare pay documents reflecting pay rate amounts different from the "bureau chief's rate" for the period prior to July 1, 2005.

10. Later in the day, following West's memo, West and Harris met with McGrath to discuss their concerns about pay. They pressed their case to be paid the same as Scheier on an equal pay theory. McGrath concurred that they should be paid the same as Scheier. When West asked about retroactive pay, McGrath told her that was Hollenbaugh's bailiwick.

11. The next day, May 20, 2005, McGrath sent West a memo stating that her salary would be increased to an hourly base rate of \$27.436422 effective January 8, 2005, and increased to an hourly base rate of \$29.779843 (same as Scheier) effective July 1, 2005. Hollenbaugh wrote the memo for McGrath's signature, at Fasbender's direction. Fasbender told Hollenbaugh West's base pay for the period January 8 to July 1, 2005, should be half of the difference between West's grade 19 hourly base pay of \$25.46642 and the \$29.779843 figure. The Department paid West \$1,505.45 in retroactive pay.

12. West grieved the pay decision internally within the Department, then filed this wage appeal with the Board. She contended that she was entitled to retroactive pay at the hourly base rate of \$29.779843 from January 8 to July 1, 2005, and that the Department's action constituted a retroactive reduction of her promotion pay.

13. West's hourly base rate of pay at grade 19 prior to the promotion was \$25.46642, 95.9% of the market rate for a grade 19 position. The entry pay for a grade 20 position was an hourly base rate of \$23.73221; the market pay was \$29.2399 hourly. At grade 20, absent a pay plan exception, the most she could have been paid under the pay plan rules was an hourly base rate of \$28.05112. The Department never obtained a pay plan exception for West's position.

IV. DISCUSSION¹

Mont. Code Ann., Title 2, chapter 18, part 3, establishes the framework for determining state employee compensation. The Department of Administration, State Personnel Division, 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 Mont. Code Ann. § 2-18-1011.

West contends that, upon her promotion, the pay plan rules required the Department of Justice to set her pay at the hourly base rate of \$29.779843 effective January 8, 2005, and that the decision to pay her a lower hourly rate for the period January 8 to June 30, 2005, constituted a retroactive reduction of pay, not allowed by the pay plan rule. The Department contends that West's pay following her promotion was properly set in accordance with the pay plan rules.

Although the parties have characterized the matter as whether West was entitled to retroactive pay to January 8, 2005, the essential question is whether the Department properly set West's pay for the period January 8, 2005 to July 1, 2005. The Department did not retroactively reduce West's pay.

Pay Plan Rule 1809 provides:

(1) The base salary for an employee promoted to a higher grade level will be set, at the discretion of the agency, within a range from the entry rate of the higher grade to a base salary that maintains the employee's market ratio as it was in the lower grade. . .

(2) When determining a promoted employee's new base salary, the agency should consider criteria including, but not limited to: the employee's job related

¹**Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece (1940)*, 110 Mont. 541, 105 P.2d 661.**

qualifications (experience, knowledge, skills and abilities), existing salary relationships within the agency and the work unit, ability to pay, and the competitive labor market.

The base salary that the Department of Justice set for West was properly within the range provided for in Pay Plan Rule 1809. The market salary for a grade 19 position in January 2005 was \$55,215.00 annually or \$26.54567 hourly. West's base hourly salary was \$25.46642. Thus, her market ratio for her grade 19 position was 95.9% ($\$25.46642 / \$26.54567 = 95.9\%$). The market salary for a grade 20 position in January 2005 was \$60,819.00 annually or \$29.2399 hourly. Applying West's market ratio to the market salary at grade 20, the maximum base salary West could be paid was \$28.05112. The base salary the Department established for West during the period for which she is claiming additional pay was \$27.436422, and is within the range provided for in the rule, which gave the Department the discretion to set the pay between \$23.73221 and \$28.05112. The base salary West is claiming exceeds that allowable by the pay plan rules. A higher rate of pay required a pay plan exception. The evidence does not support a finding that the agency abused its discretion in setting West's base pay at \$27.436422.

West's theory of her case is that, having promised that she would receive a pay increase retroactive to January 8, 2005, the agency could not set the pay increase as any amount other than a base salary equal to that of Scheier. Although West and Harris advocated that their pay should be the same as Scheier's, there is no support in the record that the Department agreed to pay West the same amount as Scheier until the meeting with McGrath on May 19, 2005. The testimony concerning that meeting does not support a finding that McGrath committed to paying West the same base salary as Scheier retroactively to January 8, 2005. He expressly told West that the issue of retroactive pay was up to Hollenbaugh to determine. But even though McGrath agreed that West should be paid the same base salary as Scheier, the pay plan rules did not allow West to be paid that amount, since the most West could be paid under the rules was \$28.05112.² The Department's decision to increase West's base salary to equal Scheier's was, in essence, a pay exception effective July 1, 2005. Although it was within the discretion of the Department to grant a pay exception, it was not required by the pay plan rules, and the Department had no obligation to make the exception effective earlier than July 1, 2005.

The Department also properly paid West her increased salary retroactively effective to January 8, 2005. Pay Plan Rule 1816 governs the effective date of changes in compensation resulting from reclassification. It provides that the effective date of an upward reclassification may not be more than 30 days prior to the date the position detail form ("position description") was initiated by the agency, except as provided in the classification plan rules. When a position is reclassified because of a change in the duties and responsibilities of the position, as West's position was, the new pay rate may not be made effective prior to the beginning of the pay period that includes the date of the agency-approved position description or job profile documenting the

²Although West's argument that comparable worth principles should control the compensation determination has a logical appeal, because the pay plan rules establish a maximum pay for promoted employees, they do not permit an agency to set pay based on those principles. The fact that the Pay Plan 060 rules limited agency discretion in this manner is one reason many agencies have moved to Pay Plan 020, under which the Department could have had the discretion to set pay in the way West sought. However, nothing in Pay Plan 020 would have prevented the Department from paying West less than Scheier from January to July.

duties and responsibilities on which the reclassification is based. Classification Plan Rule 1723(1)(c).

The agency approved a position description that documented the duties and responsibilities on which West's reclassification was based on January 10, 2005. The beginning of the pay period for that time was January 8, 2005. Although the State Personnel Division contended that the position description was not approved until April 12, 2005, the approvals by Tweeten and Hollenbaugh on January 10, 2005 were those contemplated by the rule for purposes of the effective date of a reclassification. Tweeten was West's immediate supervisor and Hollenbaugh was the Legal Services Division Administrator. Those managers approved a revised position description that included significant changes in West's duties and responsibilities. West commenced performance of those new duties and responsibilities with assurances from her managers that a pay increase would be retroactive to the beginning of the new duties and responsibilities.

The purpose of the Classification Plan Rule 1723 is to allow an agency to change an employee's duties and responsibilities pending completion of the reclassification process, while allowing the increase in pay to be effective with the change in duties. The approvals by Barry and Fasbender of April 14 and 15, 2005, respectively, represented the final approvals of the agency following completion of the reclassification process. To hold that the change in pay could not be effective until the completion of the reclassification process would defeat the purpose of the rule.

Thus, West's increase in pay, even though it was not to the level West sought, was properly effective on January 8, 2005.

In this respect, the respondent contends that the Board must give deference to the State Personnel Division's interpretation of its own rules, citing *Easy v. Department of Natural Resources and Conservation* (1988), 231 Mont. 306, 754 P.2d 746. Although the agency's interpretation is entitled to deference, this is not the case when it is plainly inconsistent with the spirit of the rule.

V. CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter based on Mont. Code Ann. § 2-18-1011.
2. Candace F. West has been properly compensated in accordance with Mont. Code Ann. parts 1 - 3, Chapter 18, Title 2 and the applicable pay plan rules and is not aggrieved by the manner in which her compensation has been determined. Mont. Code Ann. § 2-18-1012.

VI. RECOMMENDED ORDER

The wage appeal of Candace F. West is denied.

DATED this 16th day of February, 2006.

BOARD OF PERSONNEL APPEALS

By: /s/ ANNE L. MACINTYRE
ANNE L. MACINTYRE
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than March 13, 2006. This time period includes the 20 days provided for in Admin. R. Mont. 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