BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 415-2020:

ADRIANNE COTTON, Charging Party, vs. MONTANA DEPARTMENT OF CORRECTIONS, Respondent.	)	**HEARING OFFICER DECISION AND NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION**

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I. PROCEDURAL BACKGROUND

On January 24, 2019, Charging Party Adrianne Cotton filed a Charge of Discrimination with the Montana Human Rights Bureau (HRC) alleging the Montana Department of Corrections (DOC) retaliated against her for protected activity when it eliminated her position in November 2018.

On October 16, 2019, the Montana Human Rights Commission (HRC) remanded the matter for hearing after finding it was an abuse of discretion for the Department of Labor and Industry (Department) to have dismissed Cotton's complaint.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on December 14, 15, 16, and 17, 2020, at the Helena Job Service in Helena, Montana. Cotton appeared personally and was represented by Isaac Kantor at the Office of the Court Administrator. DOC appeared through its counsel, Sarah Mazanec and Michael Kauffman, Attorneys at Law. Counsel agreed to allow the witnesses to appear via Zoom.

Cotton, Tom Lopach, Brent Cotton, John Pavao, Matt Mitchell, Anjenette Schafer, Cynthia Wolken, Peggy MacEwen, Loraine Wodnik, Reginald Michael, Cindy McKenzie, Cynthia Davenport, Lisa Grady, John Daugherty, Amy Sassano, and Gayle Butler testified under oath.

Cotton's exhibits 1 through 12, 16, 23, 24, 26 through 29, 31 through 33, 36, 40, 41, 43, and 46 through 49 were admitted, as were DOC exhibits 101 through 148. Cotton's exhibits 13 through 21, 25, 29, 34, 35, 39, and 44, and DOC exhibits 123 through 127, 137, 138, and 140 are sealed because the demand of individual privacy exceeds the merits of public disclosure of this information as protected by Article II, Section 10 of the Montana Constitution.

Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES

1. Did the Montana Department of Corrections retaliate against Adrianne Cotton for protected activity in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If the Montana Department of Corrections did retaliate against Adrianne Cotton for protected activity as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If the Montana Department of Corrections did retaliate against Adrianne Cotton for protected activity as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

III. MOTIONS TO FILE UNDER SEAL

Cotton filed a motion seeking to seal her Motion for Rule 37 Sanctions and Supporting Brief, her Post-Hearing Brief on Evidentiary Issues, and Proposed Hearing Officer Decision and Notice of Issuance Of Administrative Decision. Similarly DOC filed a motion seeking to seal its Post Hearing Trial Brief and Proposed Findings of Fact and Conclusions of Law. Both motions are hereby GRANTED.

IV. COTTON'S MOTION FOR MONT. R. CIV. P. 37(B) SANCTIONS

After the conclusion of hearing, Cotton filed a motion for sanctions pursuant to M. R. Civ. P. 37(b) on the basis that DOC had withheld information regarding a July 2018 meeting between MacEwen and Lopach, Michael and Wolken in which one of the three asked MacEwen to proceed with a reorganization. Cotton next argues DOC failed to provide any of the budgetary information referred to by Davenport and Wolken or the organizational charts Daugherty prepared for Wolken in July or August 2018.

Cotton also argues sanctions are appropriate because Wolken misrepresented to HRB during the course of its investigation that she was not aware of the identity of the complainants despite having listed those names in her notes from the Shepherd meeting and providing that list to Schafer. Cotton again notes that such an omission directly relates to the level of Wolken's knowledge and involvement.

A. Rule 37(b) Sanctions

Failure by a party to disclose relevant evidence requested in discovery requires a sanction. Mont. R. Civ. P. 37(c). A court may impose other appropriate sanctions, including those listed at Rule 37(b)(2)(A). Other possible sanctions include: (i) directing matters be embraced or facts designated as established for purposes of the action; (ii) prohibiting a party from supporting or opposing designated claims or defenses, or introducing designated matters into evidence; (iii) striking pleadings; (iv) staying proceedings; (v) dismissing an action; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey an order. M. R. Civ. P. 37(b)(2)(A)(i)-(vii). Failure to disclose information mandates the offending party "is not allowed to use that information or witness to supply evidence . . . at a hearing, unless the failure was substantially justified or is harmless." M. R. Civ. P. 37(c).

In the context of a spoilation case, the Montana Supreme Court has addressed the burden of "a party seeking the extreme sanction of precluding or truncating litigation on the merits. . . ." *Mont. State Univ.-Bozeman v. Mont. First Judicial Dist. Court* ("MSU"), 2018 MT 220, ¶ 25, 392 Mont. 458, 426 P.3d 541 (citations omitted). Montana does not have a case directly addressing the burden of a party seeking dismissal in a failure to produce case. *See*, *e.g.*, *McKenzie v. Scheeler*, 285 Mont. 500, 513-14, 949 P.2d 1168, 1176 (1997) (merely leaving appropriate sanctions to a court's discretion); *see also Culbertson-Froid-Bainville Health Care Corp. v. JP Stevens & Co. Inc .*, 2005 MT 254, ¶ 14, 329 Mont. 38, 122 P.3d 431 (when reviewing sanctions for appropriateness, the Montana Supreme Court looks at "whether the consequence inflicted via the sanction: (1) relates to the extent and nature of the actual discovery abuse; (2) relates to the extent of the prejudice to the opposing party which resulted from the discovery abuse; and (3) is consistent with the consequences expressly warned of by the District Court, if a warning was actually issued.") (citations omitted). Essentially, the moving party must show: (1) the item not produced was subject to a duty to produce; (2) the other party intentionally, knowingly, or negligently breached the duty; and (3) the failure to produce was sufficiently prejudicial to outweigh the overarching policy of M. R. Civ. P. 1 for resolution of disputed claims on the merits. *C.f. MSU*, ¶ 25. "[A]ny sanction imposed must be proportionate to the prejudice caused by the absence of the

evidence." *Nolan v. Billings Clinic*, 2020 MT 167, ¶8, 400 Mont. 326, 467 P.3d 545 citing *MSU*, ¶32.

1. *Evidence Pertaining July 2018 Meeting*

Cotton argues that DOC's failure to disclose evidence pertaining to the July 2018 meeting between MacEwen and Lopach, Michael and Wolken in response to her discovery requests regarding any meeting related to the climate assessment, reorganization, RIF, or decision to eliminate the Government Relations Director position caused unfair prejudice and affected her approach to discovery.

DOC contends there is no basis for Cotton's contention that she was not aware of this meeting prior to hearing. DOC points to MacEwen deposition testimony on July 7, 2020, which included the following exchange between MacEwen and Cotton's attorney:

> Q. At what point did the organizational assessment turn into a reorganization?
>
> A. The organizational assessment looked at the leadership team and how it functioned and made a series of recommendations. I wouldn't say that the reorganization was the organizational assessment. It was an option that the department decided to implement in response to some of the -- what was found as a result of the assessment.
>
> Q. So who were these recommendations presented to?
>
> A. They were presented to the chief of staff Tom Lopach, the director, and the deputy director at corrections.
>
> Q. Okay. And what options did you present to them in addition to a reorganization?
>
> A. Really what I presented was that there was two --the leadership team was not functioning and too large, and it needed to be reduced, and there were several ways that they could go about that. They could just take positions off the leadership -- senior leadership team and not have them come to the meetings or participate in that level of leadership anymore, or they could, you know, change the responsibilities of those positions. The other -- the other thing that we really needed to address was the number of direct reports to the deputy director; that there was just so many direct reports that she really could not give the one-on-one

management time to that large number of direct reports, and that that needed to be reduced. So the director could take some of those direct reports as a way of addressing that, or they could have those people report to somebody else, or they could just also do a reorg and reduce the number of management positions that they had. Those were the options that were presented.

Q. And it was who made the decision, the ultimate decision, as to which option to take?

A. You know, I don't remember specifically who asked me to make a -- make that chart as to what I would implement if it was a reorg.

Q. Would it have been one of Tom Lopach, Reginald Michael, or Cynthia Wolken?

A. Yes.

See Kauffman Affidavit, Exhibit 1, Deposition of Peggy MacEwen, July 7, 2020, pp. 34:13-36:3.

DOC points to MacEwen's response to questioning by Cotton's counsel later in her deposition:

Q. Okay. I may have already asked you this. I'm not sure if I asked it this way: Do you remember who you discussed the potential organizational changes with?

A. I remember conversations with my assessment team about what their impressions were, kind of what the root causes of some of the observations were, and Carrie specifically about the government affairs position. I had some discussions about the possibility of reorg as one of several options as a result of the assessment. I put -- I was asked to put together how I would restructure it if I was going to, so I did. I sent that over to Cynthia so that she would be able to review it and give me some feedback. It probably went through several iterations back and forth before a meeting was scheduled at the governor's office to talk more specifically about that. It went through some iterations after that discussion. Some changes were made during that meeting. And then at that point I really was out of it, and Anjenette stepped in in her role and helped them with the final -- I'm going to say any changes that were

finally made to the structure and the assessment and so forth. That's, at a very high level, how I can – how much I remember about it.

See Kauffman Affidavit, Exhibit 1, MacEwen Depo., pp. 73:23-74:18.

DOC argues Cotton's counsel failed to follow up with MacEwen as to a timeframe in which these discussions occurred; nor did he inquire about the time frame of these discussions in the subsequent depositions of Lopach, Wolken, and Michael.

While DOC did not specifically list such a meeting in its written discovery responses, Cotton's counsel had this information via MacEwen's deposition, which was completed prior to the depositions of Lopach, Michael, and Wolken and approximately five months prior to hearing. Any prejudice that may have resulted from DOC's initial failure to disclose the meeting was lessened by MacEwen's deposition testimony. There should have been no surprise when MacEwen testified at hearing regarding such discussions.

Cotton cites the Montana Supreme Courts holding that, once it is determined a party has failed to obey an order to provide all discovery, the court may impose sanctions, including dismissal of the action. *Peterman v. Herbalife Int'l, Inc,* 2021 MT 142, ¶23, 356 Mont. 542, 234 P.3d 898, 903. In *Peterman*, the district court had granted the defendant's motion to compel production of the plaintiff's tax returns. Two years later, the district court dismissed the case because the plaintiff offered no explanation as to why he failed to produce his tax returns as ordered by the court. The Supreme Court found the district court did not abuse its discretion in dismissing the case because the plaintiff had made repeated assurances that he would produce the tax returns before informing defendant he was unable to do so because he had not yet filed his tax returns for those years. *Id*., ¶23.

Cotton also cites to *Eisenmenger by Eisenmenber v. Ethicon, Inc*., 871 P.2d 1313, 264 Mont. 393 (Mont. 1994). In that case, the Montana Supreme Court found the district court did not err when it imposed the sanction of default judgment on the issue of liability against the defendant based upon its failure to properly disclose an expert witness during the course of discovery. The Supreme Court found such failure was willful and in bad faith. *Id.* at 1321.

In this case, the issue is whether sanctions are appropriate given the apparent failure of DOC to list one meeting in July 2018 between four individuals who were deposed prior to hearing. MacEwen referenced this meeting in her deposition testimony and it appears Cotton's counsel failed to follow up on that information in any of the subsequent depositions. Cotton has not shown DOC's failure to disclose

one meeting in its initial discovery responses which was later disclosed in deposition testimony caused prejudice so severe that it warrants a sanction as severe as an entry of default. Further, there has been no showing that the omissions were willful or in bad faith. As such, Cotton has failed to show sanctions under M. R. Civ. P. Rule 37 are warranted.

2. *Evidence Pertaining to Budgetary Considerations*

Cotton contends she was prejudiced by DOC's failure to produce any documents relating to budgetary considerations or the organizational charts produced by Daugherty that were requested by Wolken. DOC counters it produced numerous documents in discovery related to DOC's position that the reorganization assisted the agency in facing budgetary issues. DOC points to the September 28, 2018, letter advising Cotton that she was being laid off because "of operational efficiencies and budget issues." Ex. 129. DOC also points to an October 3, 2018, email to DOC staff announcing the reorganization indicating that the transition compelled the agency "to take this opportunity to evaluate our budget . . . ." Ex. 105. DOC then points to Michael's response to Cotton's email to the Board of Crime Control noting the reorganization was necessary to "efficiently meet the DOC's fiscal challenges and operational demands." Ex. 145. Finally, DOC points to a response to a reporter's inquiry that included a summary of the savings realized upon the elimination of the Government Relations Director position. *Kauffman Affidavit*, Exhibit 3, DOC_CH_0443-0447. DOC contends it provided all of this information to Cotton during discovery, as well as emails between the DOC and the Legislative Audit Division referencing fiscal issues. *Kauffman Affidavit*, Exhibit 4, DOC_CH_00785-00786.

Cotton has not shown DOC failed to produce any document regarding budgetary issues that it had a duty to produce. Further, Cotton's argument regarding Sassano's testimony is not persuasive. Sassano testified as to the OBPP's longtime concerns regarding DOC's budget issues. There was no evidence offered to suggest MacEwen ever met with Sassano or relied on any budgetary information created by or relied upon by OBPP when conducting the organizational assessment. Therefore, Cotton's argument seeking sanction for the production of documents DOC had no duty to produce is without merit. Even if DOC had a duty to produce such documents, there has been no showing that they were relied upon by MacEwen when making her recommendation. As such, Cotton has failed to show any potential prejudice that may have resulted from an omission by DOC regarding the production of budgetary documents does not warrant sanctions.

Similarly, Cotton's argument that sanctions are warranted as a result of DOC's failure to produce Daugherty's organizational charts is without merit. Daugherty

testified at hearing that he drafted some organizational charts at Wolken's request that he understood were for OBPP in July or August of 2018. Daugherty testified he was told there were going to be changes and he was not to talk to anyone about it. Hrg. Tr. 588:3-16.

DOC produced evidence showing that it produced an August 13, 2018 email from Wolken to Dan Villa (and cc'd Sassano) at OBPP with four organizational charts attached. Those organizational charts were offered at hearing as Exhibit 120. DOC also notes that it produced an October 4, 2018, email from Wolken noting, "John and I are going to go through and make sure the [organizational] charts are all accurate. I've let Amy Sassano know that she will be receiving updated charts next week." *Kauffman Affidavit*, Exhibit 5, DOC-
Opposition to Charging Party's Motion for Sanctions 18 CHH_0725.

Further, DOC rightly argues that Cotton cannot claim surprise given her own allegation in her preliminary prehearing statement contending Daugherty was aware of the pending reorganization and her removal. Cotton noted Daugherty acted as an advisor to Michael and Wolken in the months leading up to the reorganization. *Cotton's Preliminary Prehearing Statement*, p. 10. It would appear that there was no surprise as to Daugherty's role in preparing organizational charts for Sassano's review.

Cotton has failed to show that any failure by DOC to produce Daugherty's organizational charts, which does not appear to be the case, caused such a degree of prejudice as to warrant sanctions.

3. *DOC's Response to HRB's Notice of Cotton's Complaint*

Cotton seeks sanctions for DOC's failure to disclose Wolken was aware of the complainants in the DOA investigation and to produce her notes from her meeting with Shepherd in response to the HRB's request for information. *See* Ex. 33. M. R. Civ. P. Rule 37 addresses issues that arise during the course of discovery. DOC's response to HRB's request was submitted prior to the matter being certified for hearing before OAH and well before the commencement of discovery. There has been no showing that this information was not produced during the course of discovery as it was dealt with at length during the course of hearing without objection. Therefore, Cotton has failed to show sanctions pursuant to M.R.Civ.P Rule 37 are appropriate based upon DOC's failure to produce Wolken's meeting notes in its response to Cotton's Charge of Discrimination, absent a showing that such information was not produced pursuant to a discovery request.

V. EVIDENTIARY ISSUES RAISED AT HEARING

A. The Evidentiary Weight of Pavao's Report (Ex. 16)

Cotton argues Exhibit 16, which includes an early draft of Pavao's report, is admissible to the extent that it "does not contain any factual conclusions, those factual conclusions are not relevant, were not considered, and are given no weight." Cotton further argues Exhibit 16 should be admitted as it was used at hearing to establish dates of Pavao's investigation, which Cotton contends are relevant to the consideration of temporal proximity in her prima facie case. Cotton finally argues Exhibit 16 shows the agency's reluctance to investigate her claims.

DOC argues Exhibit 16 contains several levels of hearsay. DOC notes Exhibit 16 contains summaries of Pavao's and Mitchell's interview notes, which DOC argues include out-of-court statements and repeat hearsay statements of others. DOC contends no exception to the hearsay prohibition applies and points to the language used in M.R.Evid. 801(2) and Rule 803(6) and (8).

Rule 801, M. R. Evid. defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Statement is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."

In this case, the "declarant" and the "statement" is the initial report drafted by Pavao that includes summaries of information gathered during the course of their investigation. Included in the draft report is a summary of allegations Shepherd reported receiving from DOC employees regarding Michael. As such the information contained in the draft report contains inadmissible hearsay. Further, Cotton could have called Shepherd and the other witnesses referenced in Pavao's draft report to establish certain facts rather than relying upon the document at hearing.

An exception to the hearsay prohibition can be found in Rule 801(d)(2), M. R. Evid., which provides:

> The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of that relationship, or (E) a

> statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Neither Pavao nor Mitchell are a party to the action; nor were they agents or employees of DOC. Pavao and Mitchell were independent investigators called in by Lopach to conduct an investigation regarding allegations of discriminatory conduct by Michael. Neither are representatives of DOC; nor are they authorized to speak on behalf of DOC. None of the elements allowing for the exception set forth in Rule 801(d)(2), M. R. Evid. are present in this case.

Similarly, the exception to the prohibition against hearsay found in Rule 803(8), M. R. Evid. does not apply in this case. Rule 803 provides:

> Public records and reports. To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the government in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

The Montana Supreme Court has specifically addressed the question of whether an investigation is the kind of activity that can be considered a usual activity of business such as accounting or payroll. *See Bean v. Mont. Bd. of Labor Appeals*, 1998 MT 222, ¶ 23, 290 Mont. 496, 965 P.2d 256. Clearly, this was an extraordinary situation in which workers from other state agencies were called in to conduct an investigation regarding allegations of discrimination by the director of a state agency. The investigation and the resulting reports are not the type of "regularly conducted and regularly protected activities" addressed in M.R.Evid. 803(8).

Cotton argues that the notes and draft reports are admissible as "matters observed pursuant to duty imposed by law" or "factual findings resulting from an investigation made pursuant to authority granted by law." The Montana Supreme Court addressed a similar issue in *Boude v. Union Pac. R.R. Co.*, 2012 MT 98 where it

held that it was error for the trial court to admit a report issued by the PLB, an "arbitral tribunal that reviews the outcome of a railroad's investigative hearing to ascertain whether the result is consonant with the terms of the CBA between the railroad and its union employees." *Id.* at ¶5(internal citation omitted). In *Boude*, the court held the PLB report regarding the plaintiff's termination was inadmissible and not subject to the exceptions set forth in Rule 803. The court noted, "[W]hile "factual findings resulting from an investigation made pursuant to authority granted by law" would be admissible, factual findings 'resulting from special investigation of a particular complaint, case, or incident' are not." *Id.* at ¶ 15 (citing Rule 803(8)(iv), M. R. Evid.).

The evidence shows the report of Pavao and Mitchell are the type of report contemplated by Rule 803(8)(iv), M. R. Evid. Further, the report is not a business record as it was not prepared during the regular course of business; nor are the statements included in the report admissions of a party opponent. *See* Rule 801(2), M. R. Evid; *see also Boude*, ¶15. Therefore, although Exhibit 16 was admitted over DOC's objection, the hearing officer has accorded no weight to the exhibit and has not relied upon it in reaching the decision in this matter.

1. *Charging Party's Exhibit 8*

Cotton argues Exhibit 8, which includes MacEwen's calendar and her handwritten notes, is not hearsay and should be treated as an admission of a party opponent pursuant to M.R.Evid. 801(d)(2). Cotton further argues the notes should be considered extrinsic evidence of statements made based upon MacEwen's inconsistent testimony. See M.R.Evid. 613(b).

DOC argues MacEwen's handwritten note constitutes hearsay. DOC contends the note is not a present sense impression as contemplated by Rule 803(1), M. R. Evid., as it described a statement or, not an event or observation of conduct. DOC further contends the note is not admissible as a business record given the extraordinary nature of an organizational assessment. Finally, it contends the note is not business records for the same reasons offered above regarding Exhibit 16.

Cotton's counsel had the following exchange with MacEwen regarding her March 30, 2018, meeting with Lopach:

> Q: And finally, do you recollect being told at that meeting that Mr. Lopach did not want a printed report in relation to your assessment?
> A: No.

MacEwen Hrg. Tr., 363:22-25.

MacEwen later testified as to her understanding of what Lopach expected her to do at the end of the organizational assessment.

> Q: Thank you.
> Did you understand from this meeting that you were not to produce a formal printed report?
> A: Yes.

MacEwen Hrg. Tr. 365:16-19.

MacEwen's note on her own calendar was not a direct quote of what Lopach may have said to her during their meeting. Rather, it was an indication of her understanding that she was not to produce a written report, a fact to which she testified several times at hearing. Given MacEwen testified and was subject to rigorous examination by both parties, her handwritten note on her own calendar is not hearsay, as defined by M.R.Evid. 801. Therefore, the calendar note is admissible.

2. Lopach and MacEwen as Agents of DOC

Montana Code Annotated § 28-101 provides, "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." Agency is created by "precedent authorization or subsequent ratification." Mont. Code Ann. § 28-10-201. An agent's act is ratified "by knowingly accepting or retaining the benefit of the act." Mont. Code Ann. § 28-10-211.

Cotton argues Lopach and MacEwen acted as agents of DOC in arranging for and conducting the organizational assessment and subsequent reorganization. Cotton contends Lopach acted as an agent of DOC by engaging MacEwen and Schafer and authorizing acts on behalf of the DOC, e.g. reorganization and subsequent RIF. Cotton argues DOC ratified each of the acts authorized by Lopach. Cotton points to MacEwen keeping Lopach apprised of the status of the organization assessment, as well as her designation as a witness authorized to speak on behalf of the DOC as to the organizational assessment under Rule 30(b)(6), M.R.Civ.P.

Cotton's arguments fail to consider the structure of state government. Montana Code Annotated § 2-15-103 provides,

> In accordance with Article VI, section 4, of the Montana constitution, the governor is the chief executive officer of the state. Subject to the constitution and law of this state, the governor shall formulate and administer the policies of the executive branch of state government. In the execution of these policies, the governor has full powers of

> supervision, approval, direction, and appointment over all departments and their units, other than the office of the lieutenant governor, secretary of state, attorney general, auditor, and superintendent of public instruction, except as otherwise provided by law. Whenever a conflict arises as to the administration of the policies of the executive branch of state government, except for conflicts arising in the office of the lieutenant governor, secretary of state, attorney general, auditor, and superintendent of public instruction, the governor shall resolve the conflict, and the decision of the governor is final.

The DOC is a department within the executive branch. Mont. Code Ann. § 2-15-104(i). Agency directors served at the pleasure of the governor. Mont. Code Ann. § 2-15-111(3). As such, agency directors are accountable to the governor's office. The governor's office does not act at the behest of the agency or its staff.

Cottons' argument that the DOC as the principal controlled and directed the performance of Lopach, MacEwen and Schafer as its agents is not persuasive. Lopach, as the Governor's Chief of Staff, acted on behalf of the Governor's office and well within the authority granted by the Constitution, to address what was perceived by the governor's office to be problems within the DOC's leadership team that negatively impact the agency as a whole. There is no evidence showing Lopach did so at the behest of Michael or that he or either MacEwen or Schafer were subject to the direction and control of DOC. It is therefore determined that neither MacEwen nor Lopach were agents of DOC.

3. *Testimony Regarding Budgetary Issues*

Cotton argues that testimony regarding DOC's budgetary issues is irrelevant, because MacEwen testified her organizational assessment was not based on budgetary concerns. Cotton points to MacEwen's acknowledgment that she performed no fiscal analysis and did not review any budgets as part of her assessment.

DOC argues the fact MacEwen's recommendations were not based on budgetary considerations does not render evidence regarding DOC budgetary issues irrelevant. DOC points to the testimony of Wolken that she agreed with the recommendation to eliminate the Government Relations Director position based on MacEwen's assessment, as well as her previous experience with the legislature's concerns regarding DOC's budgetary issues. *See* Hrg. Tr. 340:20-341:3.

DOC's argument is well taken. While MacEwen's recommendations were not based on budgetary concerns, it stands to reason that Wolken, with her previous experience as a legislator, would be mindful of budgetary issues when making

personnel issues. Further, given DOC is a public agency funded with public funds, it stands to reason that decisions would always be made with at least a modicum of consideration as to the potential financial impact. Further, DOC was free to offer evidence in support of its argument that it had legitimate, non-discriminatory reasons for its decision to eliminate the Government Relations Director position, which is addressed more fully below. It is therefore determined that evidence regarding budgetary issues is therefore relevant as to why DOC decided to accept MacEwen's suggestion to eliminate the Government Relations Director position. *See Wallis v. J.R. Simplot Co.*, 25 F.3d 885, 889 (9th Cir. 1994)(employer must product evidence showing the adverse action was taken for other than impermissibly discriminatory reasons).

VI. UNCONTESTED FACTS

1. Cotton began working for the Montana Department of Corrections (DOC) on November 10, 2011.

2. In April 2017, Reginald Michael was appointed DOC Director, and he began the position in July 2017.

3. In January 2018, the DOC hired Cynthia Wolken as Deputy Director.

4. In April 2018, the Montana Department of Administration (DOA) began an inquiry into allegations against Michael. Cotton participated in the investigation.

5. DOA's investigation into the allegations against Michael concluded around July 2, 2018.

6. Peggy MacEwen performed an organizational assessment of the DOC beginning in April of 2018.

7. After MacEwan's assessment, the DOC underwent a reorganization. Cotton's position, Government Relations Director, was eliminated.

8. Cotton learned of the elimination of her position in September 2018. Her last day worked for the DOC was November 23, 2018.

VII. FINDINGS OF FACT

Cotton's Career Trajectory at DOC

9. Cotton began her career with DOC as a policy specialist, with an hourly wage of $18.74. Ex. 127. In August 2012, Cotton began working as the Recruitment Specialist for DOC's Human Resources Bureau (HR), with an hourly wage of $22.43. Ex. 126.

10. Cotton was selected to serve as DOC's Government Relations Director in 2013. Ex. 125. After the position was reclassified in June 2015, Cotton's hourly wage increased to $32.44. Ex. 124.

11. Cotton supervised the Native American Liaison position and the Re-Entry Coordinator position. Cotton was also responsible for supervising the Board of Crime Control beginning in mid-2017. Hrg. Tr. 17:18-18:4.

12. In July 2017, then-Deputy Director Lorraine Wodnik, in consultation with DOC HR, created the Office of Criminal Justice Relations (OCJR) and made Cotton its administrator. Hrg. Tr. 492:16-19. After the position was reclassified in October 2017, Cotton's hourly wage increased to $45.05. Ex. 123.

13. The OCJR was created after the legislature mandated the Montana Board of Crime Control move from an agency administratively attached to the Department of Justice to DOC. As a result, the Board of Crime Control came under the purview of DOC. Hrg. Tr. 18:14-24.

14. As the OCJR Administrator, Cotton's duties included large-scale operations management, developing new initiatives, assisting in public information initiatives, and government relations. Operations management constituted 55% of the assigned duties, and government relations constituted 25% of the duties. The remaining duties constituted roughly 20% of the assigned duties. Ex. 24.

15. Cotton received excellent performance reviews throughout her employment at DOC.

Changes in DOC Leadership

16. The Governor's Office appointed Mike Batista to the DOC Director position in 2013. Hrg. Tr. 89:10-13.

17. The position of deputy director was created shortly after Batista's appointment. Hrg. Tr. 576:1-3. Batista reorganized the leadership team, which resulted in an expansion of the team to 15 people jointly supervised by Batista and then-Deputy Director Loraine Wodnik. Hrg. Tr. 468:18-19; 470:11-23.

18. Batista added the Government Relations Director position to the leadership team. Cotton was hired to fill this position. Hrg. Tr. 16:24-17:5; 489:15-23. Batista removed the Staff Services Division, which included the Policy Unit, the American Indian Liaison, Human Resources, Investigations, and Legal Services. Batista also promoted several people from within the various units to the leadership team. Hrg. Tr. 576:1-20; Ex. 120.

19. In November 2016, Batista stepped down as the DOC Director.

20. In April 2017, the Governor's Office appointed Reginald Michael to serve as the DOC Director. Michael's transition into the role was difficult. Many of the leadership team had not worked for a director other than Batista. Hrg. Tr. 608:11-18; 610:1-17.

21. Some leadership team members thought Michael asked too many questions and did not seem to understand things related to DOC operations. Hrg. Tr. 578:2-15; 610:7-19. Some leadership team members took issue with Michael's leadership style, which was different than that of Batista. Hrg. Tr. 578:2-15.

22. In January 2018, DOC hired Cynthia Wolken as Deputy Director. Hrg. Tr. 292:3-7. Wolken currently serves in this position. Wolken previously worked for Missoula County and served as a senator in the Montana Legislature. Wolken worked on criminal justice policy as a senator, and led a team that was tasked in addressing Missoula County's criminal justice challenges. Wolken also served on the Montana Human Rights Commission. Hrg. Tr. 325:16-326:19; 327:15-20.

23. Wolken earned her law degree from Washington University in St. Louis, and was selected for a Skadden Fellowship to work at Montana Legal Services on human trafficking and civil justice issues. Hrg. Tr. 326:20-327:15.

24. A number of internal candidates applied for the deputy director position, including Cotton. Wolken's appointment upset some within the leadership team, many of whom believed they were better qualified for the position. This strife had a negative impact on the functioning of the leadership team. Hrg. Tr. 578:16-22.

25. Wolken quickly found supervising the leadership team to be "unmanageable," and it seemed to consume the majority of her time. Hrg. Tr. 330:21-331:14.

26. The responsibility of supervising the leadership team was previously shared by Batista and Wodnik, who co-managed the team together. Hrg. Tr. 468:21-469:24.

27. The size of the leadership team often made decision making difficult. Wolken observed there were communication issues and mistrust amongst members of the leadership team. Hrg. Tr. 329:12-22; Ex. 108.

Cotton's Concerns Regarding Michael's Behavior

28. On September 18, 2017, Michael told Cotton he wanted to travel with her to Billings, where she was going to tour the Montana Women's Prison. Michael and Cotton met at Three Forks at 7:00 p.m., and they traveled to Billings together at Michael's suggestion. Hrg. Tr. 26:25:27:9.

29. Michael shared stories of his sexual history with Cotton, which included a story about women in his office who made bets as to whom would be the first to sleep with him. Michael also told a story about beautiful women trying to break down his bedroom door at all hours of the night when he lived with a friend who was an NFL player. Hrg. Tr. 27:12-28:9.

30. Cotton grew concerned about Michael's intentions when, after telling her stories involving his sexual history, he asked about her career goals and whether she was interested in the upcoming deputy director position . Hrg. Tr. 28:21-25.

31. Cotton went to her room after they checked into their Billings hotel and called her husband. Cotton was audibly upset and crying as she described the situation to her husband. Hrg. Tr. 29:11-17.

32. Cotton also noted the interaction in her daily planner and noting she would talk to DOC's Human Resources Director. Cotton regularly noted significant events or tasks she needed to perform in her daily planner. Ex. 24.

33. There were no other issues while Cotton and Michael were in Billings and during their return trip to Helena. After returning to Helena, Cotton felt Michael treated her more aggressively, raising his voice in meetings, and withholding information from her. Hrg. Tr. 34:21-35:6. Cotton attempted to avoid being alone with Michael. Hrg. Tr. 35:19-36:1.

34. In late-September 2017, Cotton reported to DOC Human Resources Director Kila Shepherd concerns she had regarding Michael's conduct during the Billings trip. Hrg. Tr. 33:16-34:17.

35. Cotton requested Shepherd not report her allegations and declined to file a formal complaint. Hrg. Tr. 33:18-34:7. Shepherd directed Cotton to document her concerns related to Michael's behavior. Hrg. Tr. 93:19-21.

36. Cotton did not document her concerns although she felt Michael was treating her differently after the Billings trip. 93:19-94:8; 34:19-35:6.

Shepherd Meets with Wolken

37. In February 2018, Shepherd requested to meet with Wolken due to concerns she had regarding Michael's conduct. Wolken, who had just recently been appointed to the position, requested assistance from Anjenette Schafer, Administrator of the Human Resources Division, DOA, in handling Shepherd's meeting request. Hrg. Tr. 268:4-17.

38. Schafer oversaw the state's Human Resources Policies and Program Bureau, which sets statewide policies and provides high-level HR expertise to state agencies as the Human Resources Division Administrator. Hrg. Tr. 267:8-17.

39. Schafer encouraged Wolken to meet with Shepherd off site as requested by Shepherd. Schafer also encouraged Wolken to take good notes during the meeting. Hrg. Tr. 267:24-268-17.

40. On February 22, 2018, Wolken met with Shepherd, who reported that several female employees had reported that Michael had engaged in gender discrimination. Shepherd identified the women who had complained, including Cotton. Shepherd also identified two male DOC employees who "had noticed or believed that the director treated women worse. . . ." Hrg. Tr. 294:24-295:12; Ex. 34.

41. Wolken's notes from the meeting included: "Kila stated that Sandy Jacque [sic], Judy Beck, Cindy McKenzie, Connie Winners, Adrianne Cotton and herself felt like the Director treats them worse because they are women." Ex. 34.

42. Wolken had several concerns about the motive and timing of the complaints. Wolken was concerned that Shepherd had reported to her that the issues with Michael had been happening for some time, but she never reported the issues to the former deputy director. Wolken was also concerned that none of the individuals

Shepherd mentioned had reported concerns about Michael's behavior to her. Wolken was also concerned because it had appeared to her that both Cotton and Shepherd both had difficulties with Michael's transition as DOC Director, as well as her own appointment to the DOC Deputy Director position. Hrg. Tr. 298:9-24.

43. Wolken was also concerned that Shepherd was unable to provide specifics when pressed. Wolken had worked closely with Michael since her hire and had seen nothing in his behavior as described by Shepherd. Wolken was also concerned that Shepherd told her that her desired outcome was to see Michael gone, which she suggested would allow Wolken to become Director and leave the deputy director position open. Hrg. Tr. 299:1-17.

44. After meeting with Shepherd, Wolken spoke with Tom Lopach, Chief of Staff for the Governor's Office. Lopach asked Wolken to speak to two long-term DOC employees, John Daugherty and Gayle Butler. Hrg. Tr. 295:21-296:6.

45. Wolken also met with Schafer after meeting with Shepherd and provided Schafer with a copy of her meeting notes. Hrg. Tr. 268:7-17. Wolken and Schafer then spoke with Lopach about the meeting with Shepherd. Hrg. Tr. 268:20-24; 297:10.

46. Wolken, Schafer and Lopach took Shepherd's allegations seriously and needed to be addressed. Lopach determined that a formal investigation into the allegations was required. Hrg. Tr. 268:25-269:7.

47. Shepherd told Cotton about her meeting with Wolken and that she had shared Cotton's concerns at that meeting. Hrg. Tr. 37:6-12. Cotton was unaware that Shepherd was going to report her concerns, and she would have asked Shepherd not to report her concerns due to her fear of retaliation. Hrg. Tr. 37:10-21.

DOA's Investigation into the Complaints Against Director Michael

48. Lopach, Schafer, and Wolken determined an investigation was necessary into the allegations against Michael. Hrg. Tr. 269:2-10.

49 . Lopach tasked Schafer with overseeing the investigation. Hrg. Tr. 268:24-270:1. Schafer arranged for John Pavao, State Diversity Program Coordinator, and Matt Mitchell, an attorney with DOA, to conduct the investigation. Hrg. Tr. 189: 15-24.

50. Pavao served in the U.S. military for 23 years and worked in various positions associated with equal opportunity programs. Pavao conducted between five

to ten investigations in the areas of discrimination and retaliation in the military until he moved into a major command position in which he only investigated more high-level complaints such as congressional inquiries and inspector general investigations. Hrg. Tr. 186:12-188:20.

51. Pavao has worked for the State of Montana since 2008. As State Diversity Program Coordinator, he conducts approximately two to three investigations a year. Hrg. Tr. 54:18-155:5.

52. Schafer assigned Mitchell to assist Pavao in the investigation because the investigation involved an agency director and would involve a great deal of work. Schafer also believed Mitchell would bring a legal perspective to the investigation, as well as gain valuable investigatory experience. Hrg. Tr. 270:4-18.

53. Pavao and Mitchell went through the allegations, determined interview questions, and interviewed a number of individuals, including Cotton, Michael, and Wolken. Hrg. Tr. 190:5-17; 196:17-19; 222:10-12; 348:2-18; 498:13-20; 518:12-17.

54. Pavao and Mitchell each took notes during their interviews. They later created interview summaries and asked the participants to review the summary of their interviews to ensure they provided an accurate and complete record of the interview. Hrg. Tr. 191:4-15.

55. Mitchell and Pavao notified participants at the beginning of each interview that they were protected from retaliation for participating in the investigation and told participants what to do if they experienced retaliation. Hrg. Tr. 191:4-7; Ex. 139.

56. An interview summary is prepared and provided to the subject to ensure its an accurate and complete record of the interview. Hrg. Tr. 191:4-15.

57. Mitchell participated in the interview of Cotton, who he found to be calm and composed during the interview. Hrg. Tr. 226:24-227:1. Cotton was advised to be open and honest during the interview. Cotton understood the purpose of being open and honest was to ensure a full and fair investigation. Hrg. Tr. 93:6-11.

58. Cotton testified she was not completely forthcoming with the investigators due to her fear of retaliation. Hrg. Tr. 44:21-45:4.

59. Cotton testified she reported to the interviewers that Michael had suggested a quid pro quo arrangement.

60. Cotton reported to the investigators that she did not feel threatened during the car ride or that Michael was hitting on her. Hrg. Tr. 199:13-200:3.

61. Mitchell included in his notes, "She doesn't think the director was hitting on her. He just lacks emotional intelligence. She felt uncomfortable but not threatened. She has not travelled with him since." Hrg. Tr. 201:11-16; Ex. 137.

62. Cotton also reported to Pavao and Mitchell that she thought Michael took sexual harassment seriously given his response to a situation in which a DOC employee made inappropriate comments to her. Hrg. Tr. 202:4-14.

63. Cotton observed there was no mention in the interview summary provided by Pavao and Mitchell that Michael had inquired about her interest in the position during the Billings car ride. Hrg. Tr. 45:5-19. Cotton felt if she made the absence of that information an issue she would have been made a greater target. Hrg. Tr. 45:15-19. Cotton did not act to correct the oversight. Hrg. Tr. 196:20-197:1.

64. Neither Pavao nor Mitchell recalled Cotton saying that Director Michael had suggested a quid pro quo arrangement or including such information in their interview notes. Hrg. Tr. 198:16-199:12. If Cotton had reported or implied a quid pro quo arrangement, it would have become a significant part of the investigation. It would have been a "red flag" for Mitchell if Cotton had reported or implied a quid pro quo arrangement. Hrg. Tr. 198:16-199:12; 227:2-7.

65. Pavao and Mitchell periodically checked in with Schafer during the course of the investigation. Schafer did not direct them to come to any conclusions or to change the substance of their investigative report. Hrg. Tr. 193:7-12; 270:21-271:4.

66. Lopach never suggested to Schafer that the investigation prompted by Shepherd's complaints should have a certain outcome; Lopach never asked Mitchell or Pavao to ensure a "no cause finding" as a result of their investigation. Lopach never directed anyone at DOA to achieve a certain result with Mitchell's and Pavao's investigation. Hrg. Tr. 136:23-137:18.

67. Neither Pavao nor Mitchell felt pressured by anyone to come to a certain conclusion or to make certain findings in the investigation. Hrg. Tr. 136:25-137:18; 193:10-16; 223:25-224:6; 224:23-225:1; 226:10-13; 271:21-272:7.

68. Neither Director Michael nor Wolken did anything to hinder or influence the investigation conducted by DOA or to compel a certain result.

69. Although Lopach requested assistance from DOA upon learning of the allegations, he did nothing to hinder or influence the investigation conducted by DOA or to compel a certain result. Hrg. Tr. 273:2-5; 289:11-21. Neither Pavao nor Mitchell spoke with Lopach during the course of their investigation. Hrg. Tr. 193:3-6; 220:1-6.

70. The DOA investigators determined that the preponderance of the evidence did not support the allegations against Michael. Ex. 141. The DOA investigators provided their final report to the Governor's Office. Hrg. Tr. 192-21-193:5; 235:25-236:3; 271:12-20.

71. Neither Michael nor Wolken received a copy of the final investigative report. Their only role in the investigation was as witnesses. Hrg. Tr. 348:2-18; 498:13-20; 518:23-519:5.

72. Although Wolken was aware of the complainants listed by Shepherd, she was not aware of who DOA considered to be a complainant or who was interviewed as party of DOA's investigation. Hrg. Tr. 348:1-7; 352:8-16.
DOA considered Cotton a complainant in the investigation. Hrg. Tr. 197:2-11.

73. Cotton notified DOA after the investigation had been completed that she had not filed a complaint against Michael. In an email to Schafer, Cotton wrote:

> Good morning Anjenette,
>
> I wanted to thank you for your email updating me on the outcome of concerns brought forward by employees at DOC. However, after thinking about this more over the weekend, I also want to clarify that I did not bring forth any concerns to DOA and participated in an interview only at the request of DOA. Perhaps I'm not understanding, but I thought your email inferred that I may have submitted a complaint or made an allegation, which I did not.

Ex. 141.

74. At the conclusion of the investigation, DOA again notified Cotton that she was protected from retaliation and to contact the DOA if she had any concerns of retaliation. Hrg. Tr. 274:9-15; Ex. 141.

DOC Policies Regarding Investigations

75. Under DOC Policy 1.3.20, the DOC or facility EEO officers or ADA coordinators "will commence an investigation regarding the circumstances and sufficiency of the complaint [of discrimination] within ten working days of receiving notice of the allegations." Ex. 10.

76. DOC Policy 1.3.20 does not define investigation, but refers to DOC Policy 1.3.13 on Administrative Investigations. Under DOC Policy 1.3.13, an investigation is defined as a "formal fact-finding activity that meets minimum standards identified in investigational operational procedures for the specific purpose of addressing complaints or allegations. Investigations may include, but are not limited to interviews, surveillance, review of electronic and paper records, correspondence, and other information. . . ." Ex. 9.

77. Pavao testified that, in his experience, even though the DOC policy states that formal investigations should begin within ten days of the allegations, extenuating circumstances, such as the amount of coordination required, sometimes results in exceptions to the policy. Hrg. Tr. 172:1-12.

78. There were several conversations within DOA as to how best approach the investigation after Shepherd's allegations were reported to Schafer in February and when the investigation began in April. There was never a question that an investigation would be performed. Tr. 273:6-274:7.

79. Given the nature of the allegations and the fact the allegations were made against an agency director, it was not unreasonable for the investigation to begin more than ten working days after Shepherd reported her allegations to Wolken. Further, given the number of individuals interviewed, the length of the investigation was not unreasonable.

OBPP Reorganization Proposal

80. At or near the time of Director Michael's appointment, the Office of Budget and Program Planning (OBPP) decided to evaluate DOC's organizational structure. Hrg. Tr. 598:18-599:6.

81. DOC's history of overspending its budget was an ongoing concern for OBPP. In the biennium for fiscal year 2017-2018, DOC reported to the legislature that it was $4.5 million short and would need a general fund appropriation. Hrg. Tr. 591:18-23; 595:7-22.

82. Amy Sassano, Deputy Budget Director at the Governor's Office, reviewed DOC's organizational charts as party of her evaluation. Sassano ultimately recommended the elimination of ten full-time employment positions (FTEs), including the elimination of the Government Relations Director position. Hrg. Tr. 599:2-21. Sassano was aware the Government Relations Director position supervised the Board of Crime Control, the Native American liaison, and the Re-Entry Coordinator when she recommended the elimination of that position. Hrg. Tr. 600:5-25.

83. The Governor's Office did not accept OBPP's proposed reorganization. Hrg. Tr. 603:3-9.

The Governor's Office Requests an Organizational Assessment

84. In March 2018, Lopach contacted Quint Nyman, Montana Public Employees Union, regarding concerns he had about DOC's operations. Nyman suggested Lopach contact Peggy MacEwen with the Department of Environmental Quality (DEQ). Hrg. Tr. 123:4-7; 127:11-128:2.

85. On March 8, 2018, Lopach contacted DEQ Director Tom Livers to discuss the possibility of his speaking with MacEwen about concerns he had regarding DOC operations. In Lopach's email to Livers, he wrote that he was "having a tough time from the outside determining if the struggles are from a top-management tone, a middle-management position, or line worker- or combination thereof." Ex. 130.

86. On or about March 14, and March 20, 2018, Lopach met with MacEwen and Ali Bovingdon, the Governor's Deputy Chief of Staff, to discuss his concerns regarding DOC. Hrg. Tr. 363:4-7. Lopach noted issues about communications amongst DOC leadership and the difficulties the Governor's Office had experienced trying to get information from the leadership team that was not conflicting. Lopach also mentioned there had been several internal applicants for the deputy director position who felt they were more qualified than Wolken. Lopach also noted concerns about DOC's ability to implement legislation that had recently passed. Hrg. Tr. 398:2-24; 399:10-23.

87. Lopach did not tell MacEwen specifically that there had been discrimination complaints filed against Michael. Hrg. Tr. 401:11-16. MacEwen understood the complaints referred to by Lopach as not being credible were complaints regarding management. Hrg. Tr. 363:7-18.

88. MacEwen suggested there not be a written report produced at the end of her organization assessment. MacEwen felt publishing a report would hinder the agency's ability to move forward. Hrg. Tr. 381:2-24.

89. MacEwen ultimately suggested an organizational assessment be performed. Hrg. Tr. 128:15-18; 397:13-25. An organizational assessment is a scalable tool to assess how well an organization is functioning. Hrg. Tr. 395:19-396:8.

90. The Governor's Office did not consult either Michael or Wolken in deciding to engage McEwen to conduct the organizational assessment. Hrg. Tr. 332:15-23; 520:1-10.

91. On March 26, 2018, Lopach sent an email to Wolken notifying her that an organizational assessment would be conducted.

> On Friday Peggy and I met and she walked me through her plan to engage a handful of colleagues from state government whom she believes to be great professionals, and to come to Corrections at the request of the new Deputy Director to engage in conversations with agency management identifying strengths and areas for improvement agency wide.

Ex. 116.

92. Neither the Governor's Office nor DOC leadership controlled how MacEwen conducted the organizational assessment or what conclusions she was to draw based upon her work. Hrg. Tr. 130:2-5; 406:5-21. Lopach made it clear to MacEwen that he did not want Schafer or the State Human Resources Division involved in the organizational assessment. 401:2-10. Lopach wanted to make sure the DOA investigation was separate from the organizational assessment because they were examining separate issues. Hrg. Tr. 136:14-20.

The Organizational Assessment

93. MacEwen has over 20 years of experience in Human Resources. At the time she conducted the organizational assessment, MacEwen was the Centralized Services Division Administrator at DEQ. MacEwen held the following certifications at the times relevant to this matter: SHRM senior professional certification, Capital Institute Workforce Management Master certification, and Senior HR professional certification with the Human Resources Certification Institute. MacEwen also

attended a certification program at the Master's level at Cornell for HR directors. Hrg. Tr. 394:6-16.

94. MacEwen conducted ten organizational assessments prior to the organizational assessment at the DOC. Hrg. Tr. 397:4-7.

95. MacEwen determined that the organizational assessment at the DOC would focus on leadership and communication, strategic planning, and decision-making. Hrg. Tr. 401:17-402:5.

96. MacEwen was not aware of Sassano's assessment at the time she conducted the organizational assessment; nor did she rely upon it when coming to her conclusions. MacEwen's organizational assessment was not intended to achieve fiscal savings for the DOC. Hrg. Tr. 354:19-355:9.

97. MacEwen assembled a team of five individuals (including herself) who had experience in strategic planning, communication, and leadership to conduct the organizational assessment. Bill Jarocki was chosen because of his strategic planning background. Kerry Davant was chosen because of her HR background and management background. Damone Songer was chosen because of his experience in strategic planning. Bob Habeck was selected for his expertise in planning and implementation. MacEwen's team functioned as an objective third party. Hrg. Tr. 402:13-403:2, 403:13-20.

98. MacEwen's team decided to evaluate the following areas as part of the organizational assessment: leadership, strategic planning, governance, operations, understanding of the vision, mission/vision, organizational structure and non-IT project management capacity. Hrg. Tr. 403:21-405:1; Ex. 113.

99. MacEwen's team determined they would interview everyone on the DOC leadership team about these subject areas as part of their assessment and they formulated assessment questions that would assist in gathering the information sought. Hrg. Tr. 403:3-12; 405:2-16. Ex. 115.

100. MacEwen spoke with Pavao at the beginning of his investigation. MacEwen asked Pavao to review the questions she was going to be asking as part of the DOC organizational assessment. MacEwen had hired Pavao and was aware of his experience with organizational assessments. Pavao did not tell MacEwen who the complainants were in his investigation. Hrg. Tr. 205:8-206:3.

101. Wolken helped MacEwen facilitate the organizational assessment. She made the leadership team available for interviews and provided requested

information. Wolken described her role in the organizational assessment as minimal and limited to providing information about the organizational structure of DOC. Wolken testified that she and MacEwen discussed positions, not people, when discussing the DOC's organizational structure. Hrg. Tr. 306:18-307:13; 332:24-333:5; 334:8-21; 410:16-25.

102. At the conclusion of interviews, MacEwen's team met to synthesize what they learned and to develop a plan on how the DOC could improve its functioning going forward. Hrg. Tr. 411:1-9.

103. Ultimately, MacEwen and her team interviewed all but one member of the DOC leadership team. The Interim Warden at Montana State Prison was not interviewed. Cotton was interviewed as part of the organizational assessment. Hrg. Tr. p. 408: 5-18.

Conclusions of the Organizational Assessment

104. MacEwen's team determined that the DOC leadership team did not have a clear vision or strategic direction. MacEwen's team also concluded that there was not a clear framework of how decisions were being made. In addition, MacEwen's team was concerned with the number of direct reports to the deputy director. MacEwen's team also concluded there was a lack of trust among leadership team members. Hrg. Tr. 411:10-412:12

105. MacEwen's team specifically considered the size of the DOC leadership team as the size seemed to adversely affect communication and direction of the agency. MacEwen felt the size of the DOC leadership team made it difficult to ensure everyone was on the same page and heading in the same direction. Hrg. Tr. 413:20-414:8.

106. MacEwen's team created a document describing the "current state," of the DOC leadership team, the "desired state," and the "path forward." Hrg. Tr. 414:9-19; Ex. 122.

107. As to "Organization and Decision-Making," MacEwen's team determined the "current state" was:

-Deputy has too many direct reports-span of control issue;
-High complexity and diversity of agency programs;
-Some uncertainty of Deputy's authority to act;
-Leadership positions' decision space is undefined;
-Some uncertainty of what topics should be briefed;

-Timely/complex decisions are not being made;
-Decisions are not being passed to D/D appropriately and
-Decisions are often reversed without context or explanation.

Ex. 122.

108. As to "desired state," MacEwen's team envisioned:

-Organizational structure adheres to span of control;
-Leaders can adequately manage program and staff;
-Program focus is proactive not reactive;
-Position authority and role is defined and made known;
-Positions have defined decision making spaces;
-Decisions are shared with context and explanations; and
-Timely decisions are made at the appropriate level.

Ex. 122.

109. As to the path forward, MacEwen's team suggested:

-Define decision space for critical positions: topics & triggers.
-Major shift in organizational structure- middle management.
-Determine span of control limit for Deputy.
-Use technology when available to enhance communication.

Ex. 122.

110. At some point, MacEwen was requested to provide a proposed organizational structure to address the organizational concerns that MacEwen's team had identified in the organizational assessment. Hrg. Tr. 371:25-372:6; 374:4-10; 418:10-15.

111. Neither Lopach, Michael, nor Wolken suggested to MacEwen that specific positions on the leadership team should be eliminated. Hrg. Tr. 419:7-12.

112. MacEwen created a proposed organizational chart and sent it to Wolken. MacEwen believed that proposed organizational chart provided a structure that would efficiently accomplish the DOC's programs and objectives. Hrg. Tr. 444:5-9.

MacEwen's Recommendations

113. MacEwen recommended the elimination of the Youth Services Division. MacEwen also recommended that a Central Services Division be created and that the areas of support services like Human Resources, finance, and IT be removed from the leadership team and be placed under the newly-created Division, which resulted in the elimination of the Chief Financial Officer position and the Director of IT position. MacEwen also recommended DOC implement a division for project management for non-IT projects. Hrg. Tr. 419:25-421:4; Ex. 111.

114. It is fairly common for agencies to have a Central Services Division and that the Department of Environmental Quality, the Department of Labor and Industry, and the Department of Natural Resources and Conservation all had something akin to a Central Services Division. Hrg. Tr. 421:10-13.

115. MacEwen also recommended the elimination of the Government Relations Director position. MacEwen relied upon information provided to her by Wolken, who had been Cotton's direct supervisor, about Cotton's day to day duties. Hrg. Tr. 307:17-20; 307:24-308:6. MacEwen also relied upon information gathered during DOC leadership team interviews, including an interview of Cotton, and a review of job descriptions for each position on the Leadership Team. Hrg. Tr. 378:6-22; 422:4-7.

116. Kerry Davant is currently the Deputy Director at DNRC. MacEwen included Davant in the organizational assessment because of her human resources and management background. Davant interviewed Cotton as part of the organizational assessment. MacEwen included Davant in her team due to her human resources background and management experience. Hrg. Tr. 402:13-403:2, 403:13-20. Information gathered from Cotton during her interview was similar to the information gathered in other interviews of DOC leadership team members. Hrg. Tr. 422:8-423:15.

117. MacEwen also understood, based upon her interview with Wolken, that the Government Relations Director position had been tasked with onboarding the Board of Crime Control(BOCC) when it was moved to the DOC by the legislature. Wolken believed the role of the Government Relations Director in supervising BOCC would lessen once a Bureau Chief was hired to oversee the BOCC, which Wolken understood would be a self-sufficient working group. Hrg. Tr. 331:18-11.

118. MacEwen understood, based upon the information gathered from various interviews of DOC leadership team members, that the Government Relations Director position was primarily a government affairs position. Hrg. Tr. 378:6-22.

119. In MacEwen's experience, it was unusual for a state agency to have a Governmental Relations Director position because such responsibilities usually fell to an agency's director, deputy director, and division administrators. MacEwen felt the elimination of the Government Relations Director position would be an opportunity to reduce the size of the leadership team. MacEwen thought Wolken, who had been a legislator and who had been involved in justice reinvestment, was particularly qualified to assist with government relations functions. Hrg. Tr. 425:3-22.

120. MacEwen recommended the supervision of the Native American Liaison be moved under the Director because DOC wanted to focus on Native American culture in the prison system. Hrg. Tr. 425:23-426:10.

121. MacEwen recommended the supervision of the Reentry Coordinator be moved under the Probation and Parole Division because it aligned with the Division's purpose. Hrg. Tr. 426:11-17.

122. MacEwen recommended the Board of Crime Control be moved to the newly-created Central Services Division. Hrg. Tr. 26:17-24.

123. MacEwen was not aware of Cotton's role in the investigation of complaints of discrimination against Michael. MacEwen's recommendation to eliminate the Government Relations Director position was not related to or caused by Cotton being considered a complainant in the discrimination investigation conducted by DOA. Hrg. Tr. 445:25-446:12.

MacEwen's Recommendations Lead to a Reorganization of DOC Leadership

124. On July 24, 2018, MacEwen sent Wolken an email with the subject line, "Organizational" and the note, "Here it is. Let me know if it is not what you need or doesn't make sense." Attached was a document entitled, "Organizational & Decision Space," which outlined the recommendations noted above. Also included a draft organizational structure. Ex. 111.

125. DOC did not assist MacEwen in the preparation of the organizational assessment proposal, and it was the first reorganizational proposal from MacEwen that Wolken had seen. Hrg. Tr. 337:15-338:8; 427:12-428:6.

126. On July 25, 2018, MacEwen resent the same documents to Wolken with the note, "With the revision." Ex. 110. MacEwen had erroneously listed the Board of Crime Control as a work entity of the DOC, whereas it was a bureau statutorily

within DOC. Hrg. Tr. 311:15-18. Another correction had been made regarding misnamed working groups. Hrg. Tr. 310:3-6.

127. On July 26, 2018, Wolken forwarded MacEwen's July 25, 2018, email to Michael. Wolken's email included:

> Please find attached Peggy MacEwan's (sic) organizational restructure proposal, culminating from the recommendations made through the climate assessment process. I believe the changes are operationally necessary to meet the goals and mission of the agency.

Ex. 110.

128. On August 7, 2018, Wolken sent Schafer and MacEwen a list of positions that would be affected by the reorganization, saying, "Here is the list of the positions that would be eliminated by the re-org proposal. I'm going to meet with Cynthia D. tomorrow to determine whether any of them would match open positions." Ex. 136; Ex. 2, DOC_CH_2495. Those positions included seven positions in the Youth Services Division and three Operations Manager positions in building and maintenance services (BMS), IT, and the Office of Government Relations. *Id*., Ex. 2, DOC_CH_2496-97.

129. On or about September 10, 2018, MacEwen met with Lopach, Michael and Wolken to discuss the results of the assessment. Hrg. Tr. 370:23-371:5; 417:7-14. During the meeting, they discussed various ways the deputy director's direct reports could be decreased and options for reducing the size of the DOC leadership team. Hrg. Tr. 370 23-371:24; 417:16-25.

130. One option discussed included removing people from the leadership team, but it was determined that such an option would not reduce the deputy director's direct reports. Other options included moving leadership team members to report to someone other than the deputy director, but it was determined that such an option was not an efficient solution. In the end, in order to efficiently accomplish the organizational team's recommendations, the decision was made to restructure the leadership team. Hrg. Tr. 471:25-472:10.

131. Wolken believed eliminating the Government Relations Director position made operational and fiscal sense, because the Board of Crime Control serves a financial function and it did not make sense to have the Board separate from the DOC's accounting structure. As to the Native American Liaison and the Re-Entry Coordinator, Wolken thought it made sense to have them as a part of other existing operational divisions, specifically Probation and Parole. Finally, as to

government relations, Wolken thought that such work should fall on an agency's director or deputy director. Hrg. Tr. 339:15-340:19.

132. Wolken did not think the DOC could justify keeping the Governmental Relations Director and other positions that were not necessary at a high leadership level due to past issues with DOC budgetary issues. Hrg. Tr. 340:20-341:3.

133. Wolken ultimately recommended adding the Justice Reinvestment Coordinator to the proposed organizational chart. Hrg. Tr. 442:15-443:9.

134. MacEwen's reorganizational proposal and her reasoning made sense to Lopach given there were no government relations director in other cabinet agencies and typically a cabinet agency's work liaising with the legislators is led by the agency's director, deputy director and the chief counsel. Hrg. Tr. 133:5-9, 133:24-134:8; 134:9-135:3.

135. Ultimately, the Governor's Office was the final decision maker as to whether the reorganization should be implemented and it approved MacEwen's reorganizational proposal. Hrg. Tr. 120:9-22; 341:17-19; 490:6-9.

136. MacEwen was not aware Cotton was a complainant in the discrimination investigation against Michael when she recommended the elimination of the Government Relations Director. Hrg. Tr. 445:25-446:12.

137. Michael and Wolken did not dispute MacEwen's recommendations. Hrg. Tr. 336:9-15. Neither Michael nor Wolken suggested to Ms. MacEwen or her team that there should be a reorganization at the DOC or that the Government Relations Director position should be eliminated. Hrg. Tr. 308:19-23; 337:3-11; 520:11-14.

138. No one at the DOC or the Governor's Office made changes to MacEwen's proposal to eliminate the Government Relations Director position, the CFO position, the Youth Services Division, or the IT Division Administrator position. Hrg. Tr. 441:22-442:12.

139. Schafer believed MacEwen had valid business reasons for her recommendations and understood the reasons for MacEwen's recommendations. Hrg. Tr. 245:1-13. Schafer did not recommend to MacEwen that there should be a reorganization at the DOC or that the Government Relations Director position should be eliminated. *Id.*, p. 424:19-23.

140. Lopach did not know the organizational assessment would lead to a reorganization. Hrg. Tr. 131:11-15. No one at the Governor's Office recommended to MacEwen that there should be a reorganization at the DOC or that the Government Relations Director position should be eliminated. Hrg. Tr. 131:16-25; 424:19-23.

141. Neither Michael nor Wolken knew that the organizational assessment would lead to a reorganization. Hrg. Tr. 335:8-14.

142. MacEwen did not know that the organizational assessment would lead to a reorganization, nor did she structure the organizational assessment to achieve such a result. Hrg. Tr. 419:11-16.

143. Agency reorganizations are typically required to be completed during the first year of a biennium between July and April. Hrg. Tr. 472:13-474:14; Ex. 7.

144. OBPP will consider agency reorganizational proposals on a case-by-case basis after April 1 if they are critical to the agency's mission or offer potential cost savings. Hrg. Tr. 603:23-604:19. OBPP has approved twenty-nine-percent of all agency reorganizations submitted after the April 1 deadline. Hrg. Tr. 604:20-605:5.

145. Pavao and Mitchell did not play any role in the organizational assessment. Hrg. Tr. 205:3-5; 226:18-20.

The Justice Reinvestment Coordinator Position

146. There was concern Cotton would be left without a job after MacEwen proposed the elimination of the Government Relations Director position. Hrg. Tr. 423:23-424:15. Both Wolken and Michael wanted Cotton to stay with the agency because she was a valued team member. Hrg. Tr. 343:11-12; 343:19-20; 344:8-14.

147. Cotton was offered a temporary position as Justice Reinvestment Coordinator because it was an area that Cotton had interest in and had closely followed. Wolken thought Cotton would like to work as the Justice Reinvestment Coordinator. Hrg. Tr. 314:20-23; 343:10-18.

148. The justice reinvestment process involves the three branches of state government looking at the state's criminal justice system and developing policy to improve outcomes and to save money. Wolken was involved in developing justice reinvestment as a legislator. Hrg. Tr. 328:1-9.

149. Cotton was offered six months of pay protection, with the same salary and benefits that she received as the Governmental Relations Director. Hrg. Tr. 106:21-107:14; Ex. 49. The offer of six months of pay protection did not guarantee Cotton a term of employment of at least six months.

150. Wolken told Cotton she hoped something else would come open at the DOC for Cotton during the six months that she worked as the Coordinator or that the Justice Reinvestment Coordinator position would continue to be funded. Hrg. Tr. 343:21-344:14.

151. Cotton turned down the Justice Reinvestment Coordinator position due to concerns regarding the temporary nature of the funding. Hrg. Tr. 344:19-20.

152. The person that later accepted the position as Justice Reinvestment Coordinator was employed in the position for almost two years, until August 2020 when he left to run for political office. Had he continued as Justice Reinvestment Coordinator, the DOC would have continued to seek funding for the position. Hrg. Tr. 344:15-345:6.

Complainants Affected by the Organizational Assessment

153. Judy Beck was a complainant in the DOA investigation. Hrg. Tr. 208:9-10. Beck was the DOC Communications Director for the Department. MacEwen recommended Beck report to the Director rather than the Deputy Director because the Director should be responsible for what is communicated to the public. MacEwen thought it best if there was not an intermediary involved that may cause the information to be filtered and somehow changed. In addition, during her interview, Beck discussed some of the missteps and miscommunications she believed the Director had made. MacEwen thought these issues could be avoided in the future if Beck reported directly to the Director. Beck did not tell MacEwen that she was uncomfortable with the Director. Hrg. Tr. 429:7-431:4

154. At the time MacEwen made the recommendation, she did not know Beck was a complainant in the DOA investigation. Hrg. Tr. 430:19-23.

155. Cindy McKenzie was a complainant in the DOA investigation. Hrg. Tr. 208:6-8. McKenzie was the Youth Services Division Administrator. MacEwen recommended the elimination of not only McKenzie's position, but the entire Youth Service Division, because it had shrunk to the size of a bureau. Hrg. Tr. 433:8-17.

156. When MacEwen made her recommendation, she did not know McKenzie had made discrimination complaints about Michael or that she had participated in DOA's discrimination investigation. Hrg. Tr. 434:17-25.

157. Sandy Jacke was a complainant in the DOA investigation. Hrg. Tr. 208:11-12. Jacke was an executive assistant to the Director and the Deputy Director. MacEwen recommended she be removed from the leadership team and Jacke report to the Central Services Administrator so that neither the Director nor the Deputy Director would have to directly supervise her. The DOC accepted the recommendation that Jacke be removed from the leadership team, but wanted her to continue reporting to the Director or Deputy Director. Hrg. Tr. 435:8-436:2.

158. MacEwen was not aware Jacke had made complainants against Michael or that she was a complainant in the DOA discrimination investigation. Hrg. Tr. 436:10-16.

159. Kila Shepherd[1] was a complainant in the DOA investigation. Hrg. Tr. 208:23-24. Shepherd had been DOC's Human Resources Director. MacEwen recommended the Human Resources Director position be moved into the Central Services Division to house all of the support services. Hrg. Tr. 436:17-437:5. When MacEwen made her recommendation to move the Human Resources Director position, she did not know Shepherd was a complainant in a discrimination investigation. Hrg. Tr. 437:6-9.

160. Connie Winner was a complainant in the DOA investigation. Hrg. Tr. 207:9-11. MacEwen did not recommend any changes to Ms. Winner's position in the reorganization. Hrg. Tr. 432:10-25. MacEwen did not know that Winner was a complainant in the DOA discrimination investigation when she made her recommendation. Hrg. Tr. p. 433:1-5.

161. Pat Schlauch provided information in support of the complainants during the DOA investigation. Hrg. Tr. 208:13-21. Schlauch was the Chief Financial Officer (CFO). MacEwen recommended his position be eliminated and that the Finance Division be moved into the Central Services Division because it provided support services to the agency. Hrg. Tr. .420:17-421:4; 431:5-20.

162. Schlauch was offered and accepted a job as the Program Manager-Contracts Bureau Chief within the newly created Central Services Division with full pay protection for six months, and part pay protection for the subsequent six months. Ex. 112.

[1] Shepherd's separation from DOC was unrelated to either the DOA investigation or the organizational assessment.

163. MacEwen was not aware Schlauch had been a participant in the DOA investigation when she recommended the elimination of the CFO position. Hrg. Tr. 431:17-20.

164. Kevin Olson provided information during the course of the DOA investigation that supported the complaint's allegations. Hrg. Tr. 207:12-13. Olson was the Division Administrator of Probation and Parole. MacEwen recommended that he assume supervision of the reentry program in his division because the programs lined up and supported each other. Hrg. Tr. 437:20-438:1.

165. When MacEwen made the recommendation, she was not aware Olson had participated in the DOA investigation. Hrg. Tr. 438:2-9.

166. MacEwen also recommended the elimination of the IT Director position held by John Daugherty and recommended the IT Division be moved into Central Services. Hrg. Tr. 431:21-432:5. MacEwen was not aware if Daugherty had participated in the DOA investigation when she made the recommendation. Hrg. Tr. 432:6-9.

167. Of the nine participants in the DOA investigation whose positions were affected by the organizational assessment, including Cotton's position, four positions were eliminated (McKenzie, Schlauch, Daugherty, and Cotton); one position was removed from leadership team (Jacke), three positions were not changed significantly (Beck, Winner, and Olson), and one position was vacated for other reasons (Shepherd). Both Schlauch and Daugherty were offered other positions within DOC.

168. MacEwen recommended there not be a detailed written report coming out of the organizational assessment because she worried that publishing a full report of what everyone reported about one another would hinder the effort to move the organization forward. Hrg. Tr. 381:3-24.

RIF Process

169. The Reduction in Force policy provides that "when reducing workforce, agency managers shall consider the programs they administer and the staff structure that most efficiently accomplishes the agency's program objectives." Ex. 5, p. 5.

170. The Manager's Guide to Reduction in Force for Montana State Government recommends that an agency "broadly document the reason for the reduction in force" and examine other options because "downsizing often results in litigation." Ex. 5, p. 5.

171. Schafer provided assistance to the DOC upon the conclusion of the organizational assessment. Schafer assisted with the logistics of a reorganization and RIF. At the time, the DOC did not have a Human Resources Director and the Human Resources Department was short-staffed. Hrg. Tr. 274:16-275:3; 276:5-16.

172. Cynthia Davenport, interim DOC Human Resources Director, also assisted in the RIF process. Davenport had worked at the DOC in human resources for 25 years. Hrg. Tr. 532:14-19.

173. In addition to the RIFs related to the restructuring of the leadership team, there were RIFs in the transition center in Great Falls, the Lewistown Infirmary, and at Riverside under Michael. Hrg. Tr. 577:15-578:1.

174. Schafer considered MacEwen's documentation sufficient to document the reasons for the Reduction in Force in conformance with the Manager's Guide to Reduction in Force. Hrg. Tr. 281:2-13; *See* Ex. 122.

175. The Manager's Guide to Reduction in Work Force for Montana State Government requires HR to notify the job registry "at the same time" an employee is notified of the RIF. Ex. 5, p. 11. The Guide also provides that "a laid-off employee must submit a resume to participate in the job registry." *Id.,* at p. 5.

176. Davenport prepared Cotton's RIF paperwork and notified the job registry of Cotton's RIF. Ex. 101; Ex. 129.

177. On November 13, 2018, Davenport emailed Cotton and informed her that her name had been submitted to the job registry. Davenport advised Cotton that she was required to submit her resume to HR so it could be submitted to the job registry or she could submit it directly to the job registry. Ex. 101.

178. Cotton did not submit her resume to DOC human resources or to the job registry. Hrg. Tr. 57:5-6. Cotton had no contact with Davenport after the RIF, despite Davenport's efforts to reach out to Cotton. Hrg. Tr. 538:1-539:22; Ex. 148.

179. The Reduction in Force policy provides:

> Agency managers shall offer reinstatement to the laid-off employee if the same position or a position in the same occupation in the employing agency becomes available within one year of the employee's layoff date.

Ex. 4, p. 5.

180. An individual who has been RIF'd may be placed in a position that opens up if the position is in the same classification code as the position from which the individual has been RIF'd. Hrg. Tr. 537:10-21.

181. The positions of Communications Director and Human Resources Director were open at DOC at or near the time of Cotton was RIF'd. Neither the Communications Director position nor the Human Resources Director position were within the same classification code as the Government Relations Director position. Hrg. Tr. 537:10-21.

182. Cotton would not have been considered for the Communications Director position because it was not the same job title as she held at the time of the RIF. No one who was RIF'd during the DOC reorganization would be entitled to reinstatement rights for the Communications Director position. Hrg. Tr. 259:22-260:6.

183. The Human Resources Director position required five or more years of progressive experience in human resources management. While Cotton had previous experience in human resources, she did not have the requisite background or credentials for the Human Resources Director position. Hrg. Tr. 261:24-262:6; 537:22-25.

184. Cotton did not apply for either the Communications Director position or the Human Resources position. Hrg. Tr. 92:21-93:1.

Daugherty Becomes DOC's Central Services Division Administrator

185. The Montana Reduction in Force Policy provides the following regarding skills assessments during the RIF process:

A. Skills Assessment

1. Agency managers shall first assess the skills and qualifications (including past performance) of employees when making reduction decisions and consider the following in relation to the remaining positions:

a. employees' qualifications and experience performing the duties of the remaining positions;

b. employees' qualifications and experience benefiting the agency's future goals and objectives;

c. Employees' skills to perform the specific tasks assigned to the retained positions; and

d. employees' performance history.

Ex. 4, pp.1-2.

186. The Manager's Guide to Reduction in Work Force further provides:

> The Reduction in Force Policy requires you to consider the programs that will continue and the staff structure that best achieves program objectives. It contains guidelines to help you determine which employee(s) to layoff. First, consider skill. . . If employees possess equivalent skills, length of continuous service in state government is the deciding factor.

Ex. 5, p. 8.

187. A skills assessment is used when laying off or reducing the number of people in a singular occupation. A skills assessment was used during the DOC RIF to determine which of the people whose administrator positions were being eliminated should take over the administrator position that remained. Hrg. Tr. 286:15-24.

188. Davenport performed the skills assessment and Human Resources Specialist Renee Seiller-McDaniel reviewed it. John Daugherty, Pat Schlauch, and Adrianne Cotton were considered for the Central Services Division Administrator position through a skills assessment. Hrg. Tr. 533:4-21; 535:6-11; Ex. 102.

189. Davenport also considered Cindy McKenzie in the skills assessment, but did not put her on the final skills assessment because McKenzie had resigned from her position at that point. Hrg. Tr. 535:12-18.

190. Based on the skills assessment, Daugherty was determined to be the most qualified candidate for the Central Services Division Administrator position. Hrg. Tr. 536:5-7.

191. Neither the DOC Director or Deputy Director were involved in the skills assessment and neither had any involvement in Daugherty being chosen for the position. Hrg. Tr. 341:20-22; 342:16-24; 533:22-534:3.

192. Daugherty did not receive a salary increase when he became the Administrator of the Central Services Division. Hrg. Tr. 581:1-4.

193. Cotton engaged in protected activity when she reported her concerns to Shepherd in November 2017. Cotton also engaged in protected activity when she participated in the DOA investigation that began in April 2018.

194. Cotton suffered an adverse employment action when she was laid off after the Government Relations Director position was eliminated and she was laid off in November 2018.

195. DOC made the decision to eliminate Cotton's position and to lay her off for legitimate, non-discriminatory reasons that were not pretext for retaliation.

196. DOC did not retaliate against Cotton for her protected activity.

VIII. DISCUSSION[1]

Cotton alleges her former employer, DOC, retaliated against her for complaining of Michael's conduct toward her during their trip to Billings and her participation in the investigation regarding other allegations of discriminatory conduct by Michael. Cotton argues the elimination of the Governmental Relations Director that resulted from the organizational assessment authorized by the Governor's Office, as well as DOC's failure to offer her another position after the RIF, was retaliation in violation of the MHRA.

A. Cottons' Retaliation Claim

Montana law bans retaliation in employment because of protected activity. Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion, or other material adverse employment action after engaging in a protected practice. *See* Admin. R. Mont. 24.9.603 (2). The elements of a prima facie retaliation case under Title VII are: (1) the plaintiff engaged in a protected activity; (2) thereafter, the employer took an adverse employment action against the plaintiff; and (3) a causal link exists between the protected activity and the employer's action. Admin. R. Mont. 24.9.603(2). *See Mont. State University – Northern v. Bachmeier,* 2012 MT 26, ¶ ¶ 52, 53, 403 Mont. 136, 480 P.3d 233*, Rolison v. Bozeman Deaconess Health Servs*., 2005 MT 95,¶17, 326

[1] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Mont. 491, 111 P.3d 202; *see also Beaver v. D.N.R.C.*, 2003 MT 287, ¶71, 318 Mont. 35, 78 P.3d 857.

Circumstantial evidence can provide the basis for establishing a claim of retaliation. Where circumstantial evidence is used, the respondent is required to produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, the charging party may demonstrate that the reason offered was mere pretext, by showing the respondent's acts were more likely based on an unlawful motive or with indirect evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610(3), (4); *see also Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 868 (9th Cir. 1996).

1. *Cotton's Protected Activity*

Cotton must show as the first element of a retaliation claim that she engaged in protected activity. "Protected activity" means the exercise of rights under the act or code and may include: (a) aiding or encouraging others in the exercise of rights under the act or code; (b) opposing any act or practice made unlawful by the act or code; and (c) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the act or code. Admin. R. Mont. 24.9.603(1).

The undisputed evidence of record shows Cotton engaged in protected activity when she initially complained of Michael's conduct to Shepherd, who was then DOC's Human Resources Director, in November 2017. The evidence further shows Cotton engaged in protected activity when she participated in the discrimination investigation conducted by DOA employees Pavao and Mitchell that began on or about April 16, 2018. Therefore, Cotton has satisfied the first element of her retaliation claim.

2. *The Adverse Employment Action*

Cotton must show as the second element of her retaliation claim that she suffered an adverse employment action. Cotton argues the elimination of the Government Relations Director position, which resulted in her being laid off effective November 23, 2018, was an adverse employment action. Cotton further contends DOC's failure to offer the Justice Reinvestment Coordinator position for a term of *at least* six months rather than a term of "up to six months" was an adverse employment action. Cotton finally argues DOC's failure to offer her the Communications Director position, which opened up less than one month after her layoff, constituted an adverse employment action.

An adverse employment action is an action by the employer that "would dissuade a reasonable person from engaging in a protected activity." Admin. R. Mont. 24.9.603(2). An adverse employment action is one that materially affects the compensation, terms, conditions or privileges of employment. *Chuang v. University of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1126 (9th Cir. 2000). An adverse employment action must rise above a trivial harm and ordinarily, "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). A charging party "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68-69 (2006).

The elimination of one's position is clearly a material adverse employment action. However, Cotton has failed to show DOC's failure to offer her the Justice Reinvestment Coordinator position for a period of *at least* six months or to offer her the Communications Coordinator position constituted adverse employment actions.

The Justice Reinvestment Coordinator position was subject to a federal grant for a period up to six months. Hrg. Tr. 317:21-318:7. Wolken testified she was not comfortable guaranteeing a specific term of employment given the possibility that federal funding may not come through or a request to extend the term of the grant would be denied. Hrg. Tr. 318:14-25. Wolken testified she was eager for Cotton to stay with the agency and believed she would be good in the position given her knowledge and experience in justice reinvestment policies. Hrg. Tr. 343:11-18. It was the hope that the position would continue for six months and beyond. Hrg. Tr. 343:24-344:4.

Given Cotton had worked on procuring this particular grant for the DOC, she should have understood that no guarantees could be made regarding the position's term given the nature of federal funding. Ultimately, the position was accepted by an individual who served in that role for approximately one year before leaving to run for public office. Hrg. Tr. 344:19-22. Cotton has failed to show DOC's refusal to guarantee a term of six months for the Justice Reinvestment Coordinator position constituted an adverse employment action.

Similarly, the DOC's failure to offer Cotton the Communications Director position was not an adverse employment action, as defined under Admin. R. Mont. 24.9.603(2). Generally, a former employee alleging retaliation on a failure to rehire

theory must first establish that he or she applied to work for the employer. *See*, e.g., *Ruggles v. Calif. Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986) (stating that a plaintiff claiming retaliatory failure to hire must "show that the position for which she applied was eliminated or not available to her because of her protected activities."); *see also Velez v. Janssen Ortho, LLC*, 467 F.3d 802, 807 (1st Cir. 2006) (holding that an employer's failure to rehire employee, who only submitted an open ended letter requesting "any available job," did not constitute an adverse employment action).

The Communications Director position came open in December 2018. DOC did not notify Cotton the position was available or offer the position to Cotton. However, Cotton never applied for the position. Hrg. Tr. 71:10-20; 92:24-93:1. Further, she never actually submitted her result for the Job Registry despite being directed to do so prior to her layoff. Hrg. Tr. 57:5-6; 99:21-93:1. An adverse action cannot be found where one failed to even pursue the position or take any affirmative action to suggest she had an actual interest in the position.

The Reduction in Force policy provides:

> Agency managers shall offer reinstatement to the laid-off employee if the same position or a position in the same occupation in the employing agency becomes available within one year of the employee's layoff date.

Ex. 4, p. 5. An individual who has been RIF'd may be placed in a position that opens up if the position is in the same classification code as the position from which the individual has been RIF'd. Hrg. Tr. 537:10-21.

While the Communications Director position became available shortly after she was laid off, Cotton's former position, Government Relations Director, was not in the same job classification code as the Communications Director. Hrg. Tr. 537:10-21. Schafer testified that Cotton would not have been considered for the Communications Director position under the RIF policy because it was not the same job title she held at the time of the RIF[2]. Hrg. Tr. 260:2-7. Only the individual who was RIF'd from the Communications Director position would have reinstatement rights under the RIF Policy. Hrg. Tr. 259:22-260:6.

Wodnik testified Cotton should have been considered for the Communications Director position. However, she acknowledged she does not claim to be an expert in

[2] Cotton alluded to the DOC's failure to offer her the Human Resources Director position at hearing but did not reference it in her post-hearing briefing. The analysis regarding the Communications Director would also apply with the Human Resources Director position given that it was also in a different job code than the Government Relations Director position.

human resources and that she typically relied upon human resources for guidance when making personnel decisions. Hrg. Tr. 492:20-493:1.

The evidence shows Cotton was not entitled to receive an offer for the Communications Director position because the position was not in the same job classification code as the Government Relations Director position. Further, Cotton was not RIF'd from the Communications Director position. Therefore, Cotton had no reasonable expectation of being offered the Communications Director position once it became open. This is particularly true given that she never applied for the position once it became available.

Cotton's claims that DOC's failure to guarantee her a term of at least six months for the Justice Reinvestment Coordinator position and failure to offer her the Communications Director position constituted adverse employment actions fails. However, Cotton has shown she suffered an adverse employment action when DOC eliminated the Government Relations Director position. Therefore, Cotton has satisfied the second element of her prima facie retaliation claim.

3. *The Causal Link*

The final element of Cotton's prima facie case is showing a causal link between the protected activity and the adverse action. See, *e.g., Dawson v. Entek Intern*., 630 F.3d 928, 936 (9th Cir. 2011). To maintain a retaliation claim, a plaintiff must show retaliation was the "but-for cause" of the adverse employment action. *Bachmeier*, 2021 MT at ¶ 61, citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013). A charging party "alleging retaliation cannot establish liability if her firing was prompted by both legitimate and illegitimate factors." *Nassar,* 570 U.S. at 360. The "but-for cause" is a more stringent test. *T.B. v. San Diego Unified Sch. Dist*., 806 F.3d 451, 473 (9th Cir. 2015).

"Absent direct evidence of retaliation, -- the third element of a retaliation claim -- a causal link may be established by showing that the adverse employment decision occurred proximate in time to the protected activity, and that the person who made the adverse employment decision knew of the protected activity." *Maurey v. University of S. California* (C. D. Cal. 1999), 87 F. Supp. 2d 1021, 1033 (internal citation omitted). Proof of a causal connection can also be established with evidence of different and more favorable treatment of persons who did not engage in protected activity, departures from established rules or procedures, proof that the respondent intended to take adverse action because of the protected activity or other proof that the adverse action was motivated in whole or in part by the protected activity. Mont. Admin. R. 24.9.610(2)(b).

Cotton concedes she cannot show the requisite causal link through direct evidence. Cotton argues she has produced sufficient circumstantial evidence to show the requisite causal link between her protected activity and the elimination of her position.

a. Temporal Proximity

Cotton argues that Lopach, Michael, Wolken, and other individuals involved in the discrimination investigation, organizational assessment and RIF were aware of her protected activity. Cotton concedes, however, it has not been shown MacEwen was aware of her protected activity.

It is necessary to first identify the "decisionmaker(s)" in this matter. *See Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982) (holding that a decisionmaker's knowledge of the protected activity is an essential element of proving the causal link). The evidence shows that Michael, Wolken, Schafer and Lopach all had knowledge of Cotton's initial report of her concerns to Shepherd in November 2017 and her subsequent participation in the investigation conducted by Pavao and Mitchell. Hrg. Tr. 117:16-118:4; 295:14-20. All four had this knowledge at or near the time that Lopach requested MacEwen conduct the organizational assessment. Further, all four had this knowledge when the RIF was approved and the Government Relations Director position was eliminated, thereby causing Cotton's layoff. While Cotton can show that the decisionmakers involved in the discrimination investigation, organizational assessment and RIF had knowledge of her protected activity, she has a more difficult time showing a temporal proximity between her protected activity and the adverse employment action.

"Temporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases." *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1069 (9th Cir. 2003); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). Causation can be inferred from the proximity in time between the protected activity and the alleged retaliatory act. *See Howard v. City of Coos Bay*, 871 F.3d 1032 (9th Cir. 2017).

"The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.'" *Clark County School Dist. v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508, 1511, 149 L. Ed. 2d 509 (2001). "[A]specified time period cannot be a mechanically applied criterion. A rule that any period over a certain time is per se too long (or, conversely, a rule that any period under a certain time is per se short enough) would be unrealistically simplistic." *Coszalter v. City of Salem*, 320 F.3d 968, 976-78 (9th Cir. 2003).

An inference of retaliation is not plausible where several months have elapsed. *See Clark Cty. School Dist. v. Breeden*, 532 U.S. 268, 272-73, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (two years after protected action); *Manatt v. Bank of Am.*, 339 F.3d 792, 802 (9th Cir. 2003)(plaintiff cannot show temporal proximity when 9 months elapsed between protected activity and adverse action); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) ("A nearly 18-month lapse between protected activity and an adverse employment action is simply too long, by itself, to give rise to an inference of causation."); *Sklyarsky v. Means-Knaus Partners, L.P.*, 777 F.3d 892, 898 (7th Cir. 2015), cert denied, 135 S. Ct. 2861, 192 L. Ed. 2d 899 (2015) (six-month lapse between plaintiff's EEOC complaints and adverse employment); *Musolf v. J.C. Penney Co., Inc.*, 773 F.3d 916, 919 (8th Cir. 2014) (seven months); *Richmond v. Oneok, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (3-month period meant no temporal proximity); *Hughes v. Derwinski*, 967 F.2d 1168, 1174 (7th Cir. 1992) (4-month period meant no temporal proximity); *Yartzoff*, 809 F.2d at 1376(9 month time lapse is insufficient to infer causation).

While Cotton has shown that the decisionmakers involved had knowledge of protected activity, she has not shown temporal proximity between her protected activity and the adverse employment action. Cotton shared her concerns with Shepherd in November 2017. As requested by Cotton, Shepherd did not act on those concerns. Shepherd reported those concerns to Wolken approximately three months later without Cotton's knowledge or permission. Wolken, in turn, reported those concerns to Lopach and to Schafer at or near her the time of her conversation with Shepherd on February 22, 2018. As a result of the information reported by Shepherd, Lopach requested Schafer conduct a discrimination investigation, which commenced on or about April 16, 2018.

MacEwen's organizational assessment began during this same period, which resulted in a series of recommendations being offered in late July 2018. Those recommendations, which included the recommendation that the Government Relations Director position be eliminated, resulted in Cotton's layoff, which she learned of in September 2018. Cotton's last day worked was November 23, 2018.

The evidence shows approximately five months elapsed between Shepherd reporting allegations against Michael to Wolken and MacEwen recommendation that Cotton's position be eliminated. Approximately two months passed before Cotton learned of the decision. Such a lengthy period between the protected activity and the adverse employment action – Cotton's layoff – negates a finding of temporal proximity. Cotton may still show a causal link by other means. *See Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 178 (3rd Cir. 1997) ("When there may be

valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.").

b. Departures from Established Policies and Procedures

Cotton argues that proof of a causal connection can also be established due to departures from various policies and procedures. Cotton points to three areas where she contends departures from established policies and procedures shows a causal link between her protected activity and the elimination of the Government Relations Director position.

i. DOC Policy 1.3.20

Cotton argues the discrimination investigation beginning more than ten days after the filing of the complaint as circumstantial evidence showing a causal link.

DOC Policy 1.3.20 requires the Department of facility EEO officers or ADA coordinators to confer with the Human Resources director, or designee, and "commence investigations regarding circumstances and sufficiency of the complaint within 10 working days of receiving notice of allegations…". Ex. 10.

Cotton first reported her concerns to Shepherd in November 2017. At that time, she declined to file a formal complaint and requested Shepherd not treat her concerns as a formal complaint. Hrg. Tr. 93:12-18. Shepherd, without Cotton's knowledge or permission, then reported those concerns and others to Wolken on February 22, 2018, more than 60 days after Cotton first reported concerns regarding Michael's behavior. Hrg. Tr. 37:2-21.

Wolken reported Shepherd's allegations to Lopach and Schafer on or about February 22, 2018. Hrg. Tr. 164:7-17. Schafer, Lopach and Wolken conferred and ultimately decided an investigation was warranted regarding Shepherd's allegations. Hrg. Tr. 269:2-7. Pavao and Mitchell were tasked with conducting the investigation on April 10, 2018, which was approximately 45 days after Shepherd's meeting with Wolken. Hrg. Tr. 166:24-167:5.

Pavao conceded that no investigation was conducted within ten days of Cotton's report to Shepherd. Hrg. Tr. 166:15-167:4. Pavao also conceded that his investigation began on or about April 16, 2018. Hrg. Tr. 16:6-13. Clearly, Pavao's investigation began more than ten days after Cotton's conversation with Shepherd and Shepherd's report to Wolken.

Pavao testified that extenuating circumstances can often result in delays in starting an investigation. Hrg. Tr. 172:1-12. Certainly, the situation at DOC presented such extenuating circumstances. The Director of Human Resources received a report of discrimination and did nothing to investigate that report until Wolken began working as the Deputy Director in February 2018. Given that several of the allegations reported by Shepherd came from members of the DOC Leadership Team and involved a newly appointed Director, it stands to reason that the Governor's Office would be contacted prior to an investigation being launched. It also stands to reason that it would take time to mobilize the resources necessary to conduct an investigation of that nature. While DOC did not strictly adhere to the ten-day rule set forth in DOC Policy 1.3.20, an investigation was conducted using trained investigators from DOA, which is the agency charged with ensuring state agencies are acting in compliance with the state's personnel policies.

Cotton's argument that the timing of the discrimination investigation is circumstantial evidence of a causal link is unavailing. Cotton also argues the failure to investigate the timing of the investigation is circumstantial evidence of retaliation. No agency can investigate a surmised complaint. Therefore, Cotton has not shown the failure of Pavao and Mitchell to begin their investigation within ten days of the complaint in violation of DOC Policy 1.3.20 is circumstantial evidence of a causal link.

ii. Organizational Assessment

Cotton next argues that the organizational assessment did not comply with the requirements of the Montana Operations Manual Reduction in Force Policy (RIF Policy) and A Manager's Guide to Reduction in Work Force for Montana State Government (Manager's Guide). Cotton contends MacEwen failed to comply with the documentation and analysis steps and failed to consider alternatives as required under the RIF Policy and the Manager's Guide. Cotton also contends MacEwen failed to have an accurate understanding of the duties of the Government Relations Director position and failed to independently review the information provided to her by DOC.

DOC counters MacEwen conducted an extensive organizational assessment in which she gathered information from a variety of sources, including the position holders themselves, including Cotton. Stressing that the Manager's Guide is not law, DOC contends MacEwen followed the Manager's Guide's recommendations in substance. DOC further contends that MacEwen sufficiently documented the reasons for the RIF that resulted from her organizational assessment.

DOC's argument is well taken. The evidence shows Lopach, concerned "That something wasn't working at [DOC]," contacted MacEwen at the suggestion of Quinton Nyman, Montana Public Employees Union. Hrg. Tr. 127:12-21. Lopach had no previous relationship with MacEwen and learned from Nyman that MacEwen had done an evaluation for another state agency. Hrg. Tr. 127:22-128:2. After meeting with MacEwen and discussing his concerns, MacEwen was the one who suggested an organizational assessment. Hrg. Tr. 128:10-129:4. MacEwen and Lopach met periodically but Lopach was "very much … hands off and listened as she did the work." Hrg. Tr. 129: 22-130:1.

Lopach denied the organizational assessment resulted from the complaints against Michael, and worked to keep the organizational assessment separate from the investigation conducted by Pavao and Mitchell. Hrg. Tr. 136:6-20. The evidence shows Lopach tasked one of the few people in state government who had the background and experience to properly conduct an organizational assessment and then left her alone to do just that.

While the organizational assessment may not have strictly adhered to the Manager's Guide recommendations, the evidence does not support a finding that the deficiencies were such as to call the integrity of the results of that assessment into question. Certainly, the evidence does not support Cotton's contention that Lopach tasked MacEwen with conducting a sham organizational assessment with the ultimate goal of eliminating Cotton's position.

Cotton also argues MacEwen failed to conduct a skills assessment as required under the RIF policy once it was determined that Cotton's position would be eliminated. MacEwen testified, however, she was not tasked to conduct the RIF. MacEwen testified she was called upon to make recommendations based upon her organizational assessment. Any analysis required under the RIF policy was to be conducted by State Human Resources or the DOC itself. Hrg. Tr. 374:23-375:19.

The evidence shows Lopach tasked MacEwen to conduct an evaluation of the functioning of the DOC leadership team and to make recommendations as to how that functioning could be improved. MacEwen's role was a limited one and not one that was specifically addressed under either the RIF Policy or Manager's Guide. *See* Hrg. Tr. 382:8-17. Therefore, any failure to adhere to the RIF Policy or Manager's Guide during the course of the organizational assessment is not sufficient to show a causal connection between Cotton's protected activity and the elimination of the Government Relations Director position.

Cotton also argues that MacEwen's assessment was flawed because she failed to have an accurate understanding of the percentage of Cotton's duties were related

to government relations as the Government Relations Director. Cotton notes that 25% of the Government Relations Director's duties were government relations. Ex. 40. Cotton points to MacEwen's testimony that her recommendation to eliminate the Government Relations Director position was based upon her understanding that 100% of the duties of the position were government relations. Hrg. Tr. 376:20-23.

DOC counters that MacEwen and her team interviewed various DOC employees, including Cotton. MacEwen testified:

> When we interviewed each of the leadership team, we asked them, you know, kind of what's the general structure, what each position on the leadership team, kind of what's their general function in the agency, so that we would -- that part of what we were looking at was how well they understood each other's functions and roles. So pretty much every interview talked about Ms. Cotton's position, the government affairs position.

Hrg. Tr. 378:15-23.

MacEwen's decision not to review the job descriptions is not fatal when considering the overall legitimacy of the organizational assessment. MacEwen and her people interviewed individual members of the leadership team in an effort to understand how team members functioned individually and how the team functioned as a whole. It stands to reason that one would not look solely at a job description when trying to understand the reality of an individual's position. Further, delving into the reality of the day-to-day operations of a state agency would most likely reveal personality conflicts or personal strife between employees that would not serve the agency going forward if that was memorialized in a written report. Cotton has not shown that any deviations from state policy or accepted standards in the conducting of the organizational assessment shows a causal connection.

iii. Discrimination Investigation

Cotton contends that Schafer overseeing both the discrimination investigation and the reorganization that resulted from MacEwen's organizational assessment is circumstantial evidence of a causal link. DOC argues Schafer did not actively control the discrimination investigation and allowed Pavao and Mitchell to conduct the investigation with limited oversight. DOC further argues Schafer, in her role as the Administrator of the State Human Resources Division, provided only technical assistance to the DOC in implementing the RIF.

Schafer oversaw the investigation conducted by Pavao and Mitchell. Schafer did not participate in any of the interviews, and instead received periodic updates from Pavao and Mitchell. Hrg. Tr. 235:12-20. Schafer assisted in implementing the RIF after the decision had been made to eliminate the Government Relations Director position. Hrg. Tr. 241:13-20. Schafer had no role in the decisions regarding the reduction in force. Hrg. Tr. 243:6-11. Schafer had no role in MacEwen's organizational assessment. Hrg. Tr. 245:9-13.

Given the DOC was without a permanent Director of Human Resources, it stands to reason that Schafer would have been a resource during the RIF process. There was no evidence offered showing she improperly guided and/or impeded the discrimination investigation, dictated or even suggested a certain outcome to Pavao and Mitchell, or in any way influenced MacEwen's ultimate conclusions.

iv. Skills Assessment

Cotton argues that a skill assessment was neither timely nor properly performed prior to her layoff as required under the RIF policy. When questioned about the timing of a skills assessment, Schafer testified:

> You wouldn't necessarily do a skills assessment -- We eliminate positions, not people. So if we are talking about reorganizing an agency, we would first look at the positions that are necessary. The skills assessment would be done in an instance like this where the agency was moving from three administrators to one administrator, and the skills assessment is used to determine which of the people in those positions is the best suited to stay in the remaining position.

Hrg. Tr. 247:4-12.

The Manager's Guide requires agency managers to perform a skills assessment, which requires consideration of the following:

> a. employees' qualifications and experience in performing the duties of the remaining positions;
> b. employees' qualifications and experience that benefit the agency's future goals and objectives;
> c. employees' skills to perform the specific tasks assigned to the retained positions; and
> d. employees' performance history.

The policy further provides:

> If the skills assessment does not adequately distinguish between employees, agency managers shall then consider the employees' continuous length of service to make the decision.

Ex. 4.

Davenport, who was temporarily serving as the DOC Human Resources Director, was tasked with performing the skills assessment. At the time, Davenport was also serving as the Human Resources Manager for Secured Care at the Montana State Prison. Hrg. Tr. 530:18-25.

In August 2018, Davenport was tasked to perform the skills assessment and to assist in the RIF Process. Hrg. Tr. 532:9-533:15. Davenport testified she "pulled the personnel files of the people affected, their training records, and did the assessment. . . ." Hrg. Tr. 533:16-21. Davenport then assessed the employees' qualifications and experience; knowledge of the areas to be managed; and how the employees' qualifications and experience would benefit the agency in the future. *See* Ex. 102.

> Adrianne and John [Daugherty] pretty equal except John has much more management and corrections experience (see above). Both have a deep understanding of the Dept. goals and objectives, demonstrated ability to manage others, manage budgets, establish and meet goals, work with others, project management, strategic planning.

Ex. 102, p. 2.

Ultimately, Davenport determined that Daugherty who had more than 20 years in state government was the individual that should be placed in the position. Hrg. Tr. 536:5-7. Davenport's assessment, albeit brief, appropriately addressed the four areas set forth in the RIF Policy, as well as considered the affected employees' length of service. There was no evidence offered discrediting Davenport's testimony that neither Michael nor Wolken had any involvement in the skills assessment or dictated the outcome of the assessment. Hrg. Tr. 533:22-534:3.

Cotton's argument that the skills assessment should have been performed as part of the organizational assessment is unavailing. The skills assessment was properly conducted prior to the decision that Daugherty would be offered the Centralized Services Director position. Further, the decision to offer Daugherty the position was consistent with the RIF Policy based upon his having more years of

experience than Cotton. Therefore, the timing and manner of the skills assessment is not enough to show a causal connection.

v. Cotton's Post-Rif Communication with Pavao and DOC Human Resources

Cotton argues the failure of either Pavao or DOC Human Resources to interpret her communications regarding the elimination of her position to constitute retaliation claims is circumstantial evidence of a causal link. DOC argues that neither Pavao nor Davenport had any role in the decision to eliminate the Government Relations Director position. DOC further argues there was no evidence showing that Pavao and Davenport were directed by Lopach, Michael or Wolken not to investigate the claims.

Cotton was informed she was "protected from retaliation based on [her] participation in the investigation." Ex. 26. Cotton was directed to report those concerns to Pavao, Mitchell or Schafer. *Id*. Cotton called Pavao after she learned of the elimination of the Government Relations Director position. Pavao understood she was upset, but "had no reason to believe at that time that she felt it was retaliatory in nature." Hrg. Tr. 183:2-8. Pavao testified, "But had I felt in any way that it was retaliatory, I certainly would have addressed that issue and taken that through the appropriate channels." Hrg. Tr. 183:11-19.

On October 1, 2018, Cotton sent an email to Davenport inquiring about what her role would be following the RIF. In the subsequent email exchange, Davenport answers questions about the temporary nature of the Justice Reinvestment Coordinator position and general payroll questions. There is nothing to indicate Cotton was alleging the elimination of her position was retaliatory. Ex. 148.

An investigation cannot be conducted regarding a surmised complaint. While Cotton clearly suspected the decision to eliminate her position was retaliatory, there is no evidence showing she ever actually filed a complaint. Therefore, Cotton has failed to show the alleged failure of Pavao and Davenport to investigate her concerns does not establish a causal link.

Cotton has failed to show a prima facie case of retaliation because she has not shown through either direct evidence or circumstantial evidence a causal link between her protected activity and the decision to eliminate the Government Relations Director position. Even if Cotton had succeeded in showing each element of her retaliation claim, her claim fails as she has not shown the reasons proffered by DOC for its decision was pretext for retaliation for the reasons noted below.

B. DOC's Defense

Assuming, *arguendo*, Cotton had succeeded in establishing her retaliation claim, DOC would then be required to produce evidence of a legitimate, nondiscriminatory explanation for its actions. *See St. Mary's Honor Ctr.*, 509 U.S. 502, 506-07 (1993) (once a prima facie case is established, the burden of production shifts to employer to articulate a nondiscriminatory reason for adverse employment action, causing the presumption created by the prima facie case to fall away).

To satisfy this burden, the employer "need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 257, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). *See Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78, 98 S. Ct. 2943, 2949-50, 57 L. Ed. 2d 957 (1978); *Knutson v. Boeing Co.*, 655 F.2d 999, 1001 (9th Cir. 1981). The employer bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. *Burdine*, 450 U.S. 248, 259; *see also Davis v. Team Elec. Co.*, 520 F.3d 1080, 1094 (9th Cir. 2008) ("To impose a lesser standard would allow an employer with only the slightest amount of guile to get away with retaliation simply by laying off a victim of discrimination at the same time it laid off other workers for legitimate reasons.").

DOC contends it had several legitimate, non-pretextual business reasons supporting its decision to eliminate Cotton's position. DOC points to the need for increased organizational efficiency and the need for a better functioning leadership team. DOC further contends the duties of the Government Relations Director position was more properly in the purview of the DOC Director or Deputy Director. DOC also points to its programming goals regarding the Native American Liaison position and the Re-Entry Program Coordinator position, as well as the limited role the position had after the transition of the Board of Crime Control to DOC from the Department of Justice.

Cotton argues that DOC has failed to offer legitimate business reasons for its failure to guarantee a term of six months for the Justice Reinvestment Coordinator position or to offer her the Communications Director position. As noted above, the Justice Reinvestment Coordinator position was dependent upon federal funding, which had no guarantee of continuing. Also, as noted above, the Government Relations Director position did not have the same job classification as the Communications Director position. Therefore, Cotton held no reinstatement rights to that position. There is no evidence showing Cotton ever applied for the position,

which was posted and open to application by outside applicants. Cotton's argument that the failure to guarantee her a term of at least six months as the Justice Reinvestment Coordinator or to offer her the Communications Director position is not persuasive.

Therefore, regardless of whether Cotton had successfully brought a retaliation claim, DOC has provided sufficient evidence showing it had legitimate, non-discriminatory reasons for its decision to eliminate the Government Relations Director position. Assuming again, *arguendo*, that Cotton had succeeded in establishing her claim of retaliation, the burden would now shift to her to show DOC's proffered reasons were pretext for retaliation. *See Rolison*, ¶ 16.

C. Pretext

Had Cotton succeeded, she would now have to show either that a retaliatory reason motivated the DOC in rejecting her concessionaire application for the 2019 fair or its proffered reasons are completely "unworthy of credence" in order to establish pretext. *See Villiarimo v. Aloha Island Air*, Inc., 281 F.3d 1054, 1063 (9th Cir. 2002). Essentially, Cotton would have to show by a preponderance of the evidence that, but for the protected activity, she would not have suffered the adverse action. *Bachmeier*, ¶ 61, citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).

Pretext may be established in two ways: (1) indirectly, by showing that the DOC's proffered explanation is "unworthy of credence" because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the County. *Chuang v. University of Cal. Davis,* 225 F.3d 1115, 1127 (9th Cir. 2000). These two approaches are not exclusive; a combination of the two kinds of evidence may in some cases serve to establish pretext. *Id*. Stated another way, it is the "cumulative evidence to which a court ultimately looks." *Id*. "'[V]ery little direct evidence of [a] discriminatory motive is sufficient." *Winarto v. Toshiba America Elecs. Components, Inc.*, 274 F.3d 1276, 1284 (9th Cir. 2001). But where circumstantial evidence is used, "a plaintiff must put forward specific and substantial evidence challenging the credibility of the employer's motives." *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003) (citations omitted).

Cotton would bear the "ultimate burden of persuading the court that [she] has been the victim of intentional [retaliation]." *Burdine*, 450 U.S. at 256. In order to carry this burden, Cotton must establish "both that the reason was false and that [retaliation] was the real reason for the challenged conduct." *St. Mary's Honor Ctr,* 509 U.S. at 515.

1. MacEwen's Knowledge

Cotton contends MacEwen's knowledge of the "allegations" against Michael, as well as Lopach's assessment that they were not credible, could be construed as direct evidence of retaliation. Cotton argues the evidence, if not direct, is specific and substantial circumstantial evidence of pretext.

DOC responds that Cotton's argument misstates MacEwen's testimony. DOC points to the following exchange between MacEwen and Cotton's counsel at hearing:

> Q: You further learned from Lopach in this meeting that, apparently in his view, the allegations were not credible at this time and he does not want to reward that behavior? Do you recall hearing that and noting it down?
>
> A. I remember having the conversation with him about it, but I guess I wouldn't describe it exactly like that. I remember having a conversation where we talked about that the complaints were coming in, they were kind of general complaints about management; the fact that we were doing the assessment, we didn't, didn't want to follow up on those at that point in time, that they weren't credible, meaning that they weren't of a nature that qualified under one of the, like sexual harassment or discrimination or something like that that would have triggered an automatic investigation. That's what I remember the context of notes in.
>
> Q. Okay. Are you aware of any allegations from the Department of Corrections at around this time other than allegations that were ultimately investigated by Anjenette Schafer and her team?
>
> A. No.
>
> . . .
>
> Q. Were these allegations that were referred to a reason you were brought in to do the organizational assessment?
>
> A. Would you clarify which allegations you're referring to?
>
> Q. Well, the ones that you put in your notes from that meeting.

A. Yes.

Hrg. Tr. 362:2-23; 363:7-15.

MacEwen's testimony was clear that she was called in to conduct an organizational assessment regarding complaints about DOC management. Even if Lopach advised MacEwen that there were non-credible sexual harassment allegations made against Michael, there is no evidence showing MacEwen conducted the organizational assessment to achieve any result other than identifying the challenges facing the effective functioning leadership team. MacEwen was clear that her focus was on concerns with management. Therefore, Cotton's argument that MacEwen's testimony regarding allegations discussed with Lopach constitutes direct evidence or substantial credible circumstantial evidence is not well taken.

2. Timeline of Events

Cotton then points to the timeline of events is strong circumstantial evidence of pretext. Approximately seven months passed before Shepherd reported Cotton's allegations to Wolken on or about February 22, 2018. Lopach then contacted MacEwen and it was agreed she would conduct an organizational assessment approximately 30 days thereafter. Schafer tasked Pavao and Mitchell with investigating the discrimination allegations during that same period, with the investigation beginning on or about April 16, 2018.

Cotton learned of the outcome of the discrimination investigation on or about July 2, 2018. MacEwen sent her proposed organization chart to Wolken on or about July 24, 2018. Cotton learned her position had been eliminated on or about October 3, 2018. Cotton's final day of work was November 23, 2018.

Approximately one year had passed between Cotton reporting her concerns to Shepherd and her final day of work. In the interim two agencies and multiple staff were engaged to investigate allegations against Michael, as well as to conduct an organizational assessment.

DOC argues that MacEwen prepared the organizational chart she issued on July 24, 2018, without the input of the DOC. Hrg. Tr. 428:1-6. MacEwen testified she was aware an investigation was being conducted, but she did not know the specifics of the investigation, what the complaints were, or who was being investigated. Hrg. Tr. 446:7-12.

Cotton's argument that the timing of the organizational assessment and the discrimination investigation is sufficient circumstantial evidence of pretext is not convincing. There is no evidence showing there was any coordination between Schafer and MacEwen beyond that which would avoid the two processes from overlapping or otherwise interfering in the completion of either process. There is no evidence showing that Lopach, Michael, or Wolken imposed any influence in either process or dictated a result to be reached. While Wolken acted as a facilitator for both processes, namely gathering materials and making DOC employees available for interviews, there is no evidence showing she had any input on the outcome of either process. In short, while the timing may appear suspicious, there is no evidence in the record to support a finding that the timing of the two processes shows pretext.

3. Deviation from Policies and Procedures

Cotton argues that the deviations from established policies and procedures addressed in her argument regarding causation point to a reluctance to investigate allegations against and to protect Cotton and others during the organizational assessment and subsequent RIF process.

While the documentation regarding the organizational assessment is scant, the evidence shows MacEwen assembled a team of professionals who interviewed members of the leadership team, including Cotton, and made recommendations intended to improve the functioning of the agency. It makes little sense that once MacEwen performed that organizational assessment and made her recommendations that effort would have to be duplicated as part of the RIF process. The evidence does not show that Cotton and the other complainants in the DOA investigation were the topic of the organizational assessment or that the organizational assessment was conducted in an effort to eliminate those individuals' positions.

Similarly, the evidence does not show a reluctance to investigate the concerns of Cotton and the other complaints. While the investigation began more than ten days after the complaints were received, the evidence shows that Pavao and Mitchell conducted a thorough investigation, which included interviews with Cotton and other members of the leadership team. Cotton may have disagreed with the outcome, but the evidence does not show a reluctance to investigate the concerns reported by Shepherd.

4. Reorganization Justification

Cotton argues the DOC has provided inconsistent reasons and justifications for the reorganization. Cotton points to MacEwen's testimony that she did not conduct any budgetary or financial review and compares it to the testimony of both

Wolken and Davenport that references budgetary concerns as a justification for the reorganization.

DOC argues the fact MacEwen did not consider budgetary information when conducting the organizational assessment does not render the assessment invalid. DOC points to the testimony of Wolken in which she acknowledges DOC had historically experienced budgetary issues:

> Year after year and biennium after biennium the Department had been over budget. The Legislature had been critical of so of what they perceived as top-heavy management structure in Helena. And so, you know, not just in the government relations area, but there were a few other positions that, really, we didn't operationally need to have at that level. And given our budget constraints, we couldn't justify keeping them.

Hrg. Tr. 340:20-341:3.

While budgetary issues were not specifically what led to the organizational assessment and subsequent reorganization, it stands to reason that a state agency would consider the budgetary impact of any personnel decisions. Further, Sassano testified clearly that the Governor's Office of Budget and Program Planning (OBPP) long had issues with DOC exceeding its budget year after year. There is no evidence showing that OBPP's concerns led to or contributed to the reorganization or the decision to eliminate Cotton's position. However, budgetary considerations were certainly proper when making personnel decisions affecting the one of the largest state agencies whose programming and services affects a large percentage of the state's population. Therefore, evidence showing budgetary issues were considered after MacEwen issued her recommendations is relevant and admissible. Further, it is not evidence of inconsistent reasons offered by DOC that would support a finding that its proffered reasons were pretext for retaliation.

5. Leadership Team Size

Cotton argues the reorganization resulted in the leadership team being reduced from 15 to 14 individuals. DOC argues the leadership team was reduced from 16 individuals to 12 individuals. *See* Exs. 120, 106. The evidence shows the leadership team was reduced by 25% as a result of MacEwen's recommendations. Therefore, Cotton's argument to the contrary is not persuasive.

6. Comparative Evidence

Cotton argues that five of the six women who were considered complainants in the DOA investigation and one of the two men who supported their concerns were adversely affected by the reorganization, whereas no other members of the leadership were similarly affected.

DOC argues that MacEwen offered detailed testimony as to why she made the recommendations she made after conducting the organizational assessment. There was no evidence offered showing MacEwen was aware of who were considered complainants. Further, the evidence shows two of the individuals who participated in the DOA investigation remained on the leadership team in their same positions, which tends to undercut Cotton's argument that only those who were considered complainants were adversely affected by the reorganization. The comparative evidence Cotton points to is not sufficient to make a finding of pretext.

7. Inconsistencies

Cotton argues the failure of the DOC to guarantee her a term of at least six months for the Justice Reinvestment Coordinator position and failure to offer her the Communications Director position are inconsistent with the testimony of Wolken that she wished for Cotton to stay with the DOC after the elimination of her position. For the sake of brevity, Cotton knew or should have known that no state agency could make a guarantee of a term of employment for a position dependent upon federal funding. It is disingenuous that the individual responsible for obtaining the grant for the position did not understand the limitations of such a position. Further, there is no evidence showing Cotton even applied for the Communications Director position, which was posted publicly. Cotton's former position was not in the same job classification and she had no reinstatement rights to the Communications Director position. Therefore, Cottons' argument on these grounds must be rejected.

8. DOC's response to HRB and Cotton's Discovery Requests

As noted above, DOC failed to produce Wolken's notes in response to HRB's request for information after Cotton filed her Charge of Discrimination. However, DOC produced these notes during the course of discovery. Similarly, while DOC did not disclose MacEwen's July 2018 meeting with Lopach, Michael, and Wolken, MacEwen addressed that meeting at her deposition. While DOC certainly should have disclosed that information in its written discovery responses, it appears to have

provided that information in documentary form when requested to do so. The Hearing Officer is not prepared to find DOC provided misleading and incomplete information at the beginning stages of litigation in this matter. It appears the DOC made a good faith effort to produce all information relevant to Cotton's claim that was in its possession or accessible by the agency. Therefore, Cotton's argument that various omissions by DOC during the initial stages of litigation is not sufficient to show a causal connection.

9. MacEwen and Lopach were not Agents of DOC

As noted above, MacEwen and Lopach were not agents of the DOC. While MacEwen conceded her work was not intended to support a RIF, DOC was free to rely upon that information in determining a RIF was appropriate. The RIF policy provides:

> When reducing the workforce, agency managers shall consider the programs they administer and the staff structure that most efficiently accomplishes the agency's program objectives. Agency managers shall consider employees' skills, qualifications (including performance), and length of continuous service, among other facts, when making reduction-in-force decisions.

Ex. 4.

The RIF Policy further provides a skill assessment is required when making reduction decisions. It further mandates that agency managers consider specific items "in relation to the remaining positions." Ex. 4.

Essentially the RIF Policy requires a skills assessment be performed at two stages of the RIF process. First, agency managers are required to assess the skills and qualifications of employees when making reduction decisions. The Manager's Guide, "The [RIF] Policy requires you to consider the programs that will continue and the staff structure that best achieves program objectives." Ex. 5, p. 8. The evidence shows MacEwen did this as a necessary component of the organizational assessment.

Second, agency managers are required to perform a skills assessment when remaining positions are to be filled by employees subject to the RIF. This effectuates the purpose set forth in the Manager's Guide requiring an assessment of the staff structure that best achieves program objectives. *Id.* While the two may be the same, it is not mandated that be the case in every situation. Further, the evidence does not show any mandated documentation other than agency managers "broadly document"

the reason for the RIF and what other options were considered in an effort to "help alleviate anxiety and mitigate challenges. *Id*., p. 5.

The evidence shows MacEwen conducted an exhaustive organizational assessment that consisted of each member of the leadership team being interviewed. While there may have been minor missteps, the evidence does not show that MacEwen acted with an intent to eliminate Cotton's position regardless of what she discovered. Further, there is no evidence showing Lopach, Michael or Wolken exerted any undue influence on MacEwen or her work, or that they otherwise dictated or even suggested what MacEwen's ultimate recommendations should be.

D. CONCLUSION

Cotton has failed to establish her claim of retaliation, because she failed to present sufficient evidence showing a causal link between the elimination of her position several months after her protected activity. Even if Cotton had succeeded in establishing her claim of retaliation, she has failed to show the reasons offered by DOC for its decision to eliminate the Government Relations Director position were not legitimate and nondiscriminatory, and were instead a pretext for retaliation. Therefore, Cotton's retaliation claim fails.

IX. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7).

2. Adrianne Cotton failed to prove that the Montana Department of Corrections retaliated against her for protected activity. Mont. Code Ann. §§ 49-2-301.

3. Adrianne Cotton has failed to prove that sanctions are appropriate under M. R. Civ. P. Rule 37.

4. For purposes of Mont. Code Ann. § 49-2-505(8), the Montana Department of Corrections is the prevailing party.

X. ORDER

Judgment is granted in favor of the Montana Department of Corrections and against Adrianne Cotton. Cotton's complaint is dismissed with prejudice as lacking merit.

The parties respective motions seeking to seal Cotton's Motion for Rule 37 Sanctions and Supporting Brief, her Post-Hearing Brief on Evidentiary Issues, and Proposed Hearing Officer Decision and Notice of Issuance Of Administrative Decision and to seal DOC's Post Hearing Trial Brief and Proposed Findings of Fact and Conclusions of Law are hereby GRANTED.

Cotton's Motion for M. R. Civ. P. Rule 37 Sanctions is hereby DENIED.

DATED: November 4, 2021.

/s/ CAROLINE A. HOLIEN
Caroline A. Holien, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Isaac Kantor, attorney for Adrianne Cotton, Charging Party; and Sarah Mazanec and Michael Kauffman, attorneys for Montana Department of Corrections, Respondent:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. **Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court.** Mont. Code Ann. § 49-2-505(3)(c)

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, Mont. Code Ann. § 49-2-505 (4), **WITH ONE DIGITAL COPY, with:**

Human Rights Commission
c/o Annah Howard
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728 Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND ONE DIGITAL COPY OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Office of Administrative Hearings, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The original transcript is in the contested case electronic file.