STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF JAMES D. WHEALON,	)	Case No. 1346-2009
Claimant,	)	**FINAL AGENCY DECISION**
vs.	)	
ANACONDA PUBLIC SCHOOLS,	)	
Respondent.	)	

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I. INTRODUCTION

Respondent Anaconda Public Schools District (District) appealed from the Wage and Hour Unit's Redetermination that Claimant James D. Whealon was owed $40,333.20 plus 15% penalty of $6,049.98 representing payout for 116 days of accrued vacation pay. Whealon requested that this tribunal uphold the Redetermination of the Wage and Hour unit, except that he contends that he is owed for 119 days accrued leave, at a minimum, $41,376.30, plus all applicable penalties and interest allowable by law. Hearing Officer David A. Scrimm held a contested case hearing in this matter on April 10, 2013. Whealon was represented by attorney Brenda Wahler. The District was represented by attorney Tony Koenig of the Montana School Boards Association. Exhibits 15-16, 39, 40, 60-67, 114-118, 122-123, 130-132, 166-173, 186-221, 253, and 254 were admitted. Exhibits 222-245 were admitted but are now excluded as duplicates of documents included in Exhibits 186-221. Earl Sager, Martin "Marty" Mavrinac, Jake Verlanac, Nilda Zacher, Cheryl McKinley, Dan Villa, Tom Darnell, and Whealon presented sworn testimony.

II. ISSUE

The issue in this case is whether the Anaconda Public School District owes wages for work performed, specifically vacation pay, as alleged in the complaint filed by James Whealon, and owes penalties as provided by law.

III. SUMMARY JUDGMENT

On January 30, 2013, the District filed a motion for summary judgment seeking dismissal of Whealon's claim for unpaid wages. The District argued that resolution of the following issues was determinative:

> 1. Whether Whealon was an employee of the District for the purposes of Title 2, Chapter 18, Part 6, MCA; and
>
> 2. Whether the 116 additional days of vacation for which Whealon seeks payment were forfeited pursuant to 2-18-617, MCA.

Whealon filed his response on February 13, 2013 arguing summary judgment was inappropriate because the contract provisions referring to Title 2, Chapter 18, Part 6 were ambiguous and the true meaning of the contract was subject to factual dispute. On March 29, 2013, the hearing officer issued an Order Granting Partial Summary Judgment finding that:

> With respect to Issue 1, the hearing officer finds that Whealon's vacation leave benefit was governed by Title 2, Chapter 18, Part 6, based on both the contract provisions and by his status as an "employee" under that part.
>
> With respect to Issue 2, the hearing officer finds that there are considerable factual disputes regarding the accumulation and potential forfeiture of Whealon's vacation leave to preclude summary judgment on this issue.

The hearing officer also stated that a more detailed discussion of the reasons for his decision on the motion would be included in this decision.

Hearings on wage claims are governed by the Montana Administrative Procedure Act (MAPA). Mont. Code Ann. § 39-3-216(3). Under MAPA, administrative agencies may grant summary judgment when there is no material fact issue in dispute:

> Procedural due process requires that parties be given reasonable notice and a reasonable opportunity to be heard; these due process requirements are reflected in MAPA in §§ 2-4-601, and 2-4-612(1), MCA. Section 2-4-612(1), MCA, provides that "*[o]pportunity* shall be afforded all parties to present evidence and argument on all issues involved." . . . However, due process does not require development of facts through an evidentiary hearing when there are no material factual issues in dispute.

In re Peila, 249 Mont. 272, 280-81, 815 P.2d 139, 144 (1991) (citations omitted).

The legal standard for granting summary judgment is set out in *Andrews v. Plum Creek Manufacturing, L.P.*, 2001 MT 94, 305 Mont. 194, 27 P.3d 426:

> The movant must demonstrate that no genuine issues of material fact exist. Once this has been accomplished, the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist. Having determined that genuine issues of fact do not exist, the court must then determine whether the moving party is entitled to judgment as a matter of law.

Andrews, ¶ 5 (*citing Bruner v. Yellowstone County*, 272 Mont. 261, 264, 900 P.2d 901, 903 (1995)).

Consequently, in ruling on the motion for summary judgment, the hearing officer determined that there were no genuine issues of material fact with regard to the accumulation of vacation leave. Under the express terms of Whealon's contract and as an employee under Mont Code Ann. § 2-18-601, Whealon was subject to the vacation leave provisions of Mont Code Ann. § 2-18-617.

Whealon's employment with the District was governed by a series of six employment contracts which contained the following clause regarding the accrual and use of vacation leave:

> The SUPERINTENDENT is entitled to the sick leave and vacation leave benefit under Title 2, Chapter 18, Part 6, MCA (24 days of vacation, 12 days of sick leave). . . Absences from the District in excess of two days must be approved by the Board Chair.

Exhibits 186-221.

The employment agreements also contained the following integration clause:

> 21. COMPLETE AGREEMENT. This Contract embodies the complete agreement of the parties hereto, superseding all oral and written previous and contemporary agreements between the parties. No alterations or modification of this contract shall be valid unless evidenced by a writing signed by all parties to this Contract.

Id.

When a "contract's terms are clear and unambiguous, a court must apply the language as written." *Wurl v. Polson Sch. Dist. No. 23*, 2006 MT 8, P16; 127 P.3d 436, P16. "An ambiguity exists where the language of a contract, as a whole, reasonably is subject to two different interpretations." *Anaconda Pub. Schs v. Whealon*, 2012 MT 13, P21; 268 P.3d 1258. "However, if the court finds the language to be unambiguous, then the plain language of the contract will govern, and the court can look no further." *Id*. Whealon attempted to create ambiguity when he argued that the reference to Title 2, Chapter 18, Part 6 was meant to be a reference only to Mont. Code Ann. § 2-18-612. The hearing officer does not find Whealon's assertion persuasive. The reference in the contract was to the entirety of Part 6. The reference to how many days of vacation leave and sick leave Whealon was entitled to was just an indication of how many days he would earn under the contract. Thus, by the plain and unambiguous language of the employment agreements, Whealon was entitled to vacation leave under Title 2, Chapter 18, Part 6, MCA.

The vacation leave requirements are found in Mont. Code Ann. § 2-18-617 and provide as follows:

> 2-18-617. Accumulation of leave -- cash for unused -- transfer. (1)(a) Except as provided in subsection (1)(b), vacation leave may be accumulated to a total not to exceed two times the maximum number of days earned annually as of the end of the first pay period of the next calendar year. Excess vacation time is not forfeited if taken within 90 calendar days from the last day of the calendar year in which the excess was accrued.
> (b) It is the responsibility of the head of an employing agency to provide reasonable opportunity for an employee to use rather than forfeit accumulated vacation leave. If an employee makes a reasonable written request to use excess vacation leave before the excess vacation leave must be forfeited under subsection (1)(a) and the employing agency denies the request, the excess vacation leave is not forfeited and the employing agency shall ensure that the employee may use the excess vacation leave before the end of the calendar year in which the leave would have been forfeited under subsection (1)(a).

Thus, under Whealon's contract, he was entitled to earn 24 days per year and a total of 48 days before the forfeiture provisions would begin. Arguably an employee can earn more than 48 days under the statute because an employee would continue to earn vacation leave until such time as the forfeiture occurs. Whealon was entitled to the maximum 48 days of vacation leave plus whatever he earned in his final seven and one-half months of employment, another 15 days.

Accordingly, under Whealon's contracts, his vacation leave was subject to the provisions of Mont. Code Ann. § 2-18-617. Even if there were no contract between

Whealon and the District (and the hearing officer does not so find), Whealon's vacation leave was still governed by Mont. Code Ann. § 2-18-617 because he was an employee of a political subdivision of the state.

Mont. Code Ann. § 2-18-617 applies to an "employee" defined as:

> . . . any person employed by an *agency* except elected state, county, and city officials, *schoolteachers*, persons contracted as independent contractors or hired under *personal services contracts*, and student interns.

Mont. Code Ann. § 2-18-601(6) (emphasis added).

The term "agency" means "any legally constituted department, board, or commission of state, county, or city government or any political subdivision of the state." Mont. Code Ann. § 2-18-601(1)(a). School districts are political subdivisions of the state. *See Bitney v. School Dist.*, 167 Mont. 129, 134; 535 P.2d 1273, 1276 (1975).

While Whealon, as superintendent, was required to be a certified teacher, he was not a school teacher which is defined as:

> . . . a person, *except a district superintendent*, who holds a valid Montana teacher certificate that has been issued by the superintendent of public instruction under the provisions of this title and the policies adopted by the board of public education and who is employed by a district as a member of its instructional, supervisory, or administrative staff. This definition of a teacher includes a person for whom an emergency authorization of employment has been issued under the provisions of 20-4-111.

Mont. Code Ann. § 2-18-601(26) (emphasis added).

The Montana Supreme Court has determined that personal services contracts are limited to those entered into by "professionals hired under short-term, ad hoc contracts." *Corwin v. Bd. of Pub. Educ.*, 272 Mont. 14, 20 898 P.2d 1227, 1231 (1995). Whealon was not hired under a personal services contract. He was not hired on an *ad hoc* basis, but rather had a series of annual or multiple-year contracts. Those contracts cannot be considered short-term.

Based on the express terms of his contract and by the application of Montana's vacation leave statutes, Whealon's accumulation of vacation leave was controlled by Mont. Code Ann. § 2-18-617(1)(a).

The potential forfeiture of Whealon's accumulated vacation leave was governed primarily by § 2-18-617(1)(b). Under this provision, fact questions would arise about whether Whealon made any requests to use his time, whether the head of the employing agency denied any such requests, and whether the employing agency provided reasonable opportunity to use rather than forfeit the time.

Mont. Code Ann. § 2-18-604 also applies. It provides:

> The department of administration or the administrative officer of any county, city, or political subdivision is responsible for the proper administration of the employee annual, sick, or military leave provisions and the jury duty provisions found in this part and may, when necessary, promulgate rules necessary to achieve the uniform administration of these provisions and to prevent the abuse of these provisions. When promulgated, the rules are effective as to all employees of the state or any county, city, or political subdivision of the state.

Thus, questions of material fact existed regarding the proper administration of the District's vacation leave provisions and summary judgment on the second issue was precluded.

* * *

Based on the evidence and argument presented at the hearing and the parties' post-hearing filings, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

IV. FINDINGS OF FACT

1. Whealon was employed by the District in the position of District Superintendent from July 1, 2000 through August 15, 2008.

2. Whealon holds a Class III Montana teacher's certificate, which includes an administrator's endorsement. The District's classification of the superintendent was as a 12-month certified administrator, reflecting his status as an administrator, as a year-round staff member who did not get summers off.

3. Respondent is a School District having its principal place of business in Anaconda, Montana.

4. Whealon's employment was governed by a series of six employment contracts during the course of his employment with the District. Whealon's employment contracts provided that his vacation leave was determined by Title 2, Chapter 18, Part 6, MCA.

5. Whealon used a total of 13 vacation days during his entire employment with the District. Three of those days were taken during the 2002-2003 school year; one day was taken during the 2003-2004 school year; and nine days were taken during the 2005-2006 school year. Whealon's employment contract permitted him to use up to two vacation days at any time at his own discretion.

During his employment with the District, Whealon never submitted a written request to use vacation days. During his employment, Whealon was never denied a request to use vacation days. During his employment, the superintendent's sick and vacation leave was tracked by the superintendent's office, and specifically, the superintendent's secretary. All other employees' sick and vacation leave were tracked by the payroll office.

Accrued vacation was never tracked by the District nor listed on employee pay stubs during the time Whealon worked for the District. The District did not inform Whealon that he had excess vacation leave that was subject to forfeiture if he did not use it in accord with Mont. Code Ann. § 2-18-617.

6. Whealon accrued a total of 182 days of unused vacation leave during the course of his employment by the District, consisting of 179 days from 2000 until June 2008, plus an additional three days earned between June 2008 and August 2008. (Exhibits 60-67). In accord with Whealon's contract and in accord with Mont. Code Ann. § 2-18-617, Whealon forfeited 119 days of his accrued vacation leave.

7. On August 13, 2008, the business office submitted payout for 63 days accumulated vacation leave to the Montana Teacher's Retirement System (TRS) when the District submitted final numbers. (Exhibits 131-132). Verlanic, in calculating Whealon's termination payout, only reviewed time records of Whealon for the previous two years to calculate the payout.

8. Whealon and some members of the District's Board of Trustees mistakenly believed that Whealon could continue to accrue vacation leave without limit. Whealon's contract and state law clearly state otherwise. Some District employees may have been paid out accumulated leave contrary to Montana law.

9. The District paid Whealon for all the vacation leave he could legally accrue.

V. DISCUSSION

Montana law requires that employers pay employees wages within ten days after the wages become due pursuant to the particular employment agreement.

Mont. Code Ann. § 39-3-204. Except for compliance with minimum wage and overtime law, the parties can agree to the amount of wages to be paid. "Wages" are any money due an employee by the employer. Mont. Code Ann. § 39-3-201(6).

"Vacation pay which has been earned and is due and owing must be considered in the same category as wages and is collectible in the same manner and under the same statutes as are wages." 23 Op. Att'y Gen. 151, 153 (1949); *In re the Wage Claim of Sharon Langager*, (1998) 287 Mont. 445, 453; 954 P. 2d 1169, 1173-1174.

In *Langager*, the court looked at other state court holdings regarding vacation pay and found that "an employer is free to set the terms and conditions of employment and compensation and the employee is free to accept or reject those conditions." *Langager*, 1998 MT 445, ¶25, quoting *Rowell v. Jones & Vining, Inc.* (Me. 1987), 524 A.2d 1208, 1211.

In *Stuart v. Department of Social & Rehabilitation Services* (1993), the Montana Supreme Court provided a clear indicator that use it or lose it vacation policies are neither in conflict with the Wage Payment Act nor unacceptable public policy. 256 Mont. 231, 235, 846 P.2d 965, 968. The court held that because the Montana Legislature created the right for public employees to earn annual vacation leave credits, it could condition those rights to limit the accumulation of those credits. *Id.*

Regardless of Whealon's and some of the former members of the Board of Trustees' sincere beliefs that Whealon would be allowed to cash out all his accrued vacation leave, the contract Whealon signed and state law limited the District's obligation to pay for unused vacation time.

The only possible way those hours could be payable would be for Whealon to prove that the District was irresponsible in its administration of its vacation leave policies or that the head of the employing agency did not provide a reasonable opportunity for Whealon to use his excess leave. Whealon has not proven either of those facts. Whealon's biggest obstacle was the fact that as superintendent he was the head of the employing agency and the District's administrative officer. As such, Whealon cannot complain that the District did not properly administer the vacation leave policy because he was primarily responsible for its administration. If Whealon wanted his time to be tracked by the payroll office instead of his secretary, he could have put that policy in place. His successor did. If Whealon wanted to notify all the District's employees subject to the forfeiture provision of 2-18-617 that they had excess leave that was in danger of being forfeited, he could have done that as well. Whealon was very dedicated to his duties to manage the Anaconda schools and put in an extraordinary amount of his time fulfilling his duties. While Whealon and

some of the former Trustees may have believed that Whealon could be rewarded for his extraordinary service by cashing out his accumulated leave and that they believed it was practice to do so, that was neither stated in his contract or in accord with state law. Unfortunately for Whealon, this case demonstrates the importance of ensuring that agreements which have significant financial consequences are committed to paper.

VI. 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. The Anaconda Public Schools complied with its responsibilities under Mont. Code Ann. §§ 2-18-604 and 2-18-617.

3. The Anaconda Public Schools does not owe Whealon additional unpaid wages.

VII. ORDER

Whealon's claim for unpaid wages is dismissed.

DATED this 25th day of July, 2013.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
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.