



MacEwen, Human Resources Policies and Programs Bureau Chief, SHRD) denied the appeal in its entirety.

Duncan timely appealed to Step Three. On February 2, 2012, Hearing Officer Terry Spear conducted a classification appeal contested case hearing in this matter. Bonnie Shoemaker, Steve Gibson, Ken McElroy, Karen Duncan, and Cindy McKenzie testified under oath. Exhibit Nos. 1-12, 15-25, 27-28, 30-31, 33-34, 36-37, 39, 43, 45, 47-49, 55, 60-61, and 210-223 were admitted into evidence. The parties submitted their proposed decisions and post-hearing briefs in compliance with the extended post-hearing scheduling, and the matter was submitted for decision.

Having duly considered the evidence, authority, and arguments herein, the Hearing Officer now issues the following proposed decision.

## **II. ISSUE**

The issue in this case is whether Karen A. Duncan, 11-9917 Social and Community Services Manager (as she is currently classified), Department of Corrections, is properly classified in accordance with Mont. Code Ann. parts 1 - 3, Chapter 18, Title 2. The parties do not contest BOPA's jurisdiction over this matter.

## **III. FINDINGS OF FACT**

1. On September 19, 2001, Karen Duncan was hired by the Montana Department of Corrections ("DOC") as the Youth Community Corrections ("YCC") Bureau Chief. The YCC Bureau Chief position was created in 2001 and classified under Pay Plan 60 at a Band 19.

2. DOC transferred from Pay Plan 60 to Pay Plan 20 (the "Broadband" Classification System) in 2002. Positions within the scope of the Broadband Classification Plan are classified according to statute, the Broadband Classification Policy (Exhibit 210), and the Broadband Classification Manual (Exhibit 211). The YCC Bureau Chief position was within the scope of the Broadband Classification Plan and was assigned Band 8, without any formal classification analysis.

3. Under the Policy and the Manual, SHRD may delegate its authority to classify to classifiers within agencies. SHRD will only delegate its classification authority to agency classifiers that it has trained and approved, or certified. Bonnie Shoemaker, Compensation and Classification Specialist and currently Classification and Compensation Manager, SHRD, who is responsible for administering the Broadband Classification and Pay Plans for the State, conducts this training, which is an extensive process and takes about a year to complete. Usually, a state agency with trained classifiers conducts its own classifications. SHRD will sometimes conduct classifications for an agency with trained classifiers in special circumstances, such as

when the positions subject to the analysis are controversial, upper-level management, or when there may be a conflict with the agency's classifier.

4. Ken McElroy, DOC Human Resources Bureau Chief, is a trained and certified classifier for the State of Montana. He had some concerns about the internal equity of the management position classifications within DOC under Pay Plan 20. The "internal inequities" did not seem to him to have an impact on the pay until 2007. Thereafter, he requested SHRD to conduct classifications for the entire group, and asked SHRD for assistance in conducting classification analyses of all the upper management positions in DOC.

5. In 2010, during the course of that process, at DOC's specific request, SHRD personnel conducted classification analyses for three specific management positions in DOC's Youth Services Division – YCC Bureau Chief, Superintendent of Pine Hills School, and Superintendent of Riverside School. Shoemaker conducted a classification analysis of the YCC Bureau Chief position and Lisa Coligan, another SHRD classifier, performed the classification analyses of the two Superintendent positions.

6. In performing her analysis, leading up to her October 2010 reclassification of Duncan's position at Band 8, Shoemaker understood from her conversation with the DOC HR Specialist, Carol Fah, that the DOC Division Administrator at the time, Steve Gibson, was not available to interview, might not be returning, and, if so, might not be replaced. This was Shoemaker's accurate understanding of the status quo at the time of the October 2010 reclassification of Duncan's position.

7. The information provided for Shoemaker's October 2010 reclassification analysis of Duncan's position included a job description provided by Duncan and not signed by her supervisor (Gibson), two organizational charts, and the information provided by Fah, the DOC HR Specialist. The Benchmark used was for an operations manager, Band 8. DOC had the right and responsibility to assure that the information provided for the reclassification analysis was complete and accurate.

8. Shoemaker understood that the Youth Services Division might be reorganized, that there might not be a Division Administrator, that the YCC Bureau Chief position was performing the Division Administrator duties, and that the YCC Bureau Chief was not answering to a supervisor.

9. To classify a job, both the factor or complexity level and the occupation must be determined. The combination of these two components yields a classification job code.

10. The factor or complexity level is determined solely by the complexity of the predominant duty. Predominant duty is work performed at least 50% of the time. The factor or complexity level equals the pay band level in the Broadband Classification System.

11. The predominant duties of a position are determined by a job description, a job audit, and other information gathered from the position's incumbent and supervisor.

12. The predominant duties are compared with the factor levels in the Classification Manual starting with the lowest level and going up. The predominant duties must be fully equivalent to the overall intent of the factor-level description to receive the rating.

13. Once the factor level is determined, the position is further compared with Benchmark positions. Benchmark positions verify the classifier's factor level choice.

14. Benchmarks are positions in state government that show the accurate application of the factor level language. A Benchmark lists the duties assigned to a representative position within an occupational series and describes how the classification factor relates to the duties. Non-benchmark positions cannot be used to factor level allocation.

15. Occupational classification means placing individual jobs into occupational categories based on similarities in their general characteristics that may influence occupational requirements. The process focuses on characteristics of the work, and does not consider the characteristics of the person in the job, or unusual duties that may be assigned by one organization.

16. Occupation is determined by the knowledge, skills, and abilities of the job. SHRD follows the Standard Occupational Classification (SOC) system and O\*Net, a comprehensive database of worker attributes and job characteristics developed by the federal government, in determining the knowledge, skills, and abilities of a particular job.

17. On October 1, 2010, Shoemaker issued her reclassification of Duncan's position and pay band allocation, assigning the position to Band 8. An employee (or that employee's exclusive bargaining representative, if she had one) has the right to appeal a reclassification of that employee's position. Admin. R. Mont. 24.26.508.

18. A position already classified through a formal classification analysis can only be reclassified upon a request based upon a change in methods or a change in position duties. Montana Operations Manual, Broadband Classification Policy, "G. Reclassifications," Page 4 of 6.

19. McElroy still felt concerns about the internal equities of the management position classification for Duncan's position. McElroy formerly worked for SHRD and provided classification training to many of its current analysts. His opinions are highly respected by state government agencies, including SHRD, regarding classification questions. He spoke with DOC Director Mike Ferriter about his concerns.

20. As a result of McElroy's input, DOC did not adopt the three classifications, including the October 1, 2010 reclassification for the YCC Bureau Chief position, for the stated reason that this first, October 1, 2010, reclassification analysis (done as requested by DOC) was not conducted with the whole group of upper-level management as McElroy had wanted. In other words, DOC declined to adopt the reclassifications because they were done, at its request, separate from the rest of the whole group of upper-level management.

21. DOC now requested that SHRD classify all the upper-level management positions. A memorandum was sent to the DOC division administrators explaining the process and asking them to cooperate with this effort. The YCC Bureau Chief position and the two Superintendent positions were reconsidered with the rest of the group. There had been no changes in methods and there had been no changes in the job duties of Duncan's position since the October 2010 reclassification. Duncan had not appealed the October 2010 reclassification, and, under SHRD's interpretation of its own rules, perhaps could not have appealed it, since DOC had not adopted and implemented it.

22. Armed with the results of the October 2010 reclassification, DOC made substantial changes in the information provided to Shoemaker. Director Ferriter informed her during this analysis that the Division Administrator would be replaced and the YCC Bureau Chief position would report to the Division Administrator. Shoemaker also received a new organizational chart showing three units (including the YCC Bureau) reporting to the Division Administrator. DOC also made sure that Duncan was available for Shoemaker to interview for this second reclassification analysis. As a result, Shoemaker found that Duncan's position was not top-level and must report to the Division Administrator for policy approval and public policy decisions.

23. A fair statement of the changes DOC made in the data provided to Shoemaker is that it was data reflecting how DOC now intended to have the YCC Bureau Chief work in the future, not how she was presently working. Shoemaker was told things that "would" be happening and provided a revised organization chart showing who else was (or at least would be) reporting to the new Division Administrator who "would" be brought in. In the words of counsel for SHRD, "The

first classification analysis was wrong in light of the new information and decisions that had been made in the interim.” “Respondent’s Proposed Finding of Facts, Conclusions of Law and Order and Brief in Support,” page 16.

24. The Benchmark used for both the October and December 2010 Shoemaker analyses was the same – Occupational Manager, Band 8 – but with the new or revised information DOC now provided, Duncan’s position was found to be weaker than this Benchmark.

25. The substantial and credible evidence of record established that McElroy came to believe that DOC had made a mistake, during conversion from Pay Plan 60 to Pay Plan 20, in classifying Duncan’s position at a Band 8. After seeing the October 1, 2010 reclassification of the YCC Bureau Chief position, he decided that DOC had made another mistake in asking SHRD to classify three upper management positions without classifying the rest of the upper management positions. He also concluded at that time that DOC could better achieve his vision of “equity” by making sure that Shoemaker had information about what DOC now planned to do in the immediate future regarding Duncan’s position. By declining to accept the October 1, 2010 reclassifications on the grounds that the entirety of upper management should have been done together, DOC obtained another bite at the same apple, to get the outcome McElroy deemed appropriate, by changing the information Shoemaker found important in her October 1, 2010 reclassification, to represent DOC’s present intentions for the future job duties of the YCC Bureau Chief, which might result in less complexity for her predominant job duties.<sup>1</sup>

26. The reclassification of December 2010 was not based upon the realities of Duncan’s job as they existed. It was based upon the projected realities of what McElroy believed Duncan’s position would be at some point after December 2010. This record is devoid of substantial evidence to establish that the changes presented to Shoemaker as the future reality either have or have not come to fruition since then. The record is similarly devoid of substantial evidence to establish that at the time DOC changed from Pay Plan 60 to Pay Plan 20, in 2002, that the YCC Bureau Chief position was assigned Band 8, without any formal classification analysis, by mistake based upon the actual duties of the job at that time.

27. SHRD treated McElroy, and thereby DOC, with extraordinary deference in this entire process. In the additional post-hearing briefing ordered by the Hearing

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<sup>1</sup> This finding is not suggesting that McElroy did anything unethical or improper. His sincere belief, based upon his experience and training, was that the YCC Bureau Chief was not properly a Band 8. His efforts to demonstrate that reality, in which he believed, to Shoemaker were undertaken in the discharge of his job duties.

Officer regarding what authority DOC had to decline to accept the October 2010 reclassification, SHRD responded that “even though another entity (SHRD) conducts the classification, the agency (DOC) has the authority and responsibility for them.” “Respondent’s Post-Hearing Initial Brief re Additional Filings,” p. 3. This degree of deference to the “agency with delegated authority” (DOC), especially immediately after that agency requested and received a first reclassification by SHRD, may be exceptionally rare. However, whether it is exceptionally rare, or (as SHRD insists) is standard practice under the rules, it loads the dice in favor of the agency and against the employee or employees being reclassified. An employee aggrieved by classification or reclassification of his or her position would never be able to demand and automatically to receive a “do over” reclassification within two months of the most recent reclassification simply because the employee considered it unacceptable. An employee would never be able, in any classification or reclassification process, to propose a future work scenario for the position at issue that negated conclusions reached in the most recent classification or reclassification (based apparently upon the current realities of the position), to obtain a different pay band assignment. Although there is justification, in the nature of the process itself, for the employer’s far greater participation in shaping and controlling the process of classification, DOC’s exercise of an alleged right to require the December 2010 “do over” reclassification is far too large a disparity in light of the apparent meanings of the applicable regulations.

#### IV. DISCUSSION<sup>2</sup>

The legal authority SHRD cited for the “do over” DOC demanded and got in December 2010 appears at page 3, Broadband Classification Policy, Section III. D., which involves contracting with consultants. SHRD argued that its own trained classifiers are merely “consultants” when an agency with delegated authority asks SHRD to do a classification or reclassification, and thus, an SHRD classification in such a circumstance is merely a “consultant classification recommendation” that requires approval by “a trained classifier employed by either a delegated agency or the department” before it can be implemented. *Id.*, III. D. 3. This, according to SHRD, meant that McElroy could reject Shoemaker’s October 2010 reclassification, prepare new information in light of that rejected reclassification, obtain an immediate and new reclassification for Duncan’s position based upon his newly prepared information, and thereby at last obtain the lower pay band placement he deemed appropriate.

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<sup>2</sup> Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

The term “consultant” in Broadband Classification Policy, Section III. D., is not defined. Until the revisions of May 2008 in the policy, “consultant” was “private consultant.”

Assuming SHRD intended the change from “private consultant” to “consultant” to now include within “consultant” individuals employed by state government, “consultant” after the 2008 revision (although not before) would mean “each and every trained classifier who is not employed by the agency seeking consultant assistance OR SHRD.” The policy requires that a “consultant” can only present a recommended classification, which requires approval by a trained classifier employed by either an agency with delegated authority (DOC in this case) or the department (SHRD) before implementation.

The interpretation urged in this case is, in substance, that removal of “private” in front of “consultant” meant that now “consultant” includes “each and every trained classifier who is not employed by the agency seeking consultant assistance, INCLUDING each and every trained classifier employed by SHRD.” This creates an absurdity. A trained classifier employed by SHRD is a “consultant” when asked to do a reclassification for an agency with delegated authority, even though SHRD employed trained classifiers as well as agency employed trained classifiers are authorized by the express language of the regulation to bless a consultant’s recommended reclassification so it can be implemented. This puts an SHRD employed trained classifier in both the position of a “consultant” and in the position of a trained classifier empowered to approve the recommendation of a consultant, which is absurd.

The bottom line of SHRD’s interpretation of its own regulation is that when an agency with delegated classification authority asks anyone, including SHRD employed trained classifiers, to classify positions within that agency, the agency preserves for itself an absolute right to reject any resulting “recommended classifications” without meeting any of the normal bases for obtaining anew a reclassification of the position. Without this curious interpretation of the regulation, a new reclassification request is only proper when there is either a “change in the reclassification method” or “a change in the position’s job duties,” [Broadband Classification Policy, Page 4, Section III. G. 1.] except that a recommendation by a consultant other than a trained classifier employed by either the agency with delegated authority whose job or jobs are being classified or SHRD has to be approved by a trained classifier employed either by the agency with delegated authority whose job or jobs are being classified or by SHRD. The simple meaning of that long sentence is that under all circumstances, classification of a job or jobs must

be done or approved by a trained classifier employed by either SHRD or the agency with delegated authority whose job or jobs is being classified.

After October 2010 and before the December 2010 “do over” there had not been a “change in the reclassification method” nor had there been “a change in the job duties” of Duncan’s position. Neither circumstance required by Section III. G. 1. for another request for reclassification had occurred in this case. No one had any right to request the December 2010 reclassification, but for DOC’s alleged right to get a “do over” under SHRD’s reading of III. D. 3. This extreme disparity between the limited rights of employees to challenge a reclassification, and the employing agency’s alleged absolute entitlement to reject a reclassification by an SHRD employed trained classifier<sup>3</sup> is repugnant to basic concepts of fundamental fairness.

It was DOC (with SHRD) that had control over what information would be available and would be utilized for the October 2010 reclassification. If the information provided was not correct, DOC at the very least allowed the SHRD classifier to receive and to rely upon that incorrect information, despite having had a clear opportunity to find and to correct those errors while providing the information for the reclassification. DOC waited until after Duncan’s position was again assigned Pay Band 8 and then, rejecting that reclassification, sought and got yet another reclassification. Only then did McElroy take charge and made sure that different information was provided to the classifier, with much of that different information consisting of predictions about what the job was going to become instead of descriptions of what it currently was. There was, in fairness, no justification for giving DOC this second chance (third chance, counting the original change to Broadband) at providing information upon which the classification of Duncan’s position “should” be based.

## V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this appeal of the second 2010 reclassification of Duncan’s position. Mont. Code Ann. §§ 2-18-203(2) and 1011; Admin. R. Mont. 24.26.508(1)(d)(iv) and (v).

2. The Department of Administration’s State Personnel Division and the Department of Corrections failed to follow applicable policies in redoing rather than approving and implementing the October 2010 reclassification of Duncan’s position. Broadband Classification Policy, Sections III. D. and III. G.

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<sup>3</sup> The justification that DOC wanted all reclassifications of upper management done together is without merit, since DOC asked to have the three specific positions done separately, only deciding when seeing the outcome that doing them separately was not what was wanted.

**VI. RECOMMENDED ORDER**

The Board of Personnel Appeals should order retroactive implementation of the October 2010 reclassification of Duncan’s position, with retroactive payment of all salary (and any benefits) due thereunder.

DATED: this 24th day of October, 2012.

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR  
TERRY SPEAR  
Hearing Officer

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NOTICE: Pursuant to Admin. R. Mont. 24.26.222, this RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than November 16, 2012. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.222, 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 hearing officer 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 201503  
Helena, MT 59620-1503