

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS
POST OFFICE BOX 1728
HELENA, MONTANA 59624

Case No. 2153-2016

In the matter of:

	Date of Remand	06-07-16
CAROL M. BONDY	Date of Additional Hearing	07-12-16
Claimant - Appellant	Date of Decision	07-22-16

DEPT. OF PUBLIC HEALTH & HUMAN SERVICES
Employer - Respondent

ISSUE: Whether the claimant is qualified to receive benefits based upon the reasons for this employment separation as provided in Mont. Code Ann. §§ 39-51-2302 (leaving work without good cause) or 39-51-2303 (discharge for misconduct).

INTRODUCTION: The claimant, Carol Bondy, appealed a February 19, 2016 redetermination that concluded she was not qualified to receive benefits because she had been discharged for misconduct.

The Hearing Officer conducted an in-person hearing in this matter on March 16, 2016. Bondy participated in the hearing with her attorney, Hilary Oitzinger. Shannon McDonald, attorney at law, represented the Department of Public Health and Human Services (DPHHS). Marie Matthews, the operations services branch manager, participated on the employer's behalf. Bondy and Matthews presented sworn testimony.

On March 16, Documents 1 through 82 and DPHHS Documents A through H were admitted into the record without objection. The parties were given until March 21, 2016 to provide a copy of a December 2014 memo Bondy asserted Director Opper sent to management. On March 18, 2016, the employer forwarded to the Hearing Officer and Oitzinger a copy of emails sent to management on December 4 and 5, 2014. A copy of the Governor's Legislative Communications Handbook and Montana Appointee Handbook were attachments on the email. The December 4 and 5, 2014 emails with the attachments are identified as DPHHS Document I (1-40) and were admitted as evidence.

On March 21, the Hearing Officer received Bondy's request pursuant to Mont. R. Evid. 202 to take judicial notice of Mont. Code Ann. § 2-6-1501(4)(a). DPHHS

objected to the request. The Hearing Officer takes judicial notice of this statute, but not Bondy's argument about whether it applies in this matter. Bondy also requested that the Hearing Officer take judicial notice of two purported facts:

1. Claimant/Appellant does not concede that Mont. Code Ann. § 2-6-1501(4) applies to this matter or to Tax ID numbers; and
2. Claimant/Appellant did not disseminate personal information and this fact was undisputed at the hearing.

Judicial notice is proper only when it applies to judicially cognizable facts.

Mont. R. Evid. 201(b) requires that the fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

Neither of Bondy's purported facts fulfill the requirements of Rule 201 and will not be judicially recognized. Neither purported fact is generally known or capable of accurate determination by resorting to unquestioned accurate sources. Also, the record was left open only for the parties to provide a memo Bondy testified existed and contended contradicted the employer's communication policy (Documents 18-24).

At the March 16 hearing, both counsel noted that as a result of a March 11, 2016 Order, they had a minimum amount of time to prepare for the hearing because both attorneys agreed to appear as substitute counsel on short notice. Since Bondy could not arrange for three witnesses to testify at the March 16 hearing, Oitzinger provided an offer of proof regarding the testimony these witnesses would have provided if they had testified.

A decision in the matter was issued on March 25, 2016, which Bondy appealed. On June 7, 2016, the Unemployment Insurance Appeals Board remanded this matter to the Office of Administrative Hearings for additional information. On July 12, 2016, an in-person hearing was held pursuant to the Unemployment Insurance Appeals Board's remand order. James Brown, attorney at law, appeared on Bondy's behalf. Vicki Knudsen, attorney at law, appeared on the employer's behalf. In addition to Bondy's additional testimony, Richard Opper, the director, appeared as a subpoenaed witness. Jill Caldwell and Wendie Fredrickson, former employees, also appeared and

testified on Bondy's behalf. Marie Matthews and Shannon McDonald were present, but did not testify on July 12, 2016. David Evans observed the hearing.

The parties stipulated that testimony presented by Roy Kemp and Vickie Murphy at an April 21, 2016 grievance hearing would be admitted as evidence. Kemp's testimony is on the first of the Grievance Audio recordings at 5:47:20 - 6:50:24. Vicki Murphy's testimony is on the second Grievance Audio recording and is found at 6:27:42 - 7:02:25. Documents referred to during the April 2016 grievance hearing were:

- JE 4 - DPHHS Communications Policy = Documents 18-24
- JE 8 - 2015 Legislative Communications Handbook = DPPHS Document I
- JE 1 - Bondy's job description = Documents 52-61
- JE 18 - Jacobs' email = Document 80
- JE 33 - Matthews' email to Bondy dated August 14, 2015 = Document 33
- JE 35 - Bondy's response memo dated August 19, 2015 = Documents 34, 35

The parties also stipulated that Claimant's Exhibit 4, Vicki Murphy's memorandum, and DPPHS Document X, a copy of the attachment mentioned in Claimant Document 2, could be admitted. The parties did not object to admitting DPHHS Documents J through L, V, and the third page of Claimant Document 8. Claimant Documents 1 through 3, 5, and DPHHS Documents M through Q were admitted over objections.

During the July 12 hearing, Brown stipulated that Bondy knew Hanson took home files on a thumb drive and responded to a legislator's request for information. Judicial Notice was taken for the following laws: Mont. Code Ann. §§ 2-6-106, 39-51-201 and 45 CFR § 96.33.

FINDINGS OF FACT:

1. Bondy started working for DPHHS in September 1997. For over a decade, she worked as DPHHS's audit bureau chief. Her audit bureau consisted of six employees. Her immediate supervisor for her administrative job duties was Kemp. Bondy reported to Matthews, a CPA, for her audit work job duties. Bondy provided completed audit reports and submitted proposed audits to Matthews for the audit bureau to perform. Matthews either approved or denied proposed audits Bondy and her staff suggested.

2. Prior to 2010, Bondy reported directly to DPHHS's director. In 2010, the position of operations services branch managers was created. Bondy then reported audit results to the operations services branch manager. Matthews became the operations services branch manager in July 2013.

3. Bondy and her audit bureau staff discovered issues concerning Montana Peaks, a company that contracted with DPHHS to provide services. These concerns were based on audits conducted in FY 2010, 2011, and 2012. Even though DPHHS's director initially gave Bondy the go-ahead to do further audits, it was later decided to hire an outside audit firm. Bondy was then instructed to turn over her bureau's audit work papers to the Office of Legal Affairs (Document 80). Bondy concluded DPHHS's management team was unwilling to take the necessary steps to resolve serious concerns she brought to DPHHS's attention. DPHHS's director has legal authority to enter into settlements to resolve issues.

4. Matthews' job required her to make sure the audit bureau functioned properly and efficiently.

5. In an October 3, 2014 meeting, Matthews informed Bondy that she was responsible for reporting concerns with DPHHS's transactions or processes and there were many avenues for her to report her concerns. During that meeting, Bondy told Matthews about a concern with a contract and a data extract. Matthews reminded Bondy that if she did not report her concerns, Matthews and DPHHS would do nothing to resolve potential issues (Document 37).

6. During the fall of 2014, Matthews asked Bondy questions about what she knew about an employee who felt pressured to quit. Bondy concluded Matthews was outside the scope of her job by involving Bondy in this personnel matter. After this incident Bondy felt threatened by Matthews (DPHHS Document H).

7. In 2014, Bondy gave Matthews a list of potential audits her bureau could perform in 2015. Bondy's list included audits that she and her employees concluded posed a high risk for DPHHS. Matthews did not approve the list of potential audits for various business reasons. Bondy did not agree with Matthews' decision. Bondy again concluded management would not take the necessary steps to resolve issues.

8. From 2010 until Matthews' appointment, Bondy's submission of proposed audits were usually approved. After Matthews took over this position, Bondy's proposed audit plan was not summarily approved. Matthews had to decide if audits

Bondy proposed were cost effective for DPHHS and if Bondy and her bureau employees had the skill set to perform the proposed audit. In addition to Bondy's audit bureau, DPHHS could ask for a legislative audit or hire outside auditors. As of July 2015, Matthews had not approved the audits Bondy proposed for the audit bureau to conduct in 2015.

9. In addition to proposed audits, Bondy and her employees completed audits that were requested from programs or divisions of DPHHS. In 2015, the Disability Services Division, with input from Matthews, made a decision that a 2015 audit was unnecessary. This meant fewer audits for Bondy and her employees to perform.

10. In March, April, and June 2015, Bondy and her auditors worked on internal work processes. Working on internal work processes for DPHHS benefitted many programs and Matthews had encouraged these audits. Matthews did not know what audits Bondy and her employees were doing during these months. There were no billable hours for these audits because Bondy directed her employees to report time for internal work processes as administrative time. Bondy incorrectly understood that time reported as administrative time would be spread out among many programs that the audit benefitted. The consequence of reporting time as administrative time decreased the audit bureau's billable hours because reported administrative time was not spread out to various programs.

11. In early July 2015, Bondy received an email from Shannon McMaster informing her that time charged to ADMIN was not cost allocated. McMaster also informed Bondy that if she had one project that dealt with several grants, the charges needed to be broken down by each grant and charged accordingly (DPHHS Document A). Bondy informed McMaster that time could not be directly charged to one federal grant but should be indirectly spread to many grants. Bondy should have reported work on internal work processes as legislative audit so the hours she and her employees worked in March, April, and June would have correctly been spread out to the programs the audits benefitted.

12. When Matthews discovered the audit bureau reported work hours under administrative time, DPHHS could not determine what work Bondy and her bureau had been performing in March, April, and June 2015.

13. Bondy supervised Dave Hanson. Bondy knew Hanson had taken files and provided a legislator with documentary information (Stipulated Fact from July 12 hearing).

14. DPHHS's communication policy requires employees to report a legislator's request for information to the director's office tracking system by emailing the public information officer the request. The policy also required the public information officer to approve all responses before they were sent (Documents 21, 22).

15. Bondy understood that if a legislator requested information, DPHHS's policy required a timely response. Bondy and co-workers did not understand that the 2015 Legislative Communication Handbook did not replace DPHHS's communication policy.

16. In early December 2014, Governor Bullock sent department directors his Administration's Legislative Communications Policy Handbook for the 64th Legislative Session. This handbook stated in part that it was the responsibility of executive agencies to respond to requests for information and reports about the agency's programs. The handbook indicated agencies should always respond in a prompt, courteous, and thorough manner (I). Opper forwarded this policy to his management personnel in early December 2014. Kemp informed employees that he supervised, including Bondy, about the current administration's desire to be transparent. Kemp understood legislators' requests and responses still needed to be reported to the public information officer so the director had a record of the requests and responses. While the Legislative Communications Policy Handbook was new because it allowed employees to answer legislators' questions, it did not eliminate the need to inform the public information officer about the requests and responses provided.

17. Bondy, as Hanson's supervisor, was responsible for making sure he understood DPHHS's policy when responding to a legislator's request for information. When a legislator requested information from Hanson, it was Hanson's responsibility to inform the public information officer about the request and the response Hanson provided.

18. Prior to April 19, 2015, Hanson provided information to a legislator, but did not notify the DPHHS's public information officer about the request or Hanson's response (DPHHS Document Q). On April 19, 2015, Hanson informed Fredrickson that Bondy had already met with a legislator. Hanson also told Fredrickson that he had already reported to Bondy 90% of the information he had passed on to the legislator (DPHHS Document V).

19. In late July 2015, Matthews learned from a legislative employee that Hanson sent emails with files to several legislators and a private citizen from his home computer. Matthews understood the email contained social security numbers and DPHHS' tax ID numbers. On August 3, 2015, DPHHS placed Hanson on administrative leave to investigate Hanson's potential violations of DPHHS's policies.

20. As a result of Hanson's suspension and Bondy's audit bureau not reporting many billable hours in March, April, and June 2015, Matthews did not know what work the audit bureau had been doing these months. Matthews sent Bondy a request on August 14, 2015, asking for the following information:

1. Current work assignment for each auditor and the expected completion date.
2. The audits/reviews planned to be completed in the next 3 months.
3. The projects each auditor worked on for the last year.

Matthews asked for this information for requests 1 and 2 by August 19 and for request 3 by August 21 (Document 33).

21. On August 19, Bondy provided Matthews with a list of the audit projects that were planned for September, October, and November 2015. Bondy also provided a list of the SFY 2015 audit projects that were completed in the last year. She declined to identify the auditors who completed these audits even though she identifies the auditors who completed audits in her yearly proposed audit plan (Documents 34, 35).

22. Bondy concluded Matthews' August 14 request for information posed a threat to her auditors' independence. Bondy informed Matthews that she could not identify which auditor was assigned to an audit because this violated the audit bureau's independence (Document 34). Bondy relied on the Government Auditing Standards that identifies a threat to audit independence as a threat that exerts influence or pressure that will impair an auditor's ability to make independent and objective judgments (Documents 82d, 82e). Based on the early October 2014 discussion when Matthews questioned Bondy about a personnel matter, Bondy also considered Matthews' August 14 request as a personal threat.

23. Bondy and the audit bureau she supervised must follow both the International Professional Practices Framework (IPPF) and the Government Auditing

Standards (GAS). Under GAS independence guidelines, internal auditors are considered independent for the purpose of reporting internally if the head of the audit organization is accountable to the head or deputy head of the government entity, reports the audit results to both the head or deputy head of the government entity and to those charged with governance (Document 82, Claimant's Document 4). Internal auditors must be free from management pressure. The internal audit group must maintain control of the extent of their audit work and the conclusions made from the work performed (Document 82, Claimant Document 4). Also under GAS, the auditor must issue audit reports communicating the result of each completed audit. Under the IPPF, the auditor must also communicate the result, but this is not required in writing (Claimant Document 4).

24. After Bondy sent her August 19 response, DPHHS put Bondy on paid administrative leave for refusing to provide Matthews with requested information and her alleged failure to meet the performance requirements of her job (Documents 36, 78).

25. As Bondy was escorted out of the office on August 19, Caldwell, a co-worker, heard Kemp say she would not be returning to work.

26. During the investigation, DPHHS discovered documents on Bondy's computer that noted concerns she had with DPHHS's transactions or processes, but had not reported to Matthews (DPHHS Documents B, C). Bondy had a meeting on April 13, 2015 (DPHHS Document H) and discussed many of the concerns she noted in memos DPHHS discovered on her computer.

27. Prior to December 9, 2015, DPHHS sent Bondy due process letters on October 16 (Documents 36-38) and November 13, 2015 (Documents 44, 45). On December 9, 2015, DPHHS discharged Bondy for the following reasons:

- A. Instructing audit bureau staff to report time spent as administrative time instead of allocating time to the benefitting programs.
 - B. Refusing to provide Matthews with requested information.
 - C. Failing to report concerns Bondy had with some of DPHHS's transactions and processes.
 - D. Failing to properly instruct an employee to follow DPHHS's communication policy.
- (Documents 48 - 50).

REASON FOR DECISION: An employee who has been discharged for misconduct is not qualified to receive unemployment insurance benefits. Mont. Code Ann. § 39-51-2303. Misconduct includes the willful or wanton disregard of the rights, title and interests of a fellow employee or the employer or the deliberate violations or disregard of standards of behavior the employer had the right to expect. Mont. Code Ann. § 39-51-201(19). The employer has the burden of proving misconduct. *Bean v. Department of Labor and Industry*, 1998 MT 222, 290 Mont. 496, 965 P.2d 256.

A. Instructing staff to report time worked as administrative time in March, April, and June 2015

Bondy admits she instructed her staff to report hours worked in March, April, and June 2015 as administrative time. Bondy understood hours reported as administrative time would be allocated to various programs benefitted by the internal work process audits. While reporting time under legislative audit could allocate hours to various programs, reporting time worked under administrative time did not. The result of reporting administrative time reduced the audit bureau's billable hours and left no record of work Bondy and her staff performed during these months. While Bondy could have easily confirmed her understanding of how time would be distributed when reported as administrative time, she did not. Based on the evidence, Bondy misunderstood how administrative time would be distributed. The facts do not establish that she intentionally failed to bill her time and her auditors' time correctly for March, April, and June 2015. Bondy made an error in judgment when she directed her employees to record administrative time when they worked on internal work processes in March, April, and June. Mont. Code Ann. § 39-51-201(19)(b)(iii) (misconduct does not include good faith errors in judgment).

B. Refusing to provide information that Matthews requested

Bondy asserted she interpreted Matthews' August 14 request for information as a threat to the audit bureau's independence and a personal threat. Bondy relied on GAS as the basis for declining to provide Matthews with the names of auditors who worked or were working on specific audits. Based on the evidence presented during the hearing, Bondy's reliance on GAS for audits not completed has merit. However, for audits that had been completed, Bondy was required to provide the name of the auditor. Bondy acknowledged that in her yearly audit proposal plans she identified the auditor who completed an audit. But she refused to provide this same information when Matthews asked for it on August 14, 2015, for completed audits.

Matthews' August 14, 2015 request on its face is not threatening. Matthews had legitimate business reasons for making the request. When Matthews made the request, Bondy and her staff were paid for hours of work, but most of it was not billed. As a result, Matthews had no idea what work Bondy and her staff performed in March, April, and June 2015. Even though Bondy asserted Matthews was threatening, Matthews' request for names of auditors for completed audits was reasonable.

Matthews' August 14, 2015 request for information was complicated because Bondy knew Hanson had provided information to a legislator and he had recently been suspended. The evidence shows Bondy did not trust Matthews and she knew Hanson provided information DPHHS had not known about.

Specific acts of misconduct include deliberate, willful or purposeful refusal to follow DPHHS's reasonable directions or instructions and violation of known and reasonable company rules. Mont. Code Ann. § 39-51-201(19)(a)(i)(A). After Bondy directed her employees to report internal work audits under ADMIN time, Matthews' August 14, 2015 request for information was reasonable. The evidence establishes Bondy deliberately refused to provide Matthews with requested information for completed audits, which under GAS was appropriate. Bondy even admitted she would provide this same information in August in her yearly proposed audit plan. Bondy was insubordinate and committed misconduct when she refused to provide information that GAS allowed.

C. Failing to report concerns Bondy had with some of DPHHS's transactions and processes

The evidence demonstrates tension existed between Bondy and Matthews. Before Matthews' position was created in 2010, Bondy had a direct line of communication with the director. More importantly, after Matthews was placed in this position, Matthews did not automatically agree with Bondy's proposed audits. While Matthews and Bondy both wanted to do what was in the best interest of DPHHS, they disagreed about what role the audit bureau should play. They also disagreed how effective the minimally staffed audit bureau could be in some audits and what constituted high risk for DPHHS's programs.

In early October 2014, Matthews talked to Bondy after employees raised a concern that Bondy knew about but had not reported to Matthews. Matthews specifically told Bondy she was obligated to inform DPHHS about concerns she had with

transactions or processes so DPHHS could resolve them. Also, Matthews reminded Bondy that she could report concerns to other management personnel. After October 2014, Bondy proposed audits that she felt constituted a high risk for DPHHS, but Matthews did not approve these audits. Bondy was convinced Matthews did not take any of Bondy's suggestions seriously. She did not report any concerns she had with DPHHS's transactions or processes to Matthews. Bondy met with another employee on April 13, 2015, and reported her concerns. Bondy also asserted she reported concerns to the Federal government, but declined to provide any specifics. The facts establish that after the October 2014 discussion with Matthews, she reported at least some of her concerns to an employee in an April 13, 2015 meeting (DPHHS Documents B, C). DPHHS did not establish that Bondy committed misconduct with respect to this issue.

D. Failing to properly instruct an employee to follow the DPHHS's communication policy

During the hearing, Bondy contended that in late December 2014, the director sent an email indicating legislators' requests did not have to be recorded in the director's office in accordance with the DPHHS's communication policy that was effective as of March 15, 2005 and revised on January 24, 2012 (Documents 18-22). The evidence does not support Bondy's contention on this point. The 2015 Legislative Communication Handbook (Document I) encouraged state employees to answer legislators' questions, but did not negate DPHHS's communication policy.

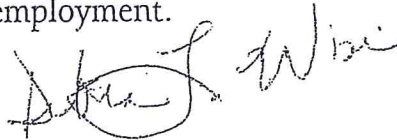
The evidence establishes that Bondy knew one of her auditors was secretly providing a legislator with documents that DPHHS had no knowledge about. The evidence indicates that while Bondy may not have known the specific information Hanson provided to the legislator, she knew Hanson was secretly providing documents to a legislator. Bondy's failure to inform management that Hanson was secretly providing documents to a legislator amounts to misconduct. Her failure to report Hanson amounts to an intentional disregard of the standard of behavior DPHHS had a right to expect from her as a supervisor of the audit bureau.

In summary, while not all of the reasons for Bondy's discharge amount to misconduct, DPHHS established that some of the reasons she was discharged amount to misconduct.

The parties should note that Mont. Code Ann. § 39-51-110, which states, "A finding of fact or law, judgment, conclusion, or final order made with respect to a

determination made under this chapter may not be conclusive or binding or used as evidence in any separate or subsequent action or proceeding in another forum except for proceedings under this chapter, regardless of whether the prior action was between the same or related parties or involved the same facts.”

DECISION: The Unemployment Insurance Division’s February 19, 2016 redetermination is affirmed. As of January 3, 2016, Carol Bondy is not qualified to receive benefits. This disqualification continues until she earns eight times her weekly benefit amount from insured employment.



DEBRA L. WISE
Hearing Officer
Helena, Montana
July 22, 2016

This decision is the final decision of the Montana Department of Labor and Industry in this case. You may appeal this decision to the Unemployment Insurance Appeals Board within 10 days after this decision was mailed to your last known address. The appeal must be received no later than **August 1, 2016**. The time for appeal may be extended for good cause. Your appeal must be filed with the Unemployment Insurance Appeals Board, P.O. Box 1728, Helena, Montana 59624; phone (406)444-3311; fax (406)444-9038; email: uiappealsboard@mt.gov.

*Calendared on
7/25/16 by [signature]*

- c: Helena Claims Processing Center
- James Brown, Attorney
- Vicki Knudsen, Attorney