

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1072-2010
OF BRADFORD L. WILSON,)	
)
Claimant,)	
)
vs.)	FINAL AGENCY DECISION
)
PARK COUNTY,)	
)
Respondent.)	

* * * * *

I. INTRODUCTION

Bradford Wilson appealed from a Wage and Hour Unit determination and redetermination that found he was not owed unpaid wages by Park County, denying him any recovery.

Hearing Officer Terry Spear convened and completed the telephonic contested case hearing in this matter on January 24, 2011. Chuck Watson, attorney at law, appeared for the limited purpose of representing claimant Bradford L. Wilson, who also attended the hearing, by speaker phone in Watson Law Offices, P.C., Bozeman, Montana, with witnesses Larry Lahren and Sheila Royston. Watson withdrew at the close of hearing, having completed his limited representation of Wilson. Respondent Park County attended, by speaker phone in the Community Room, City/County Center, Livingston, Montana, through Park County Commissioner Jim Durgan, designated representative, with its counsel, Shannan M. Piccolo. Neither party moved to exclude witnesses.

Larry Lahren, Jim Stone, Sheila Royston, Bradford Wilson, Jill Ouellette, and Jim Durgan testified under oath, with Lahren giving further testimony in Wilson's rebuttal. All testimony was by telephone. The parties stipulated to, and the Hearing Officer admitted into evidence, Exhibits 15, 67, 97, 117, 123, 124, excerpts from 125 (the cover page, pp. 1-3, 5, 13-14, 17, 23-25, Resolution No. 837 – two pages near the end of exhibit – and Schedule A to that Resolution), H, and I.

Based on the evidence, exhibits, authorities, and arguments presented, the Hearing Officer makes the following findings of fact, conclusions of law, and final order.

II. ISSUE

Is Wilson due unpaid wages as alleged in his complaint, and if so, in what amount, and is there a statutory penalty applicable to that amount?

III. FINDINGS OF FACT

1. Park County (the county) is a public employer as that term is defined by Mont. Code Ann. § 39-31-103(10).

2. Larry Lahren (“Lahren”) is the presiding officer of the county board as defined by Mont. Code Ann. § 7-4-2109.

3. Teamsters Local No. 2 (“union”) is a labor organization as that term is defined by Mont. Code Ann. § 39-31-103(6).

4. Effective September 27, 2004, Park County hired Bradford L. Wilson to work for the Park County Road and Bridge Department (the “Road Department”), as an operating engineer. Operating engineers operate all Road Department equipment, such as loaders, graders, plows, trucks, backhoes, etc. Additionally, they maintain county roads, both gravel and asphalt, and often make decisions in the field about how to accomplish the tasks at hand.

5. Operating Engineer (“road worker”) and Assistant Road Supervisor (“assistant supervisor”) are non-exempt positions within the county’s Grade 14 pay scale. When Wilson went to work, the road workers were not part of a collective bargaining unit which had a certified exclusive bargaining agent, there was no collective bargaining agreement, nor was any such agreement being negotiated.

6. Road and Bridge Supervisor (“road supervisor”) is an exempt position as defined by Mont. Code Ann. § 7-14-2122.

7. In December of 2005, Park County had a vacancy for a new road supervisor for the Road Department. Both Wilson and Ed Hillman, an outside applicant, applied for the position. The county hired Hillman.

8. At the time the county was not required to advertise the vacancy and could hire either a current employee or an “outside” applicant for the position. After hiring Hillman, the county offered, and Wilson accepted, the position of Road Department assistant supervisor, under Hillman. Wilson understood that Hillman had plans to retire after two years, at which point he, Wilson, might again apply for the supervisor position. This process of an internal hiring of an assistant supervisor was done by verbal agreement, outside of the county’s established policies for recruitment and hiring, and did not include a job vacancy announcement, written job offer, or written position description that defined assigned duties and tasks.

9. As assistant supervisor, Wilson took on the duties of helping Hillman, completing paperwork, lining out crews, and exercising authority over road workers, while still performing road worker duties. As assistant supervisor, Wilson also filled in as supervisor in Hillman's absence, and received a wage higher than his assistant supervisor wage when he was acting as supervisor. Wilson's pay grade remained Grade 14. Different job positions at the same grade level may require different skill sets and can have different pay levels.

10. Wilson and the county agreed that he would receive a pay raise for his promotion to assistant supervisor. There is no substantial and credible evidence that this raise included a COLA increase and/or a merit increase for Wilson's skills and experience, in addition to the raise for his promotion.

11. As the assistant supervisor, Wilson received a county vehicle and a cell phone, because he would be on call. The county changed his job designation from road worker to assistant supervisor. The change was reflected on Wilson's Employee Status Change Form, dated January 21, 2006. The explanation line states "promoted to assistant road supervisor." Wilson received a pay raise from \$14.57 an hour to \$15.82 an hour, as the assistant supervisor.

12. In July 2006, Wilson received another pay raise, perhaps because he had successfully concluded a probationary period as assistant supervisor, perhaps for some other reason. There is no substantial and credible evidence establishing that this was a "merit raise," part of a wage increase given to road workers as well. Indeed, there is no substantial and credible evidence establishing any particular reason for this raise.

13. In February 2008, Wilson tendered his resignation as assistant supervisor of the Road Department, requesting a "lateral transfer" back to road worker. The county accepted his resignation, requested that he meet with Polly Miller to confirm the details involved, expected him to return the company vehicle and cell phone, and expected that his wage would be decreased appropriately with his return to his prior position as a road worker in the Road Department.

14. Some of the details were resolved immediately. Some were delayed but eventually resolved. For example, the return of the vehicle and phone did not immediately occur. The return may have been delayed because until December 2008, Wilson continued to fill in as supervisor when Hillman was absent. One detail, the reduction in Wilson's wage, was not effectuated at all.

15. The Park County Commissioners, at their annual meeting with then road supervisor Hillman in July 2008, approved, without changes, the Fiscal Year 2009 budget, which had within it Wilson's continued higher wage. There is no substantial and credible evidence that they noticed Wilson's continued higher wage.

16. Effective August 2008, after the usual steps were completed to effectuate a bargaining unit classification and the collective bargaining representative certification, Teamsters Union Local No. 2 became the Board of Personnel Appeals (“BOPA”) certified bargaining unit representative for appropriate positions within the Road Department, including road worker positions. At that time, the road worker positions (including that of Wilson) became part of a collective bargaining unit. Local No. 2 and the county began bargaining regarding a Collective Bargaining Agreement (CBA) covering the unit.

17. By December 2008, Wilson was a road worker who still received the same wages he had earned (plus any wage increases provided during and after) just before he ceased being the assistant supervisor. He was now a member of a collective bargaining unit. That unit had not yet entered into an CBA with the county, but already had a certified exclusive collective bargaining representative, and was bargaining with the county.

18. Jim Stone is employed by Local No. 2 as a business representative. In that capacity, Stone represents union employees as well as bargaining units in grievances, negotiates with employers on behalf of bargaining units regarding entering into, interpreting and applying CBAs, and otherwise provides assistance and support to bargaining units and their members. In approximately June 2008, Stone began working as the representative for the Park County Road Department bargaining unit.

19. At some point in 2009, whether in the course of reviewing current wages during bargaining with Local No. 2 or some other budgeting process, the county noticed that Wilson was still being paid at the rate he had earned as the assistant supervisor.

20. The county did not believe it had the right to deal directly with Wilson about the wage reduction that had not been made in 2008. It was bargaining with Stone and the bargaining unit’s negotiation team about the terms and conditions of employment of bargaining unit members, including wages, and Wilson was a member of that bargaining unit.

21. In the middle of July 2009, during negotiations between the county and the bargaining unit, the county’s representative, Rick D’Hooge, told the union negotiators that the county had been overpaying Wilson since he resigned from the assistant supervisor position in February 2008. The overpayment was characterized as being in the range of about fifty cents per hour. D’Hooge told Stone that the county was going to reduce Wilson’s wage to what it should have been after his resignation, but would not seek to recapture the overpayment. Stone, as the

representative of the bargaining unit and lead negotiator, agreed to notify Wilson about the reduction.

22. The county wanted Wilson to agree to the reduction, and may have presented the reduction to Stone as something that would not occur until Wilson agreed. However, the county believed it could not talk to Wilson, and also made clear to Stone that it would simply take his word as to Wilson's approval.

23. Stone contacted Wilson by telephone. Wilson was unreceptive to the reduction in wages. Stone told him that it certainly appeared that the county had the right to reduce his wages. For whatever reasons, Wilson did not tell Stone that he would file a grievance, nor did he argue with Stone. He told Stone he was confused about the reason given by the county for the reduction and about the amount his wages might be reduced, and that he would seek a legal opinion.

24. Wilson called the union steward after his telephone call with Stone, and told the steward he disputed his wage reduction, and perhaps also alleged that the county and the union were not maintaining the status quo and did not have a ratified first contract. He may also have told the steward he was concerned that Stone did not know what he was doing and was not bargaining intelligently. There is no substantial and credible evidence that the steward reported the conversation to anyone. Wilson did not file a written protest with the union about the reduction. Wilson did not at that time give the county notice that he protested any belated reduction in wages because he had resigned the assistant supervisor job.

25. Left with the sense that Wilson, although he did not like the reduction in pay, understood that the county had the right to make the reduction, Stone reported back that Wilson did not oppose the reduction. This probably was not true, but the substantial and credible evidence of record does not establish that Stone knew or should have known, from his conversation with Wilson, that his report was untrue.

26. Stone told D'Hooge that the county could go forward with the wage reduction on August 20, 2009. D'Hooge told the county that Stone had spoken to Wilson concerning the wage reduction, that Wilson did not object, and that the county could implement the wage reduction. Throughout the negotiations between Park County and the Teamsters, there have been changes to the status quo that have been implemented prior to the signing of the contract when both the Teamsters and Park County have agreed to the changes.

27. On or after the date of D'Hooge's report that the county could implement the wage reduction, the county reduced Wilson's then-current hourly wage by \$.56 per hour, from \$18.93 to \$18.37, the amount the county calculated as Wilson's proper hourly wage as a road worker. There is no substantial or credible evidence

that the calculation was incorrect. Wilson learned of the reduction when he received the first paycheck in which it was implemented, in late August 2009.

28. On September 3, 2009, Wilson sent a letter to the county protesting his wage reduction and requesting clarification. The county did not respond. It still believed it could not deal directly with Wilson about the wage reduction, because it was still in bargaining with Stone and the bargaining unit's negotiation team about the terms and conditions of employment of bargaining unit members, including wages, and Wilson was still a member of that bargaining unit. Any arguments Wilson has since made that his letter constituted a grievance from an employee who was not a member of a bargaining unit that had a collective bargaining agreement is an issue outside of the scope of this case.

29. On December 17, 2009, Wilson filed with the Montana Department of Labor and Industry the wage claim adjudicated herein.

IV. DISCUSSION

The state, acting through the Department of Labor and Industry, has the power to adjudicate claims for unpaid wages. Mont. Code Ann. § 39-3-201 *et seq.*; *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925, 925-26 (1978). Wilson invoked that power when he filed his wage and hour claim against Park County.

The basic facts proved at hearing are simple. Wilson resigned from being the Park County Road Department assistant road supervisor in early 2008. His employer, Park County Road Department, failed to reduce his wages to reflect this resignation until late August 2009, when the county did reduce his wages appropriately, while foregoing any attempt to collect overpaid wages during the interim.

What might otherwise have been a fairly straightforward wage and hour claim became an unduly complicated case for essentially two reasons. First, the county seems to have done a rather confused job of handling its own payroll and wage records. This might be the reason it took the county over a year to find out that it was overpaying Wilson, and it certainly was the reason that the county's records contained plenty of ambiguities.

Second, the vigor of Wilson's challenges to the reduction in his pay in August 2009, in part because of the ambiguities in the county's records, further muddied the waters. Over the course of this proceeding, Wilson raised a whole series of irrelevant assertions. The Hearing Officer excluded, by pre-hearing rulings, those assertions furthest away from being relevant. For his remaining irrelevant assertions, that were somewhat less far away from the issues in this case, Wilson has failed to

prove them and also has failed to establish how any of them could be relevant even if he had proved them.

For an easy example, Wilson's proposed findings included the assertion that when the county asked the union about reducing Wilson's wages because of the on-going overpayment, it "failed to inform the union that Wilson's status as assistant supervisor was covered by the terms of an employment agreement and that the position of assistant supervisor was the same grade as the position of operating engineer." Whatever Wilson construed as being the "employment agreement" might conceivably have some peripheral relevance to this controversy, but Wilson never did establish any specific "agreement" regarding his job as assistant supervisor that had any bearing on this case. Also, as the county correctly pointed out, there can be several different pay levels within a particular grade, so the fact that the assistant supervisor job was the same grade as the road worker jobs was an irrelevant popgun rather than a smoking gun. The parity of grade does suggest that the assistant supervisor job may have been a lead-man labor position rather than an entry-level management position, but which it actually is has no relevance here.

The county proved that in 2009 it discovered its failure to reduce Wilson's pay to that of a road worker after he resigned as assistant supervisor in February 2008. This was the county's failure. Whatever Wilson may have done or not done, it was not part of his job responsibilities to assure that county payroll was adjusted to reflect his status change.

The county proved that, because Wilson was a member of a collective bargaining unit that had a certified exclusive bargaining representative, it properly gave notice to that representative of its intent to reduce Wilson's wages (prospectively only, making no attempt to collect past overpayments). That representative notified Wilson of the reduction that was coming, and then gave the county notice that Wilson had been notified, knowing that the county would then reduce his wages.

The county then did reduce his wages, by the amount it calculated was the portion of his current wage attributable to his former assistant supervisor position.

Mont. Code Ann. § 39-3-203(1), states:

Each employer or an authorized representative of the employer shall, on written demand, prior to the commencing of work, notify each employee as to the rate of wages to be paid, whether by the hour, day, week, month, or year, and date of paydays. Such notification must be in writing to each employee or by posting of notice in a conspicuous place.

The county reads this provision to require such notice to an individual employed by the county before any reduction of wages, even without a written demand. Since Wilson apparently concurs, the Hearing Officer will apply the statute in that fashion in this case.

Pursuant to Montana law, Mont. Code Ann. § 39-31-101 *et seq.*, public employees have the right to unionize and, through a representative of their own choosing, bargain about their wages, hours, fringe benefits, and other employment conditions. The representative is “responsible for representing the interest of all employees in the exclusive bargaining unit without discrimination for the purposes of collective bargaining with respect to rates of pay, hours, fringe benefits, and other conditions of employment.” Mont. Code Ann. § 39-31-205. Once a public employer and the union representative begin the bargaining session, both parties have a duty to bargain in good faith. Mont. Code Ann. § 39-31-305(1). The parties must “meet at reasonable times and negotiate in good faith” over “wages, hours, fringe benefits, and other conditions of employment.” Mont. Code Ann. § 39-31-305(2). Whenever a public employer acts to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201,” it has committed an unfair labor practice. Mont. Code Ann. § 39-31-401(1). A public employer directly contacting an employee about a wage change while that employee’s collective bargaining unit is bargaining for a contract or a new contract would interfere with employee bargaining rights in violation of Mont. Code Ann. § 39-31-201, MCA. *See, The Developing Labor Law* (5th Ed., BNA Books, 2006), Vol. I, Sec. 13.II.B, pp. 845-47, “Bargaining Directly With Employees.”

The county could not both notify Wilson in writing about the decrease in his wages AND bargain with the union’s bargaining representative about that wage decrease without directly contacting Wilson. Logically enough, Mont. Code Ann. § 39-3-203(2), states, in pertinent part:

The provisions of this section do not apply to an employer who has entered into a signed collective bargaining agreement, when such agreement contains conditions of employment, wages to be received, and hours to be worked

In this case, no collective bargaining agreement had yet been reached between Wilson’s bargaining unit and the county. The county was caught in an impossible situation, in which it arguably had to do two contradictory things. The law never requires impossibilities. Mont. Code Ann. §1-3-222. By asking the collective bargaining representative for Wilson’s unit to notify Wilson of the wage decrease, and waiting to implement it until after the collective bargaining representative

confirmed such notification had been given, the county gave Wilson appropriate and sufficient notice of his wage decrease, under these peculiar circumstances.

The evidence also reflects confusion about whether the county asked the union to notify Wilson of the wage decrease, or asked for union approval of the wage decrease, or even asked the union to confirm Wilson's agreement to the wage decrease. Ultimately, the county did its best to satisfy the substance of the notice requirement in Mont. Code Ann. § 39-3-203(1), by going through the bargaining unit representative to make certain Wilson had such notice of the wage decrease before it was effectuated. However the bargaining unit representative, or Wilson, or the county, understood the details of that interaction, the notice Wilson received was sufficient under these peculiar circumstances to satisfy § 39-3-203(1), even though that notice was not formally in compliance with that statute, since it wasn't in writing. The law respects form less than substance. Mont. Code Ann. § 1-3-219.

The county appropriately reduced Wilson's wage rate, and he is not owed any earned and unpaid wages.

V. CONCLUSIONS OF LAW

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

2. Park County Road Department does not owe Bradford L. Wilson any earned and unpaid wages for the times set forth in his complaint herein.

VI. ORDER

The wage claim of Bradford L. Wilson for earned and unpaid wages is hereby DISMISSED.

DATED this 22nd day of June, 2011.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR
TERRY SPEAR
Hearing Officer

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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 service of this decision. See also Mont. Code Ann. § 2-4-702.