

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1000-2011
OF ROLAND M. MENA,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
DEPARTMENT OF JUSTICE, BOARD OF)	
CRIME CONTROL,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Claimant Roland Mena appealed a determination of the Wage and Hour Unit that found he was not entitled to payout of accumulated vacation benefits under Mont. Code Ann. § 2-18-617(2) and dismissed his claim.

Prior to the hearing in this matter, the claimant filed a motion to have this tribunal declare Mont. Code Ann. § 2-18-617(2) unconstitutionally vague. That motion was denied because this tribunal, being an administrative forum, has no such power. *Jarussi v. Board of Trustees*, 204 Mont. 131, 135-36, 664 P.2d 316, 318 (1983).¹

¹ While it is not within this tribunal’s power to rule on questions regarding constitutionality of statutes, the hearing officer notes that the Montana Supreme Court has found that state employees who were convicted of criminal mischief and who engaged in sexual harassment in their jobs lacked standing to challenge the statute at issue in this case because it was “quite clear“ that their conduct reflected discredit upon them within the meaning of the statute. *Stuart v. Dept. of Social and Rehabilitation Servs.*, 256 Mont. 231, 240, 846 P.2d 965, 971 (1993). The hearing officer further notes that the Supreme Court of California has upheld a similarly worded statute in the face of an attack that the statute was unconstitutionally vague. *Nightingale v. State Personnel Board*, 7 Cal.3d 507, 498 P.2d 1006 (1972). The statute at issue in that case provided for suspension or termination from employment upon a finding that an employee’s conduct “is of such a nature that it causes discredit to his agency or his employment.” 498 P.2d at 1008-09. *See also, Nicolini v. County of Tuolumne*, 190 Cal. App. 3rd 619, 235 Cal. Rptr 559 (1987).

Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on October 6, 2011. Michael McKeon, attorney at law, appeared on behalf of Mena. Katherine Orr, Assistant Attorney General, appeared on behalf of the Respondent Department of Justice. The parties agreed to present the matter on the basis of a stipulated record and oral closing statement, the particulars of which are contained in the parties' stipulation filed on October 6, 2011 as well as the transcript of the October 6, 2011 proceeding in this case. Based on the evidence and argument adduced at hearing, the following findings of fact, conclusions of law and recommended decision are made.

II. ISSUE

Did Mena's actions while employed in his position as Executive Director of the Board of Crime Control amount to conduct that reflected discredit upon his employment under Mont. Code Ann. § 2-18-617(2)?

III. FINDINGS OF FACT²

1. The Board of Crime Control (Board) is administratively attached to the Department of Justice. Mont. Code Ann. § 2-15-2006. The Board was established as the state planning agency to promote public safety by strengthening the coordination and performance of the criminal juvenile justice systems. The Board supervises the Crime Control Division (Division) which provides financial support, technical assistance, and support services to state and local criminal justice agencies. The planning aspect of the Division involves evaluation of crime prevention, public safety, juvenile justice, victim assistance, and other related efforts in the state and management of state and federal funds. The Board is comprised of 18 Board Members appointed by the Governor of the State of Montana. Testimony, Mena, page 333.

² While this hearing officer has borrowed from the language of Hearing Officer William Corbett's findings in his August 12, 2011 decision in Mena's grievance before the Department of Justice, this is simply because his language is succinct and cannot be improved upon by this hearing officer. The fact that this hearing officer has borrowed from Hearing Officer Corbett's language in arriving at the decision in this case should not be construed as any indication that the undersigned failed to engage in an independent fact finding procedure in this case. The findings of fact contained in this decision were reached after carefully reading and independently evaluating all of the evidence in this case, including the exhibits and the transcript from Mena's grievance hearing held before Hearing Officer Corbett.

2. Mena became Executive Director of the Board of Crime Control Division (Division) in October 2003. He attended various training courses in the areas of program management and administration as well as various criminal justice crime prevention, victim assistance, and juvenile justice programs. On December 10, 2010, Mena was discharged from his position for intentionally withholding from the Board information about additional grant money available to the Board and for mismanagement of personnel (stemming, as discussed below, from his refusal to take any action to stop the divisive and wholly unprofessional conduct of a bureau chief who worked under him which resulted in creating an extremely hostile working environment in the Crime Control Division).

3. As Executive Director, Mena administered an annual budget of approximately \$10,000,000.00. He was responsible for securing grant money which was then allocated by the Board. Mena managed a staff of 20 people organized into three bureaus, each of which was headed by a bureau chief supervised by Mena. Lily Yamamoto, Don Merritt, and Mark Thatcher were the bureau chiefs. Merritt was the bureau chief of the Fiscal Services Bureau, now called the Compliance Performance Bureau.

4. Pertinent to this case, the position description states that the Executive Director was responsible in part for performance, management, supervision, and discipline of employees. The skills required to be the Executive Director involved the use of interpersonal skills that establish and maintain effective working relationships within the Division, including responsiveness, credibility, confidence, tact, cooperation, confidentiality, and sensitivity. For personal effectiveness, the Executive Director was required to exhibit maturity and to consistently adhere to high levels of ethical behavior. This includes professionalism, flexibility, interpersonal understanding, and teamwork. The Executive Director was required to show an ability and willingness to align behavior with the needs and goals of the organization and to be a role model for others. He was also to hold himself accountable for organizational activities, services, decisions, successes and failures, to demonstrate an understanding of the link between his/her own job responsibilities and overall organizational goals and needs. This included performing the job with broader goals in mind and demonstrating characteristics such as reliability, dependability, loyalty, and a commitment to serve the public. The Executive Director was also to show leadership by building relationships by establishing trust, credibility, and rapport with customers and co-workers. Mena was also to serve as a role model for subordinate staff by displaying ethical behavior, high standards of performance, self improvement, and commitment to Board goals and customers.

5. Everything the Board and its members learned about available funding was funneled through the Executive Director. Mena had informed his staff, including the three bureau chiefs, that they were not to directly communicate with the Board or its members at any time.

A. Mena's Failure to Properly Disclose Available Grant Money

i. Mena's Duties in Allocation of Grant Money

6. With regard to making decisions for allocation of grant money, the ultimate and exclusive responsibility is with the Board. The only exception to this was that the Executive Director had discretion to increase existing awards that the Board had already approved by an amount up to \$5,000.00 with reverted funds.

7. The Executive Director had to report accurately to the Board what the sub-grant or block grant balances were, including unawarded balances, so that the Board knew what it had available to make award decisions. If a Board member requested information regarding unawarded balances or fund balances, it was absolutely required that the Executive Director provide that information to the Board, and if the Executive Director did not have that information, he had to get that information. Mena, in his capacity as Executive Director, had a fiduciary duty to accurately report to the Board the amount of funds available to the Board.

8. The annual funding allocation process at the Division works as follows: when block grants are awarded to the Board, there is an RFP to advertise the availability of funds, the Division staff receives the applications, and reviews the applications with a committee of the Board. The committee takes their recommendations to the next formal Board meeting, and grant awards are made from a combination of what the committee recommends and what the Board chooses to make. When sub-grants close out at the end of the 12-month cycle (typically in June of each year), sometimes there were unused (called "reverted") funds that had not been expended. The Board tried to get these re-awarded to other projects to use them before they were refunded to the federal government. If there were reverted funds, the Board might ask the staff to solicit suggestions for allocation of those awarded funds. Between June 7, 2007 to September 26, 2007, the Anti-Drug Task Force Committee and the Board were in the process of identifying the amount of unawarded funds to allocate.

ii. Mena's Failure to Disclose Remaining Money in 2007

9. On June 7, 2007, there was an Anti-Drug Task Force Committee meeting in which the committee recommended to the Board that match funds available to the Drug Task Forces would be increased to a 30 percent match for funding of the subgrantee - Drug Task Forces - and that the Board policy of restricting reimbursement to the Drug Task Forces to five percent would be eliminated. MBCC Exhibit 9, Exhibit 2. As a result of the change in policies, there was a Justice Assistance Grant fund balance of reverted funds of \$94,578.00.

10. On June 28, 2007, the full Board met and decided to adopt the recommendation of the 30 percent match but to leave the five percent restriction on the amount awarded to the Drug Task Forces in place. The five percent rule requires that personnel costs of the subgrantee - Drug Task Force - not increase by more than five percent from one year to the next. Merritt, page 40. Retention of the five percent rule resulted in a reduction to the budgets of the subgrantee - Drug Task Forces - especially the Missouri River Drug Task Force because its budget was all in personnel costs. Merritt, pages 40, 42.

11. When the Board met on June 28, 2007, it considered the sum of \$94,578.00 as the balance of reverted funds for further allocation. The Board passed a motion for the Anti-Drug Committee to come back to the Board in its September 26, 2007 meeting with recommendations on distribution of the \$94,578.00. MBCC Exhibits 4 and 9.

12. The \$94,578.00 sum that the Board thought it was working with was not the full amount the Board had available to it for distribution. The full amount available to the Board for distribution was actually in excess of \$187,000.00 (the \$94,578.00 of which the Board was aware and the amount retained by the Board pursuant to the "five percent" rule, approximately \$93,000.00). However, at its June 28, 2007 meeting, the Board did not realize that the total amount of money available was \$187,000.00, because it did not recognize the addition of the \$93,000.00 of five percent rule money.

13. On July 13, 2007, at the request of Merritt, staff member Glenda Grover prepared a spreadsheet to account for the five percent rule money as part of the unawarded funds. The spreadsheet showed that there was \$187,000.00 in unawarded funds available, not just the \$94,578.00 that the Board believed it had.

14. Either on or shortly after July 13, 2007, Grover's spreadsheet showing the availability of \$187,000.00 for the Board's use was distributed to Mena, Merritt, and Thatcher. As it was apparent from the spreadsheet that there was \$187,000.00 in funds available, Merritt and Thatcher met with Mena to urge Mena to disclose the extra \$93,000.00 to the Board.

15. At the meeting, Merritt and Thatcher told Mena that they felt they needed to contact the committee and advise it that the actual unawarded amount was \$187,000.00. Mena overruled them, telling Merritt and Thatcher that they were not to address with the committee anything other than the \$94,000.00 amount the committee mistakenly thought was available. Mena did not want the spreadsheet showing the \$187,000.00 going to the next subgrant review committee meeting. He told Merritt only the \$94,000.00, along the lines of the motion in the June 28, 2007 meeting, would be disclosed. Mena then told Merritt that "we'll address how to spend the additional \$93,000.00 at a later date and that if the committee knew there was the additional \$93,000.00; they would just spend it on the Drug Task Forces." Merritt and Thatcher were "shocked" by Mena's intentional manipulation of the committee. Merritt, pages 48-50.

16. At a September 11, 2007 Anti-Drug Committee meeting, Mena did not disclose the extra \$93,000.00 amount to the Anti-Drug Committee. During that meeting, recommendations were made by the staff for award of only the \$94,578.00. MBCC Exhibit 6. There was no mention of the total amount actually available of \$187,000.00 in funds to the committee or the competing subgrantees or Drug Task Forces. The committee made decisions only as to the \$94,578.00.

17. It was not until the September 26, 2007 Board meeting that Mena disclosed to the Board or committee members the extra \$93,000.00 available to the Board. MBCC Exhibits 6 and 9.

18. At the September 26, 2007 meeting, the Board approved the recommendations made by the Anti-Drug Committee (that met on September 11, 2007) to award the \$94,578.00. At this meeting, a spreadsheet was presented to the Board showing the additional funds available of \$93,000.00.

19. At the September 26, 2007 Board meeting, Board member Jim Oppedahl expressed his frustration because recommendations were brought to the Board to fund programs out of the \$94,578.00 but there were no recommendations for allocations of the \$93,244.00. He expressed his concern that the Board had needed to know about all amounts available prior to that meeting. The Board tabled the

discussion of the [recently identified] extra \$93,244.00 until their December 2007 meeting. MBCC Exhibit 9. The \$93,244.00 was eventually allocated but not until March 2008.

iii. Mena's Intentional Failure to Disclose Remaining Recovery Act Money in 2010

20. In February 2010, Mena received a spreadsheet (MBCC's Exhibit 15) showing that there yet existed an unawarded balance of \$55,228.72 in Recovery Act money available to the Anti-Drug Committee for disbursement.

21. On March 25, 2010, the Anti-Drug Committee met. The purpose of the meeting was to hear presentations from seven Drug Task Forces to help the subcommittee make funding decisions for the upcoming year. Thatcher and Mena were both present at the committee meeting.

22. Thatcher told the committee there would be a discussion of staff funding recommendations. At that meeting, committee and Board member Jim Cashell asked Mena if the 2009 budgeted amount (the amount to go into the budget for the future funding) included the leftover Recovery Act money. Despite having been aware for almost five weeks that the additional \$55,000.00 was available, Mena told Cashell there was no remaining Recovery Act money. The spreadsheet which Mena had seen in February 2010 showing the existence of an additional \$55,000.00 for disbursement was not provided to the committee for the March 25, 2010 meeting.

23. Soon after the March 25 meeting, Merritt and Thatcher asked Mena why he did not tell Board member Cashell that there was Recovery Act money left over. Mena said "I have other plans for those funds." "If I would have told him (Mr. Cashell) it was there, he would have wanted to use it for the Task Forces." Mena's other plans were to fund the Crime Prevention Conference and to provide sustainability money to the newly formed Crime Prevention Association. Merritt was "shocked" by this statement because Mena was knowingly misrepresenting information and not providing information to Board members.

24. Merritt did not inform Board member Cashell of the correct amount of money available in the Recovery Act funds because Mena had prohibited all staff, Merritt and Thatcher included, from independently speaking to the Board, its subgroups, or individual Board members without his permission. Merritt feared that Mena would fire him or force him to retire if Merritt informed the Board about the additional \$55,000.00 available to it from the Recovery Act money.

25. Mena manipulated the dollar amounts available to the Board because he didn't want the extra Recovery Act money to go to the Drug Task Forces.

26. In 2010, the Board discovered that Mena had purposefully withheld information from the Board regarding available funds first in 2007 and then again in 2010. After learning of Mena's deceptive behavior in 2010, the Board could not trust that Mena was truthfully reporting funds to the Board, that all of the pertinent information available was being disclosed and that it was accurate. The Board, made up of 18 very busy people from around the state, has to put full faith in the Executive Director. Anderson, pages 287 and 288. With the Board meeting only quarterly and having no access to information about funds other than what Mena produced, the Board had to be able to trust what was placed in front of it. The Board had to rely on the accuracy and honesty of the Executive Director in reporting budgeting information. The Board accurately gauged that in light of Mena's conduct of purposefully withholding information about available funds both in 2007 and in 2010, the Board could not trust Mena to provide it accurate information so that it could carry out its mandated duty of funding various crime control and prevention projects around the state.

27. Mena's conduct reflected discredit upon his employment as Executive Director.

B. The Failure to Properly Supervise Bureau Chief Yamamoto and Turning Staff Members Against Each Other

28. On November 8, 2007, Mena wrote Yamamoto a disciplinary letter and delivered it to her. The letter stated that it was providing Yamamoto with results of interviews with staff who had gone to human resource officer Purdom expressing their desire to file a grievance because she (Yamamoto) had created a hostile work environment. The letter stated on the first page that "[s]taff members Mena interviewed expressed that they had been subject to intimidation, and inappropriate and embarrassing statements by [Yamamoto] regarding their job performance, personal lives, character and reputation, both in front of other staff members and the public." The staff members also reported that Mena had been subject to the same derogatory remarks and that [Yamamoto] had given them the impression that [she was] in control of the Division. The letter cited details of Yamamoto's degrading, humiliating, and intimidating behavior toward staff members. The letter also stated that Yamamoto would be relieved of some duties. The letter also indicated that it (the letter) would be placed in Yamamoto's personnel file and that if she continued with her inappropriate behavior, she could be discharged.

29. Despite the letter's statements to the contrary, Mena did not put the letter in Yamamoto's personnel file or relieve her of any duties. Instead, Mena put the letter in his file and he did nothing to stop Yamamoto from continuing to create a hostile work environment. Yamamoto's hostile conduct continued for the remainder of 2007, all of 2008, and 2009, until, pursuant to an independent investigation, she was suspended and ultimately terminated in 2010. Mena did nothing to stop her rampage. The only thing that he did, relative to Yamamoto, was to strip Division human resource manager Purdom of continuing to have the authority to bring him staff complaints about Yamamoto. While staff members continued to suffer under Yamamoto's treatment, Mena neither heeded nor acted upon their complaints about Yamamoto. Staff viewed Mena as Yamamoto's protector and came to distrust him.

30. Mena failed to exhibit proper supervision of Yamamoto who had created a toxic and hostile work environment at the Division. Yamamoto committed serious management abuses that Mena ignored. Indeed, Mena was critical about anyone who brought him a complaint about her. By doing this, Mena also contributed to the hostile working environment.

31. Mena favored Yamamoto to the point that he thought she could do no wrong. Merritt testified that Mena was doing nothing as a manager to understand and then correct the situation in the office. Merritt, for example, observed that Mena was fostering a continued hostile work environment by protecting Yamamoto and that Yamamoto could do whatever she wanted to do to various staff members.

32. Mena ignored Thatcher's warning to him that Yamamoto was calling him, the Board, and the Board Chairman incompetent.

33. Examples of Yamamoto's egregious behavior included:

(a) Yamamoto gave Merritt's staff orders and tried to manage them. For example, she took Merritt's staff member, Scott Furois, to meetings without Merritt's knowledge and she would ask him to prepare reports, again without Merritt's knowledge. Furois was under a corrective action plan and was misperforming. That day, Furois went to lunch with Yamamoto and after lunch submitted his resignation. Yamamoto had told Furois to resign and then told Merritt "How do you like the way I took care of that problem for you?"

(b) Yamamoto did not treat people with dignity and respect and would be intentionally mean to staff. After a staff member had given a presentation,

Yamamoto told the staff member in a derogatory manner “I can see, we’re going to have to send you to public speaking class.” Another time, Yamamoto asked a staff member, “what are you doing snooping through everybody’s mail box” when the person was simply standing near the fax machine waiting for a fax.

(c) Yamamoto would target a staff member and then Mena, without accurate information, would follow up by being intimidating or critical of that staff person.

(d) Yamamoto would instruct her staff members not to talk to Merritt and to misrepresent who the registered point of contact was on the federal grant applications. She would withhold information when her bureau applied for grant applications and when the grant awards were coming in from the Fiscal Bureau. This was brought to Mena’s attention and he only talked to Yamamoto about it. He did nothing else to investigate the allegation.

34. Mena tried to turn staff members against Merritt by going to a staff member under Merritt and talking to her about taking over Merritt’s job. Mena never told Merritt he was doing this.

35. Mena imparted false information to Merritt about what staff member Purdom allegedly said about Merritt. Mena told Merritt that Purdom had complained to Mena that Merritt had told her that she should stay at home because she had two small children. In fact, Purdom never stated that to Mena. It appears that Mena was using this as a tactic in trying to turn staff members against each other. Record transcript, pages 82-83.

36. Mena would openly embarrass Thatcher in front of all staff. Mena frequently contradicted or disregarded Thatcher.

37. Thatcher felt so belittled that it began to affect him psychologically.

38. Thatcher observed that Mena started “hollering” at Kevin Dusko that he could be looking for another job, when Dusko offered an opinion that Mena did not like. Dusko was ready to quit. There was nothing in Dusko’s speech or conduct that was out of line or disrespectful of Mena. Staff members of the Public Safety Bureau were afraid to do anything that would come to the attention of Yamamoto or Mena that could jeopardize their jobs.

39. Merritt characterized the work atmosphere as “a very toxic atmosphere.” Staff did not want to come to work. They hated coming to work. It was very

stressful and they did not want to be there. Merritt himself was seriously considering leaving in 2010. By August 2010, Merritt was totally demoralized. The workplace was going downhill and was getting destroyed. Mena's leadership, by the things he would do, and would allow Yamamoto to do, was poor. Staff members could not go to Board members about problems with Mena and Yamamoto and any grievances were to go only to Mena.

40. As long as Yamamoto and Mena were in the office, morale kept declining. Yamamoto caused hate and discontent and Mena only reacted to what Yamamoto wanted. Mena was told about this behavior and did "absolutely nothing." Record transcript, page 191, lines 7 through 8. Mena was not doing a good job. His self image and ego got in the way of him keeping in touch with what was going on at the Board of Crime Control.

41. Board Chair Anderson succinctly imparted the extent of the turmoil and dysfunction of the office under Mena when he noted "that [the office] was out of control, that there didn't appear to be any leadership, that there didn't appear to be any way for employees to air their differences or their grievances. It was just . . . a toxic work place." Record transcript, page 296, lines 2 through 7.

IV. DISCUSSION³

The claimant's contention here is that there is no evidence that he left his employment for reasons reflecting discredit upon him as an employee. He argues that only conduct that amounts to a criminal conviction or criminal conduct can ever serve as a basis for finding that someone left employment for reasons reflecting discredit upon their employment. Contrary to the claimant's argument, his conduct of intentionally concealing from the Board the existence of additional funds so that those funds could be spent on programs that he wished to fund, thereby usurping power reserved solely to the Board, is the very essence of the type of conduct that reflects discredit on the employee.⁴

³ Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

⁴ The parties agreed that in the event the hearing officer determined that Mena was due unpaid vacation time, the pay would have to be contributed to an employee welfare benefit plan, the VEBA Health Benefit Plan. The issue of whether vacation pay found to be due would have to be converted into an employer contribution paid into VEBA is moot because Mena was discharged from his employment under circumstances that reflected discredit upon the employee.

A state employee who terminates employment for reasons “not reflecting discredit on the employee” is entitled to a payout or contribution to an employee benefit plan of the employee’s unused vacation leave. Mont. Code Ann. § 2-18-617(2). That statute controls the result in this case. In the absence of this statute, Mena would have no right to a payout of his unused vacation leave. *Stuart v. Dept. of Social and Rehabilitation Servs.*, 256 Mont. 231, 235, 846 P.2d 965, 968 (1993). *See also, Poeppel v. Flathead County*, 1999 MT 130, 294 Mont. 487, 982 P.2d 1007. Thus, unless Mena left his employment for reasons not reflecting discredit on his employment, he is not entitled to the vacation payout he seeks.

Mena incorrectly asserts that he must have been convicted of a crime or have engaged in illegal conduct before he can be found to have been discharged for reasons reflecting discredit on his employment. This is so for two reasons. First, as the DOJ points out, it is apparent from the language of the applicable statute that conviction of a crime or conduct amounting to a crime is not a requisite to a finding that the employee engaged in conduct that reflected discredit to his employment. Discredit is defined as “a lack or loss of belief or confidence.” Webster’s Ninth New Collegiate (1988). Nothing in that definition requires some type of criminal or morally turpitudinous conduct in order to rise to the level of “discredit.”

Second, the case law to which the hearing officer has been directed and which he has found in his own research does not support the claimant’s contention. The Montana First Judicial District Court has specifically held that the conduct of a highway patrolman in misappropriating state funds, lying to investigators and cadets, and sexually harassing a female trooper demonstrated discredit within the meaning of Mont. Code Ann. § 2-18-617(2) such that the trooper was not entitled to a payout of unused vacation time. *Tuttle v. Dept. of Justice*, 2007 Mont. Dist. Lexis 491 (2007). Cases in other jurisdictions have also rejected arguments that criminal conduct or a criminal conviction is a prerequisite to finding discredit. *See, e.g., Warren v. State Personnel Board.*, 94 Cal. App. 3d 95, 104, 156 Cal. Rptr. 351, 355 (1979) (holding that dismissal of an employee under a governmental code of employee conduct for “failure of good behavior of such a nature as to cause discredit to his agency or employment” can be proper even though the employee has not been convicted of a crime nor been proven to have engaged in illegal conduct). Thus, conviction of a crime or criminal conduct is not a prerequisite to finding that an employee has discredited himself in his employment.

The *Warren* case is instructive as to the type of conduct that can reflect discredit upon an employee in his work. In the *Warren* case, the California Court of Appeals, interpreting the state code of employee conduct, noted that conduct

reflecting discredit upon the employee's employment must be "of such a nature as to reflect upon [the employee's] job. That is, it must bear some rational relationship to his employment and be of such character that it can easily result in the impairment or disruption of the public service." 94 Cal. App. at 104, citing *Vielehr v. State Board of Education*, 32 Cal. Pp. 3d 187, 192 (Cal. App. 1973). See also, *Nightingale, supra*.

Utilizing these criteria, Mena's conduct in purposefully withholding information both from the Board and member Cashell regarding the amount of funds available to be dispersed by the Board reflected adversely on him in his employment. Mena, as Executive Director of the agency, had a fiduciary duty (as well as a duty pursuant to his job description) to forthrightly disclose to the Board the amount of funds available so that the Board could carry out its statutory duties. Instead, in 2007, Mena hid from the Board the fact that an additional \$93,000.00 was available. Mena did this so that he could manipulate how those funds were used in the agency, thereby circumventing the Board's sole authority and control over the utilization of the funds. He engaged in this conduct again in 2010 when he purposefully withheld from the Board the existence of \$55,000.00 in additional Recovery Act money available to the Board. This hearing officer agrees with the agency's decision in Mena's grievance that "Mena failed to disclose important and relevant information to the Board, and those actions were intentionally designed to foster his desire to exert personal control over the disposition of government grant funds, a responsibility that rests solely with the Board."

The Board could no longer trust Mena to carry out a critical function of his position: to forthrightly apprise the Board of the amounts of money available to it. His purposeful failure to carry out this function through utilization of deceit in order to usurp authority granted solely to the Board was both related to his employment and was of such character that it not only easily could have, but in fact did, result in the impairment of the Board's function to appropriate monies. Mena's conduct clearly reflected discredit upon him in his employment. *Warren, supra*. His intentional deceit toward the Board regarding funds available for disbursement is alone sufficient to find that Mena has not met the threshold requirements for payout of his unused vacation leave under Mont. Code Ann. § 2-18-617(2).

Mena's mismanagement of personnel related to the abuses of Bureau Chief Yamamoto and Mena's failure to correct those issues might not by itself amount to conduct that reflected discredit upon Mena. However, when Mena lied to Merritt about what Purdom had said about Merritt in order to turn staff members against each other, he engaged in conduct that reflected discredit upon himself. In *Tuttle, supra*, part of the conduct that the First Judicial District Court found to reflect

discredit upon the trooper included lying to investigators and cadets. *Id. at* ¶ 12. With respect to the cadets, the offending trooper lied to them about how their answers to his questions about the cadets' families, finances, and marriages was relevant to the trooper's ability to control the cadets' placement after their graduation. In fact, the trooper had no power to control their placement at all. *Tuttle v. Dept. of Justice*, 2007 MT 203, ¶8, 338 Mont. 437, 167 P.3d 864. Mena's conduct in lying to Merritt about Purdom's alleged accusation from Purdom is analogous to the trooper's conduct in *Tuttle* and is the type of conduct that reflects discredit upon the employee.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 et seq.; *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Mena engaged in conduct that reflected discredit upon him in his employment.

3. Because he engaged in conduct that reflected discredit upon him in his employment, Mena is not entitled to a payout of unused vacation under Mont. Code Ann. § 2-18-617(2).

4. It was not necessary for Mena to have been convicted of a crime or to have engaged in criminal conduct in order for him to be found to have engaged in conduct that reflected discredit upon him.

VI. ORDER

There being no merit to Mena's claim, his Wage and Hour complaint is hereby dismissed.

DATED this 16th day of November, 2011.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
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.