

1 Department of Labor and Industry
2 Board of Personnel Appeals
3 PO Box 201503
4 Helena, MT 59620-6518
5 (406) 444-2718
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8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS
10 IN THE MATTER OF FISH, WILDLIFE AND PARKS DEPARTMENT GRIEVANCE 1-
11 2012
12

13 STEVEN ATWOOD AND JOHN ENSIGN,)
14)
15 Grievants,)
16 -vs-)
17)
18 MONTANA DEPARTMENT FISH,)
19 WILDLIFE AND PARKS,)
20)
21 Defendant.)
22)
23

PRELIMINARY DECISION

24
25 **I. INTRODUCTION**
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27 This matter comes on as a result of a grievances filed by Steven Atwood and John
28 Ensign under the provisions of ARM 24.26.401 et seq. Since the grievances concern
29 an administrative action common to both grievants they are consolidated for purposes
30 of this preliminary decision. Jurisdiction is with the Board of Personnel Appeals (BOPA
31 or Board) under section 87-1-205, MCA. Dan L. Spoon is counsel for the grievants and
32 the Montana Department of Fish, Wildlife and Parks (FWP) is represented by agency
33 counsel Jack Lynch.
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36 The parties have asked that this matter be handled in expedited fashion. To that end,
37 and through mutual agreement, the first two steps of the grievance procedure have
38 been bypassed and the case filed with the Board at step three. The case was filed on
39 July 18, 2011, with a further agreement by the parties that their respective position
40 papers would be filed with the Board on July 22, 2011. John Andrew was assigned by
41 the Board to conduct an inquiry into the case and issue a preliminary decision.
42

43 **II. FINDINGS AND DISCUSSION**
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45 Authority for this matter is found in section 87-1-205, MCA, which provides:
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47 **Grievance procedure.** An employee of the department who is aggrieved by a
48 serious matter of employment based upon work conditions, supervision, or the
49 result of an administrative action and who has exhausted all administrative
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1 remedies within the department is entitled to a hearing before the board of
2 personnel appeals provided for in 2-15-1705 and subject to the provisions of 2-
3 18-1011 through 2-18-1013. Any order of the board is binding upon the
4 department.
5

6 Procedurally, neither of the grievants is covered by a collective bargaining agreement
7 so there is no union grievance procedure that applies to either individual. Similarly,
8 FWP does not have its own mechanism for grievances of this nature but has
9 incorporated the statutory process into its personnel policies, last revised on June 19,
10 2002. FWP does have a policy titled Corrective & Disciplinary Actions which includes a
11 process for handling complaints brought by individuals against FWP employees, but in
12 this instance that process was not followed. Relating to that process, and so far as can
13 be determined, it is also noted that no written complaint, was ever filed as required
14 under that process. Even had a complaint been filed the complaint process specifically
15 provides that, "It is not necessary that a complaint be filed through this procedure in
16 order to take management action". This policy was also last revised on June 19, 2002.
17 Thus, section 87-1-205, MCA, and its mechanisms to address any FWP employee "who
18 is aggrieved by a serious matter of employment based upon work conditions,
19 supervision, or the result of an administrative action and who has exhausted all
20 administrative remedies within the department is entitled to a hearing before the board
21 of personnel appeals" is an appropriate forum for this case.
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25 Steven Atwood and John Ensign are both currently employed by FWP. Atwood began
26 his employment with FWP in May of 2005 and is currently the Block Management
27 Coordinator in Region 7. Ensign began his employment with FWP in 1979, returned to
28 school, and later resumed his career with FWP. He has worked in various positions
29 with the Department and has been in his current position, Wildlife Manager, for the past
30 12 years. Ensign's total time with FWP is 24 years.
31

32 The main offices for Region 7 are housed in Miles City with Region 7 encompassing an
33 area generally referred to as the Missouri River Breaks. It is prime wildlife habitat, and
34 in terms of block management the area for which Atwood is responsible is the largest in
35 the state. Although performing different roles, the jobs of Atwood and Ensign relate to
36 one another and might be described in the broad scheme of things as attempting to
37 maintain the overall delicate balance between the needs of sportsmen and landowners
38 coupled with the goal of preserving viable, harvestable wildlife populations, and
39 sustainable habitat. Block management specifically is a program formally started in
40 1985 which allows landowners to participate on a voluntary basis in hopes of managing
41 hunting activities while providing the public with no charge hunting access to private
42 land and, at times, adjacent or isolated public lands. Neither the job nor the issues
43 associated with the jobs of Atwood and Ensign are easy as there are often competing
44 interests amongst all the constituents, individually as well as in groups and associations.
45 Disagreements or differing views can arise within the agency as well as between the
46 agency and its constituents as to how best maintain balance in this complicated and
47 interdependent system while ensuring adequate big game harvesting and harvesting
48 opportunities.
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1 The past legislative session was a busy one for FWP. A great deal of legislation
2 involved the agency and its programs. Elk management and elk hunting permits were
3 of particular contention with the Missouri River Breaks a focal point of the turmoil. Thus,
4 the practices in Region 7 drew particular attention. It was in this light that John Ensign
5 and Steve Atwood each wrote a letter to a meat processing business in Jordan,
6 Montana. The letters were written by Atwood and Ensign on their own time and dime.
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9 The letters were written as a result of HB 361. HB 361 was a bill requiring archery only
10 elk permits be issued in some areas and that they not be reduced below 2007 numbers
11 in others. Essentially there was a disagreement between FWP and landowners and
12 businesses as to whether there was an overabundance of elk and whether the harvest
13 should be increased. Ancillary to this were competing beliefs on the harvest in archery
14 season versus rifle season and the harvest of antlered and non-antlered elk. In their
15 letters Atwood and Ensign advised the business owner that because of testimony he
16 offered in support of HB 361 they would no longer use the owner's shop. These
17 personal letters from Atwood and Ensign are just that – personal letters ending a
18 personal business/customer relationship. They did not reference agency position,
19 policy, or belief. They were not copied to other people, businesses or media outlets.
20 The letters were reflective of the professional belief of Ensign and Atwood that the quota
21 of elk harvested was proper. The FWP Commission concurred in that assessment and
22 that ultimately lead to the introduction of HB 361.
23

24
25 The letters were apparently sent in March of 2011, at least Atwood's 's letter bears a
26 date of March 14, 2011. In short order they became fodder for legislative discussion
27 and scrutiny when produced during a Senate Fish and Game committee hearing that
28 same month. Ultimately HB 361 died in committee on third reading in the Senate, but
29 the stage was set.
30

31 According to Ensign, on April 7, 2011, he was made aware that the FWP Director, Joe
32 Maurier, was angered over the letters and reassignment or relocation was a possibility
33 for staff in eastern Montana. Then, according to the grievants, on April 14, 2011,
34 Ensign's immediate supervisor informed Ensign that the Director had informed him that
35 removing Ensign and Atwood from their positions might be necessary to correct the
36 situation. This was then followed by testimony by the Director in a Senate confirmation
37 hearing for Dan Vermillion, an appointee to the FWP Commission. During this April 19,
38 2011, hearing Senator Barrett brought up the issue of letters and read a portion of Mr.
39 Ensign's letter into the record. Inquiring further, the committee turned to Director
40 Maurier who, as close as can be determined by the investigator since the recording is
41 somewhat garbled, stated:
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44 No, actually, this came up [the letters]. I have talked to several legislators about it
45 and Dave Risley my chief of fish and wildlife is meeting with all supervisors today
46 laying out some policy that may not be violated without consequence and we are
47 still trying to figure out exactly what the consequences will be for these
48 employees and I assure you there will be some because it is poor judgment at
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1 the least. I will have to leave it at that because it may turn into a personnel
2 matter and is something I do not support.
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4 The above then leads to June 6, 2011, at which time Director Maurier sent interoffice
5 memoranda to Steve Atwood and to John Ensign. Both began with:
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8 During the past year, Fish, Wildlife and Parks has come under serious attack by
9 legislators, landowners, and other constituents for its relationship in eastern
10 Montana communities, particularly in Region 7. Because these relationships are
11 critical to the future of the agency, a change in management direction is
12 necessary. For these reasons I am reassigning you . . .
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14 The memoranda then go on to reassign Atwood to a position as Fishing Access Site
15 Coordinator in Region 4, Great Falls, and Ensign to a Habitat Section Supervisor
16 position in Helena, also the Region 4 area. Whether or not these transfers are truly
17 lateral or not is disputed by the grievants, but regardless, the transfers are effective July
18 18, 2011, and as the memoranda explain, paid time and expenses will be handled in
19 accord with agency Moving and Relocation Policy. The memoranda go on to explain
20 that the current salary and benefits of Atwood and Ensign will remain the same.
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23 The grievants contend that the action taken to reassign them was retaliatory in nature
24 and constitutes constructive discharge, inconsistent with FWP progressive discipline
25 policy. FWP counters that the relocation of the grievants was not retaliatory nor was it
26 disciplinary in nature. Thus, since this was not a disciplinary action, progressive
27 discipline was not necessary and the disciplinary policies of FWP are not applicable. In
28 fact, according to FWP the decision to transfer and reassign Atwood and Ensign was
29 necessary to preserve the delicate balance between Region 7 and landowners in the
30 Region. Moreover, the presence of Atwood and Ensign had cast doubt on the credibility
31 of Region 7. In support of its position FWP cites three specific incidents, namely a
32 refusal by the grievants to accept a management decision and showing disrespect to
33 management in doing so; a "sloppy job" in developing facts over a landowner issue
34 involving block management; and, the events that transpired during the 2011 legislative
35 session.
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37
38 A review of the personnel files of Atwood and Ensign reveals no bad marks against
39 either individual with the last reviews completed June 21, 2011, and January 18, 2011,
40 respectively. The review of Atwood was done by John Ensign, and Ensign's review was
41 done by his immediate supervisor, Brad Schmitz. There are no negative materials from
42 co-workers, supervisors or the public in general in the files nor have any disciplinary
43 actions of any nature have been taken against either individual. The files reflect
44 employees obviously working in their chosen fields, dedicated to their jobs and their
45 professions, and working at entirely acceptable levels. In fact, both individuals have
46 consistently received positive performance evaluations high on such things as personal
47 effectiveness, landowner rapport, communication skills and interpersonal skills.
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1 The information reviewed during this phase of the grievance process does not reflect
2 any substantial attrition rate of landowners cooperating in the block management
3 program nor does there appear to be any significant loss of acreage in the block
4 management program. Information provided by the grievants shows that in 2005 there
5 were 345 cooperators and in 2011 there were 353. The highest attrition rate during that
6 period of time was 7% in each of three years successive years with 2010 showing a 2%
7 rate and 2011 a 4% rate. For the year 2011 13 cooperators did not re-enroll in the block
8 management program with only one being for a stated reason of "cooperation
9 dissolved-property still in enrolled". In short, and granted that this is a limited review
10 given the expedited nature of this process, there does not appear to be any mass
11 exodus from the program as a result of Region 7 actions in general, let alone those of
12 either Atwood or Ensign. Moreover, those landowners who leave the program do so for
13 a variety of reasons ranging from property sales to death to disagreements with FWP
14 policies on wolf and bison management. In all of this nothing specifically points to the
15 actions of Atwood or Ensign causing whatever dissatisfaction there may or may not be.
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18 On the reverse side, FWP points out that negative perceptions of the Department's
19 reputation in Region 7 has been expressed to the Director by numerous individuals with
20 some twelve persons being named in the affidavit of Director Maurier. A review of these
21 names indicates they are individuals including the current chair of the FWP
22 Commission, lobbyists for outfitters and guides, outfitters, legislators, and one person
23 described as the statewide coordinator for the Block Management Program. Precisely
24 what the negative perceptions were, or are, has never been pointed out by FWP either
25 to the grievants or in the position paper, only that it exists and came about as a result of
26 the conduct of Atwood and Ensign. As pointed out by the grievants, apparently only
27 one of these individuals resides in Region 7 and the interests of at least some of these
28 individuals may even run counter to block management. Be that as it may, these
29 individuals are constituents or employees of FWP and their concerns warrant attention
30 by the agency and the concerns of the Director are certainly valid ones.
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33 Addressing the three cited reasons for the action taken by FWP the first is a failure to
34 accept the direction set by FWP management and disrespect shown to the same
35 management. The root of this issue is found in what is characterized as a program
36 "competing" with block management, the Community Hunting Access Partnership, or
37 CHAPS. Whether CHAPS was a competing program to block management or whether
38 it was just another tool to enhance access is a point of contention, but CHAPS is cited
39 as evidence for this resistance and disrespect. In brief background, discussion of
40 CHAPS goes back to at least 2008. In fact, during the 2009 session legislation was
41 proposed (and died in committee) addressing the concept. Even though the legislation
42 was not successful FWP, recognizing there were legitimate questions about block
43 management in Region 7, assigned Deputy Director Art Noonan to study CHAPS over a
44 two year period. In conjunction with this study a group of people was put together to
45 study CHAPS. Principal members included the Region 5 supervisor as well as John
46 Ensign with others from Regions 5, 6 and 7 called in as needed. It is questionable
47 precisely who this group consisted of, or for that matter, whether or not Steve Atwood
48 was even a part of this "group" other than when brought in for his particular expertise.
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1 Nonetheless, he and Ensign are identified as those having disrespect for management
2 and its decisions.
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4 In September of 2010, Deputy Director Noonan participated in a conference call with
5 Region 7 staff discussing CHAPS. Deputy Director Noonan was in Helena during the
6 conference call. It is not clear, but staff from Region 5 may also have participated as
7 well. During the call Noonan announced that the decision of FWP was to not adopt
8 CHAPS. To this, someone believed by FWP to be one of the two grievants, uttered
9 "bullshit". In reviewing this matter one phone call was made by the author of this
10 preliminary decision and that call quickly revealed that it was neither of the grievants
11 who made the utterance. The utterance was made by a Region 7 biologist, who not only
12 identified himself to Deputy Director Noonan over the phone, but at the time of the
13 utterance that same individual was admonished by Ensign, his supervisor, that his
14 utterance was over the line. Although the grievants, as well, obviously, as others, may
15 have disagreed with the decision made by management, there is no evidence of
16 disrespect by either of the grievants. Moreover, it is unclear why one of the grievants,
17 Atwood, should even be lumped into this whole CHAPS situation when his involvement
18 seems limited.
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22 Concerning the second stated reason for the transfer, it is specifically noted that in his
23 memoranda to Ensign and Atwood Director Maurier writes "*During the past year, Fish,*
24 *Wildlife and Parks has come under serious attack by legislators, landowners, and other*
25 *constituents for its relationship in eastern Montana communities, particularly in Region 7*
26 *"(emphasis added).* The second incident refers to events occurring in 2008, or perhaps
27 even as early as December of 2007. Again, there is nothing in the evaluations of
28 Atwood or Ensign referencing a "sloppy job" done by the grievants. One would think
29 that, if as bad as portrayed, something would have appeared in a personnel file, but
30 there is nothing. Not only is using this justification for the transfer dated, but as with the
31 above incident it more or less shotguns the grievants as opposed to recognizing any
32 individual accountability or responsibility, if there is any. Moreover, the "members of the
33 public" referenced by FWP are not specified either in terms of number or name nor is
34 there any way to determine whatever their motivations might be. The nature of the
35 "public" simply is not clear given what has been produced in the expedited nature of this
36 grievance. Other than saying credibility was lost with landowners and outfitters in
37 Region 7, nothing actually demonstrates that to be the reality.
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40 As to the third and final reason for the transfer, clearly the letters of Ensign and Atwood
41 generated discussion in the legislature and were no doubt very problematic for the
42 Director. However, there were no policies in place prohibiting letters of this nature and
43 there was nothing in the letters implicating the agency in any fashion. In fact, based on
44 the Director's statement in committee, any policy regarding such communication was in
45 the works and did not even exist at the time the letters were sent. It is axiomatic that
46 someone cannot be held accountable for violating policies of which they are not aware.
47 Nonetheless, in hindsight the grievants certainly could have anticipated that the letters
48 might surface and create controversy. Simply withdrawing their business would have
49 been sufficient and if asked for the reason, a response then would have been more
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1 prudent. In 20/20 hindsight writing the letters was not a wise choice, but does
2 expressing your personal dissatisfaction with an individual business person constitute
3 bad judgment and does that action so damage your reputation and credibility in the
4 region so severely that you cannot effectively perform your duties in that region
5 anymore? The question then posited by the grievants is whether or not the action taken
6 by the agency constitutes discipline and is thus a valid grievance requiring remedial
7 action by the Board of Personnel Appeals.
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10 In this vein FWP points to a decision made by a Board appointed hearing examiner in
11 2005. The two main similarities between that case and the case of Atwood and Ensign
12 is that in both cases the grievants were assigned different duties and their pay was
13 preserved. Beyond that they are markedly different. Unlike with Ensign and Atwood,
14 the grievant in the 2005 case was not transferred to another region, but instead became
15 subject to a differing supervisory structure within the same region, even though barred
16 from entering Region 4 Great Falls offices during normal working hours. Special
17 consideration was given to his unique circumstance with one reality of the reassignment
18 being that the grievant became not only the highest paid field warden in the state, but
19 one entitled to overtime at that high rate. Moreover, and unlike Ensign and Atwood, in
20 the previous case the grievant did have a differing from the norm performance review
21 addressing his strengths and weaknesses. The issues he had within his work location
22 were assessed and evaluated before action was taken. And, unlike Atwood and
23 Ensign, the previous grievant was offered at least three other positions befitting his skills
24 and abilities. Given all this the hearing examiner determined that the decision of FWP
25 was not disciplinary in nature in large part because the action taken was not punitive
26 and the grievant failed to show he was aggrieved in a serious matter of employment.
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29 In this preliminary decision it simply cannot be said that what has transpired to date is
30 not a serious matter of employment for Steven Atwood and John Ensign. As previously
31 stated, this is an expedited process and far more may be borne out when this case
32 proceeds to hearing as it no doubt will, but at this point the allegations made by FWP
33 are lacking in substance and what occurred has a punitive, disciplinary appearance to it.
34 In the case of Atwood and Ensign, and contrary to the other assertions made by FWP,
35 there is a fundamental appearance that the decision made by FWP was based on the
36 letters sent by Atwood and Ensign and whatever fallout there was from that, and that
37 alone. No policy was violated by sending these letters. They were merely free
38 expression from one person to another disagreeing on a matter of importance for both.
39 There was no intent in the letters to do any harm to FWP or its programs. Whether that
40 harm actually occurred and precisely what the harm was, or is, remains in serious
41 doubt. Whether the ability of the grievants to do their jobs is compromised at all, let
42 alone severely, is also seriously in doubt. Whether the credibility of Region 7 is
43 damaged is also in doubt. Beyond this, and "consequences" is a key word in all this,
44 one would have to wonder the consequences of what expressing ones personal belief in
45 personal communication, based on professional experience - a belief supported by the
46 FWP Commission - and then being reassigned and transferred for doing so, means to
47 staff and constituents in Region 7.
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1 This is a most difficult case for everyone, including this Board Agent, and will likely be
2 more so in the next phase of the statutory grievance process. At this phase of process
3 it is recognized that it is an inherent prerogative of management to reassign and transfer
4 employees and nothing in this preliminary decision is meant to ignore that fact; the
5 significance of all this to FWP; or, the genuine concerns of FWP, but at least on a
6 preliminary basis this case is not as straightforward as seen by FWP.
7

8 9 **III. PRELIMINARY DECISION**

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11 Pursuant to ARM 24.26.303 (3)(b) it is the preliminary decision that the grievance of
12 John Ensign and Steven Atwood be sustained and the transfer and reassignment
13 rescinded.
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16 DATED this 27th day of July, 2011.
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22 BOARD OF PERSONNEL APPEALS

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25 By: _____

26 
27 John Andrew
28 Board Agent
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30 NOTICE

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32 The parties have five days to accept or reject this preliminary decision. Notice of
33 acceptance or rejection is to be sent to the attention of the Board Agent at P.O. Box
34 201503, Helena, MT 59620-1503. Non-acceptance of the Preliminary Decision by
35 either party will result in the transfer of this case to the Hearings Bureau for hearing.
36 Fully knowing the intent of the parties to expedite this case, the case file will be
37 forwarded to the Hearings Bureau even before any notice of acceptance or rejection of
38 the preliminary decision is received by the Board Agent.
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CERTIFICATE OF MAILING

I, Sharon Norley do hereby certify that a true and correct copy of this document was mailed to the following on the 27th day of July, 2011, postage paid and addressed as follows:

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