

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

LINDA RAIHA,

Charging Party,

-v-

BUTTE-SILVER BOW LOCAL
GOVERNMENT,

Respondent.

HRB No.: 0061011911

**FINAL AGENCY DECISION AND
ORDER**

INTRODUCTION

Linda Raiha (Raiha) filed a complaint with the Department of Labor and Industry asserting that Butte-Silver Bow Local Government (Butte-Silver Bow) unlawfully discriminated against her based on her age and retaliated against her. The Hearings Bureau (Bureau) held a contested case hearing pursuant to § 49-2-505, MCA. Following the hearing, the Bureau issued a decision that determined Butte-Silver Bow did not discriminate or retaliate against Raiha. Raiha filed an appeal with the Montana Human Rights Commission (Commission). Butte-Silver Bow filed a cross appeal. The Commission reversed in part and determined that Butte-Silver Bow did discriminate against Raiha. The Commission remanded the case for a determination of damages. Butte-Silver Bow now appeals the damages awarded. Raiha cross appeals the damages awarded. The Commission considered the matter on July 23, 2008. GERALYN

Driscoll appeared and argued on behalf of Raiha. Thomas M. Welsh appeared and argued on behalf of Butte-Silver Bow.

BACKGROUND

Raiha worked for Butte-Silver Bow for over 20 years as a “floater.” A “floater” is a person who moves around to different departments assisting with various tasks. For a number of years before the claim at issue, Raiha was a part time “floater” for the city court clerk’s office. In that capacity, she assisted the head court clerk. During that time, Raiha was never evaluated for her work in the city court clerk’s office, contrary to the requirements of Butte-Silver Bows personnel policies. Further, Raiha did not receive negative performance evaluations in her other work.

In 2005, a new position was advertised internally for a deputy city court clerk. As the “floater” Raiha was performing many of the duties that would be required for the new position. Raiha applied for the position but was not interviewed. The position was later advertised to the public and a young woman was hired.

Pursuant to the collective bargaining agreement applicable to Raiha, the union representing Raiha filed a grievance and requested to know the reason or reasons she was not interviewed or hired. Article 8, section 3, the relevant clause of the collective bargaining agreement reads in part: “The unsuccessful, in-house applicant shall be given a statement of the reasons why he/she was not hired for the position.” When Raiha made this request through the proper procedures, she was sent a letter from Butte-Silver Bow’s Chief Executive that read in part: “Please be advised that I am denying your appeal to Judge Kambich’s decision on the City Court Clerk position. Considering that Judge Kambich is an elected official, I will not go against his decision.”

On the first appeal to the Commission, because Raiha was not properly given the reasons for not hiring her as required by the collective bargaining agreement, the Commission determined Raiha had proven Butte-Silver Bow's failure to interview her was pretext for age discrimination. In addition, the Commission was concerned the lack of any performance evaluations of Raiha to make her aware of any performance issues was contrary to Butte-Silver Bow's own personnel policies and the intent of the Governmental Code of Fair Practices as codified at §49-3-201, MCA.

During the course of the grievance process and this human rights claim, the person who was originally hired for the position was let go. The position was modified and upgraded from a grade 2 to a grade 4 and was readvertised. Raiha did not apply for the position again when it was posted. Raiha continued to work for Butte-Silver Bow in a different capacity in a grade 2 position.

On remand to the Bureau for a determination of damages, the parties agreed the hearing officer could use the original transcript to determine damages. The hearing officer ordered that Raiha be instated into the position for which she had applied. He further awarded Raiha lost wages in an amount of \$4,830.00 and interest on the lost wages in an amount of \$440.80. The hearing officer determined the lost wages damages by figuring the difference between the pay of a grade 2 and a grade 4 position with Butte-Silver Bow. The hearing officer also awarded emotional distress damages of \$5,000.00.

THE PARTIES' ARGUMENTS

Butte-Silver Bow argues the hearing officer was clearly erroneous in awarding Raiha damages of \$230 per month, the difference between grades 2 and 4, because Raiha failed to prove she would have been properly qualified for the deputy clerk of

court position when it was upgraded from a 2 to a 4. Butte-Silver Bow did not appeal Raiha's reinstatement into the position, but stated at oral argument that this appeal was implicit in its argument that Raiha was not entitled to the lost wages damages because she did not prove she was qualified for the upgraded position or prove it would have been upgraded if she held the position. Butte-Silver Bow also argues the hearing officer erred in awarding this pay difference because Raiha did not apply the second time the position was posted. Finally, Butte-Silver Bow argues the hearing officer erred in awarding \$5,000 emotional distress damages because Raiha did not prove she suffered either any overt discrimination or any severe emotional distress.

Raiha argues she proved she was discriminated against because she was not interviewed for a position she was qualified for, and therefore, she did not have to further prove she would be qualified for the position once it was upgraded. Raiha also asserts she was qualified for the position. Further, Raiha argued at oral argument that it should not matter that she did not apply during the second posting because her grievance was proceeding and she should not be required to reapply for a position she knew she would not be interviewed for. Raiha argues that she proved she suffered emotional distress because she testified it was very demeaning to her to not be interviewed for a job she had been performing for a number of years. She also argued that emotional distress damages can be inferred from the circumstances and she proved she was discriminated against.

As to Raiha's cross appeal, she asserts the hearing officer erred in failing to award damages for retaliation because she asserts the eventual substantive reasons Butte-Silver Bow gave during litigation for not hiring her were not true. Raiha also argues she is entitled to appropriate tax contributions for her retirement as part of her damages. Finally, Raiha argues the hearing officer was clearly erroneous in using July

2006 as the starting month for the pay differential because the upgrade to the position occurred in January 2006. She argues she is entitled to damages from February 2006 to date.

Butte-Silver Bow asserts Raiha's brief on cross appeal was not timely. Butte-Silver Bow also asserts that Raiha cannot raise the issue of damages for retaliation on cross appeal because she already raised it in the earlier appeal and the Commission did not reverse on the issue of retaliation. Finally, Butte-Silver Bow conceded that if Raiha is awarded lost pay damages in the amount of the \$230 per month difference, it would make the appropriate employee and employer deductions on that amount.

DISCUSSION

After careful and due consideration, the Commission concludes the hearing officer's award of damages is correct. The Commission modifies the damages in part in accordance with undisputed issues as set out below.

First, the Commission specifically reiterates that Raiha proved her discrimination claim by proving pretext by a preponderance of the evidence because she was not properly given the reasons for the failure to hire her as required by Art. 8, Section 3 of the collective bargaining agreement and as she could have known if evaluated as intended by the personnel policies developed pursuant to § 49-3-201, MCA. Further, the Commission holds the hearing officer was correct in not awarding damages on Raiha's retaliation claim because the Commission determined on the initial appeal that the hearing officer did not err in concluding Butte-Silver Bow did not retaliate against Raiha.

Second, on the specific damages awarded, the Commission holds the hearing officer was correct in awarding lost wages and emotional distress damages. The Commission hereby modifies the lost wages award in that the \$230 pay difference between the grade 2 and the grade 4 used to determine damages begins in February

2006. Therefore, the lost damages begin February 2006 and continue through July 2009 at \$230 a month for 30 months for a total of \$6,900. Further, due to agreement of the parties at oral argument, any tax or retirement contributions are to be based on this amount with Butte-Silver Bow deducting the appropriate amount out of the award and paying it towards Raiha's benefit, and, in addition, making the appropriate employer contributions based on this amount. Raiha is also entitled to interest according to the hearing officer's rationale of 10% per year divided by 12 months times \$230 per month times 30 months for a total of \$57.00. Finally, the hearing officer was correct in awarding Raiha emotional distress damages in the amount of \$5,000.

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

DATED this ____ day of September, 2008.

Ryan Rusche, Chair
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 September ____, 2008.

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