STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF EMPLOYEE CLASSIFICATION AND COMPENSATION GRIEVANCE APPEAL:

SUNDI WEST, Appellant, vs. MONTANA DEPARTMENT OF MILITARY AFFAIRS, Respondent.	) Case No. 1867-2022)))))))))	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDATION**

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I. BACKGROUND

On March 11, 2022, Appellant Sundi West (West) filed a Step I grievance. On April 6, 2022, West filed a Step II grievance. On May 23, 2022, West filed a Step III grievance. On July 15, 2022, pursuant to Admin. R. Mont. 24.26.548(4), West filed exceptions to the Step III preliminary decision of the board agent, and the case was transferred to the Office of Administrative Hearings (OAH) for a contested case hearing under the Board of Personnel Appeals procedure.

Hearing Officer Joslyn Hunt convened a contested case hearing in the matter on July 25-26, 2023, in Helena, Montana. West was represented by Attorney Rebekah Ryan. The Montana Department of Military Affairs (Department) was represented by Attorney Alan Zackheim. Also present at the hearing was Damien Maricich, the Department's representative, and Elena Hagen, paralegal for Agency Legal Services. At hearing, West, Brad Livingston, and Bonnie Shoemaker (Shoemaker) testified. West's Exhibits 1-7 and the Department's Exhibit 8 were admitted with no objection.

II. ISSUES PRESENTED

1. Whether the Department failed to correctly set West's pay in accordance with the Department pay plan policy when she was hired as the Deputy Director in 2014.

2. If West's pay was incorrectly set, what is the remedy?

III. FINDINGS OF FACT[1]

1. On or about September 8, 2014, West was offered the position as the Department's Deputy Director, with a job title of Operations Manager.[2]

2. The Deputy Director position was classified at pay band level 8.

3. The Deputy Director position was associated with job code 111218 (-218 job code).

4. Major General Matthew T. Quinn (Major General Quinn) hand-delivered West's offer letter to her at her office. The pay rate in the offer letter was $85,000 annually. Neither the Department nor West maintained a copy of West's offer letter.

5. In reviewing her offer letter, West thought the offer seemed "low" because she knew what the previous person who held the position was being paid and the position had been reclassified. The reclassification changed the pay band level of the position from pay band level 7 to pay band level 8, due to the increase in duties associated with the Deputy Director position. West thought her offer would have been higher.

6. West knew the range of what the job was advertised at, which was $85,000 to $97,000 annually.

7. At the time West was offered the Deputy Director position, the Department had a pay plan policy in effect. West made a request of Major General Quinn to be paid per the pay plan policy.

8. The pay plan policy defined "pay zone" as "[t]he salary range between 80% of market and 120% of market in the pay band for a position's code." The term "pay zone" was not used again in the pay plan policy.

9. The pay plan policy defined "hiring range" as "[t]he salary range usually between 80% of market and 100% of market." The language in the policy indicated the hiring range was "usually" followed.

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[1] Any finding of fact offered by a party not specifically addressed herein is deemed not supported by substantial competent evidence in the record.

[2] For purposes of clarity, the position is referred to as Deputy Director.

10. The Department was not required to pay its employees at 80 percent of market. The bulk of its employees were paid at or above 80 percent of market.

11. West did not recall the offer letter referencing 80 percent of the 2012 market.

12. During the discussion when Major General Quinn gave West the offer letter, he told West the pay for the position of Deputy Director was in accordance with the pay plan policy. West understood his statement to mean that the amount in the letter was in accordance with the pay plan specifically because it was within the pay range of 80 to 120 percent of market for a pay band level 8 position. West accepted the position at $85,000 annually.

13. Before the exchange between Major General Quinn and West, in response to a request she received, Bonnie Shoemaker (Shoemaker), Classification and Compensation Program Coordinator for the Department of Administration, sent an email to State Human Resources Division Administrator Anjenette Schafer (Schafer) confirming 80 percent of the 2012 market for West's Deputy Director position was $111,368 annually. This email was dated September 4, 2014, and was sent at 10:39 AM, Mountain Standard Time.

14. The September 4, 2014 email from Shoemaker also had a list of five other management employees and their respective pay, with the average pay equating to $80,271, and ranging from $72,800 to $86,254. These employees were classified at pay band level 8 or -218 job codes.

15. Schafer indicated in an email dated September 4, 2014, at 3:43 PM, Mountain Standard Time, to Major General Quinn that "the job [Deputy Director] was posted at 85-97k, so that needs to be taken into consideration and pay should be in that range." The Department offered West the pay rate of $85,000 per year.

16. West's Deputy Director position was entered into the State Accounting Budget Human Resources System (SABHRS) at job code 111217 (-217 job code), which was an error. The error was corrected months after West accepted the Deputy Director position to reflect West's position at job code 111218 or -218 job code.

17. When the job code error in SABHRS was corrected, West's salary was then at 61 percent of the 2012 market when accounting for her position being at a -218 job code. When West's job code was corrected, her pay remained unchanged.

18. West believed the error in the job code meant that the original amount in her offer letter was incorrect because it was not at least 80 percent of market for a pay band level 8. West made several attempts over the course of several years to have her pay corrected. The Department indicated on various occasions that it was attempting to get more money for her position through a variety of means.

19. Shoemaker stated employees are classified before they are hired and West was classified at a pay band level 8 or -218 job code. A job code does not automatically create an agency pay range. The pay range is for the agency to set. The market rates for a position are linked to the job code. The Department used its pay plan policy to set pay ranges and linked the pay ranges to the pay band level or the job code.

20. Eighty percent of the 2012 market at a -217 job code amounts to $80,183.

21. Eighty percent of the 2012 market at a -218 job code amounts to $111,368.

22. West's starting pay was 84 percent of the market for the -217 job code, which was competitive within the pay zone of the pay plan policy. However, this was not the correct job code.

23. West's pay at $85,000 was under the minimum competitive pay zone of the pay plan based on a -218 job code.

24. West was offered more than all but one of the other management employees listed in Shoemaker's email. Those employees were all at pay band level 8. The Department intended to offer West the actual amount it offered.

IV. DISCUSSION[3]

A. Classification, Compensation, and Benefits Law

In general, Title 2, chapter 18 of the Montana Code addresses state employee "classification, compensation, and benefits." An employee is entitled to file a complaint with regard to classification or compensation determinations with the "board of personnel appeals provided for in [Mont. Code Ann. §] 2-15-1705 and to be heard under the provisions of a grievance procedure to be prescribed by the board." Mont. Code Ann. § 2-18-1011(1). Montana Code

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

Annotated § 2-18-1011(1) states: "An employee . . . affected by the implementation of parts 1 through 3 of this chapter is entitled to file a complaint." Part 1 includes general provisions, Part 2 includes classification provisions, and Part 3 includes compensation determination provisions.

Administrative Rule of Montana 24.26.540 addresses the classification and compensation grievance procedure for an employee, providing "[a]ny employee . . . may utilize this grievance process to grieve a classification or compensation issue under Title 2, chapter 18, parts 1 through 3, MCA." Admin. R. Mont. 24.26.540(1). Subsection (2)(b)(ii) of Admin. R. Mont. 24.26.540 provides a classification and compensation grievance shall address that the "position was incorrectly allocated to [a band level] and should be allocated to [a different band level]." Because West argues that the error in the band of the job code also indicated an error in pay, her claim properly falls within (2)(b)(ii), as indicated in the prior order of the Hearing Officer. Finally, Montana Code Annotated § 2-18-203(3) provides "[t]he period of time for which retroactive pay for a compensation or classification appeal may be awarded under 2-18-1011 through 2-18-1013 or under parts 1 through 3 of this chapter may not extend beyond 30 days prior to the date on which the appeal was filed."

B. The Parties' Arguments Regarding the Offer Letter and the Events Surrounding the Offer Letter

West contends the Department's intent was to set her pay in accordance with the pay plan policy, and that her pay has never been at 80-120 percent of the 2012 market for a -218 job code. Effectively, West requests the Hearing Officer to retroactively reform her salary so her salary aligns with what she understood she was told by Major General Quinn regarding her pay. Namely, that her pay for the Deputy Director position would be in accordance with the pay plan policy and therefore would be at least 80-120 percent of the 2012 market for a position classified at pay band level 8. West's request is based on her understanding of the original agreement. She asserts the later discovery of the job code error in the system supports her understanding because it illustrates she was being paid 61 percent of the 2012 market at the time of hire, instead of 80 percent of the 2012 market, which she argues she was promised.

The Department contends that West's salary should not be adjusted by this proceeding because she should be bound to the salary amount she accepted. The Department asserts West's offer letter accurately stated her starting pay and nothing prevented West from confirming the amount she was offered was less than 80 percent of the 2012 market at the time she accepted the offer. The Department further argues that the pay plan policy does not

require West to be hired at 80 percent; other employees were hired below 80 percent; and nothing about the clerical error regarding her -217 versus -218 job code affected what she was paid. Instead, the Department continued that the amount she was offered and paid did not equal 80 percent of a -217 or -218 job code; that it had the discretion to offer an amount under 80 percent and still be in conformance with its pay plan policy; and that its offer of $85,000 was in accordance with the pay plan policy.

Although this is not a contract claim, both parties utilize contract law principles to argue their respective points regarding the original agreement. That is, West argues Major General Quinn and the Department intended to pay her 80 percent of the 2012 market and, effectively, were mistaken in offering her $85,000 annually due to a job code error. The Department disagrees such intent to pay West at 80 percent of the 2012 market was present, and the Department argues it was also not mistaken in presenting the $85,000 offer to West that she accepted. Given these arguments, contract law principles determine whether a mistake of fact exists regarding the parties' agreement. No evidence was introduced to indicate the offer letter contained an integration clause and, therefore, evidence outside of the offer letter, as argued by both the parties, must be considered. *See In re Marriage of Olson*, 2005 MT 57, ¶ 17, 326 Mont. 224, 108 P.3d 493 ("The parol evidence rule precludes the admission of extrinsic evidence of an unambiguous integrated writing in any situation involving parties to the instrument when the rights and duties created by the document are the dispositive issue.").

Here, the parties do not agree on whether the $85,000 amount in the letter was correct and each offered evidence outside the letter in support of their argument. Again, West argues a mistake was made and the parties intended a different amount in the offer letter, at least 80 percent of the 2012 market for the -218 job code. Reformation of a contract is an equitable remedy that allows a court to revise a contract to reflect the true intentions of the parties. *In re Marriage of Pfennigs*, 1999 MT 250, ¶ 31, 296 Mont. 242, 989 P.2d 327. "When, through fraud or a mutual mistake of the parties or a mistake of one party while the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons in good faith and for value." Mont. Code Ann. § 28-2-1611. A mistake of fact is "a mistake not caused by the neglect of a legal duty on the part of the person making the mistake and consisting in: (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing material to the contract which does not exist or in the past existence of such a thing which has not existed." Mont. Code Ann. § 28-2-409(1)-(2).

A mutual mistake of fact occurs when the parties share a common misconception about a vital fact that the parties based their bargain on. *Mitchell v. Boyer*, 237 Mont. 434, 437, 774 P.2d 384, 386 (1989). If the parties bear the risk of a mistake, however, they cannot avoid a contract. *See Wray v. State Compensation Ins. Fund*, 266 Mont. 219, 225, 879 P.2d 725, 728 (1994) (citation omitted). "Parties bear the risk of a mistake when they know they have limited knowledge regarding the facts to which the mistake relates at the time the contract is made and treat their limited knowledge as sufficient." *Id.* Treating "limited knowledge as sufficient" is sometimes described not as a mistake, but as "conscious ignorance." *See Habor Ins. Co. v. Stokes*, 45 F.3d 499, 502 (D.C. Cir. 1995). A party who is aware of a problem or uncertainty, yet elects to "take a chance" waives her right to rescind. *BP Group, Inc. v. Kloeber*, 664 F.3d 1235, 1240 (8th Cir. 2012) (citation omitted). "In determining whether there has been a mutual mistake of fact, we must examine the facts as they existed at the time of agreement. . . . A mutual mistake in prophecy or opinion may not be taken as a ground for rescission where such mistake becomes evident through the passage of time. What is today only a conjecture, an opinion, or a guess, might by tomorrow, through the exercise of hind-sight, be regarded then as an absolute fact." *United States v. Garland*, 122 F.2d 118, 122 (4th Cir. 1941). Stated differently, a failure to predict the future is not a mistake of fact. *See Gamble v. Sears*, 2007 MT 131, ¶ 46, 337 Mont. 354, 160 P.3d 537 (it is undisputed that if Gamble's fracture existed at the time of settlement, the parties were mutually mistaken regarding a material fact, and the settlement agreement must therefore be rescinded).

In contrast, a unilateral mistake is not normally grounds for relief for the mistaken party. *See Goodman Realty v. Monson*, 267 Mont. 228, 232-233, 883 P.2d 121, 124 (1994) (reformation "belongs to the aggrieved party who is laboring under a mistake known or suspected by the other party," as opposed to an aggrieved party who knew of the mistake prior to signing the contract while the other party had no knowledge). Plaintiffs may not avoid the agreement due to a unilateral mistake of fact when there is no misrepresentation, no ambiguity in the agreement, and the other party has no notice of such mistake and acts in good faith. *See Quinn v. Briggs*, 172 Mont. 468, 475-476, 565 P.2d 297, 301 (1977). "[E]ven if one of the contracting parties believes the words of the contract mean something different, the parties to the contract are bound by the plain meaning of the words used in the agreement as properly interpreted, unless the other party knows of such mistake." *Id.*

C. Analysis

To reform or correct the offer letter in this case as requested by West and allow her to be paid at 80 percent of the 2012 market instead of the $85,000

she accepted at the time of hire, she must show by a preponderance of the evidence that either a mutual or unilateral mistake of fact exists that entitles her to relief. As the following details, the Hearing Officer concludes no evidence of either a mutual or unilateral mistake of fact exists warranting reformation of the offer letter.

First, upon reviewing the Department's pay plan policy, the Hearing Officer concludes as a matter of law that the language of the policy does not mandate that pay always be set at least 80 percent of market. The policy clearly allows for variances from the general rule by stating "usually." Further, the Hearing Officer finds that although West understood Major General Quinn's statement that her pay was in accordance with the pay plan policy to mean that the $85,000 amount was at least 80 percent of market, that is not what the statement meant. Rather, based on a preponderance of the evidence, the Hearing Officer finds the statement meant that the offer of $85,000 was still in accordance with the pay plan policy, even though it was less than 80 percent of market. No evidence exists that the Department caused West's different understanding through neglect of a legal duty. Further, no evidence exists that the job code error was due to the Department's mistaken belief that the job code for the position was a pay band level 7. Both West and the Department knew the Deputy Director position was a pay band level 8 (-218 job code); they both knew what the pay plan said; they both knew at what salary range the Deputy Director position posted; and they both knew what the letter said.

There is also no evidence a past or present mistake of "an unconscious ignorance or forgetfulness" existed. Both parties had access to full information about the agreement, as there was no amount that could not be determined at the time the offer was accepted. West took Major General Quinn's statement that her pay was in accordance with the pay plan to mean that she would be paid 80 percent of the 2012 market. Eighty percent of the 2012 market at a -217 job code was $80,183, whereas 80 percent of the 2012 market at a -218 job code was $111,368. The fact West understood Major General Quinn's statement that her pay was in accordance with the pay plan does not thereby equate to a mutual mistake of fact, however. West accepted the position at $85,000 without further ensuring her pay was, in fact, 80 percent of the 2012 market. Her argument that doing so would have just shown she was at 84 percent of the market because her job was coded incorrectly is unavailing, because Shoemaker classified her position correctly and provided the Department with the correct amounts for pay band level 8 positions. In addition, the fact what West was offered amounted to 84 percent of a -217 job code does not evidence a mistake. The evidence shows West was told her pay would be in accordance with the pay plan. To the Department, either 84 percent or 61 percent was in accordance with the pay plan because the plan did not require a certain percentage. The Department proved as much. West

understood the pay plan indicated salaries were usually set at 80 to 100 percent; but they were not required to be so set. West also indicated that she took Major General Quinn at his word that her pay was in accordance with the pay plan, which meant she acted with limited knowledge and without confirming the information herself. While she believed Major General Quinn's statement to mean that she would be paid at 80 percent of the 2012 market, again, she did not confirm that fact. Just accepting Major General Quinn's statement did not equate to unconscious ignorance on West's part. Doing so, instead, equated to conscious ignorance by West taking a chance she may be incorrect, whereby she also bore the risk of a mistake.

The Department presented evidence of an email from Schafer to Major General Quinn on September 4, 2014, showing Major General Quinn knew the salary range that the Deputy Director position posted at, which was $85,000 to $97,000. This range was not linked to the job code of a position, as Shoemaker confirmed. The agency sets that pay range. On September 4, 2014, Major General Quinn also knew what 80 percent of the 2012 market was for a -218 job code, given that the number was provided to him by Schafer through Shoemaker. That amount was $111,368. Major General Quinn knew what the pay plan said and that others with -218 job codes were being paid, on average, $80,000.

It does not follow that Major General Quinn had an unconscious ignorance of the pay plan or the 80-120 percent of market language in the pay plan when he had a discussion with West about her salary. Instead, Major General Quinn advised West her pay was in accordance with the pay plan based on knowledge of what the pay plan said, what 80 percent of the 2012 market was for -218 job coded employees, and what others with -218 job codes were receiving, along with the posting and the fact the Department was not required to pay 80 percent of the market. If the Department was not required to pay 80 percent, West's pay would still be in accordance with the pay plan as he told her—just not at the level she understood. She understood his statement that her pay would be in accordance with the pay plan to mean 80 percent of the 2012 market. The evidence shows the Department knew her offer was lower than 80 percent of the 2012 market. No mistake of fact on the part of the Department therefore occurred. Accordingly, the Hearing Officer concludes no mutual mistake of fact existed when West was offered the Deputy Director position at a salary of $85,000, because West and the Department were not both harboring under the same misconception. One, because West acted with conscious ignorance and bore the risk of a mistake and, two, because the Department acted with knowledge of the pay plan. *Thielbar Realties v. National Fire Ins. Co.*, 91 Mont. 525, 530, 9 P.2d 469, 471 (1932) ("A mutual mistake is one which is reciprocal and common to both parties, where each alike labors under the same misconception.") (citation omitted).

In addition, the job code error and the steps taken by West to rectify her pay she believed were associated with that error do not negate her acceptance of the job at $85,000 upon limited knowledge as to alignment with the pay plan. The job code error may not have been discovered until months after West accepted her position; however, that fact does not equate to a mutual mistake between the parties. The job code error was present at the time West accepted the position. With its existence at that time, it does not follow that had the parties known of the job code error, a different job offer would have resulted. What the Department knew at the time Major General Quinn offered West the position was that the job posted at $85,000 to $97,000; others with job codes of -218 were being paid, on average, $80,000; the pay plan did not require pay at 80 percent of the market; and 80 percent of the 2012 market for a -218 job code was $111,368. West may believe the job code error affected the posting that the Department reviewed, but Shoemaker's testimony contradicts that speculation with sufficient evidence. The agency sets the pay for a posting. The posting is not linked to the job code. And, while the Department may have intended on raising everyone's pay to at least 80 percent of the market, nothing in the pay plan required that to occur.

West has consistently argued that the later-discovered job code error affected the pay she was supposed to receive at the time she accepted the position of Deputy Director. The Hearing Officer disagrees because the Department was not harboring under a misconception regarding West's job code that, then, ultimately affected West's pay. The error in the job code did not affect the salary West accepted. The Department knew West was at a pay band level 8 or a -218 job code, and that other -218 job codes needed to be reviewed, which they were. Again, the Department acted with complete information about West's posting, the -218 job code, the pay plan, and what 80 percent of the 2012 market for a -218 job code was when developing the offer it presented to West. How different the jobs of other employees at pay band level 8 were from West's duties does not impact this analysis either because those employee were still classified at pay band level 8 and West's pay was set higher than others given her supervisory role. Therefore, the Hearing Officer concludes West's offer letter should not be reformed on the basis of mutual mistake given that the Department did not have a mistaken belief about the amount it offered her.

The final consideration is whether a unilateral mistake of fact existed justifying correction of the offer letter West accepted. For a unilateral mistake of fact to exist justifying reformation, the evidence must show that West labored under a mistake that the Department knew or suspected. The preponderance of the evidence does not show West's belief at the time she accepted the offer was due to a mistake the Department knew or suspected. The parties do not dispute that an error in the job code existed in this case,

where West's position in SABHRS was entered as a -217 job code, instead of a -218 job code. At the time the Department offered West the Deputy Director position at a salary of $85,000, the Department did not know an error existed in SABHRS regarding West's position job code. That error was realized months later—a fact the parties do not dispute. Further, as discussed above, the facts do not indicate the Department was mistaken in its understanding of the amount it intended to offer her and no facts indicate the Department knew West understood the amount to be different than what it offered her until after she accepted the offer. Finally, no facts indicate the Department knew of a misunderstanding West might have had about the pay plan policy. Accordingly, the Hearing Officer concludes West's unilateral mistaken belief does not justify reformation of West's offer to what she believed Major General Quinn meant. West was not laboring under a mistake of fact based on the job code error and she was not laboring under a mistake of fact that the Department knew, suspected, or caused. To the extent West was laboring under a unilateral mistake of fact, because the Department did not know about or cause that mistake, she bore the risk of that mistake by agreeing to the explicit amount.

Based on the foregoing, the Hearing Officer concludes reformation of West's offer letter cannot occur given that no mutual mistake of fact existed and no unilateral mistake of fact occurred that the Department knew about or caused. Neither Major General Quinn's statement to West, the pay plan policy, or the job code error serve as grounds to change the amount West was offered. As such, the Hearing Officer need not reach the remaining issues in this case because the Hearing Officer also concludes the salary that West accepted is correct.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to Mont. Code Ann. § 2-18-1011.

2. The parties are subject to Title 2, Chapter 18 of the Montana Code Annotated.

3. No mutual mistake of fact existed regarding West's offer letter because there was no common misconception shared between West and the Department regarding the pay plan or the job code or the offer letter pay amount.

4. The unilateral mistake of fact that West held regarding her offer letter was not a mistake known or caused by the Department regarding the pay plan or the job code or the offer letter pay amount.

5. The salary of $85,000 annually that West accepted after she was offered the position of Deputy Director was correct.

VI. ORDER

The Hearing Officer recommends that West's grievance be dismissed.

DATED this 14th day of November, 2023.

JOSLYN HUNT, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

NOTICE: Pursuant to Admin. R. Mont. 24.26.254, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are filed with the Board within 20 days of service of the recommended order.

Any exception must include all the party's specific exceptions and reasons for the exceptions. Exceptions must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 201503
Helena, MT 59620-1503
dlierdbopa@mt.gov

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by email as follows:

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DATED this 14th day of November, 2023.

Sandy Duncan