

DA 24-0032

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 278

ADRIANNE COTTON,

Cross-Petitioner, Respondent,
and Appellant,

v.

MONTANA DEPARTMENT OF CORRECTIONS,

Cross- Petitioner, Respondent.
and Appellee.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. BDV-2022-522
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Isaac M. Kantor, Kantor Law, PLLC, Missoula, Montana

For Appellee:

Michael A. Kauffman, Patricia Klanke, Drake Law Firm, P.C.,
Helena, Montana

Submitted on Briefs: August 14, 2024

Decided: November 26, 2024

Filed:



Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Adrienne Cotton appeals from a December 13, 2023 order of the First Judicial District Court. The District Court found that the Human Rights Commission (Commission) order reversing and remanding Hearing Officer Holien’s (Holien) findings of fact and conclusions of law was arbitrary, capricious, and exceeded the Commission’s statutory authority. We affirm.

¶2 We restate the issues on appeal as follows:

Issue One: Did the District Court err in finding the Commission exceeded its statutory authority when it rejected the hearing officer’s conclusions of law by reweighing the evidence?

Issue Two: Did the District Court err by reinstating the hearing officer’s decision as the final agency decision?

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On January 24, 2019, Cotton filed a charge of discrimination with the Commission, alleging that the Montana Department of Corrections (DOC) retaliated against her for protected activity when it eliminated her position. Hearing Officer Holien held a contested case hearing December 14–17, 2020. Sixteen witnesses testified and almost 80 exhibits were admitted.¹

¶4 Cotton began working for DOC in November 2011. By the time the events at issue took place, Cotton was serving as DOC’s government relations director and administrating the Office of Criminal Justice Relations. She also supervised the Native American Liaison,

¹ The facts come from uncontested findings of fact made by Holien.

the Re-Entry Coordinator position, and the Board of Crime Control. She received excellent performance reviews throughout her employment at DOC.

¶5 In 2013, then Director of DOC, Mike Batista, created the position of Deputy Director and reorganized the leadership team, expanding it to 15 people and adding Cotton's position to the leadership team. Batista stepped down as Director in 2016 and, in April 2017, Reginald Michael was appointed DOC Director. Michael's transition into the role was difficult, including some leadership team members taking issue with his leadership style.

¶6 The Deputy Director position became available in 2017 and numerous internal candidates, including Cotton, applied for the position. Cynthia Wolken was hired as DOC Deputy Director in January 2018. Some members of the leadership team were upset by this appointment, as they believed they were better qualified than Wolken, which had a negative impact on the leadership team. Wolken found supervising the leadership team to be unmanageable due to its large size, communication issues, and mistrust.

¶7 In September 2017, Cotton and Michael traveled to Billings together to tour the Montana Women's Prison. During the trip, Michael shared stories of his sexual history and asked Cotton about her career goals, which concerned her. After arriving in Billings, Cotton called her husband, audibly upset and crying while describing the situation. In late September, Cotton reported her concerns with Michael's conduct to DOC Human Resources Director Kila Shepherd, but requested Shepherd not report her allegations or file a formal complaint.

¶8 In February 2018, after several female employees had raised concerns of gender discrimination, Shepherd met with Wolken to discuss concerns with Michael's conduct. Shepherd identified the women who had complained along with two male employees who had noticed the concerning behavior. Wolken and Anjenette Schafer, Administrator of the Human Resources Division for the Department of Administration (DOA), discussed these concerns with Tom Lopach, Chief of Staff for the Governor's Office. Lopach, Schafer, and Wolken took Shepherd's allegations seriously and determined that a formal investigation was required. The DOA began an inquiry into allegations of harassment against Michael in April 2018, which concluded July 2, 2018. The investigation began more than 10 business days after the allegations were reported to Schafer, against DOC policy. Holien found this was not unreasonable given the nature of the allegations and that they were made against an agency director.

¶9 Schafer oversaw the investigation. She arranged for John Pavao, State Diversity Program Coordinator, and Matt Mitchell, an attorney with DOA, to conduct the investigation. Pavao and Mitchell interviewed a number of individuals involved in the allegations. Pavao and Mitchell did not feel pressured by anyone to come to a certain conclusion or make certain findings in the investigation. Nobody hindered them in their investigation. The DOA investigators determined that a preponderance of the evidence did not support the allegations against Michael.

¶10 At around the same time that Michael was appointed, the Office of Budget and Program Planning (OBPP) decided to evaluate DOC's organizational structure as it had a

history of overspending its budget. OBPP ultimately recommended eliminating ten full-time positions, including Cotton's.

¶11 Separately, Lopach contacted Peggy MacEwen at the Department of Environmental Quality to discuss his concerns with DOC operations. He noted: issues with communications and the difficulties the Governor's office had in getting non-conflicting information from the DOC leadership team; several internal candidates for the deputy director position felt more qualified than Wolken; and concerns about DOC's ability to implement recent legislation. MacEwen suggested an organizational assessment of the DOC, which she performed. Michael and Wolken were not consulted by the Governor's office in deciding to conduct the assessment. Neither Schafer nor Human Resources was involved in the assessment. Nor did the Governor's office or DOC control how MacEwen conducted the assessment.

¶12 MacEwen was unaware Cotton was a complainant in the discrimination investigation against Michael. She was also unaware of OBPP's recommendations when she conducted her assessment. Her goal was not to achieve fiscal savings for DOC but instead focused on leadership, communication, strategic planning, governance, operations, and decision making, among other things. MacEwen interviewed everyone on the leadership team about these areas except for the interim warden at Montana State Prison. She concluded that DOC's leadership team did not have a clear vision or strategic direction; there was no clear framework for how decisions were being made; there was a lack of trust among the leadership team; and she was concerned with the number of direct reports to the deputy director. MacEwen felt that the large size of the leadership team led to many of

these difficulties. While she was requested to provide a proposed organizational structure, no one suggested to her that specific positions on the leadership team be eliminated.

¶13 MacEwen recommended a “[m]ajor shift in organizational structure—middle management” as one path forward. MacEwen suggested the elimination of several positions, including Cotton’s. At that time, she was unaware of Cotton’s role in the investigation of Michael. MacEwen’s assessment culminated in a reorganization, which, among other things, included eliminating Cotton’s position as government relations director. The Governor’s office was the final decision maker, and it approved MacEwen’s reorganizational proposal.

¶14 Both Wolken and Michael wanted Cotton to stay with DOC because she was a valued team member. Cotton was offered a temporary position in an area where she had previously expressed interest. She was offered six months of pay protection with the same salary and benefits as she had before. Wolken told Cotton she hoped another position would become available within those six months or that the offered position would continue to be funded. Cotton turned down the position due to the uncertainty around its temporary nature. Cotton was laid off in November 2018.

¶15 Holien found that DOC made the decision to eliminate Cotton’s position and to lay her off for legitimate, non-discriminatory reasons that were not a pretext for retaliation and that DOC did not retaliate against Cotton for the protected activities she engaged in.

¶16 Cotton appealed Holien’s decision to the Commission. In its written order, the Commission rejected her conclusions of law that found DOC had not retaliated against Cotton. It based its decision solely on the “temporal proximity” between Cotton engaging

in protected activity and the removal of her position within DOC. DOC petitioned the District Court for review of the Commission's order. The District Court found that the Commission had exceeded the scope of its review and had not made the requisite analysis in its order to overturn Holien's findings and conclusions. It thus reversed and vacated the Commission's order and reinstated Holien's decision as the final agency decision in the matter. Cotton appeals.

STANDARD OF REVIEW

¶17 On judicial review of contested cases under the Montana Administrative Procedure Act, the Court "may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Section 2-4-704(2), MCA. The Court may reverse 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.

Section 2-4-704(2), MCA; *see also Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 16, 387 Mont. 202, 394 P.3d 159.

DISCUSSION

¶18 *Issue One: Did the District Court err in finding the Commission exceeded its statutory authority when it rejected the hearing officer's conclusions of law by reweighing the evidence?*

¶19 The Commission's standard of review of a hearing officer's findings of fact and conclusions of law is governed by the Montana Administrative Procedure Act (MAPA),

§ 2-4-621(3), MCA:

The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision *but 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.

(Emphasis added.) *See also Blaine Cnty.*, ¶ 25. The standard of review "is not whether there is evidence to support findings different from those made by the trier of fact, but whether substantial credible evidence supports the trier's findings." *Blaine Cnty.*, ¶ 26 (internal quotation omitted). Substantial credible evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Blaine Cnty.*, ¶ 26. The evidence is viewed in the light most favorable to the prevailing party. *Blaine Cnty.*, ¶ 26.

¶20 Here, the Commission modified two of the Holien's 196 findings of fact, neither of which ultimately influenced Holien's finding that "DOC made the decision to eliminate Cotton's position and to lay her off for legitimate, non-discriminatory reasons that were not pretext for retaliation" and that "DOC did not retaliate against Cotton for her protected activity."

¶21 To establish a retaliation claim under the Montana Human Rights Act, the employee must establish a prima facie case by showing: (1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse action. *Bollinger v. Billings Clinic*, 2019 MT 42, ¶ 29, 394 Mont. 338, 434 P.3d 885. The burden then shifts to the employer to articulate legitimate, non-discriminatory reasons for the discharge. *Bollinger*, ¶ 29. If so, the burden then shifts back to the employee to demonstrate the articulated reasons are a pretext for retaliation by showing a retaliatory reason motivated the employer or that the employer’s reasons are completely unworthy of credence. *Bollinger*, ¶ 29. Determining whether there is evidence of intent to discriminate is a pure question of fact. *Blaine Cnty.*, ¶ 23 (citing *Pullman-Standard, Div. of Pullman v. Swint*, 456 U.S. 273, 287–88, 102 S. Ct. 1781, 1789 (1982)). Whether the employer had legitimate, non-discriminatory reasons for the adverse employment action and whether those reasons are pretextual are also questions of fact. *See Shepherd v. State*, 2023 MT 99, ¶¶ 20–21, 412 Mont. 330, 529 P.3d 1285.

¶22 There is no dispute here that Cotton engaged in protected activity and suffered an adverse employment action. However, Holien made thorough findings of fact that ultimately concluded that DOC had not engaged in retaliation nor was its decision to eliminate Cotton’s position pretextual. Cotton only challenges a few of the findings of fact, none of which are dispositive to the Holien’s ultimate findings. The Commission “[found] that the proximity in time between Cotton’s participation in the protected activity and DOC’s decision to eliminate her position is sufficient” to establish causation, retaliation, and pretext. It framed this issue as a question of law and thus reversed Holien

without finding that substantial evidence did not support the officer's findings of fact that supported its conclusions of law.

¶23 While the Commission is correct that temporal proximity can be circumstantial evidence supporting a retaliation claim, it erred in holding that this was a question of law. Instead, “regarding a causal link between the protected activity and the employer’s material action, [w]hether an adverse employment action is intended to be retaliatory *is a question of fact* that must be decided in the light *of the timing* and the surrounding circumstances.” *Norval Elec. Coop., Inc. v. Lawson*, 2022 MT 245, ¶ 36, 411 Mont. 77, 523 P.3d 5 (emphasis added and internal quotation omitted).

¶24 The Commission cited *Yartzoff v. Thomas*, 809 F.2d 1371 (9th Cir. 1987), for its proposition that it can overturn a hearing officer’s decision as a matter of law. But *Yartzoff* does not stand for this premise. *Yartzoff* was an appeal of a district court’s order granting summary judgment in favor of the defendant because Yartzoff had failed to make a prima facie case on any of his retaliation claims. The Ninth Circuit affirmed on several of the claims where Yartzoff had failed to provide evidence on one of the factors he was required to show to make a prima facie case of discrimination. However, it reversed on several claims where he had presented a prima facie claim and the defendant had presented evidence of non-retaliatory reasons for adverse employment decisions. Those “explanations raise[d] a genuine issue of fact as to whether the EPA retaliated against Yartzoff.” *Yartzoff*, 809 F.2d at 1377. Indeed, the Ninth Circuit noted that summary judgment is generally inappropriate in discrimination cases where the plaintiff has established a prima facie case “because of the ‘*elusive factual question*’ of intentional

discrimination.” *Yartzoff*, 809 F.2d at 1377 (quoting *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 733 (9th Cir. 1986)) (emphasis added). Thus, instead of reversing the district court and finding discrimination as a matter of law due to the proximity of protected activity and adverse employment actions as the Cotton asserts, the Ninth Circuit reversed a grant of summary judgment and remanded for trial so the *factfinder* could decide whether the evidence showed retaliation or pretext.

¶25 Hearing Officer Holien specifically looked at temporal proximity and found that the time between Cotton’s protected activities and the adverse employment action was not sufficient evidence alone of causality to rise to a *prima facie* case of temporal proximity. Additionally, regarding pretext, Holien found that “while the timing may appear suspicious, there is no evidence in the record to support a finding that the timing of the two processes shows pretext.”

¶26 “An agency abuses its discretion if it modifies the findings of a hearing officer without first determining that the findings were not supported by substantial evidence.” *Blaine Cnty.*, ¶ 25. The Commission did not find that Holien’s findings of fact were not supported by substantial evidence before rejecting her conclusions of law. *Compare Mont. State Univ.-N. v. Bachmeier*, 2021 MT 26, ¶ 48, 403 Mont. 136, 480 P.3d 233. Instead, it substituted its judgment for that of Holien, exceeding its statutory authority by applying the wrong standard of review and abusing its discretion.²

² Cotton argues that the Commission made additional findings to support its conclusion that she was retaliated against at the hearing. In addition to exceeding its statutory authority (*see* § 2-4-621(3), MCA (requiring Commission to “state[] with particularity *in the order*” the findings of fact not based upon competent substantial evidence) (emphasis added)), our review of

¶27 *Issue Two: Did the District Court err by reinstating the hearing officer’s decision as the final agency decision?*

¶28 Cotton cites *Blaine County*, ¶ 28, and argues that the District Court erred by reinstating Holien’s decision without considering whether every one of her findings was supported by substantial credible evidence in light of the whole record.

¶29 But in *Blaine County*, we specifically affirmed a district court’s decision to reinstate a hearing officer’s findings when the Commission did not find that the hearing officer’s findings were not supported by substantial evidence. *Blaine Cnty.*, ¶ 38; *see also Blaine Cnty.*, ¶ 36 (collecting cases). Cotton misinterprets the MAPA standard of review to require that a district court, in *every* contested case, must review *every* finding of fact for clear error. This is not the job of a reviewing court.

¶30 Neither the Commission nor a district court review the record de novo to determine whether it is supported by substantial evidence. Instead:

As to any finding of fact made by the hearing examiner which is rejected or modified by [the Commission] the Court should itself review such finding of the hearing examiner to determine whether it was “based upon competent substantial evidence” under § 2-4-621(3), MCA. If the Court makes a determination that such finding was so supported it should then determine that the rejection or modification by [the Commission] of such finding was “characterized by abuse of discretion or clearly unwarranted exercise of discretion” under § 2-4-704(2)(a)(vi), MCA.

Fugate v. Shotgun Willies, Inc., 270 Mont. 47, 51–52, 889 P.2d 1185, 1187–88 (1995). As with any appeal, the appellant must direct the reviewing court to findings of fact or conclusions of law that it takes issue with, and the reviewing court generally will not review

the reasoning given in the hearing merely shows additional findings the Commission inappropriately reweighed.

issues beyond the scope of those appealed to it. *See, e.g.*, § 2-4-702(1)(b), MCA (“the party may not raise any other question not raised before the agency”); *see also* § 2-4-702(2)(b), MCA (“The petition must include . . . a statement of the manner in which the petitioner is aggrieved, and the ground or grounds specified in [§] 2-4-704(2) upon which the petitioner contends to be entitled to relief. The petition must demand the relief to which the petitioner believes the petitioner is entitled.”). The petitioner bears the burden of showing that a finding is clearly erroneous; otherwise, it is binding on the court. *Terry v. Bd. of Regents*, 220 Mont. 214, 217, 714 P.2d 151, 153 (1986); *see also Hoven, Vervick & Amrine, P.C. v. Mont. Comm’r of Labor*, 237 Mont. 525, 530, 774 P.2d 995, 998 (1989) (“[R]eview of agency decisions is not intended to be a de novo consideration of findings of fact made by the agency. . . . [T]he party appealing from an agency decision to the District Court has the burden of showing that his rights were substantially prejudiced by an arbitrary or capricious or a clearly erroneous agency decision.”).

¶31 Thus, the District Court was not required to review every factual finding made by Holien for clear error. Instead, the court—as with every reviewing court—generally limits its review to the errors alleged by the petitioner or appellant. We similarly limit our review to those errors Cotton alleges in her brief before us. Cotton notes seven findings of fact that Holien made which she alleges are clearly erroneous.³

³ Cotton argues there are numerous other clearly erroneous findings of fact but that “[t]here is not space here to fully address” them and points us to “[a] more extensive, although by no means complete, discussion” of these alleged errors in her briefing to the Commission. However, appellate briefs must contain a party’s arguments, and parties may not incorporate arguments by mere reference to trial briefs or other sources. *Barrett v. State*, 2024 MT 86, ¶ 28 n.4, 416 Mont. 226, 547 P.3d 630 (citing *State v. Ferguson*, 2005 MT 343, ¶¶ 40–41, 330 Mont. 103, 126 P.3d

¶32 Cotton first argues that Finding of Fact 69 is clearly erroneous. Holien found that neither Pavao nor Mitchell spoke with the Governor’s Chief of Staff, Lopach, during their investigation into the allegations against Michael. Cotton points to a note Mitchell wrote during his interview of Michael that says “Note, talk to Tom re issue told” as evidence that this finding was clearly erroneous. But Pavao testified that he did not have any conversations with Lopach during the investigation. And Mitchell testified directly that he did not remember having any direct conversations with Lopach during their investigation. Mitchell further testified that the note did not stick out as something memorable. Holien weighed the evidence and found that neither Pavao nor Mitchell spoke with Lopach during the investigation. This finding is supported by substantial evidence in the record, namely the direct testimony by Pavao and Mitchell. The note may have been a note to call Lopach—but that does not mean it ever happened. This is an issue of witness credibility squarely within Holien’s purview. Additionally, even if this finding was unsupported by the evidence, it does nothing to affect the remainder of Finding of Fact 69, where Holien found that Lopach did nothing to hinder or influence the investigation to compel a certain result. The Commission struck the finding that neither Pavao nor Mitchell spoke with Lopach during their investigation; that was an abuse of discretion because the finding was supported by substantial credible evidence. The District Court did not err by reinstating the finding.

463). As such, we confine our review to the facts specifically asserted to be clearly erroneous by Cotton.

¶33 Cotton next argues that Finding of Fact 77 is clearly erroneous. Holien found DOC policy states that formal investigations should begin within 10 days of the allegations, but Pavao testified that, in his experience, extenuating circumstances such as the amount of coordination required sometimes results in exceptions to the policy. Cotton argues this finding was clearly erroneous because Pavao also testified that there were no written exceptions to this policy. The Commission amended this finding by adding that there were no exceptions to the policy. Again, this does not conflict with what Pavao testified to. Even though there are no written exceptions to the policy, in his experience several investigations have been of a complex enough nature that the policy was not followed. Holien found that, in this case, the failure to adhere to DOC policy to begin an investigation within ten days was not circumstantial evidence of retaliation because of the nature of these allegations: they were against an agency director; the Governor’s office was involved and concurred that an investigation be conducted; there were several allegations that all needed to be investigated together; and it would take time to mobilize the additional resources necessary to conduct an investigation of such nature. Holien’s findings were not clearly erroneous in light of substantial evidence in the record.

¶34 Cotton argues Finding of Fact 87 was clearly erroneous, which found Lopach did not tell MacEwen about discrimination complaints against Michael and that MacEwen understood only that there had been complaints about management. The Commission reviewed this finding and adopted it as written, finding substantial evidence in the record to support it. We agree. MacEwen took notes of a meeting with Lopach about “allegations” that he did not feel were credible at the time. MacEwen testified that the

“allegations” they discussed at that meeting were “general complaints about management,” not complaints “of a nature . . . like sexual harassment or discrimination or something like that.” Cotton takes the rest of that discussion out of context in arguing MacEwen knew about discrimination complaints.⁴ Substantial evidence supported Holien’s finding.

¶35 Cotton argues that Findings of Fact 115, 118, and 119 are clearly erroneous. These findings discuss why MacEwen recommended eliminating Cotton’s position. This included: a review of Cotton’s job description; information regarding her job that MacEwen gathered from various interviews of the DOC leadership team; an opportunity to reduce the size of the large DOC leadership team; and that it was unusual for a state agency to have a governmental relations director as those responsibilities usually fell to the director or deputy director. Cotton argues that Holien clearly erred because MacEwen testified that she was under the mistaken assumption that Cotton’s position was 100% focused on governmental relations. Without an accurate understanding of everything she did, Cotton argues MacEwen would not be able to make an informed recommendation to eliminate her position. Again, Cotton points us to only one bit of testimony in an otherwise thorough record that provides substantial evidence for Holien’s findings. It is clear from both the record and the findings of fact that MacEwen understood Cotton’s other duties involved, among other things, supervising the Board of Crime Control, the Native American liaison, and the reentry coordinator. MacEwen recommended those duties get reorganized to other employees for several reasons and recommended elimination of

⁴ Notably, Cotton did not file a sexual harassment complaint.

governmental relations director as that was a duty more properly under the director or deputy director.

¶36 Finally, Cotton takes issue with Finding of Fact 137, which found that neither Michael nor Wolken disputed MacEwen's recommendations nor suggested there should be a reorganization or that Cotton's position be eliminated. The record again presents substantial evidence for this finding, which the Commission agreed with. The evidence Cotton points to only tends to show that MacEwen was asked to make a chart showing how she would reorganize the leadership team, not that any specific results be accomplished in the reorganization, including eliminating Cotton's position. The record and findings show this was MacEwen's recommendation. Holien did not clearly err under the appropriate standard of review.

¶37 The District Court ultimately concluded that, because the Commission did not find Holien's supporting findings or ultimate finding that DOC did not retaliate against Cotton clearly erroneous, it exceeded its standard of review. The District Court concluded that these findings were supported by substantial record evidence. We agree. The court therefore did not err in reinstating Holien's findings as the final agency decision. *Blaine Cnty.*, ¶¶ 36, 40–41.

CONCLUSION

¶38 The Commission exceeded its standard of review by reweighing evidence that Holien had already weighed. The District Court did not err in reinstating Holien's findings as the final agency decision, which were supported by substantial record evidence.

¶39 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ LAURIE McKINNON

/S/ INGRID GUSTAFSON

/S/ JIM RICE