

1992

# Kevin Holland v. The Utah State Office of Education and the Department of Human Resource Management, Career Service Review Board : Brief of Appellant

Utah Court of Appeals

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J. Kent Holland; Anderson & Holland; attorney for appellant.

Stephen G. Schwendiman; assistant attorney general; attorney for respondents.

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 920486CA

Case No. 920486-CA

IN THE UTAH COURT OF APPEALS

KEVIN HOLLAND,  
Appellant,

vs.

THE UTAH STATE OFFICE OF  
EDUCATION and THE DEPARTMENT  
OF HUMAN RESOURCE MANAGEMENT,  
CAREER SERVICE REVIEW BOARD,

Respondents.

BRIEF OF APPELLANT

92-0486-CA

Priority # 15

Appellant Kevin Holland, by and through his attorney of record, J. Kent Holland, and pursuant to the Utah Rules of Appellate Procedure, hereby files the following Brief in the above entitled matter.

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FILED

NOV 20 1992

COURT OF APPEALS

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### JURISDICTION

This appeal is from a final judgment of the Career Service Review Board of the State of Utah. Jurisdiction in this matter is conferred upon this Court under § 63-46b-14 Utah Code Annotated (1953, as amended).

### ISSUES PRESENTED AND STANDARD OF REVIEW

1. Whether Human Resource management violated the mandatory rule regarding priority in hiring from the statewide reappointment register, thereby impairing Kevin Holland's rights as a Reduction in Force employee. A correction-of-error standard of judicial review applies to agency decisions involving statutory interpretations which an appellate court is as well suited to decide as the agency. Taylor v. Utah State Training School, 775 P.2d 432 (Utah App 1989); Hurley v. Board of Review, 767 P.2d 524 (Utah 1988) at 527. This court should review this matter as a matter of law, considering Human Resources' compliance or noncompliance under a correction of error standard. Thurston v. Box Elder County, 191 Utah Adv. Rep. 27 (Utah App. 1992)

2. Whether the Career Service Review Board erred in determining that Kevin Holland's previous position as a Graphic Arts Camera Specialist was not "comparable" to a grade 19 position, and therefore erred in limiting him to lesser positions. The interpretation of statute is a question of law, and this Court

should review it for correctness. Anderson v. Public Service Commission, 190 Utah Adv. Rep. 24 (Utah 1992), Savage Indus. v. State Tax Comm'n, 811 P.2d 664 (Utah 1991).

3. Whether the Career Service Review Board erred in deciding that an estoppel could not have arisen from the representations, oral and written, made to Kevin by Department of Human Resources staff members concerning his qualifications and grade. The determination of whether estoppel could possibly have arisen is a question of law, and this Court should review it for correctness. Anderson v. Public Service Commission, 190 Utah Adv. Rep. 24 (Utah 1992), Savage Indus. v. State Tax Comm'n, 811 P.2d 664 (Utah 1991).

**DETERMINATIVE STATUTES AND PROVISIONS**

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**STATEMENT OF THE CASE**

A concise statement of the facts material to consideration of the questions presented are as follows:

1. The Petitioner, Kevin Holland (hereinafter referred to as "Kevin") was employed as an Apprentice Graphic Arts Camera Specialist with State Printing, Division of Central Services, Department of Administrative Services, from January, 1985 through May, 1990, when he was laid off due to a reduction in work load.

2. At the time that Kevin was laid off, he was listed as "approximately Grade 19".

3. In the course of his exit interview, Kevin was advised by Connie Reed, the Human Resource Manager for Department of Administrative Services, that his position was most closely comparable to a Grade 19 position.

4. Shortly after being so advised by Connie Reed, Kevin was similarly advised by Paula McKissick and Gary Manning, human resource analysts for the Department of Human Resource Management, that his position was most comparable to a Grade 19 position.

5. In January, 1991, Kevin applied for a position as a Graphic Arts Specialist for the Office of Education. The position was a Grade 19 position and involved work which was very similar, if not identical, to Kevin's previous position with the State Printing Office.

6. Kevin was interviewed twice for the Office of Education position, and was not told at either interview that a Grade 19 position would not be comparable to his previous position.

7. In approximately March, 1991, Kevin was advised by Jay Jensen, a human resource analyst for the Department of Human Resource Management, that he could also apply for a Grade 17 position under the same rehiring priorities as a person on the statewide reappointments register.

8. Rather than hiring Kevin for the position for which he had applied, the Office of Education hired Katherine Wiser, a current employee of the State Printing Office.

9. On May 22, 1991, after Kevin had filed a grievance with the Career Service Review Board, the Department of Human Resource Management changed his listing on the reappointment register from Grade 19 to Grade 18.

10. Kevin's grievance came before the Hearing Officer of the Career Service Review Board on November 15, 1991, and was denied.

11. Kevin's grievance was appealed to the Career Service Review Board pursuant to Utah Code Annotated § 67-19a-408, and a Decision and Order was entered on July 22, 1992.

#### **SUMMARY OF THE ARGUMENT**

This case is before the Utah Court of Appeals as an appeal from the decision of an administrative agency. Appellant Kevin Holland ("Kevin") will show that this case presents three errors made in its earlier disposition. First, that Human

Resources did not follow mandatory state guidelines in administering its rehiring of Kevin as a Reduction in Force worker. Second, that the Career Service Review Board ("CSRB") erred in its narrow interpretation of the word "comparable." Finally, that the CSRB erred in holding that estoppel could not have arisen in this matter. Kevin asks this court that he be reinstated at Grade 19, and placed in appropriate employment.

#### ARGUMENT

##### POINT ONE: HUMAN RESOURCES DID NOT FOLLOW

##### THE STATE'S MANDATORY REDUCTION IN FORCE GUIDELINES.

Human Resources did not apply the mandatory state rule of priority in hiring when they hired Katherine Wiser ahead of Kevin. Human Resource Management Rule 5-4.(3), sets out this mandatory rule:

##### **R468-5-4    Order    of    Selection    For    Career                  Service Positions**

\*   \*   \*

5-4.(3)    Third, appointment shall be made from the statewide reappointment register containing the names of employees who meet the minimum qualifications for the position and who have previously attained the same salary range as the vacant position.

5-4.(4)    Fourth, appointment at management discretion may be made through transfer or promotion of qualified employees within State government.

The use of the word "shall" in this statutory language

makes it mandatory for Human Resources to comply with this rule. No discretion is allowed where a qualified employee can be found on the statewide register. Human Resources' "management discretion" is only applicable after no employees who meet the minimum qualifications and have attained the same salary range are able to be located. Human Resources did not have the discretion to remove Kevin from his rightful place on the reappointment register. Administrative agencies do not have legal authority to alter the RIF laws. Taylor v. Utah State Training School, 775 P.2d 432 (Utah 1988) Thurston v. Box Elder County, 191 Utah Adv. Rep. 27 (1992). By ignoring this mandatory rule, Human Resources wrongfully eliminated the benefit of the reappointment register.

Kevin Holland met the qualifications for the vacant Grade 19 position. He had previously attained, even exceeded, the salary range. By going outside the reappointment register, ignoring their mandatory Management rule, and hiring Ms. Wiser from outside the reappointment register, Human Resources violated the rights of the state employees on the register. Kevin should be reinstated in the Grade 19 Position.

**POINT TWO: THE CSRB ERRED IN**  
**ITS DEFINITION OF "COMPARABLE."**

Kevin's earlier position was comparable to a grade 19. Utah Code Ann. § 67-19-17 provides in pertinent part:

**Reappointment of employees not retained in exempt position.**

Any career service employee accepting an appointment to an exempt position who is not retained by the appointing officer, unless discharged for cause as provided by this act or by regulation, shall:

(1) be appointed to any career service position for which the employee qualifies in a pay grade comparable to the employee's last position in the career service provided an opening exists. [Emphasis added.]

It is undisputed that Kevin was not discharged for cause. As stated by Mark E. Rowley, State Printer, in a letter submitted with Kevin's hearing brief: see Addendum "A"

It became necessary to reduce our workforce in the pre-press area. The workload in that department reduced to the point we felt a reduction in force was necessary... [Kevin Holland] was not fired, or under any disciplinary action.

Kevin was qualified for the position which he was seeking, a fact which the Office of Education does not dispute. Therefore, as a "reduction in force" employee, Kevin was eligible under Utah Code Ann. § 67-19-17 to be hired "in a pay grade comparable to the employee's last position... provided an opening exists." The opening for which he applied was nearly identical to the position which he had previously held with the State Printing Office.

The priorities for hiring are set forth by the Human

Resource Management Rules, which provide in pertinent part:

**R468-5-4 Order of Selection For Career  
Service Positions**

\* \* \*

5-4.(3) Third, appointment shall be made from the statewide reappointment register containing the names of employees who meet the minimum qualifications for the position and who have previously attained the same salary range as the vacant position.

5-4.(4) Fourth, appointment at management discretion may be made through transfer or promotion of qualified employees within State government.

It is undisputed that Kevin's priority was ahead of Katherine Wiser's because Kevin was a former state employee who had been laid off and placed on the reappointment register, whereas Katherine Wiser was a present state employee. Stephen G. Schwendiman, counsel for the agency, admitted at the hearing:

[T]he Office of Education freely acknowledges that if the determination is made that 19 is the position that is the equivalent position to the apprentice program, then the rule would have mandated he be hired into the position which Ms. Wiser was hired into.

Kevin was, therefore, entitled to be hired unless the position in which he had previously worked was not "comparable" to a Grade 19 position.

The error made by the Hearing Officer was in her determination that an applicant is only entitled to priority as to



positions "equivalent or lower in grade" (Findings of Fact and Conclusions of Law, page 4), rather than using the test called for by the statute, which by its literal wording entitles a qualified applicant to a position at a pay grade which is "comparable" to the employee's last position. Kevin has not been able to locate any rule in the Human Resource Management Rules or any other State rules which state that he is solely entitled to positions of equivalent or lower grade. It is, therefore, unclear whether the Administrative Law Judge relied on some rule or only on the opening statement of Assistant Attorney General Schwendiman, see page 13 lines 11-12 of the Step 5 Hearing Transcript, in adopting this standard. However, the law is clear in this matter. No administrative agency may, by rule or interpretation, extend or restrict a statute contrary to its meaning. See Utah Hotel Co. v. Industrial Com., 107 Utah 24, 151 P.2d 467, 153 ALR 1176; Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 US 129, 80 L.Ed 528, 56 S.Ct. 397, reh den 297 US 728, 80 L.Ed 1010, 56 S.Ct. 587; Whitcomb Hotel v. California Employment Commission, 24 Cal.2d 753, 151 P.2d 233, 155 ALR 405; Casualty Reciprocal Exchange v. Sutfin, 196 Okla 567, 166 P.2d 434; Roberts v. Commissioner of Int. Rev., (CA9) 176 F.2d 221, 10 ALR.2d 186; Helvering v. Sabine Transp. Co., 318 US 306, 87 L.Ed 773, 63 S.Ct. 569.

The Hearing Officer erroneously interpreted "comparable" in a cramped and narrow fashion. Webster's Seventh New Collegiate Dictionary defines "comparable" as:

[c]apable of or suitable for comparison.

Nothing in the commonly understood definition or the statutory language indicates that "comparable" means "equal to or less than", as the Office of Education and CSRB now maintain. It is important to note that the position of Apprentice Graphic Arts Camera Specialist existed only in State Printing and not in any other State agency. Human Resources was required by law to find an equivalent grade to place Kevin on the general pay plan. There is no question that experts in personnel management evaluated the position of Apprentice Graphic Arts Camera Specialist and determined that this was equivalent to a Grade 19. Their determination is confirmed by observation of the graphs attached as Addendum "A." As the Court can see, an Apprentice Graphic Arts Camera Specialist starts at a rate of \$9.01 per hour which is higher than a Grade 19 starting at \$8.81 per hour.

Even the four staff members of the Department of Human Resource Management who analyzed Kevin's former position all found it most comparable to a Grade 19. As shown in the bar graph previously submitted by Kevin and attached hereto as Addendum "C", his former position was in some respects better and in some

respects worse than the position for which he had applied, but in all respects the difference was one of small degree in either direction. Further, in Kevin's particular instance, his Apprentice Graphics Arts Specialist salary with equivalent increases would always be in excess of Grade 19. See Addendum "D".

The Department of Human Resource Management contends that Kevin's grade was more the equivalent of a Grade 18, but the starting salary for a Grade 18 is much lower, at \$8.35 per hour. The starting salary is crucial because at the State salary increases are given by percentages, therefore, an employee with a higher starting salary will always remain at a higher salary than a similarly situated employee with a lower starting salary. Kevin's salary as an Apprentice Graphic Arts Camera Specialist would have remained higher than that of a Grade 19 because of these percentage increases. Therefore, the position of Apprentice Graphic Arts Camera Specialist was most comparable to a Grade 19.

**POINT THREE: THE CSRB ERRED IN**

**HOLDING THAT ESTOPPEL COULD NOT APPLY.**

Estoppel is defined by the following elements. A representation is made, relied upon to the complaining party's detriment, that is later asserted to be untrue. Restatement (2nd) of Contracts, § 90, Calamari and Perillo on Contracts, § 99. Justice requires that the party who made the representation be held

to its truthfulness. This rule is limited in its application to state government in Utah. Anderson v. Public Serv. Comm'n 190 Utah Adv. Rep. 24 (Utah 1992), Utah State Univ. of Agric. & Applied Science v. Sutro & Co., 646 P.2d 715 (Utah 1982) Under the rules governing estoppel against state administrative agencies, the wronged party cannot recover unless he or she relied upon a specific written representation by an authorized agent. Anderson, 190 Utah Adv Rep. 24. The injustice that results from the government action must be substantial. Mendez v. Utah Dept. of Social Servs. 813 P.2d 1234 (Utah App 1991), Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689 (Utah 1979), Sutro, 646 P.2d 715, 718 (Utah 1982); Ehlers & Ehlers v. Carbon County, 805 P.2d 789, 792 (Utah App. 1991).

These elements have occurred in Kevin Holland's case. At the outset, it will be noted that no less than four (4) employees of the Department of Human Resource Management told Kevin that the position at which he had worked was most closely comparable or equivalent to a Grade 19 position. No representative of the State of Utah made any contrary representation until he was turned down for the position at the Office of Education and Ms. Wiser was hired.

These representations were official, made by authorized agents of the administration, and accompanied by written memoranda.

see Addendum "B". The harm done in this case is substantial. Kevin attempted to secure employment at what he was told was a comparable level, but was unable to do so. Promissory estoppel is the only remedy available that will redress these injuries caused by reliance. The reversal of Kevin's evaluation as a Grade 19 attempts to lock him into a lower-paying job in a manner not allowed by the statute, and should not be allowed.

In Kevin Holland's exit interview, Connie Reed, Human Resource Manager for the Department of Administrative Services, advised that he was eligible for a Grade 19 position since his position was equivalent to a Grade 19. Jay Jensen, the Human Resource Analyst for the Department of Human Resources who was assigned to help Kevin get rehired, reviewed his file and confirmed that he had rehire rights for any Grade 19 position.

Kevin Holland relied upon these representations, and applied for a Grade 19 position. After being denied the position, Holland filed the appropriate grievance pursuant to Utah Code Annotated § 67-19a-401 et seq., the department asserted that these representations were not true, by re-evaluating his status. This is the type of injustice that estoppel is meant to prevent. Kevin Holland is entitled to rely on the representations made to him.

#### **CONCLUSION**

Human Resource Management violated Kevin Holland's rights

by ignoring the mandatory rule requiring them to hire qualified applicants from the statewide reappointment register. This rule is not discretionary, and failing to follow it was an abuse of discretion on the part of Human Resource Management. Kevin Holland was qualified for the position and had previously exceeded the salary range. The decision of Human Resource Management should be overturned.

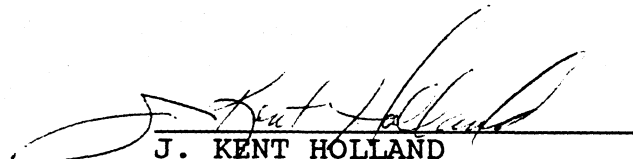
There is no question that the most comparable salary range for Kevin was a Grade 19. The statute could have easily stated equal to or less than instead of comparable, but it did not. The drafters of the statute apparently did not intend to lock a reduction in force employee seeking rehire into a lesser position. The administrative agency or department cannot change a meaning of a statute by rule making or interpretation. However, that is exactly what has been attempted by Human Resource Management Department.

The Career Service Review Board erroneously interpreted the law when it held that an estoppel did not, and in fact could not, arise. Kevin was informed by several members of the Department of Human Resource Management that he was being considered a grade 19. Documents were prepared for his file evidencing his status as a Grade 19. He relied on these representations by applying for a Grade 19 position. After he was

denied the position, and after he filed the appropriate grievance, he was "re-evaluated" at a lower level. This is an injustice of the type estoppel was meant to prevent.

Kevin Holland was entitled to have the job at the Board of Education which was wrongly given to Ms. Wiser. The denial of this position, and his subsequent re-evaluation and loss of status were wrongful. Therefore, he is entitled to re-instatement in that position or a comparable position and is further entitled to all appropriate back pay and benefits.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of November, 1992

  
J. KENT HOLLAND  
Attorney for Appellant

**ADDENDUM "A"**





Norman H. Bangerter  
Governor

Archie S. Hurst  
Director

# State of Utah

Department of Administrative Services  
Division of Central Services

1250 State Office Building  
Salt Lake City, Utah 84114  
(801) 538-3014

State Printing  
B-52 State Office Building  
Salt Lake City, Utah 84114

To whom it may concern:

Kevin Holland has been employed by State Printing for 5 years. His main duties have been in conjunction with the pre-press area. His current duties include shooting negatives, halftones, and PMT's, as well as stripping and plate burning. Kevin has been the principal employee responsible for this work. He is proficient in these areas. He also has done a very good job of maintaining the equipment that he uses, including performing minor repairs to the equipment. This has resulted in cost savings to us. While employed at State Printing, Kevin has also worked in inventory, estimating, and in purchasing for 1 year.

It became necessary to reduce our workforce in the pre-press area. The workload in that department reduced to the point we felt a reduction in force was necessary. In addition, new equipment being purchased would further reduce the demand for employee hours especially in the darkroom, stripping, and plate making areas. These factors necessitated a lay off for Kevin. He was not fired, or under any disciplinary action.

I have appreciated all of Kevin's hard work and wish him the best.

Mark E. Rowley,  
State Printer

**ADDENDUM "B"**

WORKFORCE ADJUSTMENT PLAN  
DEPARTMENT OF ADMINISTRATIVE SERVICES  
DIVISION OF CENTRAL SERVICES  
STATE PRINTING

1. Reasons for reduction-in-force: Personnel costs in State Printing are now running about 50 percent of total sales. Industry standards set overhead at 30 to 35 percent of total sales. In realigning printing responsibilities, it had been determined that the pre-press area is overstaffed considering the amount of work being ordered.
2. Categories of work to be eliminated: Apprentice Graphic Camera Specialist.
  - a. Revenue Source: Internal Service Funds
  - b. Low org: 1122 County: Salt Lake
  - c. Org chart: attached
3. Have time-limited, seasonal, temporary and probationary employees been displaced.

No. We currently have one temporary (TE) bindery operator 13. This position needs to be filled permanently and has been offered to the affected employee which he has declined.

4. Specific measures taken to facilitate placement of affected career service employee.

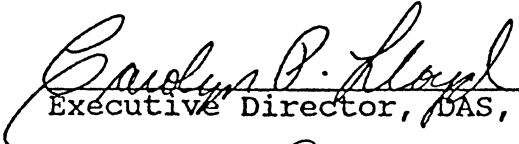
As shown in the attached letter, the employee was offered a job doing inventory and press work. This position would be a comparable grade to his current position (approximately grade 19). He had previously done these duties and this would have merely been a reassignment of previous duties. He brought in a doctor's statement saying he could not do the lifting required of this position. We then offered him the Bindery Operator 13 position at no reduction in pay. He has told us he would prefer to be RIF'ed. Employee has also asked that the effective date of this RIF be around May 16, 1990.

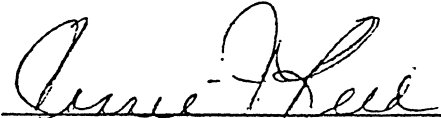
It may be necessary at another date to move another current employee to the Bindery position.

a. Interchangeable skills were considered - see attached matrix prepared by Mark Rowley, State Printer. Camera work will now be done by Katherine Wiser, the RIF employee's supervisor. She has previously held the title of Graphic Camera Specialist.

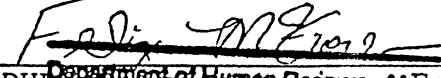
5. Employees and their retention are listed on the attached page.

Recommending Officer, Director of Central Services, Archie S. Hurst

 5-16-90  
Executive Director, DAS, Carolyn P. Lloyd

  
Human Resource Manager, DAS, Connie W. Reed

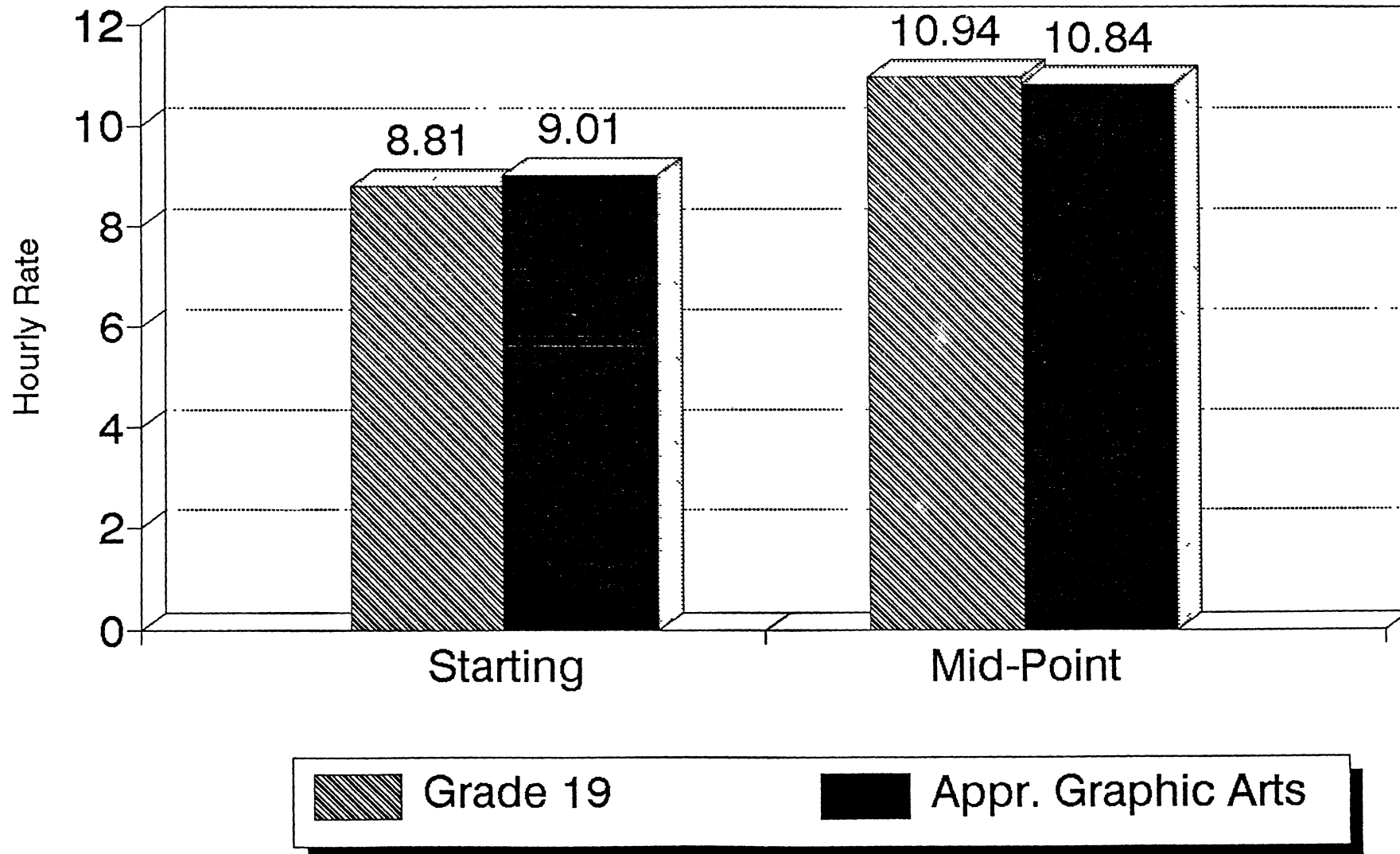
**APPROVED BY**

 Director, Employment Division  
Department of Human Resource Management J. McGowan  
DHRT Representative

ADDENDUM "C"

# Salary Comparison

## Grade 19 vs. Appr. Graphic Arts



**ADDENDUM "D"**

# Salary Increases

(Historical Average: 1.25% per year)

