STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF WILLIAM R. JONES, Claimant, vs. TOSTON IRRIGATION DISTRICT, Respondent.	)	Case No. 2144-2011 **FINAL AGENCY DECISION**

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I. INTRODUCTION

On June 10, 2011, William R. Jones filed a claim with the Department of Labor and Industry contending that Toston Irrigation District (District) owed $1,639.09 for work performed during the off-season in 2009 and $844.16 for work performed during the off-season in 2010 and additional claims for unpaid wages and overtime. On June 22, 2011, Scott Hagel, Attorney for the District, filed a response to the claim, contending Jones was not owed any additional wages for work performed during that period.

On August 22, 2011, the Wage and Hour Unit issued a determination finding Jones was not owed any additional wages and dismissed Jones' claim. Jones filed a timely request for redetermination. On September 28, 2011, the Department issued a redetermination affirming its earlier decision and dismissal. Jones filed a timely appeal to a contested case hearing.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Department's Hearings Bureau on May 23, 2012. On May 25, 2012, the Hearings Bureau issued a Notice of Hearing and Telephone Conference. Following a scheduling conference on June 11, 2012, the matter was set for hearing on October 29, 2012.

On June 25, 2012, the respondent filed a Motion for Summary Judgment. Both parties submitted briefs on the motion. On July 18, 2012, the Hearing Officer issued an Order Granting Partial Summary Judgment that left only the issue of

whether Jones was owed additional wages for work performed during the off-season months in 2009 and 2010.

On September 28, 2012, the Hearings Bureau received a Motion to Withdraw from Jennifer Dwyer, who was Jones' attorney at that time. On October 4, 2012, the Hearing Officer granted Dwyer's Motion to Withdraw and stayed the remaining portions of the hearing schedule. On October 18, 2012, a scheduling conference was held with Jones and the respondent's attorney. The hearing date was then reset for December 4, 2012 to allow Jones time to obtain counsel, with a final pre-hearing conference set for November 13, 2012.

On November 13, 2012, Jones indicated during the final pre-hearing conference that he had not yet obtained counsel. The parties indicated mediation was not an option at this point. Following the conference, Jones contacted the Hearings Bureau and indicated he was interested in pursuing mediation. A conference was then set for the parties to meet with Mediator Gregory L. Hanchett. On December 5, 2012, Hanchett notified the Hearing Officer that the parties had indicated they were not prepared to mediate the wage and hour claim without also mediating claims the parties had before the District Court.

On December 20, 2012, a scheduling conference was held where the hearing was set for January 29, 2013. The claimant was given until December 28, 2012 to submit a written request for subpoenas. The claimant did not submit such a request.

Hearing Officer Caroline A. Holien conducted the hearing on January 29, 2013 in the Sacajawea Room at the Walt Sullivan Building in Helena, Montana. The claimant was present and appeared without counsel. Scott Hagel, Attorney at Law, represented the respondent. Jones, District Clerk Doris Hossfeld, and District Board Members Leonard Lambott, Rick Van Dyken, and Franklin Slifka presented sworn testimony. Attorney Chris Olivera also attended the hearing on behalf of the employer.

The administrative record compiled at the Wage and Hour Unit (Documents 1 - 88) was admitted into the record. Claimant's Exhibits 1 through 13 were admitted, as was Claimant's Exhibit 14, which was admitted over the employer's objection on relevancy grounds. Employer's Exhibits A through KK were also admitted. The parties declined to file post-hearing briefs. The case was deemed submitted at the end of the administrative hearing.

II. ISSUE

Whether Toston Irrigation District owes additional wages for work performed during the off-season months of November, December, January, and February 2009 and 2010, as alleged in the complaint filed by William R. Jones and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Toston Irrigation District (District) employed William R. Jones as District Manager beginning on or about January 13, 2006, with a start date of March 1, 2006. The parties did not execute a written employment agreement. Dept. Exs. 84 - 85. The manager was required "to be on call 24 hours a day, maintain the pumps, canals, and pipelines, and to track water usage." Claimant's Ex. 1.

2. The District is a Bureau of Reclamation project. Claimant's Ex. 1. The District operates as a public, non-profit irrigation district responsible for the operation and maintenance of the ditches, canals, and waterways used for the supplying and storing of water for agricultural purposes. The District is not operated on a sharecrop basis. Jones is excluded from the overtime compensation provisions outlined in Mont. Code Ann. § 39-3-405 by operation of Mont. Code Ann. § 39-3-406(2)(h). Jones is not excluded from the minimum wage provisions outlined in Mont. Code Ann. § 39-3-404. See Order Granting Partial Summary Judgment dated July 18, 2012.

3. The District hired Jones to work from March 1, 2006 through October 31, 2006, with an annual salary of $16,000.00. The District provided Jones with the use of a home that was undergoing repairs at the time Jones was hired. Jones moved into the home in November 2006. The District paid Jones mileage for the use of his personal truck in the performance of his job duties. Claimant's Ex. 12.

4. The District did not require Jones to keep a time card or otherwise track his hours worked. The District did not require Jones to work a set number of hours each week or month. The number of hours Jones worked each month fluctuated. Jones worked approximately 30 hours per week during the irrigation season, which accounts for approximately 35 weeks of the year. Jones worked approximately 50 hours per month during the off-season months of November, December, January, and February. Neither party kept track of the number of hours Jones worked.

5. The District requested Jones keep a time card during the first few weeks of his employment. Jones did not consistently keep track of his hours and the issue was not raised again until July 2010. At that time, the District asked Jones to track his

hours for purposes of preparing work plans for the District and for the Bureau of Reclamation. Jones resisted keeping track of his hours because he felt the request made in July 2010 was retaliatory and offensive in nature due to a personal conflict between him and Board Member Leonard Lambott.

6. Jones was assisted in the performance of his duties by a former District Board Member during the spring months of 2006. Jones also worked for another employer during this period, which he subsequently separated from in 2007. The spring months were a busy time for both employers and Jones felt overwhelmed by the prospect of working both jobs.

7. In August 2006, Jones became concerned with his finances and the strain of working for both employers during the upcoming spring. Jones approached the Board of Commissioners (Board) about performing some of his spring duties during the off-season months. Jones wanted the security of continuing employment so he could perform his spring duties during the off-season without worrying about whether he had a job with the District in the spring. Jones was also concerned about not being covered by workers' compensation insurance during the off-season. Jones did not intend to perform new or additional duties during the 12-month period, but rather "exchange one for the other," in terms of performing his spring work during the off-season months.

8. On September 14, 2006, Jones requested the Board employ him on a year round basis so there would be no issues with workers' compensation coverage. Jones also requested to perform his spring work during the off-season months and that the District pay his wages to him in 12 monthly installments rather than the eight monthly payments as initially agreed upon. Jones requested that his final two months of checks be divided to cover the last four months of the year. The Board granted Jones' requests and agreed to change the terms of the employment agreement to allow Jones to perform his spring work during the off-season months and to pay his annual salary to him in 12 monthly installments. The Board paid Jones the $4,000.00 owed to him in four equal payments in September, October, November, and December 2006. Claimant's Ex. 3.

9. The parties did not prepare a written agreement regarding the changes to the employment agreement. Jones indicated during the September 14, 2006 meeting that he was satisfied with the minutes serving as the record of the parties' agreement between the parties. Claimant's Ex. 3. The parties had a clear mutual understanding that the changes to the employment agreement would allow Jones to perform his spring work during the off-season and that allowed Jones to receive his regular salary on a 12-month basis rather than an eight-month basis.

10. Jones' annual salary in 2007 was $16,480.00, with a monthly salary of approximately $1,373.33. The District increased Jones' annual salary by 3% during each year of his employment. Jones' annual salary in 2008 was $16,974.40, with a monthly salary of approximately $1,414.52. Respondent's Ex. A.

11. Jones' annual salary in 2009 was $17,483.63, with a monthly salary of $1,456.97. Respondent's Ex. A. Jones worked an average of 30 hours per week during the irrigation season, which consists of approximately 35 weeks. Jones worked a total of 1,050 hours during the irrigation season (30 hours x 35 weeks). Jones worked an average of 50 hours per month during the off-season months for a total of 200 hours (50 hours x 4 months). Jones worked approximately 1,250 hours during 2009. Jones' hourly wage in 2009 was $13.98 ($17,483.63 ÷ 1,250 hours). Jones' hourly wage was greater than the minimum wage at the time of $6.55. Dept. Exs. 45 - 48.

12. Jones' annual salary in 2010 was $18,008.14, with a monthly salary of approximately $1,500.68. Jones worked an average of 30 hours per week during the irrigation season, which consists of approximately 35 weeks. Jones worked a total of 1,050 hours during the irrigation season. Jones worked an average of 50 hours per month during the off-season months for a total of 200 hours. Jones worked approximately 1,250 hours in 2010. Jones' hourly wage in 2009 was $14.41 ($18,008.14 ÷ 1,250 hours). Jones' hourly wage was greater than the minimum wage at the time of $7.25. Dept. Exs. 45 - 48.

13. In March 2010, ice damaged the pump house resulting in damage requiring thousands of dollars of repair. The District hired three other men to work on repairing the damage. The District submitted a claim to its insurance company for 163.25 hours worked by the three men and a claim for 195 hours worked by Jones. Doris Hossfeld, Clerk for the District, estimated that Jones worked more than the three men hired and estimated Jones worked 20% more hours than the three men, whose time Jones had tracked. Neither the District nor Jones kept track of the number of hours Jones worked on the pump house. Jones worked significantly less hours than the 500 hours he claimed at hearing.

14. In June 2010, Jones aggravated a pre-existing back injury, which affected his ability to perform his job duties. Neither the District nor Jones filed a claim with the District's workers' compensation carrier at that time. In August 2010, Jones was required to undergo emergency surgery, which caused him to be totally unable to perform his job duties. Jones' last day of work was on or about August 13, 2010.

15. On August 27, 2010, Board President Franklin Slifka sent Jones a letter advising him that the District would continue paying him for the time remaining in

the 2010 irrigation season and that he would be paid under the 12-month pay structure as previously agreed upon. Slifka also noted, "Your job description states that the season for you ends October 31 and if you desire the balance of your pay at that time, please let us know and it can be arranged." Claimant's Ex. 5.

16. On January 1, 2011, Jones submitted an invoice to the Board requesting $1,500.00 for ten months of meter reading and $9,669.00 for repairs he had performed on the house provided to him by the District. Respondent's Ex. JJ.

17. On February 2, 2011, the District sent Jones a letter confirming that the Board had voted on September 9, 2010 to eliminate the Manager position effective December 31, 2010 due to budgetary concerns. Board Member Leonard Lambott has been performing the District Manager's duties since the position was eliminated without any pay beyond that which he receives as a Board Member. Claimant's Ex. 6. Lambott spends approximately 21 hours each week performing the duties of the District Manager.

IV. DISCUSSION[1]

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to "show the extent and amount of work as a matter of just and reasonable inference." ***Id. at*** 189, 562 P.2d at 476-77, ***citing*** *Anderson,* 328 U.S. ***at*** 687, ***and*** *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; s*ee also, Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that the lower court properly concluded that the plaintiff's wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, "'the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee, and if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation' . . . ." *Garsjo,* 172 Mont. ***at*** 189, 562 P.2d ***at*** 477, ***quoting*** *Purcell v. Keegan*, *supra,* 359 Mich. ***at*** 576, 103 N.W. 2d ***at*** 497.

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

Neither party kept track of the hours Jones worked throughout his employment, including the off-season months in 2009 or 2010. Jones indicated he worked 50 hours per week during the irrigation season. Jones estimated he worked between 30 and 50 hours per month during the off-season. Board Member Leonard Lambott, who assumed the Manager's duties after Jones' position was eliminated, testified he worked approximately 21 hours per week performing the District Manager's duties. Lambott testified he worked significantly less hours during the off-season. It seems unlikely that Jones spent 50 hours per week performing work in a position that was intended only to be part-time. Given Lambott's testimony, which was more direct than Jones' testimony regarding the time he spent performing the District Manager's duties, it is more likely that Jones worked an average of 30 hours per week during the irrigation season.

It also seems unlikely that Jones worked as much as 50 hours per month during the off-season. Jones testified his estimate of the number of hours he worked during the off-season was based upon his review of the Board meeting minutes and his recollection of how much time it took to complete the various jobs mentioned in the minutes. Jones testified he prepared an outline of the hours he worked for his former attorney but either lost or destroyed the outline. Jones admitted he did not attempt to recreate the outline or prepare a more formal accounting of the time he believed he worked during the off-season months.

Jones' testimony regarding the hours he worked during the off-season was vague and speculative. Jones' testimony was not supported by any writings or other materials prepared during the course of his employment that might have supported his testimony. Jones' testimony appeared to be primarily based upon his review of the meeting minutes, which he had previously suggested were not an accurate record of the discussions held before, during, or after the meetings. Further, Jones' testimony at times appeared to be exaggerated. For example, Jones testified he worked 500 hours on the pump house in March 2010. District Clerk Doris Hossfeld testified she filed an insurance claim for the three men hired to assist Jones and claimed they worked only 163.25 hours. Hossfeld testified Jones kept track of the employees' hours and was aware the District was filing an insurance claim. It seems unlikely that Jones worked 500 hours given his own testimony, as well as the testimony of Hossfeld, that he never notified the Board that he was working such an excessive number of hours.

The District originally advertised the District Manager position as only offering work during the irrigation season that runs from March 1 through October 31. It is unlikely there was so much work that needed to be performed during the off-season that Jones was required to work 50 hours per month. Further, given Lambott's testimony regarding the number of hours he worked after assuming

the District Manager's duties, it seems unlikely Jones was working 50 hours per month during the off-season. Jones' testimony was also suspect given that he never complained that he believed the District was not paying him enough for the work he performed during the off-season until several months after his employment had ended with the District. However, the employer did not present sufficient evidence to contradict Jones' testimony. Therefore, Jones has shown he worked 50 hours per month during the off-season in 2009 and 2010.

The next issue is whether the terms of the employment agreement entered into by the parties during the September 14, 2006 Board meeting conformed with the state law.

An employer and an employee are free to enter into their own employment agreement so long as the employee's regular rate of pay is equal to or greater than the applicable minimum wage under Admin. R. Mont. 24.16.2512(2)(e)(i), which states:

> An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a *clear mutual understanding of the parties* that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Law if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement. (Emphasis added).

In this case, Jones was an employee of an organization covered by Mont. Code Ann. § 39-3-406(2)(h). As such, Jones is excluded from the overtime provisions of Mont. Code Ann. § 39-3-405. However, Jones is not excluded from the minimum wage provisions of § 39-3-404. The issue then becomes whether Jones was compensated at a rate not less than the applicable minimum wage rate for every hour worked during the off-season months of 2009 and 2010.

Jones' annual salary in 2009 was $17,483.63, with a monthly salary of $1,456.97. Jones worked an average of 30 hours per week during the irrigation season, which consists of approximately 35 weeks. Jones worked a total of 1,050 hours during the irrigation season (30 hours x 35 weeks). Assuming Jones worked an average of 50 hours per month during the off-season months, the evidence shows he worked a total of 200 hours during the off-season (50 hours x 4 months). Jones worked approximately 1,250 hours during 2009. Jones' hourly wage in 2009 was $13.98 ($17,483.63 ÷ 1,250 hours). Jones' hourly wage was greater than the minimum wage at the time of $6.55.

Jones' annual salary in 2010 was $18,008.14, with a monthly salary of approximately $1,500.68. Jones worked an average of 30 hours per week during the irrigation season, which consists of approximately 35 weeks. Jones worked a total of 1,050 hours during the irrigation season. Assuming Jones worked an average of 50 hours per month during the off-season months, the evidence shows he worked a total of 200 hours during the off-season. Jones worked approximately 1,250 hours in 2010. Jones' hourly wage in 2009 was $14.41 ($18,008.14 ÷ 1,250 hours). Jones' hourly wage was greater than the minimum wage at the time of $7.25.

The evidence shows Jones' average hourly wage was greater than the applicable minimum wage during the off-season in 2009 and 2010. The next issue is whether the parties had a clear mutual understanding regarding the terms of the employment agreement.

The courts have had opportunity to consider what constitutes a "clear mutual understanding" of the parties. In *Craver v. Waste Mgt. Partners of Bozeman* (1994), 265 Mont. 37, 874 P.2d 1, the Montana Supreme Court found there was "no express written or oral consent" by the employees to the calculation of salaries by the employer according to the fluctuating workweek method. *Craver*, 265 Mont. at 40, 874 P.2d at 2-3. As a result, the court found that the employer and employee did not "mutually agree" to a fluctuating hours salary, and that "fact alone [was] fatal to any allegation that [the employer's] pay scheme fit the requirements of Admin. R. Mont. 24.16.2512(2)(3)." The court emphasized that the rule only "permits an employer to use the salaried, fluctuating pay scheme as long as the employer and employee mutually agree to the scheme." *Craver*, 265 Mont. at 43, 874 P.2d at 4.

In *Lewis v. B&B Pawnbrokers, Inc.*, 1998 MT 302, the Montana Supreme Court found the district court improperly applied the fluctuating workweek method upon only the claimant's testimony that suggested he understood his paycheck would remain the same regardless of the number of hours he worked from week to week. The court found that the record was "void of a clear, mutual understanding between *Lewis* and *B&B* that would support a proper application of the fluctuating workweek method. *Lewis* at 92. The court found that *Lewis* was employed on an "oral-albeit confused-understanding of his employment conditions" based upon *Lewis'* testimony that he initially thought he was receiving a "monthly salary plus 'commission'" from the employer until the pay scheme changed to paychecks being issued bi-weekly. *Lewis* apparently believed that his monthly wage was based upon an hourly rate even though his monthly pay never fluctuated according to hours actually worked when the pay scheme changed to bi-weekly payments.

Courts in other jurisdictions have also addressed the complicated issue of the fluctuating workweek method. In *Andrews v. Central California Irrigation District*, 1999 U.S. Dist. LEXIS 23653, the U.S. District Court for the Eastern District of California held that the plaintiffs had an understanding of the employer's fluctuating workweek pay structure based upon their having worked under that structure for approximately four years, which the court found was sufficient time to gain an understanding of the system. The court also pointed to cases decided in other jurisdictions:

> The few cases that directly address this issue agree. See *Griffin v. Wake County*, 142 F.3d 712, 716 (4th Cir. 1998) (holding that as long as the employer "plainly communicated" the "essence of the plan," that the employees would receive the same amount of base pay each week regardless of the number of hours worked, there is a satisfactory "understanding"); see also *Roy v. County of Lexington, South Carolina*, 141 F.3d 533, 547-48 (4th Cir. 1998); *Condo v. Sysco Corp.*, 1 F.3d 599, 601-02 (7th Cir. 1993), cert. denied, 510 U.S. 1110, 1110, 114 S. Ct. 1051, 127 L. Ed. 2d 373 (1994). *Griffin* also held with every paycheck, employees received a regular "lesson" about how the fluctuating work week operates, see id. at 716-17, and that the plaintiffs had lived with the system for nearly six years before filing the lawsuit. See id. at 717.

The changes made to the employment agreement were done upon the request of Jones during the September 14, 2006 Board meeting. The District granted Jones' request that he be allowed to work on projects that he would normally perform in the spring during the off-season months. The District also granted Jones' request that he receive his annual salary on a 12-month basis rather than on an eight-month basis as contemplated in the original employment agreement that governed the first six

months of his employment. Jones testified that he anticipated "trading" his time in the spring by performing his spring work during the off-season months. Jones testified he was not requesting 12 months of work for the same pay but that he was merely exchanging one for the other.

From September 2006 through December 2006, the District paid Jones $1,000.00 per month, which was based upon the remaining two months of pay of $4,000.00 being divided by the four remaining months of the year. The District continued to pay Jones his annual salary on a 12-month basis to allow him to perform his spring work during the off-season months for approximately four years. At no time did Jones complain that he believed the pay structure to be unfair or that it did not fairly compensate him for all work performed.

Jones' testimony that he never agreed to the pay structure that was in place during the final four years of his employment is not credible. The change in the employment agreement was done at his behest and each paycheck served as a lesson on how the pay structure worked. Further, given that Jones never complained that he felt he was working an excessive number of hours given his pay structure until several months after his separation, it is unbelievable that he did not understand that he was paid a set monthly salary for the work he performed.

Each Board Member who appeared at the hearing testified that he understood that Jones had requested only to be paid throughout the year and that Jones was never required to perform work outside of his job description. Clerk Doris Hossfeld testified she also understood Jones wanted to receive his annual salary on a 12-month basis and that she was never aware that Jones felt he was performing additional duties that fell outside of his original job description.

The testimony of the employer's witness was detailed, clear, and supported by the documentation submitted by both parties. Unlike the parties in *Craver* and *Lewis*, the parties in this case had a clear, mutual understanding that Jones would be paid a fixed salary for a fluctuating schedule during the last 36 months of his employment.

The evidence shows the parties had a clear mutual understanding that Jones would receive a fixed salary for a fluctuating workweek and that Jones would be paid on a 12-month basis, as requested. The evidence shows the parties' agreement was in conformance with Admin. R. Mont. 24.16.2512(2)(e)(i). The evidence also shows Jones was compensated for all work performed under the employment agreement at a rate not less than the applicable minimum wage. Therefore, the District does not owe Jones any additional 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 Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Jones has not shown that he is owed additional wages for work performed during the off-season months of 2009 and 2010.

VI. ORDER

Based upon the foregoing, the claim of William R. Jones for additional wages for work performed during the off-season in 2009 and 2010 is dismissed.

DATED this 22nd day of February, 2013.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
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.