

**BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA**

ROBERTA DREW,

Charging Party,

-v-

YELLOWSTONE COUNTY, JAMES RENO,
and DWIGHT VIGNESS,

Respondents.

Cause No. 0031010360
0031010361
0031010370

**ORDER AFFIRMING
FINAL AGENCY DECISION**

On November 5, 2004, the Department of Labor and Industry's Hearings Bureau issued a Final Agency Decision in the above-entitled matter. Respondents, Yellowstone County, James Reno, and Dwight Vigness, were the first to file an appeal with the Montana Human Rights Commission (Commission). Charging Party, Roberta Drew, filed a cross-appeal. Prior to the hearing, the Commission reviewed the appeal and cross-appeal briefs filed by the parties, the reply briefs, as well as the response briefs. Additionally, the Commission reviewed thirteen volumes of transcripts from the prior-level hearing. The parties were able to reach a stipulation in which it was agreed that when a party referenced an exhibit from the record in a brief, that particular exhibit would be attached for the Commission's consideration. *See Admin. R. Mont. 24.9.1717(2)(a).*

On March 10, 2005, Chair of the Commission, Franke Wilmer, conducted a pre-hearing conference with the parties to discuss outstanding motions and establish

procedure for the day of the hearing. See *Admin. R. Mont. 24.9.1717(10)*. The Commission considered the matter on March 14, 2005.

On the day of the hearing, four members of the Montana Human Rights Commission were in attendance: Chair of the Commission, Franke Wilmer, and members, Ryan Rusche, Jack Copps, and Allen Secher. Commission member Janine Pease was not present. Cal Stacey appeared and argued on behalf of Respondents and Tim Kelly entered an appearance on behalf of Charging Party.

Following oral argument and a lengthy discussion period, the parties agreed, and the Commission considered, Respondents' appeal and Charging Party's cross-appeal separately. On the day of the hearing, a majority of the Commission rejected the Charging Party's cross-appeal, therefore affirming the Final Agency Decision. Since the Commission was unable to reach a majority on Respondents' appeal, the matter was deferred to the remaining Commissioner, Janine Pease, for her consideration. Commissioner Pease voted *in absentia* to affirm the Final Agency Decision. With a majority vote, the motion to affirm the Final Agency Decision, with respect to Respondents' appeal, passed.

SUMMARY OF FINAL AGENCY DECISION ON APPEAL

The parties appealed a November 5, 2004 Final Agency Decision, *Roberta Drew v. Yellowstone County, Yellowstone County Commissioners Jim Reno, and Dwight Vigness*, HRC Case Nos. 0031010360, 0031010361, and 0031010370. The decision contains four parts: 168 findings of fact, an opinion, the conclusions of law, and finally, the order.

At the contested case hearing, the parties argued and the hearings officer ruled on five separate issues.

First, the Final Agency Decision concludes that Respondents did not violate either the Governmental Code of Fair Practices (GCFP) or the Montana Human Rights Act (HRA) when it created an interim chief public defender position instead of allowing Charging Party Drew to serve as acting chief public defender. The hearings officer determined the evidence ultimately established that it was not Charging Party Drew's political ideas¹ or gender that had motivated Respondents to create the interim position, rather it was a desire to sever ties with the former chief public defender.

Second, the Final Agency Decision considered whether Respondents violated the Governmental Code of Fair Practices (GCFP) or the HRA on the basis of political belief or gender when it chose to hire Curtis Bevolden (Bevolden) instead of Charging Party Drew. The hearings officer determined Drew was unable to establish that Respondents' decision to hire Bevolden was unlawfully motivated by her political ideas. However, the hearings officer did find that Respondents unlawfully took Drew's gender into consideration in reaching its decision. The decision goes on to conclude that even though Respondents may have been motivated by an illicit discriminatory motive, Respondents would still have chosen Bevolden.

Third, the Final Agency Decision determines that Respondents illegally retaliated, in violation of both the GCFP and the HRA, when they terminated Charging Party Drew's employment on December 17, 2002. The decision finds that Drew established, with direct evidence that her discharge from employment without proper process resulted from retaliatory animus for filing a complaint of discrimination.

¹ Only the Governmental Code of Fair Practices contains "political ideas" as a protected class status. See *Mont. Code Ann. § 49-3-201*.

Fourth, the Final Agency Decision finds that Respondents illegally discriminated in its failure to timely process Charging Party Drew's grievance. Finally, the decision concludes that Respondents continued to illegally retaliate against Charging Party Drew in denying her grievance at the Level I and II meetings in April and March 2003.

In the resulting order, the hearing officer found judgment in favor of Charging Party Drew and against Respondents. Respondents were ordered to pay Drew \$16,323.39 for lost wages, \$1,496.39 as prejudgment interest and \$50,000 for her emotional distress as a result of the illegal discrimination. Respondents were ordered to calculate and make retroactive contributions to Drew's social security, Medicare, and Public Employee Retirement System (PERS) from October through December 2003. Respondents were ordered to pay attorneys' fees and costs for prosecuting Level I and II of Drew's formal grievance with the county.

As for the affirmative relief, Respondents were enjoined from considering sex when making hiring decisions for management positions and further from retaliating against employees that file complaints of discrimination. Respondents were asked to submit proposed policies reflecting compliance and training in conformance with the permanent injunction.

SUMMARY OF RESPONDENTS' APPEAL TO THE COMMISSION

Respondents were first to file an appeal to the Montana Human Rights Commission. In its consideration of Respondents' appeal, the Commission considered several arguments raised in briefing and through oral argument. In briefs to the Commission, Respondents raised several procedural arguments regarding the Department's administrative process and the failure of the hearings officer to properly

rule on motions and evidentiary objections. Respondents argued the Department's administrative process denied Respondents the right to a jury trial and therefore it was denied due process and equal protection of the law. Further, Respondents argued it was not given the opportunity to "disqualify" the assigned hearings officer in violation of "§ 17 of Article II of the Montana Constitution."²

Additionally, Respondents contended that since the Commission is statutorily obligated to sit in "independent judgment," and since the credibility of the witnesses proves crucial to Charging Party's claims, Respondents argued the Commission was unable to perform its statutorily obligated function unless it has the opportunity to judge the demeanor of the witnesses during testimony. Respondents set forth an objection to the hearings officer's failure to grant summary judgment and raised additional objections to several evidentiary rulings.

As for the findings, Respondents argued in both briefing and in oral argument that the Final Agency Decision was not supported by the record. Specifically, Respondents argued: (a) the record does not contain evidence to support a finding of retaliation in the firing of Drew; (b) there is no evidence of discrimination based on gender; and (c) that the record does not support a conclusion that the Respondents retaliated in considering Charging Party Drew's grievance with the county. Finally, Respondents contest the damage award on the grounds that it is not based on substantial evidence.

Respondents argued nothing in the record supports a finding that Respondents fired Charging Party Drew because she had brought a complaint. On the contrary, Respondents asserted that the hearings officer made an express finding that it was

² As part of the administrative process, the Montana Human Rights Commission will not rule on constitutional questions. Constitutional questions are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of powers. Art. III, Section 1, 1972 Mont. Const. See *Shoemaker v. Denke*, 2004 MT 11, ¶ 20, 319 Mont. 238, ¶ 20, 84 P.3d 4, ¶ 20.

Curtis Bevolden (Bevolden) that made the decision to fire Drew. At the time Bevolden made his decision, he had a bevy of legitimate reasons for her termination. Therefore, since the hearings officer concluded Bevolden had no knowledge of Drew's complaint prior to making his decision, Respondents argued his decision to terminate could not have been grounded in discriminatory animus.

Respondents argued the conclusion that Drew was not selected for the interim position based (in part) on gender is not supported by the record. Respondents contend Yellowstone County's consideration of another female for the interim position repudiates this finding. Further, Respondents argued the hearings officer erred in his conclusion that allegations of a sexual relationship affected Respondents decision to hire a male, Bevolden. Even if Respondents had reached its decision based on this consideration, this would not constitute discrimination based on gender.

Finally, in regards to the findings, the Respondents conceded in briefing and in oral argument that Yellowstone County, James Reno, and Dwight Vigness failed to immediately handle Drew's grievance, but Respondents argued this was mere negligence not discriminatory conduct and that any issue Drew may have with the handling of the grievance procedure goes beyond the scope and jurisdiction of the Commission. Respondents asserted it was not retaliation to rule unfavorably during the first two phases of the internal grievance proceedings. Respondents argue the hearings officer is speculating on the information supplied at these proceedings.

As for the damage award, Respondents argued the amounts are not supported by evidence in the record. Here, Respondents contend it offered to reinstate Drew as of October 1, 2003 and Drew voluntarily decided not to work. Therefore, Respondents asserted any loss of income during that time frame was due to Drew's conduct, not a failure of Respondents. Respondents argued the emotional distress award is impossible

to understand. Respondents argued that if Drew suffered emotional distress, it was as a result of her own conduct.

SUMMARY OF CHARGING PARTY'S CROSS APPEAL

The Commission considered four arguments on cross appeal. In her brief to the Commission, Charging Party Drew contended: (1) the hearings officer erred in failing to conclude Respondents did not breach their affirmative duty to select an interim chief public defender on the basis of merit and qualification; (2) the decision is in error because it failed to include the value of any health insurance premiums in the damage award; (3) it was error not to award costs incurred by Charging Party during all levels of the grievance procedure; (4) and, the hearings officer's order of affirmative relief was insufficient.

Charging Party began her cross appeal by arguing that the hearings officer made a material omission by failing to conclude that Respondents had breached their affirmative duty to recruit and select on the basis of merit and qualification as required by Section 49-3-202(1), MCA. Charging Party asserted this legal error warrants correction in order to reduce the likelihood of reoccurrence. Charging Party argued the record established the Respondent made its determination to hire Bevolden based on one requirement, specifically the ability to assume the six felony cases. Therefore, the record sets forth a violation of the statutory provision of the GCFP and to conclude otherwise disregards the plain language of the statute.

Next, Charging Party argued the hearings officer erred in making Drew "whole." Drew contends she did not offer evidence on health insurance benefits and premiums because she did not have this information in her possession, the Respondents did.

Charging Party asserted she should have been awarded fees and costs for the Level III portion of the grievance procedure. Charging Party acknowledged she was awarded those costs (pursuant to an order in that proceeding), but it should not be assumed in the Final Agency Decision that the Respondents will pay costs as directed.

Charging Party then argued that the primary purpose of enforcing civil rights laws is to eliminate discriminatory effects, which requires the appropriate affirmative relief. Given the pattern of misconduct in this case, Charging Party asserted the affirmative relief should have included that the Human Resource Officer be charged with the duty to certify that Respondents are in compliance with the Governmental Code of Fair Practices (GCFP) on all hiring decisions. In addition, a strict prohibition should have been placed on the Commissioners to hold open meetings when discussing employment decisions. Finally, since the law provides for criminal sanctions, the Department should have imposed a policy requiring complaints of willful violation be referred to law enforcement for the appropriate investigation and action.

ANALYSIS

The Commission is a quasi-judicial panel consisting of five members of the public, including one attorney. *See Mont. Code Ann. § 2-15-1706*. A majority of the membership constitutes a quorum to do business, however, a favorable vote of at least a majority of the members is required to adopt any resolution, motion, or other decision. *See Mont. Code Ann. § 2-15-124(8)*. By administrative rule, the Commission may reject or modify the conclusions of law and interpretations of administrative rules in the final agency decision, but may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in the order

that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. *Admin. R. Mont. 24.9.1717(2) and 24.9.1719(a)*. With regard to an award or penalty, the Commission may accept or reduce, but it may not increase it without reviewing the complete record. *Id.*

In case law, the Montana Supreme Court has held that the Commission may overturn a hearings officer's findings of fact if it follows proper procedure and states with particularity in the order that the findings of fact were not based upon competent substantial evidence. See *Moran v. Shotgun Willies*, 270 Mont. 47, 889 P.2d 1185 (citing to Mont Code Ann. § 2-4-621(3)). The Commission's reversal of a hearing officer's findings cannot survive judicial review unless the findings are not supported by substantial evidence. See *Schmidt v. Cook*, 2005 MT 53, ¶ 31, ___ Mont. ___ ¶ 31, ___ P.3d. ___, ¶ 31.

The Commission considered, and the parties agreed to the consideration by the Commission, of the appeals separately.

The Commission considered Respondents' appeal first.

I. Respondents' Appeal

Following the presentation of oral argument and an opportunity to question counsel, the Commissioners' discussion began with Commissioner Copps motion to reject the Final Agency Decision. This motion was seconded. In discussion, Commissioner Copps' stated his intention was to nullify both the Findings of Fact and the Conclusions of Law of the Final Agency Decision. Commissioner Copps stated that the findings of the hearings officer were flawed and did not support a conclusion of retaliation, Copps acknowledged the conclusion on sex discrimination was a closer call. Although Commissioner Rusche agreed there were problems with the Final Agency

Decision's findings, he was unwilling to reject all of the findings. Similarly, Commissioner Wilmer argued that there were findings that were clearly supported by the record. Commissioner Copps' motion to reject the Final Agency Decision failed on a one to three vote.

Commissioner Secher then made a motion to affirm the final agency decision. The motion was seconded. In discussion, Commissioner Secher stated that the evidence supported the Final Agency Decision. Commissioner Rusche disagreed and restated concerns he had with some of the findings. Commissioner Secher's motion to affirm the Final Agency Decision failed on a one to three vote.

In discussion, the Commission expressed its concerns about simply rejecting the conclusions of law without modifying the findings of fact.³ Following a discussion as to which findings in the Final Agency Decision were actually on appeal to the Commission, the Commissioners discussed the possibility of continuing its discussion to determine if a modification to the Final Agency Decision was possible. By statute, the Commission has 120 days from the receipt of the notice of appeal to hear an appeal. *Mont. Code Ann. § 49-2-505(4)*.

Commissioner Rusche then made a motion to modify the final agency decision. Specifically, Rusche motioned to modify the Final Agency Decision by striking Conclusions of Law Nos. 2(a) and 2(d) and striking the language in Conclusion of Law No. 4 that awarded \$50,000 for emotional distress and to accordingly modify the corresponding order. Commissioner Rusche supported his motion by stating that he did not believe the identified conclusions were the correct application of the law based on the findings. Commissioner Rusche's motion failed for lack of a second.

³ For example, Commissioner Rusche noted that Finding of Fact, No 146, the hearings officer finds, "The county fired Drew because she had filed a human rights complaint against the county." See *Final Agency Decision, HRC Case No. 0031010360, 0031010361, and 0039010370*.

Commissioner Copps raised a motion to reject the Final Agency Decision's Conclusions of Law because the Conclusions are unsupported by substantial credible evidence and that the Findings of Fact are not supported by the record. The motion was seconded. Once it was determined that passing this motion would affirm the findings of the hearings officer in their entirety, Commissioner Copps withdrew his motion.

Commissioner Wilmer raised a motion to reconsider affirming the Final Agency Decision. The motion was seconded. Commissioner Wilmer supported her motion by stating that the logic may not have been perfect, but there was sufficient evidence in the record to support the conclusions of the hearings officer. Upon call for the question, two Commissioners voted in favor of the motion and two Commissioners voted against.

Since the Commission was unable to reach a majority vote on a motion for Respondents' appeal, and further, since it was determined that additional time would not change or alter the minds of the attending Commissioners, the matter was deferred to Commissioner Janine Pease for her consideration. *Admin. R. Mont. 24.9.1718(2)*.

Commissioner Pease reviewed the transcripts, the briefing, and the tapes from the oral argument before the Commission. Commissioner Pease determined she did not require additional argument, nor did she require additional deliberation with the Commissioners. Commissioner Pease determined the conclusions of law were correct and that substantial evidence in the record supported the decision. Commissioner Pease voted in favor of the outstanding motion to affirm the Final Agency Decision.

Therefore, for the purposes of Respondents' appeal the Final Agency Decision is affirmed.

II. Charging Party's Cross Appeal

The Commission then considered Charging Party's cross-appeal.

Pursuant to the cross appeal, Commissioner Rusche raised a motion to affirm the Final Agency Decision. The motion was seconded. In discussion, the Commissioners raised concerns since the prior motion to affirm the Final Agency Decision was outstanding. Further, since Commissioner Copps wholly disagreed with the Final Agency Decision and further, since he disagreed with the Charging Party's appeal, Commissioner Copps chose to abstain from voting on the motion.

Upon call for the question, the motion to affirm the Final Agency Decision passed with three votes.

CONCLUSION

After careful and due consideration, a majority of the Commission concludes, on both the appeal and the cross-appeal, that the Final Agency Decision in this matter is supported by competent substantial evidence and complies with essential requirements of law. *See Admin. R. Mont. 24.9.1717(2)*. The Commission chose not to modify or reject the Final Agency Decision pursuant to either the Respondents' appeal or the Charging Party's cross appeal.

A person who has exhausted all administrative remedies available within an agency and who is aggrieved by a final decision in a contested case is entitled to file a petition for judicial review within 30 days after service of the final agency decision in the district where the petitioner resides, where petitioner's maintains its principal office, or where the agency maintains its principal office. *See Mont. Code Ann. § 2-4-702*.

The Commission adopts and incorporates the Final Agency Decision issued by

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the Hearings Bureau.

DATED this ____ day of April 2005.

Chair Franke Wilmer
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned employee of the Human Rights Bureau certifies that a true copy of the forgoing Human Rights Commission ORDER was served on the following persons by U.S. mail, postage prepaid, on April____ 2005.

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