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**STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU**

**IN THE MATTER OF THE
WAGE CLAIM OF SHANE B.
SIERER**

CASE NO. 240-2009

CLAIMANT,

V.

**MONTANA DEPARTMENT OF
LABOR AND INDUSTRY,**

RESPONDENT.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DETERMINATION**

INTRODUCTION

The contested case hearing was held on February 10, 2010. The hearing was more than four hours in length.

Mr. Joseph Nevin represented the Montana Department of Labor and Industry. Mr. Shane B. Sierer, the Claimant, represented himself. Testimony was heard from Mr. Sierer, Mr. Brent Rabe, and Ms. Tammy LaVigne.

The exhibits are listed in the Record of Exhibits and attached thereto. Except for Exhibit L, the exhibits were admitted in evidence without objection. Mr. Sierer made an objection to Exhibit L as hearsay, but I overruled the objection and admitted Exhibit L.

Without objection, I took judicial notice of a calendar entitled "State of Montana Insurance Deductions Calendar 2008." A copy of the calendar is identified as Enclosure 1. Mr. Nevin requested that judicial notice be taken of Mont. Code Ann. § 2-18-618 (2007). Mr. Sierer did not object. A copy of the statute of which judicial notice is taken is identified as Enclosure 2. The enclosures are listed on the Record of Exhibits and attached thereto.

1 On December 31, 2009, I received “Respondent’s Pre-Hearing
2 Memorandum. In this document the Department stated: “The issue in this case is
3 whether the Respondent owes the Claimant additional wages.” The Department
4 also identified contested issues of fact as follows:

- 5 What was the Claimant’s rate of pay at the time of his resignation?
- 6 What is the proper rate of pay for Claimant’s unused vacation leave?
- 6 What is the proper rate of pay for Claimant’s unused sick leave?

7 Mr. Sierer, in his Pre-Hearing Memorandum dated January 7, 2010, concurred with
8 these statements of the Department.

9 In some of the following Findings of Fact, a statement is identified as the
10 belief or understanding of a witness. A Finding of Fact expressed in terms of such
11 opinions of a witness does not, standing alone, indicate what weight, if any, I gave
12 to the opinion.

13 To the extent the following Findings of Fact may be deemed to be
14 Conclusions of Law, they are incorporated by reference in the Conclusions of Law.
15 To the extent that the following Conclusions of Law may be deemed to be Findings
16 of Fact, they are incorporated by reference in the Findings of Fact. The
17 Conclusions of Law include the application of the law to the facts that I have found
18 by the preponderance of the evidence. References to testimony and exhibits are
19 intended to be helpful, but are not intended to list all possible relevant references.

20 **FINDINGS OF FACT**

21 In the time prior to January 2008, Mr. Sierer had several discussions about
22 his employment with Ms. LaVigne, the Division Administrator, Centralized
23 Services Division, Department of Labor and Industry. Test. Sierer; Test. LaVigne.

24 Mr. Sierer was Fiscal Support Bureau Chief. Pay band 7 applied to the
25 position of Bureau Chief. Test. Sierer.

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1 Mr. Sierer understood that Ms. LaVigne agreed he could resign as Bureau
2 Chief and take an accountant position in the Centralized Services Division, for
3 which he would be paid less than his pay as Bureau Chief. Test. Sierer.

4 Mr. Sierer had some apprehension about this change because his duties and
5 tasks in the accountant position had to be defined. This required the completion of
6 a job profile and evaluation and classification of the accountant position by the
7 Human Resources (HR) office. Test. Sierer.

8 On January 14, 2008, Mr. Sierer sent an e-mail to Ms. LaVigne. The e-mail
9 stated what Mr. Sierer understood was his agreement with Ms. LaVigne. Test.
10 Sierer; Ex. A.

11 The e-mail contains the statement, “my change in pay will become effective
12 two weeks from the later of this notification or the new job profile classification
13 from HR.” Ex. A. Mr. Sierer understood this statement to mean that the change in
14 pay would occur two weeks after January 14, the date of the e-mail, or two weeks
15 after the date of the new job profile classification, whichever was later. Two weeks
16 after January 14 was January 28. Test. Sierer.

17 The accountant position that Ms. LaVigne discussed with Mr. Sierer was an
18 existing vacant position. She understood that Mr. Sierer could take that position
19 without going through the usual application process. Test. LaVigne.

20 After receiving the e-mail from Mr. Sierer the afternoon of January 14, Ms.
21 LaVigne believed that the terms needed to be clarified. She felt there had been
22 communication problems between Mr. Sierer and herself during the previous six
23 months. She understood that Mr. Sierer wanted to be able to leave work by 3 p.m.
24 so he could get his children from school. Such a part-time schedule would not be
25 acceptable for a Bureau Chief position, but it would be acceptable for an
26 Accountant position. Test. LaVigne.

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1 Brent Rabe is the Personnel Officer for the Department. He saw Mr. Sierer's
2 e-mail (Ex. A) and had a discussion with Ms. LaVigne about the need to clarify the
3 terms of the job re-assignment. Test. Rabe.

4 Mr. Rabe had input in the drafting of the letter to Mr. Sierer from Ms.
5 LaVigne dated January 15, 2008. The letter was an effort to establish the terms of
6 employment in writing. The HR office routinely assists supervisors with letters
7 from supervisors to employees that document a new rate of pay. Test. Rabe; Ex. B.

8 Ms. LaVigne hand-delivered her January 15, 2008, letter to Mr. Sierer. Test.
9 LaVigne; Ex. B.

10 Mr. Sierer returned the letter with his signature and the date "1/18/08" added
11 under the statement, "I accept this offer of employment." Test. Rabe; Ex. B.

12 Mr. Sierer identified his signature on Exhibit B. This was signed on
13 January 18, 2008, at a time when he was having personal problems. Test. Sierer;
14 Ex. B.

15 A Personnel Action Form is required when an employee changes positions.
16 Ms. LaVigne's signature is on the Personnel Action Form marked Exhibit C. This
17 form reflects Mr. Sierer's reassignment from Bureau Chief to Accountant and the
18 change in hourly base salary from \$31.37 to \$21.375. On this form the Effective
19 Date of "1/28/2007" is a typographical error. The year should be 2008. Test.
20 LaVigne; Ex. C.

21 In the second half of January 2008, Mr. Sierer believed that Ms. LaVigne
22 was not fulfilling their agreement. For example, he expected to be moved to an
23 office at the other end of the building, but he stayed in the Bureau Chief's office.
24 He also felt that she was micro-managing him. Test. Sierer.

25 On January 24, 2008, Ms. LaVigne signed a Job Profile and Evaluation for
26 the position of Accountant, number 66815. This was the position that had been
27 discussed with Mr. Sierer. Ms. LaVigne had added Section II.B. on page 2 of the

1 form. This was 10% of the job duties. The other 90% of job duties remained the
2 same. Test. LaVigne; Ex. K.

3 On January 25, 2008, a Human Resource Specialist in the Department's HR
4 office completed the job evaluation of the Accountant position. The Department
5 had authority to determine this classification. It was band 6. Test. Rabe; Ex. L.

6 Mr. Sierer was not informed that the Accountant position job evaluation had
7 been completed by HR. Test. Sierer.

8 Ms. LaVigne did not orally inform Mr. Sierer that his rate of pay was
9 changing on January 28, 2008. Test. Sierer.

10 The terms "job profile" and "job description" have the same meaning. A job
11 profile describes the duties of a position. The position exists whether it is vacant or
12 whether an employee is in the position. Job profiles can be changed without
13 employee input. No policy requires employees to be notified of changes in job
14 profiles. HR does not require the person in a position—the incumbent—to sign the
15 job profile. Test. Rabe.

16 After working on January 31, 2008, Mr. Sierer packed up his personal
17 belongings from his office and left a message that he was resigning. January 31,
18 2008, was the last day he worked for the Department. Test. Sierer.

19 Mr. Sierer was contacted and asked to submit his resignation in writing. By
20 letter dated February 4, 2008, and hand-delivered to HR on February 5, Mr. Sierer
21 tendered his resignation. Test. Sierer; Ex. E.

22 Ms. LaVigne's signature is on the Personnel Action Form marked Exhibit D,
23 which Ms. LaVigne prepared on February 5, 2008. The form shows Mr. Sierer's
24 hour base salary was \$21.375. Although the letter of resignation (Ex. E) is dated
25 February 4, 2008, Ms. LaVigne used February 1, 2008, as the effective date on this
26 Personnel Action Form because that was the ending day of the last pay period in
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1 which Mr. Sierer worked. A copy of the resignation letter was attached to the form.
2 Test. LaVigne; Ex. D; Ex. E; Encl. 1.

3 For purposes of determining the hourly base salary of Mr. Sierer at the time
4 he terminated employment with the Department, it does not matter whether the
5 effective date of Mr. Sierer's resignation was January 31, February 1, February 4, or
6 February 5, 2008, because each of these dates is after January 28, 2008, which is the
7 date Mr. Sierer's hourly base salary changed. Test. Rabe.

8 In mid-February Mr. Sierer received compensation for his work and for
9 unused vacation leave and sick leave. He was paid \$21.375 per hour for the hours
10 worked on January 28, 29, 30, and 31. The payment for unused vacation leave and
11 sick leave was calculated at an hourly rate of \$21.375. He phoned the payroll office
12 and sent an e-mail to Ms. LaVigne questioning the rate of pay. Test. Sierer.

13 In response, Mr. Sierer received a letter dated February 21, 2008, from Ms.
14 LaVigne. Test. Sierer; Ex. 1.

15 Ms. LaVigne's letter to Mr. Sierer states in part: "Our agreement was that
16 your new pay would be effective 2-weeks following your notice (January 14) or
17 when the job profile/reclassification was complete, which ever was later." Ms.
18 LaVigne wrote that the job classification was completed on January 25, 2008.
19 Ex. 1.

20 Mr. Sierer disagreed with the explanation in Ms. LaVigne's letter (Ex. 1).
21 His understanding of the agreement, as stated in his e-mail of January 14, 2008,
22 (Ex. A) was that the change in pay would occur two weeks after the date of his e-
23 mail or two weeks after the job profile classification, whichever occurred later.
24 Test. Sierer.

25 Two weeks after the date of Mr. Sierer's e-mail (Ex. A) was January 28,
26 2008. Two weeks after the completion of the job classification on January 25 was
27 February 8. He believed the change in pay from \$31.37 per hour to \$21.375 per

1 hour would not occur until the later date. Thus, Mr. Sierer believed that his rate of
2 pay was \$31.37 per hour and did not decrease to \$21.375 per hour before he
3 resigned. Test. Sierer; Ex. A; Ex. 1; Encl. 1.

4 CONCLUSIONS OF LAW

5 The undersigned Hearing Examiner has jurisdiction of this matter. Mont.
6 Code Ann. § 2-4-611; § 39-3-216(3).

7 The decision of the hearing examiner/hearings officer is the final order of the
8 Department. Mont. Code Ann. § 39-3-216(4); Admin. R. Mont. 24.2.101(2)(b).

9 Mont. Code Ann. § 2-18-617(2)(a)(2007) states in pertinent part: “An
10 employee who terminates employment . . . is entitled upon the date of termination
11 to . . . (i) cash compensation for unused vacation leave”

12 Admin. R. Mont. 2.21.232(3) states in pertinent part: “The value of unused
13 vacation leave is computed based on the employee’s salary rate at the time of
14 termination.” Ex. G.

15 Mont. Code Ann. § 2-18-618(6)(2007) states in pertinent part: “[A]n
16 employee who terminates employment with the agency is entitled to a lump-sum
17 payment equal to one-fourth of the pay attributed to the accumulated sick leave.
18 The pay attributed to the accumulated sick leave must be computed on the basis of
19 the employee’s salary or wage at the time the employee terminates employment . . .
20 .” Encl. 2.

21 Consistent with Mont. Code Ann. § 2-18-618, the Montana Operations
22 Manual states that the amount of cash compensation for unused sick leave is
23 calculated using “the employee’s regular rate of pay at the time of termination of
24 employment.” Ex. F, ¶ 141(1).

25 The elements of a contract are parties capable of contracting, their consent, a
26 lawful object, and sufficient consideration. Mont. Code Ann. § 28-2-102. A
27 contract comes into existence when there is an offer by one party and an

1 unconditional acceptance of the offer by the other party. E.g., Kuchinski v. Security
2 Gen. Ins. Co., 141 Mont. 515, 519, 380 P.2d 889, 891 (1963).

3 The interpretation of a contract is a question of law. E.g., Ophus v. Fritz,
4 2000 MT 251, ¶ 19, 301 Mont. 447, 11 P.3d 1192.

5 If the language of a contract is unambiguous, the duty of a court is to apply
6 the language as written. E.g., Nordlund v. School Dist. No. 14, 227 Mont. 402, 404,
7 738 P.2d 1299, 1301 (1987).

8 “When a contract is reduced to writing, the intention of the parties is to be
9 ascertained from the writing alone if possible” Mont. Code Ann. § 28-3-303.

10 “The words of a contract are to be understood in their ordinary and popular
11 sense” Mont. Code Ann. § 28-3-501.

12 “The language of a contract is to govern its interpretation if the language is
13 clear and explicit and does not involve an absurdity.” Mont. Code Ann. § 28-3-401.

14 “The whole of a contract is to be taken together so as to give effect to every
15 part if reasonably practicable, each clause helping to interpret the other.” Mont.
16 Code Ann. § 28-3-202.

17 “The execution of a contract in writing . . . supersedes all the oral
18 negotiations or stipulations concerning its matter which preceded or accompanied
19 the execution of the instrument.” Mont. Code Ann. § 28-2-904.

20 Evidence can be considered of the circumstances under which the agreement
21 was made, but not evidence of promises or understandings or conditions of
22 performance that were never made part of the written contract. Yellowstone II Dev.
23 Group, Inc. v. First American Title Ins. Co., 2001 MT 41, ¶ 36, 304 Mont. 223, 20
24 P.3d 755.

25 “Evidence of the circumstances under which a contract was made and the
26 matter to which it relates may be considered, but such evidence is not admissible to
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1 add to, vary, or contradict the terms of the contract.” Corporate Air v. Edwards Jet
2 Ctr. Mont., Inc., 2008 MT 283, ¶ 30, 345 Mont. 336, 190 P.3d 1111.

3 Whether an ambiguity exists in a contract is a question of law. E.g., Doble v.
4 Bernhard, 1998 MT 124, ¶ 19, 289 Mont. 80, 959 P.2d 488.

5 The determination whether a contract is ambiguous is made on an objective
6 basis. “[A]n ambiguity exists only if the language is susceptible to at least two
7 reasonable but conflicting meanings.” Mary J. Baker Revocable Trust v. Cenex
8 Harvest States Coops, Inc., 2007 MT 159, ¶ 20, 338 Mont. 41, 164 P.3d 851.

9 Exhibit B is a written contract.

10 Exhibit B is not ambiguous with respect to the effective date of the change in
11 Mr. Sierer’s rate of pay. The first paragraph of Ex. B. contains the explicit
12 statement, “the effective date of your new position will be January 28, 2008.” The
13 next paragraph states that the rate of pay of \$31.37 per hour will change to \$21.375
14 per hour.

15 Although Exhibit A referred to the date of notification of the job profile
16 classification, Exhibit B does not. However, Mr. Sierer signed and dated Exhibit B
17 under the words “I accept this offer of employment.” Thus, the terms of Exhibit B
18 supersede the previous understandings the parties may have had.

19 **DETERMINATION**

20 Mr. Sierer’s hourly base rate of pay at the time of his resignation from
21 employment by the Department was \$21.375.

22 The proper rate of pay for calculation of Mr. Sierer’s cash compensation for
23 unused vacation leave is \$21.375.

24 The proper rate of pay for calculation of Mr. Sierer’s cash compensation for
25 unused sick leave is \$21.375.

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APPEAL RIGHTS

Mont. Code Ann. § 39-3-216(4) states: “The decision of the hearings officer is final unless an aggrieved party requests a rehearing or initiates judicial review, pursuant to Title 2, chapter 4, part 7, by filing a petition in district court within 30 days of the date of mailing of the hearings officer’s decision.”

DATED this 16th day of February, 2010.

/s/ Thomas G. Bowe
THOMAS G. BOWE
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