BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

Tom Russell,	)	Case No. 9201005100
	)	
Charging Party,	)	
	)	
versus	)	*Hearing Examiner's Decision*
	)	
Butte Silver Bow County,	)	
Law Enforcement Agency,	)	
	)	
Respondent.	)	

I. Procedure and Preliminary Matters

Tom Russell ("Russell") filed a verified complaint with the Montana Human Rights Commission on August 20, 1993. He alleged Butte Silver Bow County Law Enforcement Agency ("BSBLEA") denied him employment opportunities because of religion, violating his rights under the Human Rights Act and the Governmental Code of Fair Practices. The Commission, on December 1, 1995, certified his complaint for a contested case hearing. The Commission appointed the undersigned as hearing examiner.

This contested case was called to hearing on June 25, 1996, in Butte, Silver Bow County, Montana, in the Chief Executive's Conference Room, Butte Silver Bow County Courthouse. Russell was present with his attorney, Mitchell A. Tyner. BSBLEA's designated representative, Undersheriff Joseph E. Lee was present with BSBLEA's attorney, Donald C. Robinson, Poore, Roth & Robinson, P.C. Witnesses were excluded on Russell's motion. Witnesses and exhibits are listed on the attached dockets.

Hearing proceeded on June 25, 26, 27 and 28. Hearing reconvened on July 30-31 and August 1-2, 1996, and concluded on August 2, 1996. Russell filed his written closing argument on September 20, 1996. BSBLEA filed its written closing argument on September 23, 1996.

On September 23, 1996, Russell sent a letter to the hearing examiner, citing and discussing *Opuku-Boateng v. California*, 95 F.3d 1461 (9th Cir. 1996). BSBLEA responded by letter on September 30, 1996. The record closed on September 30, 1996.[1]

On October 31, 1996, the hearing examiner requested supplemental briefs addressing whether prejudgment interest was properly awarded against BSBLEA (a government entity). The parties filed the supplemental briefs on November 18, 1996, and the case was submitted.

II. Issues

Two issues are dispositive of this case. Can an employer delay any response to a request for religious accommodation for more than two months while awaiting a legal opinion? Must an employer, to accommodate sabbath beliefs of an employee, force other employees to make shift changes, contrary to established practice under existing union contracts? Beyond those two issues, what harm did Russell prove he suffered because of BSBLEA's failure to take reasonably prompt action? The degree to which failure to provide temporary accommodation limited Russell's employment prospects is important. Finally, is an award of prejudgment interest against a government entity appropriate?

III. Findings of Fact

1. BSBLEA hired Russell, a Butte resident, as a jailor on June 6, 1982. Russell worked part-time until the summer of 1985. He then became a full time jailor, with the same job duties. BSBLEA assigned him to the afternoon shift. He worked from 4:00 p.m. to midnight, with Monday and Tuesday afternoons as days off.

2. Russell joined the Seventh-day Adventist Church on October 20, 1984. The Seventh-day Adventist Church considers Saturday the sabbath. Observance of the sabbath commences at sunset Friday and extends to sunset Saturday. Sabbath observance can be a matter for a

[1] The Ninth Circuit amended the *Opuku-Boateng* decision on November 19, 1996. The decision as amended has been considered by the hearing examiner.

particular Seventh-day Adventist congregation to address. Discipline of a member of the congregation who fails properly to observe the sabbath is possible, but for the most part, sabbath observance is a matter for the conscience of the individual member.

3. Russell believed he could continue to work on the sabbath. Seventh-day Adventist doctrine recognizes a difference between secular work and work of necessity.[2] Hospital work is an example of necessary work. For a time, Russell considered his work as a jailor to be necessary work. Still, as time passed, he began to doubt his analysis. He looked for ways to keep his job and observe the sabbath.

4. On June 29, 1986, Russell made a written request for a shift change. CP 25. He sought the change "mainly because of my desire to keep the sabbath as a Seventh Day Adventist by attending bible studies on Friday evenings and services on Saturday mournings [sic]." His written request also stated "I wish not to work the 24 hr. period of the sabbath," and included as a final reason "I wish to work Amway on a part time basis during evening hours to supplement my income."[3]

5. BSBLEA responded in writing (also part of CP 25), through jail administrator Jack Walsh. Walsh wrote, in pertinent part: "I contacted the county attorney in reference to the change of shifts for your religious beliefs, he advised me that recent court rulings state management has no obligation to arrange shifts so employees may attend religious services."

6. Russell continued to work his afternoon shift. He continued to rationalize his work on the sabbath as work of necessity. He also continued to discuss sabbath observance with his pastor and other church members. He became more and more uncomfortable with his Saturday

---

[2] The precise meaning of this distinction is not relevant to this case. The genuineness of Russell's belief and the sincerity of his religious practice were never seriously challenged.

[3] Russell never pursued his Amway efforts during the sabbath. His testimony regarding Amway is, in this respect, unrebutted.

work. The "work of necessity" rationalization no longer seemed valid to him.

7. Russell tried, after the 1986 request, to find his own accommodation. He approached other jailors about switching shifts, but found no workers willing to switch with him. He also lobbied his union to bargain for either shift changes or seniority rights in shift selections. He was not able to obtain majority support for either proposal. *See*, R 246.

8. During the winter of 1990-91, Russell offered to pay another jailor, Robert Lampi, to work Russell's shifts during sabbath hours. Lampi agreed, and told Russell that Walsh had approved the arrangement.[4] Russell had seen other jailors swap shifts. He had himself worked another jailor's shifts. BSBLEA had approved the prior short-term swaps involving Russell. Russell believed BSBLEA had also approved the swaps he observed, for such things as bowling tournaments. He believed the arrangement with Lampi was acceptable to BSBLEA.

9. Jail Administrator Walsh and Sheriff Robert Butorovich received complaints from other jailors about the arrangement between Russell and Lampi. BSBLEA's agreement with the jailor's union dictated a "call out" procedure to cover hours left vacant by a jailor who (for whatever reason) did not work his normal shift. The union contract authorized overtime wages for the jailor who accepted a call out. Russell's arrangement with Lampi denied other jailors the contract right to earn those overtime hours.

10. BSBLEA had other concerns about the arrangement between Russell and Lampi. The hours Lampi worked for Russell on Friday and Saturday were reported as hours worked by Russell. Russell was then paying Lampi directly. As a result, wage and withholding statements, and unemployment insurance records, were not accurate. BSBLEA also considered questions of

---

[4] Russell believed Lampi did tell BSBLEA about both the arrangement and the reason for it (sabbath observance). Lampi did not testify. Russell's testimony about what Lampi told him is admissible to explain why Russell proceeded with this arrangement--Russell's belief (state of mind) that the arrangement had been approved. BSBLEA properly interposed a hearsay objection to Russell's testimony about what Lampi told him, as proof of what BSBLEA was told by Lampi.

legality, supervision and control worrisome.

11. BSBLEA decided to prevent the Russell-Lampi arrangement from continuing. On March 11, 1991, Jail Administrator Walsh directed Russell in writing to end his arrangement with Lampi. CP 53. Russell complied with this direction.

12. On March 25, 1991, Russell made a written request for religious accommodation. CP 56. Richard Fenn, Director of Public Affairs and Religious Liberty of the North Pacific Union Conference of Seventh Day Adventists, aided him in preparing this request. Russell contacted Fenn in March of 1991, for assistance and guidance in obtaining religious accommodation from BSBLEA. Fenn's job included providing help to Seventh-day Adventists seeking such accommodations. After requesting accommodation, Russell continued to work his regular shift, including sabbath hours.

13. The day after Russell's written request, March 26, 1991, Sheriff Butorovich wrote to the Butte Silver Bow County Attorney, Robert McCarthy. Butorovich asked McCarthy if BSBLEA was required "to accommodate [Russell's] request concerning religious beliefs and practices." CP 57. Butorovich had been Sheriff of Butte Silver Bow County since 1980. He stated in his letter that Russell had never before requested relief from or complained about having employment duties on his sabbath. Butorovich asked McCarthy to seek opinions from both the Montana Attorney General and the U. S. Attorney about Russell's request. McCarthy assigned Butorovich's request to Deputy County Attorney Carlo Canty on March 27, 1991. R 235.

14. Sheriff Butorovich testified that he had never before received any request for religious accommodation during his tenure with BSBLEA.[5] He was unfamiliar with the law and legal issues involved in such requests. Besides asking for advice from the County Attorney,

[5] BSBLEA never explained Butorovich's ignorance of Russell's 1986 request for religious accommodation.

Butorovich also discussed Russell's request with Undersheriff Lee, and Assistant U. S. Attorney Robert Brooks.

15. Brooks wrote to Butorovich on March 27, 1993, enclosing an annotation regarding religious accommodation (the letter is part of R 303). The letter and attached annotation were forwarded to Deputy County Attorney Canty.[6]

16. In March of 1991, BSBLEA had not decided who would cover vacation absences among the jailors. Jail Administrator Walsh obtained written confirmations of vacation coverages in May of 1991. R 298 and R 299.

17. BSBLEA normally offered vacation coverages to the other jailors on a first-come first-served request basis. Over the years, patterns of vacation coverage had developed, in which certain jailors would sign up to cover the vacations for particular shifts. BSBLEA was under no obligation to preserve these patterns.

18. When Russell made his March 25, 1991, request for accommodation, Walsh, for BSBLEA, had the power to offer Russell vacation coverage for a day shift jailor, Terry Dunmire. Dunmire had Saturdays and Sundays off. Dunmire's vacation would be July 1-31, 1991.

19. When Russell made his March 25, 1991, request for accommodation, Walsh, for BSBLEA, had the power to offer Russell vacation coverage for a swing shift jailor, Mick Doherty. Doherty had Fridays and Saturdays off. Doherty's vacation would be, in pertinent part, August 5-15, 1991.

20. When Russell made his March 25, 1991, request for accommodation, Walsh, for BSBLEA, had the power to offer Russell vacation time for August 2-3, 1991, the Friday and Saturday between Dunmire's and Doherty's vacations. Russell had 28 days of vacation accrued. Walsh could also have offered Russell vacation time for the Fridays and Saturdays following

---

[6] Butorovich did not know Canty, and was not aware until May of 1991 that Canty would be providing legal guidance. *See*, CP 63.

August 15, 1991. In March of 1991, BSBLEA had sufficient lead time to cover those shifts from the last half of August through November 9, 1991. BSBLEA budgeted for vacation coverage, and had the power to assign vacation coverage to other jailors.[7]

21. Butorovich did not act in March of 1991 to accommodate Russell. He did not direct jail administrator Walsh to attempt any temporary accommodation. BSBLEA did not tell Walsh of Russell's March request for religious accommodation until much later. Nobody contacted Russell for BSBLEA. BSBLEA waited to hear back from the County Attorney's office, and did not respond to Russell's request for religious accommodation.

22. On April 29, 1991, Russell (again after conferring with Richard Fenn) wrote a follow-up letter to Butorovich. CP 62. Russell asked for notification of what BSBLEA would do in response to his request for religious accommodation. During the month between the first letter and the second letter in 1991, BSBLEA told Russell nothing.

23. Undersheriff Lee responded in writing on May 2, 1991. CP 63. In this letter, Lee identified Canty as the lawyer in the County Attorney's office who would respond. When he wrote this letter, Lee understood that the County Attorney's office was reviewing Russell's religious accommodation request.

24. On May 22, 1991, Fenn wrote to BSBLEA (CP 69) renewing Russell's request for accommodation. To this point, BSBLEA had given no substantive response to Russell. Fenn's letter was forwarded to Canty by the County Attorney. R 311. Canty made no response, because he had not completed his research.

25. During the time that Canty was researching the request (March 27 to approximately May 30), Undersheriff Lee met with Butorovich, Walsh, Butte Silver Bow's risk management

---

[7] BSBLEA did not prove that such a temporary arrangement would still create the expense and problems which it would have generated long term. As a temporary accommodation, this arrangement was not shown either to create some more than *de minimis* expense or to cause an undue hardship.

and budget personnel and Canty. Lee may have held some of these meetings before writing his May 2, 1991, letter to Russell. However, until Canty had completed his research and wrote his memo dated May 30, 1991 (R 307), BSBLEA took no action in response to Russell's request.

26. Canty's May 30, 1991, research memo (R 307) showed that BSBLEA had already determined that it could not accommodate Russell: "Preliminary indications are that accommodating the present request may likely result in a real hardship to the County." The balance of the memo, after this initial conclusion, outlined what BSBLEA should do to document a good faith effort at reasonable accommodation before formally rejecting Russell's request. BSBLEA's documentation of its effort would not, to a virtual certainty, result in any change in the conclusion that accommodation of Russell was impossible.

27. BSBLEA did virtually no investigation before deciding that accommodation was impossible. The jail staff consisted of a small group of men and women. BSBLEA could accurately predict the responses of these employees to proposals of shift changes. BSBLEA knew without investigation that accommodation efforts involving shift changes would incur additional expense. BSBLEA decided that accommodation would not be possible, and then awaited Canty’s advice about how to prove it. Canty recommended documentation to defend the decision BSBLEA had already reached. The recommendation triggered BSBLEA’s effort to document the reasons for its decision.

28. On May 31, 1991, Russell again wrote to Sheriff Butorovich. CP 70. Russell gave notice that he would no longer work on the sabbath. After two months with no progress, he forced the issue. Russell had known since his March request for accommodation that he would eventually take this step if BSBLEA did not offer an accommodation. He had consulted with his local pastor and other members of the church. He had visited repeatedly with Richard Fenn. He decided it was now time to stop working on the sabbath. Russell's notice, given the Friday

before, showed that the first sabbath he would observe by not engaging in secular work would be Friday-Saturday June 7-8. Had BSBLEA offered temporary accommodation for a period after the end of May, Russell could and would have decided to work on the sabbath a little longer.

29. Butorovich forwarded Russell's notice to Canty, who drafted a letter in response. R 305. Butorovich signed and sent the response on June 3, 1991. CP 72. In the response, Butorovich represented that "full and fair consideration" would be given to a variety of proposed accommodations (listing several). Butorovich asked Russell for suggestions about possible accommodations. This letter, drafted by Canty, did not reveal or even hint that BSBLEA had already concluded it could not accommodate Russell. This letter did not say that BSBLEA was awaiting Canty's "investigative report" so BSBLEA could follow the steps outlined in the report and document its reasons for refusing to accommodate. This letter asked Russell to continue to work on his sabbath, while offering the representation that "a specific attempt to make accommodations so that you may observe your sabbath shall be made immediately." This representation was at best misleading and at worst false. BSBLEA already knew it would not accommodate Russell.

30. On June 6, 1991, Richard Fenn again wrote to Sheriff Butorovich. CP 74. Fenn's letter includes a strong rejection of Butorovich's request that Russell continue to work on the sabbath while awaiting a possible accommodation. From Fenn's letter, he clearly was urging Russell not to continue to work on the sabbath. Had BSBLEA offered temporary accommodation that first involved another month of working on the sabbath, Fenn might still have discouraged Russell from accepting. Yet Tom Russell himself, from his demeanor and testimony, wanted to resolve this conflict and keep his job. He would have worked on his sabbath for a little longer if BSBLEA had offered to him some genuine prospects for accommodation.

31. Canty did prepare an "investigative report" for BSBLEA's use in documenting a "good faith" effort at accommodation. The report was prepared after Canty completed his research and discussed possible accommodations with Lee and others in BSBLEA. The report outlined various possible efforts at accommodation. BSBLEA used the report to document its "accommodation efforts." The report was forwarded to BSBLEA on June 10, 1991. R 303A--one page memo, June 10, 1991, Canty to McCarthy and Butorovich. The report, which in final form became Exhibit R 227, included Canty's directions to BSBLEA about what to do to gather the data necessary to complete the documentation.

32. BSBLEA returned its documentation of accommodation efforts, handwritten and typed upon Canty's report, the next day (June 11, 1991). R 303A and R 303B. The responses were then typed into the report, and the final report (R 227) prepared. This process took a period of approximately three weeks. The exact date the final report was done is unclear.

33. BSBLEA's final report (R 227) was not an accurate reflection of its decision-making process. BSBLEA decided to refuse accommodation before the draft report was prepared and provided by Canty. The final report was an accurate reflection of the reasons BSBLEA relied upon to defend its decision not to accommodate. The report was simply a formal defense of a decision already made before Canty provided his initial recommendations.

34. The reasons stated in the report were true regarding permanent accommodation. BSBLEA could not, without actual additional expense, accommodate an afternoon shift jailor's Saturday sabbath observance. BSBLEA hired new jail employees for existing openings. The new hire was assigned to the shift open at the time.[8] BSBLEA could not require a current jailor to change shifts with Russell without significantly altering the existing operating procedures.

[8] A current jail employee could seek to change from his or her shift to another shift which was open. BSBLEA had no contract right to refuse such a request. A new hire after such a change would be assigned to the shift "opened" by the current employee's change.

The union would have opposed such a change. The cost of the conflict with the union would have been substantial, including legal fees and interruption of business for Butorovich and Undersheriff Lee to participate in the conflict. BSBLEA would have incurred these expenses whether or not BSBLEA prevailed in the conflict with the union. Win or lose, BSBLEA could not force shift changes to accommodate Russell without actual additional expense.

35. BSBLEA could not use voluntary shift changes to accommodate Russell on a long-term basis. Russell himself knew (and testified) that the jailors would not agree to trade shifts to accommodate his sabbath observance. BSBLEA could not force jailors to change shifts without additional expense, and the jailors would not agree to shift changes. Therefore, BSBLEA could only provide long-term accommodation if it could unilaterally alter the hours or days off for the various shifts.

36. BSBLEA could not unilaterally alter the shift schedules without additional expense. BSBLEA had committed to long-term changes in staffing and shift schedules, by a letter from the sheriff to the union following consultations. R 251, last two pages. Imposing any unilateral alterations in shift schedules after making such a commitment would be tantamount to an open invitation to grievances and litigation. Grievances by individual jailors and union action would have resulted from unilateral shift schedule changes. Whether or not BSBLEA could have successfully defended unilateral shift changes, it would have incurred the actual additional expense of the defense. Whether BSBLEA legally had the power to make such unilateral changes, it could not do so without sufficient expense to justify refusal to attempt such changes.

37. Russell did not have enough vacation time to use for sabbath observance. Roughly two half-shifts (Friday and Saturday) fell within his sabbath. He needed at least 52 days of vacation time (one full shift per week) to cover his sabbath observance. He needed 104 days of vacation time to be off both Friday and Saturday afternoon full shifts. Even if BSBLEA could

have assigned another jailor to cover such vacation absences, Russell had too little vacation entitlement to use this approach.

38. BSBLEA could not reduce Russell's hours to less than full-time to accommodate sabbath observance. Russell would have accepted such a reduction. His arrangement with Lampi was a *de facto* version of such a reduction. Still, such a reduction would only have been possible if BSBLEA could have assigned another jailor to cover at least the two half-shifts of Russell's afternoon duties within his sabbath. BSBLEA decided the cost of benefits, insurance, vacation, etc., for an additional part-time jailor would exceed available funding. R 317.[9] Russell did not rebut the facts upon which BSBLEA based this decision. Russell did not prove that BSBLEA could, contrary to the testimony of its witnesses, assign an existing jailor to cover his sabbath shifts or half-shifts long-term without additional overtime expense.

39. BSBLEA incurred actual additional overtime expense of $165.64 for the shifts Russell missed in June. R 306A and R 306B. The cost per year for overtime at this rate would have been approximately $1987.68.[10] This was the cheapest method of long-term accommodation available to BSBLEA, and the apparent cost of $2,000.00 per is probably less than the actual cost would have been.

40. BSBLEA could not reasonably provide a permanent accommodation[11], but BSBLEA failed and refused to provide a reasonable temporary accommodation. BSBLEA could have

---

[9] BSBLEA documented, in R 317, the costs and problems with a number of options, including shift changes, reduced hours for Russell, and other scheduling changes with the existing jailors.

[10] BSBLEA understated the costs in Exhibits R 306A and R 306B. In at least two instances, 5 hours of overtime were compared to 8 hours of regular time for Russell. As a result, the overtime expense was less than the cost of Russell's full-shift, showing a savings to the sheriff from the overtime call-out. This false comparison reduced the projected costs of accommodation.

[11] Other options were considered for permanent or long-term accommodation, and properly rejected as impossible. BSBLEA reasoned after the fact, in justifying its refusal to accommodate, but its reasoning was sound.

temporarily accommodated Russell in March of 1991. Failure to act promptly and provide temporary accommodation harmed Russell.

41. After his first 1991 accommodation request, Russell continued to work his regular shift, including sabbath hours, for more than two months while awaiting a response. Had a timely response provided temporary accommodation for July and August of 1991, Russell could have and would have continued to work in June of 1991. With his vacation time used after the second vacation coverage shift, starting in mid-August, Russell could have continued to work for BSBLEA until Thursday, November 14, 1991.

42. From June through November 14, 1991, Russell could have worked 5.45 months (including ten of 22 workdays in November) as a full-time jailor had BSBLEA offered appropriate temporary accommodation. Instead, he worked 12 of 22 workdays in June (.55 months), due to "reporting off" for Friday and Saturday shifts on 4 weekends, and being suspended for 2 days. He worked 4 of 22 workdays in July (.18 months); he reported off for Friday and Saturday shifts the first week, and was fired the following Monday. He did not work in August through November. He worked .73 months for BSBLEA during that 5.45 months, losing income for the remaining 4.72 months.

43. Russell's monthly wage when he lost the 4.72 months of work was $1,582.39. CP 151, Addendum B. Russell lost $7,468.88 because BSBLEA failed and refused promptly to provide temporary accommodation. This loss reflects solely the gross wages Russell would have earned during this period of time.

44. The loss commenced July 8, 1991. The loss accrued monthly at 10% per annum simple interest. Russell lost the use of $1,582.39 from August 8 to September 8, 1991. The interest accrued was $13.44. Russell lost the use of $3,164.78 from September 8 to October 8, 1991. The interest accrued was $26.01. He lost the use of $4,747.17 from October 8

to November 8, 1991. The interest accrued was $40.32. He lost the use of $6,329.56 from November 8 to December 8, 1991. The interest accrued was $52.02. From December 8, 1991, to the present, he lost the use of the entire $7,468.88, with interest accruing at $746.89 per annum ($2.05 per day). The interest accrued through January 9, 1997, is $3,933.89. Interest continues to accrue at $2.05 per day.

45. Russell also lost the opportunity to seek transfer within city-county government. Because BSBLEA did not provide reasonable temporary accommodation, Russell had less than two weeks from BSBLEA's notice that accommodation was refused until BSBLEA fired him (June 30, 1991, to July 8, 1991). He had less than two weeks in which to consider his options and attempt to find another job by seeking a transfer.

46. BSBLEA had no procedure for helping an employee transfer to another department of city-county government, and no power to make such a transfer. But had Russell sought a job elsewhere in Butte-Silver Bow government, Sheriff Butorovich would have given him a positive recommendation (see, CP 110, evaluation of Russell, 7/16/91). An applicant already employed by Butte Silver Bow government had an appreciably better prospect of obtaining another position within that government. The hiring procedures used by the various entities within Butte Silver Bow city-county government favored in-house applicants. Russell had less than two weeks to seek such a transfer. He did not try, but he had no time.

47. BSBLEA did not directly discourage Russell from seeking a transfer. BSBLEA did not conceal from Russell the possibility of seeking a transfer. However, BSBLEA did conceal from Russell for more than two months the decision it made almost immediately not to offer any long-term accommodation. BSBLEA also refused to provide a temporary accommodation. The combination of these two acts--that of concealment and that of refusal--took from Russell a six month "window" of opportunity in which to seek other employment within city-county

government.

48. Russell's chances of finding regular employment at a salary commensurate to his jailor's salary (excluding overtime, shift differentials and uniform allowances) would have been far greater had he been able to continue working for BSBLEA through November 14, 1991. He received notice in June of 1991 that no long-term accommodation was possible. The advantage he lost, being ousted from employment within Butte Silver-Bow government within two weeks of that notice, significantly decreased his ability to find work at the wage level he otherwise would have enjoyed. However, Russell failed to show it was more likely than not that a job for which he was qualified would have opened in Butte Silver-Bow government within his window of opportunity. Russell also did not prove that a shift opening consistent with his sabbath observance occurred at the jail within his window of opportunity.[12]

49. Russell did not attempt to find work with Butte Silver-Bow County after BSBLEA fired him. City-county government did not refuse to hire Russell because BSBLEA fired him. Still, having been fired for unexcused absences, Russell's prospects for finding other work within city-county government were poor. For the six month period during which BSBLEA could have accommodated him, his prospects would have been far better as a present employee.

50. Russell since being fired by BSBLEA has struggled to find comparable employment. To date, he has failed to find work that is comparable in salary or security to the work he lost because of his religious belief and practice. His losses, to the extent he would have found a comparable job within city-county government had temporary accommodation been provided, continue today, and will continue in the future.

51. Russell has not established an entitlement to emotional distress damages. BSBLEA

[12] Had Russell proved, in either fashion, that he would have found another government job within the six months, his continuing damages to the present would be in the range of $19,000.00 to $22,000.00 per year before deduction of actual wages earned.

proved that after his discharge Russell experienced episodically serious mental problems. It is possible that those mental problems, or at least the acute episodes of such problems, resulted from stress and upset. It is possible that the stress and upset were the result of losing his job. Still, Russell did not prove it was more likely than not that his emotional distress resulted from the failure by BSBLEA to provide reasonable accommodation.[13] Indeed, Russell objected to the admission of evidence regarding the later episodes of acute mental problems, arguing the problems were irrelevant. Russell has not established compensable emotional distress.

IV. Opinion

BSBLEA is not liable for its refusal to provide a permanent accommodation.

From the first time Tom Russell asked for religious accommodation, BSBLEA consistently refused to consider accommodation. BSBLEA's view, from Russell's first request in 1986 through the day he was fired, was "We can't possibly do this."

The unwillingness of this employer to make a good faith effort to accommodate is patent. BSBLEA evidenced a willingness to go to any lengths to deny religious accommodation, spending far more time and expense on defending its refusal to accommodate than accommodation itself would have cost. Nevertheless, the underlying inquiry remains whether reasonable accommodation was possible, not whether possible accommodation was cheaper than resisting accommodation.

The employer's failure to make a good faith effort to accommodate does broaden the inquiry about reasonable accommodation. The proper inquiry after a *prima facie* case of religious discrimination is established does become, "What could Respondent have done?" ("Charging Party's Closing Argument," p. 3.) This inquiry addresses neither the breadth of

[13] At least some of Russell's financial distress (low earnings) in the years after 1991 may result from these mental problems. Having failed to prove a causal connection between the mental problems and BSBLEA's illegal discrimination, Russell is not entitled to any recovery for continued low earnings which may result from those problems.

Carlo Canty's legal research nor the hidden motivation of Sheriff Butorovich. This inquiry addresses the actual accommodations possible for BSBLEA without undue hardship. All possible accommodations are considered, to decide whether any such accommodation would actually have been reasonable. *Kundert v. City of Helena*, Case No. 9301005512 (Montana Human Rights Commission, 1996); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1994); *Proctor v. Consolidated Freightways*, 795 F.2d 1472 (9th Cir. 1986); *APWU v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986); *Burns v. So. Pac. Trans. Co.*, 589 F.2d 403 (9th Cir. 1978), ***cert. den.***, 439 U.S. 1072 (1979); *Anderson v. General Dynamics*, 589 F.2d 397 (9th Cir. 1978).

BSBLEA need not bear more than some *de minimis* expense to accommodate Russell. *TransWorld Airlines v. Hardison*, 432 U.S. 63, 53 L.Ed.2d 113, 97 S.Ct. 2264 (1977). The expense found too great in *Hardison* (higher wage expense) is precisely the expense (overtime wages) BSBLEA faced here. BSBLEA stretches the facts in setting forth the "thirteen (13) other potential methods of accommodation" besides shift changes that it allegedly considered. "Post-Hearing Brief by Respondent Butte-Silver Bow Law Enforcement Agency," p. 16. But no reasonable method of long-term accommodation was proved. All workable methods suggested did involve undue hardship (more than some *de minimis* expense) for BSBLEA.

Russell cites *Opuku-Boateng*, ***op. cit.***, as authority that BSBLEA should be presumed able to transfer Russell. The 9th Circuit decision rests upon distinguishable facts. In *Opuku-Boateng*, all facility employees were required to work an equal number of "undesirable" shifts, on a rotating basis. This was not true of BSBLEA's jailors in 1991. In *Opuku-Boateng*, evidence ruling out voluntary shift changes was inadmissible hearsay. Here Russell himself admitted the other jailors would not agree to shift changes. In *Opuku-Boateng*, there were enough employees so that voluntary shift changes during the year could reasonably

accommodate the sabbath practices of the requesting employee. BSBLEA did not employ enough jailors to use voluntary shift changes for Russell's sabbaths.

Finally, in *Opuku-Boateng* the undue hardship asserted in requiring shift changes was not an out-of-pocket cost for the employer. BSBLEA did establish that more than some *de minimis* financial cost would have resulted from permanent accommodation of Russell's religious practice. The expense was not so hypothetical that BSBLEA had to try shift changes and bear the expense of resulting grievances and litigation to prove the expense was real. The most viable long-term accommodation proved was reducing Russell's work week and covering his sabbath with another employee, even beyond the normal vacation coverage. This method would still have cost $2,000.00 per year in additional expense (overtime), at the very least. This is more than some *de minimis* expense.

A daily overtime expense of $77.00 to accommodate religious practice is more than *de minimis*. *Reid v. Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975). An additional yearly expense of $390.00 to accommodate an employee's religious belief likewise is more than *de minimis*. *Ansonia Bd. of Ed. v. Philbrook*, 479 U.S. 60, 93 L.Ed.2d 305, 107 S.Ct. 367 (1986), note 3. There is no "sliding scale" on which to compare the total expense of the operation to the additional expense of accommodation. BSBLEA would have spent more to accommodate Russell than some *de minimis* amount. Although BSBLEA displayed an execrable attitude toward religious accommodation of any kind, refusal to provide any long-term accommodation was defensible. Long-term accommodation would have cost money. An employer is not required to spend money to provide religious accommodation.

<u>BSBLEA is liable for its failure to act immediately to attempt temporary accommodation.</u>

BSBLEA did have the capacity to accommodate Russell temporarily. BSBLEA could have responded promptly to his request, in March of 1991, and made efforts to accommodate

him temporarily while the inquiry continued. Russell would then have remained employed through November 14, 1991, without any extra expense to BSBLEA. BSBLEA failed and refused promptly to provide this temporary accommodation, and did not establish a reasonable explanation for this failure. In this respect, this case is on all fours with the 9th Circuit's reasoning. *Opuku-Boateng*, ***op. cit.***

For a law enforcement agency to offer ignorance of the law as justification for prejudicial delay is appalling. BSBLEA could have and should have acted at once to arrange what accommodations it could offer to Russell. BSBLEA is therefore responsible for the harm that resulted because it refused to act at all until the County Attorney's office provided a defense plan against long-term accommodation.

During this contested case, BSBLEA has filed 81 pages of legal arguments, in six different documents. Careful review of all 81 pages reveals no legal authority in support of the proposition that a law enforcement agency can defend failure to accommodate for more than two months by pleading ignorance of the law. Even setting that professed ignorance aside, it was unreasonable in the extreme for BSBLEA, *knowing it would not offer a permanent accommodation*, to say nothing for more than two months. It was unreasonable in the extreme for BSBLEA, for that same time, to do nothing to accommodate temporarily, out of an inchoate fear that doing more than nothing for this employee might set a precedent.[14]

BSBLEA could have provided the temporary accommodation detailed in the findings, at no cost. Jack Walsh could have arranged for the stated vacation coverages, and he should have. Jack Walsh either did not know of or did not want to honor the accommodation requests Russell

---

[14] BSBLEA adopted the approach of the waiter whose customer complained of a mouse in his stew: "Don't shout and wave it about, or the rest will be wanting one, too." The defense is spurious. "If it is to be presumed as a matter of law that an employer may be required to do for one employee only what it may do for all employees 'without undue hardship,' no employer would ever be required to accommodate any religious belief of any employee." *Opuku-Boateng*, ***op. cit.*** at note 25.

made in March of 1991.[15] Bureaucracies routinely do nothing for a long time, to avoid doing the wrong thing. That response carries the risk that doing nothing is itself the wrong thing.

BSBLEA wanted to do as little as legally permissible to accommodate Tom Russell. Doing as little as legally permissible to treat employees equally may be normal for an employer, private or public. Doing more often costs more, and many employers see no profit in spending more to be "better," "nicer" or "fairer" than the law requires. Religious accommodation in particular does not require an employer to sacrifice the monetary "bottom line." However, BSBLEA did less than the law required. The "do nothing" period involved doing nothing when BSBLEA could have accommodated temporarily at no extra expense. The "do nothing" period extended long enough to prejudice that potential temporary accommodation. By the time Russell asked about vacation coverages, BSBLEA had committed the vacation coverages to other jailors. BSBLEA is liable for the harm resulting from this culpable delay. Those coverages could have and should have been offered to Russell in March of 1991.[16]

City-county government should be required to offer Russell a job or provide front pay.

One of the two thorny legal problems here is fashioning a remedy for Tom Russell's loss of the opportunity to find another job within city-county government. *Opuku-Boateng*, ***op. cit.***, suggests the presumption that Russell would have found such a job, but the evidence adduced here does not support such a presumption. Russell has not proved that such a transfer would have been available had BSBLEA provided temporary accommodation.

---

[15] BSBLEA took the position at hearing that Walsh did not know of the accommodation request until later. From Walsh's response to the 1986 accommodation request, of which apparently Sheriff Butorovich was ignorant, Walsh would not have attempted any accommodation of Russell unless he was specifically ordered to do so. Either way, BSBLEA is responsible for the harm resulting from its failure to act promptly to offer temporary accommodation.

[16] BSBLEA also argued that Russell could not perform the job duties of the day shift. Walsh in particular testified that he did not want Russell on the day shift. BSBLEA's effort to prove that Russell was only competent to work the evening shift was contradicted by both the prior use of Russell on other shifts and by Butorovich's glowing evaluation of Russell in 1991. This post hoc justification for failure to offer temporary accommodation was not credible.

Courts or commissions award damages in employment discrimination cases to rectify the harm caused and to make the victims whole. *P. W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Dolan v. School District #10*, 195 Mont. 340, 636 P.2d 825, 830 (1981); ***accord***, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 2372 (1975). What Russell lost was the opportunity, for six months, to seek a job as a current employee of city-county government. Had a job for which he was qualified become available during that six month period, he probably would have obtained a transfer. The value of that lost opportunity was substantial. Tom Russell had limited prospects, after he was fired, ever to find a comparable job. Indeed, he has not done so to date. BSBLEA took away a significant prospect for employment.

The Commission can order city-county government, not solely BSBLEA, to remedy the harm caused by BSBLEA. **See**, *Wilkinson v. Hill County Sheriff's Office*, Case No. 9001004083 (Montana Human Rights Commission, 1995) (imposing an affirmative action plan on Hill County rather than respondent Sheriff's Office only). BSBLEA cannot itself provide the opportunity Russell lost in 1991. City-county government can. To assure some incentive to provide a genuine opportunity, front pay should be awarded.

City-county government must, for six months after the final decision of the Commission, offer Russell the first full-time permanent job for which he is qualified. Unless and until such a job offer is made, front pay should be awarded to Russell, even after the initial six months, for a maximum period of 30 months.[17] City-county government can find and offer a job to Russell, and avoid most or all of the front pay liability. It can fail to do so, and pay the front pay as it accrues. The incentive for city-county government is clear.

---

[17] City-county government will decided internally which department's budget bears the burden of the front pay. The front pay award is against Butte-Silver Bow city-county government, not merely against BSBLEA.

Front pay damages are appropriately limited here.

"Front pay" is an amount granted for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when reinstatement is not feasible. Front pay is temporary, lasting until the victim can reestablish a "rightful place" in the employment market. *Sellers v. Delgado Community College*, 839 F.2d 1132 (5th Cir. 1988), ***citing*** *Shore v. Fed. Ex. Co.*, 777 F.2d 1155, 1158 (6th Cir. 1985), *Rasmussen v. Hearing Aid Inst.*, Case No. 8801003988 (Montana Human Rights Commission, 1992), ***aff'd sub nom.*** *Hearing Aid Institute v. Rasmussen*, ***op. cit.*** Front pay is awarded when reinstatement is impossible or inappropriate. *Thorne v. City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986), *EEOC v. Pacific Press Publ. Assoc.*, 482 F.Supp. 1291 (N.D. Cal.) (when effective employment relationship cannot be restored, front pay is appropriate), ***aff'd***, 676 F.2d 1272 (9th Cir. 1982). In *Rasmussen*, ***op. cit.***, the Montana Supreme Court articulated the front pay standard: "An award of front pay is made in lieu of reinstatement when the antagonism between employer and employee is so great that reinstatement is not appropriate." 258 Mont. at 378, ***quoting***, *Fadhl v. City and County of San Francisco*, 741 P.2d 1163, 1167 (9th Cir. 1984).

Since Russell should be given back the chance he lost to find other employment in city-county government, front pay is awarded until he can exercise that opportunity. Until Russell is offered a job, he is entitled to front pay to compensate for the loss of his 1991 employment opportunity. Since he did not prove it more likely than not that he would have actually obtained a comparable job in 1991, some limit upon his front pay is also appropriate. If a full time permanent job for which Russell is qualified opens in the first six months after this final order, city-county government will be liable if it fails to offer that job to Russell, not just for the front pay awarded, but also for the future losses resulting from the failure to comply with the Commission's order. Until such an offer is made, in the first six months or later, front pay

should continue for up to 30 months.

In 1991, Tom Russell was making $1,532.89 per month. The union contracts provided for seniority and annual raises. Whether Russell would have obtained another government job, and kept it, are questions unanswered in the record. Therefore, Russell's front pay, starting from the date of the final decision of the Commission, should be set at $1,500.00 per month, with no reduction for actual present wages, and no increases for raises. This is approximately what he was making at the time he was fired. The entitlement should cease when a job is available in city-county government. Until then, the front pay obligation should remain unchanged, because the incentive for city-county government to offer a job is not altered by what Russell may be earning from other work.

To end its liability for the indicated front pay, city-county government must offer Russell a permanent full-time job. For six months, Butte Silver Bow consolidated government, in its entirety, is obligated to offer Russell the first available full-time permanent job for which he is qualified. If no such job opens during that six month period, city-county government may but no longer must offer Russell such a job during the next two years. Absent such an offer, the front pay entitlement shall continue for the entire 30 month period.

Emotional distress damages were not proved.

Once a violation has been proven under state or federal civil rights statutes, emotional harm is compensable only if the claimant proves both (1) that distress, humiliation, embarrassment or other emotional harm occurred, and (2) that respondent's unlawful conduct proximately caused the emotional harm. *Carey v. Piphus*, 435 U.S. 247, 264 at n. 20 (1978) (voting rights); *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984) (employment discrimination); *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974) (racial discrimination in housing); *Brown v. Trustees of Boston U.*, 674 F.Supp. 393 (D.C. Mass. 1987) (sex-based tenure

denial); *Portland v. Bureau of Labor and Industry*, 61 Or.Ap. 182, 656 P.2d 353 (1982), ***affirmed***, 298 Or. 104, 690 P.2d 475 (1984) (sex-based employment discrimination); and *Hy-Vee Food Stores v. Iowa Civil Rights Comm.*, 453 N.W.2d 512, 525 (Iowa, 1990) (sex and national origin discrimination). Because Russell has not proved a connection between emotional distress and the conduct of BSBLEA, it is immaterial whether emotional distress occurred. He cannot recover for emotional distress.

Interest on the back pay is appropriate.

Prejudgment interest is awarded on back pay. *P. W. Berry Co.*, ***op. cit.***; *Foss v. J.B. Junk*, Case No. SE84-2345 (Montana Human Rights Commission, 1987). The Commission awards prejudgment interest either from when the wages would have been paid, *P. W. Berry Co.*, ***op. cit.***, or from when the hearing was held, *Amstutz v. Mountain Bell*, Case No. HpE80-1235 (Montana Human Rights Commission, 1986). The differences in commencement dates for prejudgment interest result from differences in proof. When the amount lost and the accrual date for it are proved, interest from the due date is proper. *P. W. Berry Co.*, ***op. cit.***, *Foss*, ***op. cit.***

The parties briefed the question of prejudgment interest liability for a government entity. This is the second thorny legal issue here. Government entities are exempted from post and prejudgment interest under certain circumstances. ***See***, *Weber v. State*, 258 Mont. 62, 852 P.2d 117 (1993); §2-9-317 MCA; §27-1-212 MCA. No case law addresses whether prejudgment interest under the Montana Human Rights Act is barred against government entities.

Neither the legislature nor the Montana Supreme Court has exempted public employers from Human Rights Act liability for prejudgment interest, to make whole the damaged party. The Commission should not favor public employers over private employers without clear authority. Prejudgment interest should therefore be awarded.

V. Conclusions of Law

1. BSBLEA illegally discriminated against Russell, by failing and refusing to act with reasonable promptness to provide temporary accommodation, when it received his request for accommodation of his religious practices and beliefs. §49-2-303(1)(a) MCA.

2. Russell lost $7,468.88 in gross wages as a proximate result of this illegal discrimination. §49-2-506(1)(b), MCA.

3. BSBLEA owes Russell $3,933.89 in prejudgment interest at 10% per annum through January 9, 1996, and continuing at $2.05 per day until the Commission's final order.

4. Butte Silver Bow City-County government must offer Russell the first full-time permanent job for which he is qualified that becomes available within six months of the date of the Commission's final order here. After six months, Butte Silver Bow City-County government may later offer Russell any full-time permanent job for which he is qualified.

4. BSBLEA shall pay monthly front pay to Russell, at $1,500.00 per month. This front pay entitlement begins the day of the Commission's final order here and continues until the first day a full-time permanent job with Butte Silver Bow City-County government is available for Russell. Front pay is due and payable at the end of each successive calendar month. If no full-time permanent job offer is made by Butte Silver Bow within 30 months after the Commission's final order, Russell's front pay entitlement shall cease after payment for 30 full months. The first and last payments shall be calculated on a percentage basis (days of the month for front pay divided by days of that month). If front pay becomes due for the full 30 months, the entitlement for the last month of such pay (the 31st calendar month) shall be for the difference between 100% and the percentage entitlement for the first calendar month of front pay.[18]

---

[18] For example, if the order issues on March 7, 1997, the first payment, due on March 31, 1997, shall be for 80.6% of $1,500.00, and the 31st payment, due on September 30, 1999, if no job is offered in accord with this order, shall be for 19.4% of $1,500.00.

5. The circumstances mandate injunctive and other affirmative relief. BSBLEA shall develop a policy, approved by Commission staff, for prompt response to any future religious accommodation requests.[19]

VI. Proposed Order

1. Judgment is granted in favor of charging party and against respondent on Tom Russell's complaint that Butte Silver Bow Law Enforcement Agency failed and refused to provide reasonable accommodation for charging party's religious belief and practice.

2. Respondent is ordered to pay $11,402.77 to charging party for back pay lost because of the illegal discrimination. This sum includes prejudgment interest up to and including January 9, 1996.

3. Respondent is ordered to pay prejudgment interest to charging party on the back pay portion of the award in paragraph two, at 10% per annum, $2.05 per day, beginning January 10, 1996, until the date of the Human Rights Commission's final order.

4. Butte Silver Bow City-County government is ordered to offer Russell the first full-time permanent job for which he is qualified that becomes available within six months of the date of the Commission's final order here. After six months, Butte Silver Bow City-County government may later offer Russell any full-time permanent job for which he is qualified.

4. Butte Silver Bow City-County government is ordered to pay front pay to Russell, at the end of each calendar month, in the sum of $1,500.00 per month. This front pay entitlement begins the date of the Commission's final order here and continues to the first working day of a full-time permanent job offered to Russell by Butte Silver Bow City-County government. If no such job is sooner offered, Russell's front pay entitlement ceases with the

[19] "Prompt" still allows the employer to conduct a reasonable inquiry into the sincerity of the religious belief and the genuineness of the need for accommodation. No such issues arose in Tom Russell's case, nor did BSBLEA defend its delay with evidence of any such grounds.

monthly payment that completes 30 full months of front pay (the 31st monthly payment unless the first payment is for a full calendar month).

5. Respondent is ordered not to violate any of the rights of its employees as protected under the Montana Human Rights Act, and specifically ordered to adopt a policy under which genuine requests for accommodation of sincerely held religious beliefs or practices shall be promptly addressed, with exploration of temporary accommodation commencing immediately upon receipt of such a request. Respondent shall submit a draft written policy to the Commission staff within four calendar weeks of the Commission's final decision here, and shall adopt the policy as soon as possible after the draft policy, with any revisions required by the staff, is approved by the staff.

Dated: January 9, 1997.

_____

Terry Spear, Hearing Examiner
Montana Human Rights Commission