IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 19-0590

BOARD OF PERSONNEL APPEALS, MONTANA DEPARTMENT OF ADMINISTRATION, MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES,

Appellants/Respondents,

vs.

APRIL ARMSTRONG, DAVID R. BARNHILL, K. AMY PFEIFER, PEGGY PROBASCO, and PATRICK QUINN,

Appellees/Petitioners.

APPELLANTS' OPENING BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, Honorable James P. Reynolds, Presiding

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STATEMENT OF ISSUES

Whether the district court erred in granting Appellees' petition for judicial review, reversing Board of Personnel Appeals' Final Agency Decision, and remanding this matter down to the hearing officer.

STATEMENT OF THE FACTS

At all relevant times, Appellees were employed as attorneys in the Child Support Enforcement Division (CSED) of the Department of Public Health and Human Services (DPHHS).[1] DPHHS also employed additional attorneys in its Office of Legal Affairs (OLA). The OLA attorneys, except those with managerial duties, and Appellees were classified at Band 7 in the Broadband Classification and Pay Plan system (Broadband System), and each position has a job code of 231117. *App. C* at 17 (FOF 13).

While the two positions shared the same band level and same job code, that is where the similarities between these two positions ends. For instance, there were significant differences between the turnover experienced in OLA and CSED. OLA faced substantial turnover issues, while there was little to no turnover in Appellees' positions. *App. C* at 24 (FOF 53-54). Moreover, the OLA attorneys had a higher complexity in their job duties as they had non-predominant duties that

[1] Following a reorganization in 2019, Appellees were moved out of the Child Support Enforcement Division and moved into the Office of Legal Affairs, where their pay was equalized to that of the OLA attorneys.

rose to a Band 8 level. *App. C* at 22 (FOF 42). Appellees, on the other hand, had no duties—either predominant or non-predominant—that rose to Band 8 level. *App. C* at 22 (FOF 42). The compensation statutes give an employer discretion to set pay based upon competency (complexity of job duties) and competitiveness (turnover). Mont. Code Ann. § 2-18-301(4). These differences, which served as the basis for the OLA attorneys being paid more than Appellees, will be discussed in more detail below.

In addition, the OLA attorneys were situated within the Director's office and answer to the highest authority within DPHHS. *App. C* at 17 (FOF 11). Moreover, the OLA attorneys' position within the Department hierarchy shows that they are responsible for providing legal assistance to both the Director and to any other division or bureau within DPHHS. *App. C* at 24 (FOF 51). The OLA attorneys were expected to perform any and all legal research activities, and provide opinions covering the broad spectrum of work performed by DPHHS. *App. C* at 17 (FOF 14). OLA attorneys are assigned to specific divisions within DPHHS; however, they are also responsible for taking on projects assigned to them by their superiors regardless of whether the task pertained to their assigned division(s). *Id.*

Conversely, the CSED attorneys' positions were located within a particular division of DPHHS, CSED, and their duties all related solely to child support enforcement. *App. C* at 18 (FOF 15). The CSED attorneys' work pertained

exclusively to CSED, and they were not responsible nor obligated to take on other work assigned by OLA. While the CSED attorneys had to consider other legal issues, those issues related solely to child support enforcement. *App. C* at 18 (FOF 15). These hierarchical differences show that the jobs of the respective work units were not the same.

The aforementioned differences in these respective positions resulted in the OLA attorneys' pay being, historically, higher than Appellees' pay. From at least 1999 until 2019, the average pay of the OLA attorneys and the average pay of Appellees were not equal. *App. C* at 18 (FOF 16).

Prior to 2004, both sets of attorneys were paid under Pay Plan 60, the pay plan for state government prior to the current Broadband System. Under that system, all state employees covered by Plan 60 who were hired in a particular pay grade were paid the same amount, unless an exception was granted by the Department of Administration. On February 4, 2002, before the OLA attorneys moved to the Broadband Pay Plan, they received a pay exception to address recruitment and retention issues. *App. C* at 18 (FOF 17). The OLA attorneys moved into the Broadband system in 2002. *Id.* In the approximate two years between when OLA moved to broadband and when CSED moved to broadband, the OLA attorneys received two market increases that were allowed as a result of turnover in their work unit. *Id.*

On April 5, 2006, after the CSED attorneys had moved to Broadband, they were given their first market adjustment. *App. C* at 18 (FOF 18). In 2006, the CSED Administrator, Lonnie Olson, recommended to DPHHS Director Joan Miles that Appellees' pay be increased by $5,000.00 annually. *Id.* Olson believed such an adjustment would make their pay "on par" with that of the OLA attorneys' pay, as he understood to be the practice. *Id.* Director Miles approved the pay adjustment. *Id.* Appellees understood that the purpose of the raise was to make the pay of the CSED attorneys and administrative law judges "on par" with that of the OLA attorneys. *App. C.* at 18 (FOF 19). However, at that time, while Appellees' pay was raised to be closer to that of the OLA attorneys' pay, it was not made equal to that of the OLA attorneys. *App. C* at 18 (FOF 19).

At the time of Appellees' 2006 market adjustment, their hourly base pay was between $27.60 and $23.06, while the OLA attorneys' hourly base pay ranged from $29.30 to $23.16. *Id.* The OLA attorney with similar level of experience as those attorneys within CSED were paid $29.30 and $27.60, respectively, a difference of almost $2, and approximately 6%. *App. C* at 18 (FOF 20). The difference in pay between the highest paid attorney at OLA and the lowest paid CSED attorney was $6.24 an hour, approximately 21% different. *App. C* at 19 (FOF 21).

In April 2011, Ms. Armstrong, who was employed by CSED as an administrative law judge at the time, discovered that her pay was different than an OLA attorney's pay through an administrative hearing that she was presiding over. *App. C* at 19 (FOF 22). Ms. Armstrong did not make a demand for higher pay at that time and did not request higher pay for Appellees. *Id.*

In July 2011, Ms. Armstrong applied for a CSED attorney position that was vacant. *App. C* at 19 (FOF 24). Ms. Armstrong was offered the CSED attorney position on August 18, 2011. *Id.* After being offered the position, Ms. Armstrong attempted to negotiate her salary. *Id.* However, Ms. Armstrong's request for a negotiated salary was denied on September 9, 2011. *Id.* Hank Hudson told Lonnie Olson that raising Ms. Armstrong's pay was "not possible" at that time, as the 2011 Montana Legislature had instituted a pay freeze for state employees. *Id.* Ms. Armstrong, nonetheless, accepted the position.

In January 2012, Appellees filed suit against DPHHS in District Court. On May 5, 2012, Appellees and the OLA attorneys received market adjustments as part of the Governor's directive to assist employees negatively impacted by the legislative pay freeze if agencies had the ability to pay. *App. C* at 19 (FOF 26). Phase I of the May 5, 2012, market adjustment implemented a set amount of pay increases for all non-union Band 2 through 7 employees, the amount of which was based on DPHHS's negotiations with the unions. *App. C* at 19 (FOF 27). Phase II

allowed DPHHS to "address identified inequities and/or irregularities, such as adjusting employees' pay that fell below the minimum of new pay ranges and addressing critical recruitment and retention issues." *Id.*

As a result of the Phase II adjustments, Appellees Barnhill and Quinn received additional market increases to bring them up to eighty percent (80%) of DPHHS's adopted pay range. *App. C* at 20 (FOF 28). DPHHS's human resources personnel (HR) recommended giving the OLA attorneys an additional pay increase as part of Phase II; however, that increase was not implemented during the Phase II process. *App. C* at 20 (FOF 29). During the Phase II process, Linda Galloway, as assistant HR director, recommended that the pay for the OLA attorneys be approximately 5% higher than the rate of pay recommended for the CSED attorneys. *App. C* at 20 (FOF 30).

Ms. Galloway's recommendation was based on the differences in the respective job duties of Appellees and the OLA attorneys. *Id.* Ms. Galloway relied on her extensive HR experience for her recommendation. *Id.* Ms. Galloway compared the Appellees and OLA attorneys to her experience at Montana State Fund, where a claims attorney at Montana State Fund was paid less than an attorney in the corporate law office of the organization because the claims law attorneys, although they had a lot of intersecting kinds of law, it's still a relatively narrow field of practice compared to a corporate attorney in the corporate office.

App. C at 20 (FOF 31). Further comparing the Appellees and OLA attorneys to Montana State Fund, Ms. Galloway stated: "A claims attorney might touch on those areas in connection with the claim, but the corporate attorney is responsible for giving guidance to everyone from the chief executive officer of the organization, just like at an agency giving guidance to the director of the agency on every single possible legal aspect of running that agency." *App. C* at 20 (FOF 32). Ms. Galloway did not think five percent was enough, and she actively advocated for more than a five percent difference. *App. C* at 20 (FOF 32). The DPHHS director of human resources, Deb Sloat, relied on Ms. Galloway's expertise and experience, and adopted her recommendation that the OLA attorneys be paid 5% more than the CSED Attorneys. *App. C* at 20 (FOF 30). However, affordability concerns prevented DPHHS from increasing the OLA attorneys' pay at all during Phase II of the Governor's directive. *App. C* at 20 (FOF 32).

On July 18, 2012, Appellees' District Court lawsuit against DPHHS was dismissed because they failed to exhaust their administrative remedies under Mont. Code Ann. § 2-18-1011(1) and Admin. R. Mont. 24.26.508. *App. C* at 20 (FOF 33). In August 2012, DPHHS attempted to resolve this pay dispute by offering to equalize Appellees' pay in exchange for Appellees taking on some of the OLA work. *App. C* at 20 (FOF 34). Ann Hefenieder, the CSED attorney bureau chief, rejected DPHHS's solution, saying that the offer would not work. *Id.*

On November 17, 2012, Laura Vachowski left her OLA attorney position for another job that paid more money. *App. C* at 21 (FOF 35). On December 15, 2012, the OLA attorneys received a market adjustment as a direct result of Ms. Vachowski's departure. *Id.* The stated basis for the OLA attorneys' December 15, 2012 market adjustment was "a strategy for retaining skill and knowledge specific to the department programs and state and federal statutes that are applicable to these programs." *App. C* at 21 (FOF 36). The OLA attorneys' December 15, 2012 market adjustment put their base pay at more than 5 percent above the CSED attorneys' average base pay. *Id.*

While Ms. Sloat was concerned about the OLA attorneys being paid more than five percent over Appellees, she agreed with the December 15, 2012, market adjustment for the OLA attorneys. *Id.* Ms. Sloat agreed with this market adjustment because "[t]he OLA had turnover where, indeed, the CSED attorneys were not having turnover." *Id.* The OLA attorneys' December 15, 2012, market adjustment was consistent with DPHHS's pay plan rules, which state:

> To the extent possible, the Department will utilize consistent pay practices across divisions. However, because divisions provide a wide range of services, divisions also may have very different challenges in attracting and retaining a competent workforce. Therefore, each division may work with human resources to develop division-specific components for addressing those challenges.

App. C at 21 (FOF 37).

In March 2013, DPHHS requested that Jim Kerins, an independent human

resources consultant, perform a desk audit for the purpose of completing a classification review of the OLA and Appellees' positions. *App. C* at 21 (FOF 38). As part of the desk audit, Mr. Kerins interviewed all five Appellees. *App. C* at 21 (FOF 39).

Appellees testified they had sufficient time to meet with Mr. Kerins and that there were no errors in his analysis of their job duties. *App. C* at 21 (FOF 39, 41). Following his interviews, Mr. Kerins issued a report in which he found that "There are distinctions in the Knowledge, Skills, and Abilities required as well as the scope and effect of Lawyers within DPHHS." *App. C* at 22 (FOF 42). Mr. Kerins also found that the complexity of the non-predominant duties of the OLA attorneys rose to a Band 8 level, whereas Appellees' non-predominant duties did not rise above Band 7. *Id.* A difference in the non-predominant duties is a valid basis for differentiating pay between two identically classified employees. *See Fellows v. Dept. of Administration*, 2011 MT 88, 360 Mont. 167, 252 P.3d 196.

Appellees were not immediately provided with a copy of Kerins' report due to turnover within DPHHS management. *App. C* at 22 (FOF 43). Appellees were eventually provided with a copy of Mr. Kerins' report on November 14, 2013, after the new management team had the opportunity to review and discuss it. *Id.*

On November 18, 2013, Appellees met with Chad Dexter, who was the new division administrator for CSED. *App. C* at 22 (FOF 44). At the time that Mr.

Dexter met with Appellees, he was not contemplating a salary adjustment for them. *Id.* Mr. Dexter did not support a pay increase for Appellees, at that time, due to the declining TANF collections which affected CSED's budget, a pending lawsuit (*Mashek*), and "a Kerins report that doesn't really say they do the same thing" as the attorneys in OLA. *Id.* Mr. Dexter also did not support a pay increase for Appellees due to internal equity concerns within their own division, as Appellees would have been making more than administrators if their pay was equalized to that of the OLA attorneys. *Id.*

In addition, Mr. Dexter understood the basis for the most recent OLA attorney salary increase was related to recruitment and retention problems in that office. *Id.* Mr. Dexter acknowledged that CSED did not have a turnover issue and that it would be hard for him to defend a pay increase without the same justification as OLA. *Id.*

Appellees filed their Step I grievance in this matter on June 24, 2014. *App. C* at 23 (FOF 46). Ultimately, Appellees were given a market adjustment on June 28, 2014. *App. C* at 22 (FOF 45). Appellees' June 2014, market adjustment was implemented because they were being inadequately compensated based on the competencies required for this position. *Id.* While Appellees' competencies had not changed in 2014, DPHHS had adopted the actual 2010 pay market for Band 7 attorneys during that period. *App. C* at 22-23 (FOF 45). The new pay range made

the CSED attorneys' pay low within that pay range and DPHHS wanted to bring them into the 80th percentile within the newly adopted pay range. *App. C* at 23 (FOF 45). From June 28, 2014, to the time that the agency reorganized its legal staff and Appellees became members of OLA, their pay was either within or close to 5% of that of the OLA attorneys.

STATEMENT OF THE CASE

Initially, Appellees filed a complaint with the First Judicial District Court in 2012 to resolve their rate of pay dispute. *App. C* at 19 (FOF 26). However, their complaint was dismissed by the District Court due to their failure to exhaust their administrative remedies by failing to complete the grievance process.[2] *App. C* at 20 (FOF 33); *see Mont. First Jud. Dist. Cause No. BDV-2012-77*, Lewis and Clark County. For reasons unknown, Appellees waited two years after dismissal of their District Court complaint to file their administrative grievance in June of 2014. *App. C* at 23 (FOF 46).

Deb Sloat, as the human resources director for DPHHS, was responsible for responding to Appellees' Step I grievance. *Id.* On July 15, 2014, Ms. Sloat denied Appellees' Step I grievance finding that they were properly compensated in accordance with the Broadband Classification Plan (Mont. Code Ann. § 2-18-201,

[2] Petitioners also asserted a wage claim pursuant to Mont. Code Ann. § 39-3-201. The District Court dismissed this cause of action, holding that the Wage Protection Act governs the payment of actual wages due an employee under the established rate of pay, and does not govern disputes over the amount of the rate of pay.

et seq.) and the Broadband Pay Plan (Mont. Code Ann. § 2-18-301, et seq.). *App. C* at 23 (FOF 46-47). Ms. Sloat also determined that the OLA and Appellees' pay complied with DPHHS's pay plan rules, which provided: "To the extent possible, the Department will utilize consistent pay practices across divisions. However, because divisions provide a wide range of services, divisions also may have very different challenges in attracting and retaining a competent workforce. Therefore, each division may work with human resources to develop division-specific components for addressing those challenges." *App. C* at 23 (FOF 47).

Appellees then escalated their Step II grievance on July 25, 2014, to the Department of Administration. *App. C* at 23 (FOF 48). Compensation and Classification Coordinator Bonnie Shoemaker was responsible for reviewing and responding to the Appellees' Step II grievance on behalf of the State Human Resources Division of the Department of Administration. *Id.*

Ms. Shoemaker testified that DPHHS's pay plan rules are in compliance with the State broadband pay plan policy. *App. C* at 23-24 (FOF 49). DPHHS's pay plan rules specifically list recruitment and retention as one of the factors to consider when setting pay. *App. C* at 24 (FOF 50). DPHHS's pay plan rules allow market pay adjustments when there is documented recruitment and retention issues. *Id.* DPHHS's pay plan rules also allow for strategic pay adjustments when the division has a strategy to recruit or retain critical competencies. *Id.*

Ms. Shoemaker relied, in part, on DPHHS's organizational chart in arriving at her Step II decision because it showed that the two set of lawyers were in different locations within DPHHS's organizational structure. *App. C* at 24 (FOF 51). Different locations of the positions within the organizational structure of the agency is an indicator that the jobs are, in fact, different, because there are different managers, different responsibilities and duties. *Id.*

Ms. Shoemaker also looked at the job descriptions for both the OLA and Appellees' positions in arriving at her Step II decision. *App. C* at 24 (FOF 52). Ms. Shoemaker found that because the CSED attorney job descriptions stated that one hundred percent of their job duties were predominant duties and because they listed no non-predominant duties, that entire job would have to be identified within a particular band for classification. *Id.* She also relied on Mr. Kerins' report for her evaluation of the CSED Attorneys' Step II grievance and his "conclusions regarding the classification level, the classification of . . . both the predominant duties and the fact that there were non-predominant duties that were not considered in the classification." *Id.*

Ms. Shoemaker reviewed the turnover that occurred in OLA from 2011 to the date that she conducted her Step II analysis. *App. C* at 24 (FOF 53). Ms. Shoemaker found that turnover justified each market adjustment that the OLA attorneys had received since May 4, 2004, when they transitioned to Broadband.

Id. Ms. Shoemaker determined that additional turnover had occurred at OLA since the December 15, 2012, market adjustment. Conversely, Ms. Shoemaker found that no turnover had occurred in Appellees' positions since September 19, 2011. *App. C* at 24 (FOF 54). Moreover, Appellees did not apply for any of the Band 7 OLA attorney vacancies. *Id.* As a result, Ms. Shoemaker concluded that the fact that Appellees did not apply for any of the Band 7 OLA attorney vacancies indicated that the jobs were not the same. *App. C* at 24-25 (FOF 54). She testified that "[i]f someone is offering more money and the work is the same, why wouldn't [they] apply for it." *App. C* at 25 (FOF 54).

After reviewing "extensive documentation," which was "verified through the independent analysis of an outside consultant," Ms. Shoemaker concluded that "[t]he CSED attorneys are paid differently than the OLA attorneys, based on differences in the job duties and recruitment needs, as allowed by the broadband classification and compensation system, and the agency's pay plan rules." *App. C* at 25 (FOF 55). Ms. Shoemaker also concluded that "[t]he work of the CSED attorneys and OLA attorneys is sufficiently different to allow different pay" and "the agency has provided sufficient documentation to justify different pay for the OLA attorneys compared to the CSED attorneys." *Id.* Ms. Shoemaker denied Appellees' grievance accordingly.

Appellees then sought a Step III contested case hearing on October 1, 2014. *D.C. Doc. 29* at 2. The hearing occurred in March 2015 and was presided over by Hearing Officer Terry Spear. *Id.* Following the hearing, the parties briefed their respective positions in this matter.

Hearing Officer Spear rendered his initial decision on February 26, 2016. *App. A.* Therein, he found, partially, in favor of Appellees. *Id.* Citing the administrative decision in a similar case (*Mashek*), he placed significant emphasis on the "internal equity" factor set forth in Mont. Code Ann. § 2-18-301(4) (2015), and found that internal equity demanded that pay amongst employees be the same for employees in the same job code and pay band. *Id.* He held that the turnover evidence presented by DPHHS supported no more than a 5% difference in the pay between Appellees and the OLA attorneys. *Id.* at 25-26. However, he limited Appellees' ability to seek back pay to the date that they filed their Step I grievance. *App. A* at 26.

The parties filed objections to various portions of the recommended decision with BOPA. After the parties had filed their objections, but before BOPA had heard the matter, this Court rendered its decision in *Mashek v. Dept. of Public Health*, 2016 MT 86, 383 Mont. 168, 369 P.3d 348. Therein, this Court held that, under Mont. Code Ann. § 2-18-301(4) (2015), internal equity was not a standalone factor and that the hearing officer, in that case, erred by analyzing it in isolation of

the other two statutory factors of competency and competitiveness. *Id*., ¶ 12. Rather, those three factors must be weighed, and one factor cannot be elevated above any other factor. *Id*.

Based upon this clarification of the law, BOPA remanded the matter back down to the hearing officer to allow him the opportunity to analyze the matter in accordance with the newly established framework set forth in *Mashek*. *App. B.* BOPA recognized that the hearing officer did not have benefit of the *Mashek* decision when he decided that matter, and that he committed error by elevating internal equity over competency and competitiveness. *App. B* at 3. Notably, Appellees never sought judicial review of BOPA's remand order, and, instead, allowed the matter to be remanded and redecided by the hearing officer.

On May 4, 2017, the Hearing Officer issued a rather unusual recommended decision on remand. *App. C.* While his decision was entirely in favor of DPHHS, he utilized the first 14.5 pages to air his grievances and present commentary about his perceptions of BOPA's remand order. *Id.* at 1-15. He claimed that he was being forced to accept certain evidence and that BOPA had essentially ordered him to decide the case in favor of DPHHS. *Id.*

Appellees, once again, filed objections and this matter went before BOPA. During the second BOPA hearing, the board members took exception to the hearing officer's characterization of their remand order. *App. F*. After

deliberating, they rejected the first 14.5 pages of the hearing officer's commentary, but adopted the hearing officer's findings and conclusions. *App. D.*

Thereafter, Appellees filed a petition for judicial review. *D.C. Doc. 1.* After oral argument, Judge Reynolds reversed BOPA's order adopting the hearing examiner's second proposed order. *D.C. Doc. 29.* In doing so, the district court first concluded BOPA "overstepped its proper role in reviewing the hearing examiner's *first* order," i.e., that BOPA erred when it remanded the case to the hearings examiner in light of *Mashek*. *D.C. Doc. 29* at 9 (emphasis added). Apparently, Judge Reynolds accepted Appellees' argument *in toto* and found that BOPA improperly "direct[ed] the hearing officer how to weigh the evidence and to defer to DPHHS" on remand. *Id*. The district court further concluded BOPA failed to exercise its "function" and to determine whether there was adequate evidence to support the hearing examiner's *first* proposed order—an order that even Judge Reynolds recognized was based on a misunderstanding of the law. *Id*. at 9, 11 (acknowledging "it would have been appropriate for BOPA to remand the hearing examiner's first proposed order for further consideration in light of the Supreme Court's decision in *Mashek*").

In addition, the district court concluded that BOPA violated Mont. Code Ann. § 2-4-621(3) when it rejected the hearing examiner's commentary without "stating with particularity the reasons for rejecting these findings." *D.C. Doc. 29*

at 10. As such, the District Court ordered this matter remanded to the hearing officer yet again for reconsideration in light of *Mashek* and intervening changes in the organization of DPHHS. *Id.* DPHHS and DOA timely appealed.

STANDARD OF REVIEW

The standard of judicial review of an agency decision under the Montana Administrative Procedures Act (MAPA) provides in pertinent part:

> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
>
> (a) the administrative findings, inferences, conclusions, or decisions are:
>
> (i) in violation of constitutional or statutory provisions;
>
> (ii) in excess of the statutory authority of the agency;
>
> (iii) made upon unlawful procedure;
>
> (iv) affected by other error of law;
>
> (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
>
> (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Mont. Code Ann. § 2-4-704(2). This standard of review applies to both the District Court's review of the agency's decision and the Supreme Court's subsequent review of the District Court's decision. *Blaine County v. Stricker*, 2017 MT 80, ¶

16, 387 Mont. 202, 394 P.3d 159, 163 (citing *In re Transfer of Ownership & Location of Mont. All-Alcoholic Bevs. License No. 02-401-1287-001*, 2007 MT 192, ¶ 6, 338 Mont. 363, 168 P.3d 68).

SUMMARY OF APPELLANTS' ARGUMENT

The district court violated MAPA and erred by granting Appellees' petition for judicial review, reversing BOPA's Final Agency Decision, and remanding this matter back down to the hearing officer. First, the district court did not have subject matter jurisdiction to reverse BOPA's Order of Remand because Appellees failed to appeal that order within the timeframe set forth in MAPA.

Second, even if the district court had jurisdiction to render judgment on BOPA's Order of Remand, the district court erred in its interpretation and conclusions about BOPA's Order of Remand because nothing therein directed the hearings examiner how to weigh the evidence or to defer to DPHHS in any way. A review of the language of the remand order shows that several statements were taken out of context by Appellees and the district court. When the full context of the order is considered, it is clear that BOPA did not direct the hearing officer to accept DPHHS's evidence or to decide this matter in favor of DPHHS.

Next, the district court also erred because BOPA did not violate the standard of review set forth in MAPA when it rejected the hearing officer's commentary. The hearing officer's commentary did not constitute findings of fact, and,

therefore, BOPA was under no obligation to conduct a complete review of the record prior to rejecting it. Even if the hearing officer's commentary could be construed as findings of fact, the appropriate remedy would have been to remand this matter to BOPA and allow it the opportunity to rectify its supposed error.

Finally, the district court should be reversed and BOPA's Final Agency Decision should be reinstated because the actual findings of fact and conclusions of law in BOPA's Final Agency Decision, that were adopted by BOPA, were supported by substantial, competent evidence in the record.

ARGUMENT

I. THE PROPRIETY OF BOPA'S INITIAL ORDER OF REMAND IS NOT PROPERLY BEFORE THIS COURT AND, EVEN IF IT WAS, THE ORDER DID NOT VIOLATE MAPA

A. The District Court Lacked Subject Matter Jurisdiction Over BOPA's Order of Remand Because Appellees Failed to Appeal the Order Within the Deadline Set By MAPA

The district court erred by making any determination regarding BOPA's Order of Remand because Appellees failed to appeal the order within the appeal timeframe set forth in MAPA. Since Appellees failed to timely appeal BOPA's Order of Remand, the district court never acquired subject matter jurisdiction to make any determination on the Order. Therefore, the district court's decision regarding BOPA's Order of Remand was done so in error.

Jurisdiction involves the fundamental power and authority of a court to determine and hear an issue. *State v. Diesen*, 1998 MT 163, ¶ 5, 290 Mont. 55, ¶ 5, 964 P.2d 712, ¶ 5. Jurisdictional issues "transcend procedural considerations." *Thompson v. Crow Tribe of Indians*, 1998 MT 161, ¶ 12, 289 Mont. 358, ¶ 12, 962 P.2d 577, ¶ 12. Given that jurisdiction issues touch of the ability of the Court to hear and rule on an issue, "lack of jurisdiction over the subject matter can be raised at any time and a court which in fact lacks such jurisdiction cannot acquire it even by consent of the parties."

Corban v. Corban, 161 Mont. 93, 96, 504 P.2d 985, 987 (1972).

Similarly, the United States Supreme Court recently observed that:

> subject-matter jurisdiction, because it involves the court's power to hear a case, can never be forfeited or waived. Moreover, courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.

Arbaugh v. Y & H Corp., 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (citation and internal quotation marks omitted).

This Court has held that only the Legislature may validly provide for judicial review of agency decisions. *Nye v. Dept. of Livestock*, 196 Mont. 222, 226, 639 P.2d 498, 500 (1982). As such, a district court's authority to review administrative rulings is constrained by statute. *In re McGurran*, 1999 MT 192, ¶ 12, 295 Mont. 357, ¶ 12, 983 P.2d 968, ¶ 12. This includes the applicable statutes of limitation

governing the time for review. *McGurran*, ¶ 12. Accordingly, this Court has determined that "filing deadlines for petitions for judicial review are jurisdictional in nature, and the failure to seek judicial review of an administrative ruling within the time prescribed by statute makes such an 'appeal' ineffective for any purpose." *McGurran*, ¶ 12. "The district court's jurisdiction is controlled by the period of time prescribed by the legislature and is limited to the time provided by the applicable statute. The right to an appeal of an administrative agency's ruling is created by statute and is limited by the provisions of the statute as to the time within which the right must be asserted." *MCI Telecommunications Corp. v. PSR*, 260 Mont. 175, 178, 858 P.2d 364, 366 (1993).

The Montana Administrative Procedure Act (MAPA) provides that "proceedings for review must be instituted by filing a petition in district court within 30 days after service of the final written decision of the agency. . . ." Mont. Code Ann. § 2-4-702(2)(a). This Court had determined that remand orders constitutes a final appealable order. *See e.g. Whitehall Wind, LLC v. Montana Public Service Commission*, 2010 MT 2, 355 Mont. 15, 223 P.3d 907; *Grenz v. Montana Dept. of Natural Resources*, 2011 MT 17, 359 Mont. 154, 248 P.3d 785; *Matter of Claim of Mays v. Sam's Inc*., 2019 MT 219. The same rationale that this Court adopted concerning remand orders issued by district courts applies equally to remand orders issued by administrative bodies. As such, the 30-day appeal

deadline set forth in MAPA should be applied to BOPA's Order of Remand.

While Appellees had misgivings about BOPA's decision to remand this matter back to the hearing officer, they did not apply for judicial review within 30 days from the date of BOPA's Order of Remand. Rather, Appellees allowed the matter to be remanded to the hearing officer and waited until after BOPA issued its Final Agency Decision, several months later, to appeal those issues. Since Appellees failed to timely appeal BOPA's Order of Remand, the district court never acquired jurisdiction over BOPA's Order of Remand. Absent jurisdiction, the district court erred when it made any determinations regarding the alleged errors found in the Order of Remand.

B. BOPA's Initial Order Remanding the Matter to the Hearing Officer in Light of *Mashek* Was Proper and Did Not Violate MAPA

Even if the district court had jurisdiction to rule on BOPA's Order of Remand, the district court's Order should be reversed and BOPA's Final Agency Decision should be affirmed. As the district court aptly noted, BOPA properly remanded back to the hearing officer because "[t]he hearing officer's first proposed order relies in mistake on *Mashek*, before that case was reversed by the Supreme Court." *D.C. Doc. 29* at 11. Under *Mashek*, this Court held that the factors set forth in Mont. Code Ann. § 2-18-301(4) (2015) did not comprise standalone rights and must be given equal weight. *Mashek*, ¶ 12. This Court reversed the district court and the hearing officer, therein, because it placed undue influence on the

"internal equity" factor to the detriment of the other two factors of competency and competitiveness. *Id.* This shows that the district court acknowledged that BOPA had a proper basis for remanding this matter due to an error of law.

Even though the district court acknowledged that BOPA's remand was proper, the court faulted BOPA for supposedly "overstep[ing] its proper role in reviewing the hearing examiner's first order. . . . BOPA went beyond this by directing the hearing officer how to weigh the evidence and defer to DPHHS. BOPA simply determined that it did not agree with the hearing examiner's determination of the weight and credibility of witnesses. It did not determine whether there was adequate evidence to support the hearing officer's first proposed order. That is its function." *D.C. Doc. 29* at 9. First and foremost, once BOPA determined that the hearing officer's decision was based upon an error of law, it was under no further obligation to determine whether adequate evidence existed to support the hearing officer's decision. As such, to the extent that the district court faulted BOPA for not conducting such a review, BOPA was under no such obligation and any conclusion is erroneous. Further, there is nothing in BOPA's Order of Remand to support the following conclusion by the district court:

> BOPA also disagreed with the weight and credibility of the evidence given by the hearing examiner. BOPA directed the hearing examiner to give deference to the testimony of DPHHS's expert witness. BOPA articulated a standard by which the hearing examiner ought to give deference to DPHHS's decision in setting pay disparities for its

> employees, unless there was some showing of gender or religious discrimination.

D.C. Doc. 29 at 3. Unfortunately, the district court failed to cite any portion of BOPA's Order of Remand as support for its conclusions. As such, the State and this Court are left to guess as to what the district court based its decision on. Regardless, the district court's conclusions are erroneous because BOPA's Order of Remand cannot be interpreted as supporting these conclusions.

The plain language of BOPA's Order of Remand speaks for itself, and nothing in BOPA's first hearing could be construed to require a different meaning. BOPA's Order of Remand makes it clear that it remanded this case because "the Recommended Decision was based on an error of law due to the hearing officer's failure to adequately weigh the three factors set forth in Mont. Code Ann. § 2-18-301(4). Instead, the hearing officer elevated the single factor of 'internal equity' above the other factors of 'competency' and 'competitiveness.' *App. B* at 3. BOPA recognized that:

> in conducting the review of this case, the Board has the benefit of relying on the high court's *Mashek* opinion, which reinstated the Board's Final Agency Decision and set forth instruction as to the interpretation of the statute in question. The hearing officer had no such benefit as his Recommended Order was issued prior to the *Mashek* opinion. Instead, the Recommended Order relied on analysis from the now-vacated *Mashek* Hearing Officer Decisions.

App. B at 3. Nowhere in the Order of Remand does BOPA direct the hearing officer to accept certain evidence or find in favor of DPHHS. Rather, in

conformity with this Court's pronouncement in *Mashek*, BOPA stated that:

> "[a] correct application of Mont. Code Ann. § 2-18-301(4) requires the hearing officer to consider the totality of circumstances in weighing all three factors without raising one factor above the rest. Proper regard should be given to the employer's decisions concerning pay disparities unless such decisions appear to be factually unsupported. Lacking proper regard for the employer's decisions, the Recommended Order fails to establish evidence related to, and analyze the application of, factors other than internal equity.

App. B at 3-4. The CSED Attorneys and the hearing officer seized upon isolated language within this paragraph as supposed evidence that BOPA was directing a certain outcome. *D.C. Doc. 12* at 12. However, a plain reading of this portion of BOPA's order proves otherwise.

Rather, this statement characterizes BOPA's recognition that, under the *Mashek* analytical framework, "proper regard" must be given to the two -301(4) factors of competency and competitiveness, which give the employer discretion to set pay for reasons aside from internal equity concerns. BOPA identified this standard because it had determined that the hearing officer had elevated internal equity over these two other factors in violation of *Mashek*. No reasonable interpretation of this paragraph could result in a determination that BOPA order the hearing officer to decide this matter in a particular manner.

Moreover, such an argument neglects that BOPA explicitly directed the hearing examiner to give proper regard to DPHHS's decisions regarding pay disparities "unless factually unsupported." This language specifically preserved

the hearing officer's authority to weigh the evidence and credibility of witnesses, and to decide whether sufficient evidence existed to support DPHHS's decisions regarding pay amongst the work units. The Board explicitly stated that the hearing officer must consider those decisions and justifications only if the evidence supported them. Under a plain reading of the Board's remand order, "factually unsupported" decisions and justifications for pay disparities should not be considered.

Perhaps the most conclusive evidence disproving the district court's conclusion that BOPA sought a desired outcome is the statement made by BOPA when deliberating over the motion to remand this matter back to the hearing officer. Notably, during its deliberations regarding the hearing examiner's first proposed order, BOPA acknowledged that "it could play out that a hearing officer that applies [the three factors in Mont. Code Ann. § 2-18-301(4)] could send a recommended order back that, that looks at those three factors and still recommends 105 percent of differential, but at least it's based on something that everyone can see." *App. E* at 64 (September 15, 2016, Oral Argument Transcript). This statement clearly shows that BOPA recognized that, after reweighing the -301(4) factors in conjunction with the evidence, the hearing examiner could arrive at the exact same decision. This recognition defeats Appellees' and the district court's conclusion that BOPA sought a particular outcome and directed the hearing

officer to produce an order to that effect.

Again, if the CSED Attorneys thought the remand order violated MAPA in any of these ways, they could have, and should have, petitioned for review of BOPA's Order of Remand. They apparently did not read the order that way. They did not appeal, and their attempt to attack that order now, after the fact, is too late and is not supported by the record in any event.

C. Nothing in BOPA's Review of the Hearing Examiner's Second Proposed Decision or the Final Agency Decision Supports the District Court's Conclusion That BOPA Acted Improperly When It Remanded the Case to the Hearing Examiner.

The district court cited to a portion of BOPA's Final Agency Decision as additional support for its conclusion that BOPA improperly directed the hearing examiner how to weigh the evidence on remand and to defer to DPHHS. Of course, that decision is not the decision on remand and could not have provided any guidance to the hearing examiner on remand, as it was not in existence at that time. Regardless, nothing in the Final Agency Decision supports such a conclusion.

The district court cited to the following statement from the Final Agency Decision as supposed evidence of BOPA's intention to direct the hearing officer to weigh the evidence in favor of DPHHS:

> The hearing officer's Order on Remand incorporated direction from the Board and properly weighed evidence from the employer, in the form of expert witness testimony.

D.C. Doc. 29 at 8. Unfortunately, the district court neglected to cite the entire sentence, the second part of which is integral to gaining a proper interpretation and understanding of the cited portion. The entire sentence reads as follows:

> The hearing officer's Order on Remand incorporated direction from the Board and properly weighed evidence from the employer, in the form of expert witness testimony, *to analyze the required element of competitiveness*.

App. D at 3 (emphasis added). The omitted phrase is important because it provides the context for the portion of the sentence that immediately precedes it. Once the omitted portion is read in conjunction with the cited portion, it becomes clear that the district court misconstrued BOPA's statement.

When viewed in its correct and full context, this statement does not constitute an acknowledgment by BOPA that it directed the hearing examiner to accept certain evidence or decide this case in a particular manner. Rather, it is merely a statement recounting BOPA's observation of what the hearing examiner did. He followed the Board's direction to properly weigh evidence surrounding the element of competitiveness—an element to which the hearing examiner's first proposed order failed to give proper regard under *Mashek*. The evidence that the hearing examiner considered was unrebutted expert witness testimony presented by the State. The commas in the sentence identify the evidence the hearing examiner weighed—expert witness testimony—when analyzing the element of

competitiveness. Once this statement is viewed in its totality and in context, it becomes clear that BOPA's Final Agency Decision contains no admission that it had dictated to the hearing officer that he was to accept certain evidence or find for the State as the district court claims. Since this statement does not purport to say what the district court concluded it says, the district court's overall conclusion—that BOPA directed the hearing officer to find for DPHHS—was erroneous.

Additionally, when deliberating the hearing officer's Recommended Decision on Remand, the board members expressly disagreed with the hearing officer's accusations that he had been forced to accept certain evidence and decide this case in a particular manner. Even the Presiding Officer—who dissented from the Board's Final Agency Decision—concurred that there was no ill motive by the Board. Chairperson MacIntyre stated that, "I'm very disappointed with the administrative law judge's approach to this case. You know, even though I dissented from the board's decision in the initial findings of fact and recommended order, I did not see the board's order as directing the hearing officer to adopt anything specific." *App. F* at 27 (July 15, 2017, Oral Argument Transcript). Additionally, board member Johnson, who made the remand motion, directly contradicted these conclusions.

> My intent, when I made the motion, was certainly not to provide unfettered discretion to a department or to a hearing officer who was trying to apply the law as it was written at that point in time but to merely ensure that all three of the factors that were set forth in that

> law were considered as part of the discussion -- as part of the decision.
>
> So I don't, I don't agree that this board had any intent – I've read the remand order again, and I don't see that there was any statement by this board that we wished for an agency of the State or a hearing officer to have untrammeled or unfettered discretion. We merely wanted the case decided based on the factors that were set forth in law at that time.

App F at 111 (July 15, 2017, Oral Argument Transcript at 24). Board member Johnson went on to state that "the last time we remanded this case, it was simply because we didn't feel that all three of the factors were considered and we felt the 105 percent rule adopted by the hearing officer was arbitrary. . . . I simply don't see anything that . . . provides unfettered discretion, or . . . turns the world of compensation topsy-turvy to try to reach some end that the board had in mind. That simply wasn't the case." *Id.* at 32.

Simply put, BOPA did not violate MAPA or the CSED Attorneys' rights because its decision to remand this matter was based exclusively on an error of law. The district court acknowledged the appropriateness of BOPA's decision, yet faulted BOPA based upon unsubstantiated conclusions that are not supported by the plain language of BOPA's Order of Remand, its Final Agency Decision, or any statements made during their deliberations on either proposed order. In fact, both the Order of Remand and BOPA's acknowledgement that, after reweighing the factors, the hearing officer could arrive on the same conclusion defeat the district court's conclusions herein. Since BOPA properly remanded this matter and there

is nothing to support the district court's conclusion that BOPA directed the hearing officer to accept DPHHS's evidence and decide this matter in its favor, the district court's Order should be reversed and BOPA's Final Agency Decision should be reinstated.

II. BOPA'S FINAL AGENCY DECISION SHOULD BE REINSTATED BECAUSE BOPA APPLIED THE APPROPRIATE STANDARD OF REVIEW AND ITS DECISION IS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD

BOPA's Final Agency Decision should be reinstated because the district court erred when it concluded that BOPA failed to apply the appropriate standard of review under MAPA. Moreover, the findings of fact within the Final Agency Decision are supported by competent, substantial evidence in the record and the adopted conclusions of law are correct.

A. The District Court Erred Because BOPA Was Not Required to State with Particularity the Basis for Its Rejection of the Hearing Officer's Commentary and Opinions

The district court erred when it concluded that BOPA violated MAPA when it rejected the hearing officer's commentary without stating with particularity the reasons for rejecting this commentary. Under MAPA, a reviewing agency "may not reject or modify the findings of fact unless the agency first determines from a review of 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." Mont. Code Ann. § 2-4-621(3). The district court's conclusion that BOPA violated Mont. Code Ann. § 2-4-621(3) when it "deleted all of the hearing examiner's reasons why he was changing his first proposed order" was erroneous because—as the district court noted—the first 14.5 pages of the hearing officer's proposed order contained the hearing officer's reasons or opinions *about the scope and effect of the remand order*. The rejected commentary did not include any facts underlying the substantive issues to be decided by the hearing officer. As such, they do not constitute the findings of fact that can only be rejected after conducting a complete review of the record and stating with particularity that the findings are not based upon substantial evidence. Essentially, the district court created a new standard of review that requires a reviewing agency to review the entire record and set forth a particularized basis for its rejection of a hearing examiner's commentary or opinions regarding his disagreement with this Court's decision in *Mashek* or BOPA's remand order for reconsideration of this case in light of that decision. Since such a standard is not articulated in MAPA, the district court's Order is based upon an error of law, and should be reversed.

Plus, as discussed above, even if these types of "facts" were the type of facts referenced in MAPA, as discussed above, there is nothing in the record to support the hearing examiner's reading of the remand order. The plain language of the order does not support it. The transcript of the oral argument does not support it.

And certainly nothing that happened after remand during BOPA's review of the hearing examiner's second proposed order could ever have supported the hearing officer's interpretation of the remand order. Therefore, the district court should be reversed in this respect.

B. This Court Should Affirm BOPA's Second Order Denying the CSED Attorneys' Claim Because the Board Applied the Appropriate Standards of Review Under MAPA

BOPA's Final Agency Decision should be reinstated because it adopted the hearing officer's findings of fact which are based upon substantial competent evidence in the record. The only findings of fact that BOPA was required to review in accordance with MAPA are those facts underlying the substantive issue to be decided by the hearing officer, *i.e.* the facts surrounding the three *Mashek* factors and not the hearing examiner's opinions and commentary regarding that decision and BOPA's remand order. Those pertinent facts are set forth on pages 15-25 of the hearing officer's May 4, 2017, Recommended Order on Remand. BOPA correctly determined that each of those factual findings contained citations to the record and were supported by competent substantial evidence. BOPA adopted these findings in full, and, as such, was not required to review the entire record or set forth its basis for doing so. Thus, BOPA committed no error under MAPA when it adopted the hearing officer's findings of fact that were all in favor of the State.

To reverse BOPA's Final Agency Decision, this Court would have to overlook and disregard the substantial competent evidence in the record which establishes that DPHHS had a valid basis—competency and competitiveness—for paying its OLA attorneys more than the CSED Attorneys. The uncontroverted evidence, as set forth in the above factual background, established that the OLA work unit suffered from turnover whereas the CSED Attorneys experienced no turnover. Additionally, the OLA attorneys had non-predominant duties which rose to a Band 8 level while all the CSED attorneys' duties were strictly Band 7. This, alone, is sufficient to set different pay rates as this Court found in *Fellows v. Dept. of Administration*, 2011 MT 88, 360 Mont. 167, 252 P.3d 196.

The CSED Attorneys presented no evidence or testimony to refute DPHHS's showing regarding turnover and the respective duties of these attorneys. Rather, they premised their argument primarily on their interpretation of internal equity as meaning equal pay for those positions classified in the same job code and pay band. Their position ignores the Broadband rules. Moreover, their argument was obliterated when this Court issued its decision in *Mashek.* Even when weighed against the ambiguous term of internal equity, the issues surrounding competency and competitiveness allowed DPHHS to pay the OLA attorneys more. Since the substantial competent evidence in the record establishes that DPHHS had the legal authority and a factual basis for paying the OLA attorneys more than the CSED

Attorneys, BOPA's Final Agency Decision should be reinstated.

CONCLUSION

As the foregoing demonstrates, the district court's Order on Petition for Judicial Review should be reversed and BOPA's Final Agency Decision should be reinstated.

Dated this 29th day of May, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I hereby certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is doubled-spaced except for quoted and indented material; and the word count calculated by Microsoft Word is 8747 excluding the Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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CERTIFICATE OF SERVICE

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