

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

In the Matters of Consolidated Classification Appeal Nos. 3-2002 (Case No. 1158-2002) and 3-2003 (Case No. 796-2003):

Teresa Garrison, Debbie Byrd,)	
Michelle Ekstrom and Patti Sundberg,)	
Administrative Support, Department of)	
Natural Resources and Conservation,)	
Appellants,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND RECOMMENDED ORDER
State Personnel Division,)	
Department of Administration,)	
Respondent.)	

* * * * *

I. INTRODUCTION

In this appeal, Teresa Garrison and Debbie Byrd (Appeal No. 3-2002), and Michelle Ekstrom and Patti Sundberg (Appeal No. 3-2003), the appellants, contend that the Department of Administration (DOA) incorrectly assigned complexity factor rating level 3 under the Benchmark Factor Method (BFM) for their Administrative Support positions with the Department of Natural Resources and Conservation (DNRC). Appellants contend that their proper complexity factor rating was level 4. Based upon this contention, appellants assert that their positions were incorrectly classified as class 249110 Administrative Support, Grade 10, instead of class 249111 Administrative Support, Grade 11, upon a level 3 rather than level 4 complexity rating, both under the statewide classified pay plan (pay plan 060) and under the broadband pay plan (pay plan 020) when DNRC switched to it.

Hearing Officer Terry Spear conducted a contested case hearing in this matter on September 23 and September 30, 2004. Richard Letang and Quinton E. Nyman represented the appellants. Ron Wilson represented DOA.

Appellants Michelle Ekstrom and Teresa Garrison, Kristin Jacobson and Jim Kerins, outside consultants to the Department of Administration, Mike Mikota, Senior Personnel Specialist for the Department of Natural Resources and Conservation, Kelly DaSilva, Human Resources Consultant for the Department of Administration, and Chris Blazer, Senior Classification Analyst for the Department of Administration, testified in person. By agreement of the parties, Fred Staedler, appellant Sundberg’s supervisor, and Jonathan Hansen, appellant Ekstrom’s supervisor, testified by telephone. The parties stipulated to the admission of Appellants’ Exhibits U-1 through U-20 and Respondent’s Exhibits A through HH. Having considered the testimony of the witnesses and arguments of the parties’ representatives, the Hearing Officer makes the following findings of fact, conclusions of law, and order.

II. ISSUE

The issue is whether the complexity factor rating of level 3 was proper for all four appellants' classifications under BFM. A complete statement of issues appears in the Hearing Officer's "Order Denying Motions to Dismiss, to Return to Step 2 and to Clarify Remedy," February 20, 2004.

III. FINDINGS OF FACT

1. Acting through their union, Teresa Garrison, Debbie Byrd, Michelle Ekstrom and Patti Sundberg filed classification appeals with the Board of Personnel Appeals regarding their jobs with the Montana Department of Natural Resources and Conservation (DNRC) on January 3, 2002. Their appeals each included an attachment (referenced on each appeal form itself) which identified the issues appealed and explained the reasons each issue was appealed, as well as copies of their respective position descriptions. The Board's agent, Jennifer Jacobson of the Labor Standards Bureau of the Employment Relations Division, Montana Department of Labor and Industry, received the original appeal documents on January 3, 2002.

2. In October 2002, retroactively effective to May 18, 2002, DNRC switched from the Statewide Classification System (pay plan 060) to the Broadband Classification System (pay plan 020). The four appellants in this case received broadband classifications consistent with their existing job description complexity factor levels, which in all four instances were level 3.

3. During the administrative proceedings on their classification appeals at Step 2, DOA found that all four appellants properly had a supervision received factor level of 3 instead of 2. It recommended that Sundberg and Ekstrom receive Grade 11 classification with back pay for not more than 30 days prior to the date of appeal filing. For Garrison and Byrd, DOA found that the new point total was still proper for a Grade 10 classification under pay plan 060. During the contested case proceedings, the parties agreed in writing that the supervision received factor level should be at level 3 rather than 2 for all four appellants.

4. On June 26, 2003, appellants filed a single typed letter with the Board's agent, obtaining a photocopy with the Standards Bureau's "received" date stamp establishing receipt. The letter had a single line after the addressee information, with "Re: Appeal #" typed on the line and handwritten after the typed "#" the designation "CLA 3-2002." The letter stated, in its entirety, the following.

The Association and Appellants have received the Department of Administrations classification review on the subject review. After reviewing the materials the appellants wish to move the appeal to step 3. The issue still at appeal is level of complexity. The Association believes the position would be better classified under complexity level 4. All other factors originally appealed have been resolved.

When no appeal notice was forthcoming, the appellants contacted the Board's agent, who could not find the original letter. On July 31, 2003, the appellants provided a copy of the original letter (including the original date stamp establishing when the Board's agent had previously received it). On August 5, 2003, the Board's agent issued notices acknowledging in each instance receipt of appeal at step 3 in, respectively, Consolidated Classification Appeal Nos. 3-2002 and 3-2003, and transferring both appeals to the Hearings Bureau. This present proceeding followed.

5. At all times relevant to these consolidated appeals, DNRC employed Garrison, Byrd, Ekstrom and Sundberg in administrative support positions. Garrison (position number 60755) worked in the Northwestern Land Office in Kalispell. Byrd (position number 60765) worked in the Northwestern Land Office in Libby. Ekstrom (position number 60922) worked in the Southwestern Land Office in Missoula, as office manager. Sundberg (position number 60426) worked in the Southwestern Land Office in Anaconda, as office manager.

6. Garrison's work involved spending 61.25% of her time engaged in duties at a level 3 complexity, including answering internal and customer inquiries related to various DNRC programs, issuing and administering special use licenses, permits and leases (related to outfitter/guides and cabin sites) and providing forestry assistance in various programs including Hazard Reduction Agreements, Streamside Management Zones and Best Management Practices, as well as fire management. She spent 34.75% of her time engaged in the same duties, but at a level 4 complexity. Her level 4 complexity work included 2% of her time answering inquiries about and issuing and administering Hazard Reduction Agreements, .25% of her time on slash inspections, 30% of her time on Cabin Site leasing program work and 2.5% of her time as a rotational unit fire duty officer.¹ The balance of her time was engaged in more purely administrative duties at level 2 complexity (2%) related to the same programs, or in office management duties at undeterminable complexity levels (2%).

7. Byrd's work involved spending 68% of her time engaged in duties at a level 3 complexity, including answering internal and customer inquiries related to various DNRC programs, administration regarding Hazard Reduction Agreements, the Streamside Management Zones and Best Management Practices, as well as slash burning inspections, some fire management, preparation of Environmental Impact Statements, administrative work in budgeting and payroll/personnel processing and some computer work (software training for other DNRC employees and computer program updating). She spent 27% of her time engaged in the same duties, but at a level 4 complexity. The balance of her time was spent in more purely administrative duties at a level 2 complexity related to the same programs.²

8. Ekstrom's work involved spending 66.5% of her time engaged in duties at a level 3 complexity, including answering internal and customer inquiries related to various DNRC programs, issuance of Hazard Reduction Agreements, issuance of burning permits and firewood and timber permits, slash burning inspections and account management, issuance of notices with accompanying affidavits, some fire management, preparation of Environmental Impact Statements, wildland training, status reports, administrative work in budgeting, payroll/benefits and cost accountability [sic], some office management, some supervision and some computer troubleshooting and training. She spent 29% of her time engaged in the same duties, but at a level 4 complexity. Her level 4 complexity work included 10% of her time answering inquiries about and issuing and administering Hazard Reduction Agreements, 3% of her time on slash inspections, 1% of her time on burn permits, 3.5% of her time on timber and firewood permitting program work, 1% of her time on troubleshooting servers and computer training, 3% of her time

¹ See Exhibit I-13. The hearing officer found higher Level 4 percentages (and, as a result, lower Level 3 percentages) than the exhibit reflects.

² See Exhibit J-13.

as an incident commander/fire duty officer, 1% of her time drafting seasonal position descriptions, 4% of her time dealing with budget responsibility and 2.5% of her time providing supervision.³ The balance of her time was engaged in more purely administrative duties at a level 2 complexity (4%) related to the same programs or general duties of undeterminable complexity (.5%).

9. Sundberg's work involved spending 75% of her time engaged in duties at a level 3 complexity, including answering internal and customer inquiries related to various DNRC programs, issuance of Hazard Reduction Agreements, issuance of burning permits and firewood and timber permits, slash burning inspections and account management, issuance of notices with accompanying affidavits, considerable fire management, preparation of Environmental Impact Statements, status reports, administrative work in budgeting and cost accountability [sic], some supervision and some computer program updating. She spent 21% of her time engaged in the same duties, but at a level 4 complexity. The balance of her time was engaged in more purely administrative duties at a level 2 complexity related to the same programs.⁴

IV. OPINION

Montana law requires the Department of Administration to develop a classification plan for state employees and permits employees to appeal the allocation of positions to classes in the system. Mont. Code Ann. §§ 2-18-201 and 2-18-203(2). The function of developing guidelines for classification is delegated to DOA. Mont. Code Ann. § 2-18-202.

The Board of Personnel Appeals' function in this matter is limited to determining whether a position is properly classified. The purpose of that function is to review the actions of DOA and to ensure that DOA properly adheres to its rules, regulations, and practices. *Mead v. Board of Personnel Appeals* (1988), 235 Mont. 208, 213-14, 766 P.2d 1300, 1303.

The four appellants have the burden of proving by a preponderance of the evidence that they have been aggrieved by DOA classification of their positions. Mont. Code Ann. § 2-18-1012; Admin. R. Mont. 24.26.513(f). Accordingly, the appellants must show by a preponderance of the evidence that either the factor levels of complexity are incorrect or that the department's application of the BFM to the position was flawed.

This case involves both the Statewide Classification System and the Broadband Classification System. Both classification manuals set out essentially identical principles of application for the complexity issues involved in this case:

(1) Use of the predominant work principle, meaning that the work to which the factors are applied must be work performed 50% of the time or more. In those instances where no duty is performed 50% or more of the time, the predominant work consists of the most difficult duties grouped into a body of work performed at least 50% of the time.

³ See Exhibits G-14 and G-15. The hearing officer found higher Level 4 percentages (and, as a result, lower Level 3 percentages) than the exhibit reflects.

⁴ See Exhibit H-14 and H-15.

(2) The predominant work must be fully equivalent to the intent of the factor level chosen.

(3) Predominant work factors be applied to the same body of predominant work.

(4) A reviewer must start at the first factor level and progress to the first level that most fully describes the total predominant work.

(5) Comparison to benchmark positions is mandatory.

Classification Manual, Vol. 3, “Methods and Procedures,” Statewide Classification System, pp. II-2 through II-5 and *Classification Manual*, Vol. 3, “Methods and Procedures,” Broadband Classification System, pp. 3-7.

The appellants presented no credible evidence comparing the complexity of their work to benchmark positions, as required by the Benchmark Factoring Method implemented by DOA. Nevertheless, if each appellant’s predominant individual work (more than 50% of an appellant’s work) involved work at complexity level 4, the result could change the classification of the jobs of Garrison and Byrd from grade 10 to 11 under pay plan 060 (with the point totals they would have had) and change the band classifications of all four appellants when DNRC converted to pay plan 020 during the pendency of this appeal. The parties agreed that all four appellants performed some work at complexity level 4 and some work at complexity level 3. The key disputes centered whether DOA properly determined the amount of level 4 complexity work each appellant performed.

Complexity level 3 work involves systematic, detailed, skilled application of related methods and techniques, and examination of multiple procedural or technical variables. Typical work requires the selection of appropriate courses of action based upon identification and examination of data. Decisions are based on a combination of variables that are readily observable in nature, and modification of the structure of work elements, the content of the data, or basic work formats. This work requires the knowledge of appropriate standardized procedures, or sources of information, and the ability to determine courses of action based upon standardized rules and regulations, or the skill to operate tools and equipment that require some training or the completion of on-the-job training programs.

Complexity level 4 work involves seeking out and gathering data that is not readily available, summarizing and drawing conclusions from data, and/or fabricating and composing work elements into new arrangements. Procedures include: interpretation of data, information and guidelines; coordinating pre-determined, sequential activities to complete projects in a project-driven work environment; and evaluation of related procedures and circumstances. This work requires knowledge of an occupationally specialized vocation, in which procedures may be modified to fit conditions.

See, Exhibits A-E for BFM complexity level 3 and 4 benchmark positions.

DOA provided expert testimony, through both its classification employees and through outside consultants, regarding the complexity level of the particular duties of the appellants. Rule 702, Mont. R. Ev., provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

It is unclear whether there is a scientific or technical field of expertise of classification of complexity levels under the two Montana State employee pay plans. However, in *Berry v. City of Detroit* (1994), 25 F.3d 1342, 1352, a federal court clearly stated the distinction between scientific (and technical) expertise versus experience:

The distinction between scientific and non-scientific expert testimony is a critical one. By way of illustration, if one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.

On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness *if* a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.

Berry at 1349-50.

As in *Berry*, the present case involves experience. In *Berry*, the court decided that the expert had insufficient qualifications to establish a foundation to express reliable opinions about the specific practice and policy involved. *Berry at* 1348. But the reasoning of *Berry* supports consideration of DOA's experts' testimony regarding complexity.

There is no basis for the legal conclusion that only persons with sufficient experience in classification work under the two state pay plans are capable of understanding and determining the complexity factor levels of particular jobs. However, all four of DOA witnesses have sufficient experience in classification to express opinions about the appropriate classifications for these appellants that can and did assist the Hearing Officer in deciding the case.

The federal court in *Berry, at* 1353-54, went on to conclude that the expert had also impermissibly testified about ultimate legal conclusions. An expert may not testify about the ultimate determination for the fact-finder on a question of law or in circumstances where no specialized knowledge is necessary to make the ultimate determination from the evidence, and the expert is serving as an advocate for an outcome rather than aiding the understanding of the fact-finder. *Kizer v. Semitool, Inc.* (1991), 251 Mont. 199, 205-07, 824 P.2d 229; *Heltborg v. Modern Machinery* (1990), 244 Mont. 24, 31-32, 795 P.2d 954; *Mahan v. Farmers Union Central Exchange, Inc.* (1989), 235 Mont. 410, 421; 768 P.2d 850; see also, *Crockett v. City of Billings* (1988), 234 Mont. 87; 761 P.2d 813; *Hart-Anderson v. Hauck* (1988), 230 Mont. 63, 748 P.2d 937, **quoting**

Marx Co. v. Diners' Club (2nd Cir. 1977), 550 F.2d 505, *cert. den.* 434 U.S. 861. While the expert testimony in this case was close to advocacy, it relied upon many years of experience in structuring and applying the state classification system. It was within the appropriate scope of expert testimony, and was helpful and appropriate for fact finding.

This is an administrative proceeding, akin to a district court bench trial for the applicable rules and procedures. Expert testimony can be rejected in favor of more credible lay testimony. *Rose v. Rose* (1982), 201 Mont. 86, 651 P2d 1018. Indeed, the testimony of Garrison and Ekstrom established that DOA underestimated the amount of level 4 complexity work that those two appellants performed. On the other hand, neither the documentary evidence nor the testimony of two of the appellants and two of their supervisors established that any of the four appellants performed complexity level 4 work 50% or more of the time. Instead, the substantial evidence of record supported findings that all four appellants performed complexity level 3 work more than 50% of the time.

This factual finding does not end the inquiry in this case. The predominant duty rule requires that when there is no single duty which occupies at least 50% of the worker's time, "the classifier must identify the most difficult duties and group them into a body of work that would be performed at least 50 percent of the time." *Classification Manual*, Vol. 3 (pay plan 060), pp. II-2 and II-3 and *Classification Manual*, Vol. 3 (pay plan 020), p. 4. Having done so, the classifier must then pick the lowest complexity level that comprises part of the predominant duties as the applicable level:

In these cases, the classifier must apply the first level that accurately describes the predominant work. This means that the classifier must select the lowest level that describes at least part of the predominant work, regardless of the percentage of the predominant work.

Classification Manual, Vol. 3 (pay plan 060), pp. II-3 and *Classification Manual*, Vol. 3 (pay plan 020), p. 5.

All four appellants, according to DOA's analysis, did 50% or more of their work processes at a complexity level 3. To get to that conclusion, DOA's analysis took work processes, and divided them between complexity levels. For example, Garrison spent 1.5% of her time answering inquiries about Hazard Reduction Agreements and 1.5% of her time issuing Hazard Reduction Agreements. DOA divided the time spent on those two duties equally between level 4 complexity and level 3 complexity work. Garrison disagreed, testifying that more than 50% of her work in those two processes was at complexity level 4. All parties engaged in the same parsing of duties for all four appellants. *See, e.g.*, Exhibits I-13, J-13, G-14, G-15, H-14 and H-15 and compare with different percentages proposed in "Appellant's [sic] Closing Arguments."

The classification manuals do not address the propriety of assigning multiple complexity levels to a single duty, or the proper procedure to follow if undertaking such an operation. As a result, this case could have presented a legal question for which there is no directly applicable authority. Simply put, does the predominant duty rule apply in the same way to duties which sometimes involve different complexity levels as it does to multiple duties which are at differing

complexity levels? Since both sides engaged in the same kind of parsing of single duties performed by the appellants, the hearing officer will accept the parsing in this case as the appropriate way to analyze the complexity demanded by the work processes.

Although there is no definition of “duty” in either classification manual, the clear meaning of the word is “work process” or “work performed.” Thus, if one particular work process, such as answering inquiries about Hazard Reduction Agreements, involves some work at complexity level 4 and some work at complexity level 3, parsing the work to reflect the differing levels ignores the necessity that the worker be able, in order to perform the duty, to function at the highest level.

The hearing officer has concerns about the micro-analysis both sides used in this case. The manuals do not address the propriety of dividing a work process into multiple complexity levels, which takes the “predominant work” analysis to a new level. For an extreme example, a neurosurgeon may spend a considerable amount of time within the work process of surgery performing tasks that do not require the high complexity level of actual incursions into the human brain (such as maintaining the sterile field). Would it then be proper to allocate those tasks, within the work process of performing surgery, to lower complexity levels? It seems absurd to do so, since inability to perform the actual operation would clearly disqualify the doctor from working as a neurosurgeon. Yet, in far simpler work duties such as answering inquiries about Hazard Reduction Agreements and issuing Hazard Reduction Agreements, which the worker arguable could not perform without being able to function at the highest complexity level the duties required, the parties have allocated different complexity levels within the duty in determining the overall complexity classification for the four positions. However, since the appellants did not provide any persuasive authority or argument against this micro-analysis, the question is not ripe in this case.

The appellants, as the parties seeking relief, had the burden of proving that their classifications were in err. They failed to carry that burden of proof.

Throughout this case, DOA has interposed technical defenses. DOA argued that the appeals were not perfected until a much later date, and that the request for contested case hearing was either not timely or only applied to two of the four appellants (one of the two classification cases, as ultimately defined at DOA’s request). Those issues were decided in the prehearing “Order Denying Motions to Dismiss, to Return to Step 2 and to Clarify Remedy,” and nothing DOA presented at hearing justified revisiting and altering that order.

Finally, with the parties’ agreement upon the proper supervision received classification for the appellants, DOA argued that this proceeding was moot as to Sundberg and Ekstrom (since DOA recommended changing their pay plan 060 classifications from 10 to 11 as a result). First, there is no evidence that such a change has, to date, been implemented. Second, even if that change has already been implemented, that would at most limit Sundberg and Ekstrom’s potential entitlement to a higher classification to the time after DNRC changed to pay plan 020 in May 2002. Thus, the issue of complexity was not wholly moot for any of the appellants.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to Mont. Code Ann. § 2-18-203 and Admin. R. Mont. 24.26.508.

2. The Department of Administration correctly classified the positions of Teresa Garrison, Debbie Byrd, Michelle Ekstrom and Patti Sundberg with the Department of Natural Resources and Conservation as class 249110 Administrative Support, Grade 10, under the statewide classified pay plan (pay plan 060), except that supervision received factor level should be at level 3 rather than 2 for all four appellants, resulting in a retroactive change in classification for Sundberg and Ekstrom from pay plan 060 Grade 10 to Grade 11, retroactively to 30 days before the date of their appeals. DOA and DNRC subsequently correctly assigned broadband placements for all four appellants based upon a level 3 rather than level 4 complexity rating when DNRC switched to pay plan 020, effective May 18, 2002.

VI. RECOMMENDED ORDER

The Hearing Officer recommends that Classification Appeal Nos. 3-2002 (Case No. 1158-2002) and 3-2003 (Case No. 796-2003) be DISMISSED upon confirmation that Sundberg and Ekstrom have received proper classification and salary adjustments for a change in their supervision received factor level from 2 to 3, retroactively effective December 3, 2001.

DATED this 19th day of January, 2005.

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR
TERRY SPEAR
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than February 11, 2005. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

* * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

Richard Letang and Quinton E. Nyman
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Helena, MT 59604-5600

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day, served upon the following parties or such parties' attorneys of record by means of the State of Montana's Interdepartmental mail service.

Ron Wilson
Personnel Division
Room 130 - Mitchell Building
Helena, MT 59620

DATED this 19th day of January, 2005.

/s/ SANDY DUNCAN

GARRISON ET AL.FOF.TSD

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