

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0051011274,  
0051011275, 0051011276, and 0051011277:

ROBERT EDWARDS, ) Case Nos. 2348-2005, 2349-2005,  
 )  
 ) 2351-  
 ) 2005, 2350-2005  
Charging Party, )  
 )  
vs. )  
 ) **FINAL AGENCY DECISION**  
CASCADE COUNTY, CASCADE COUNTY )  
SHERIFF'S OFFICE, UNDERSHERIFF )  
CLYDE "BLUE" CORNELIUSEN AND )  
CASCADE COUNTY SHERIFF )  
DAVE CASTLE, )  
 )  
Respondents. )

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**I. PROCEDURE AND PRELIMINARY MATTERS**

On October 29, 2004, charging party Robert Edwards filed a discrimination complaint with the Montana Department of Labor and Industry alleging that respondents Cascade County, Cascade County Sheriff's Department, Undersheriff Clyde "Blue" Corneliusen and Sheriff Dave Castle discriminated against him on the basis of political ideas/belief when they subjected him to a hostile work environment, made employment decisions which detrimentally affected him, and altered the terms and conditions of his employment beginning on or about June 30, 2004 and continuing. Hearing examiner Terry Spear held a contested case hearing on October 25-28 and November 18, 2005 (with the parties' joint stipulation to extend jurisdiction for the additional day of hearing). Elizabeth A. Best, Best Law Offices, PC, represented Edwards; Robert J. Vermillion, Smith, Walsh, Clarke & Gregoire, represented Cascade County; Kevin C. Meek, Davis, Hatley, Haffeman & Tighe, PC,

represented Castle, Corneliusen and the Sheriff's Department. The transcript of hearing records the witnesses who testified and the exhibits admitted or refused.

After the filing of the transcript of hearing, the parties filed post hearing arguments and submitted the matter for decision on February 14, 2006. Copies of the Hearings Bureau's docket of this contested case proceeding accompany this decision. The hearing examiner now *sua sponte* amends the caption in this case, to reflect the name change mandated by 2005 amendments to Montana law, changing the title of respondent "Cascade County Sheriff's Department" to "Cascade County Sheriff's Office."

## II. ISSUES

The issues for this case are whether the respondents (or any of them), beginning June 30, 2004, subjected Edwards to a hostile work environment or otherwise took adverse employment actions against him and if so, whether those acts were taken because he supported Kent Funiak rather than Castle in the primary election for Cascade County Sheriff in 2004. A full statement of the issues appears in the final prehearing statement.

## III. FINDINGS OF FACT

1. Respondent Cascade County is a local government unit, created under Article XI of the Montana Constitution. It is a political division of the state, operating pursuant to Mont. Code Ann., Title 7. Respondent Cascade County Sheriff Dave Castle is the elected chief law enforcement officer of the county, pursuant to Mont. Code Ann. § 7-3-432, and is a sworn peace officer. Respondent Cascade County Undersheriff Clyde "Blue" Corneliusen is an employee of Cascade County and a sworn peace officer, selected to be undersheriff by Castle after his victory in the Democratic primary for sheriff candidates in June 2004, and appointed undersheriff by Castle after his appointment as sheriff effective June 30, 2004. Corneliusen acted on behalf of the Sheriff's Office with authority delegated by the sheriff. Respondent Cascade County Sheriff's Office comprises the employees of Cascade County that are under the direction and control of the sheriff, including but not limited to sworn peace officers.

2. Charging Party Robert Edwards is an employee of Cascade County, working within the Cascade County Sheriff's Office as a deputy sheriff. He has been a sworn peace officer in the employ of the county for more than nine years. Edwards began his career in law enforcement in 1987, as a Military Policeman in the United States Army. After his discharge, he graduated from the Montana Law Enforcement

Academy. The county hired him as a detention officer at the Cascade County Jail. Approximately 6-7 years ago the sheriff at the time promoted him to deputy sheriff.

3. Edwards became a Deputy Coroner in 1996, an additional position available to qualified deputies (with additional pay). In 2000, Edwards completed a forty-hour course and received certification as a Field Training Officer (FTO) for the Sheriff's Department, qualifying him to train new officers. He performed FTO duties within the department until June 2004.

4. Edwards consistently received positive performance evaluations for the performance of his law enforcement duties. Throughout his employment, Edwards received commendations, accolades and pay increases.

5. In 2004, Deputy Sheriff Dave Castle ran against Cascade County Sheriff Kent Funyak in the primary election on the Democratic ticket. There were no candidates for the office in the Republican primary. Funyak had been appointed by the Cascade County Commissioners to complete the term of the previously elected sheriff, who retired. A majority of the sworn peace officers in the Sheriff's Office supported Castle. Edwards was part of the minority of officers who openly supported Funyak. There was considerable controversy and rancor within the Sheriff's Office during the primary campaign. Castle won the primary election on June 8, 2005. Winning the Democratic primary effectively meant Castle would be the next sheriff.

6. Edwards treated Castle respectfully and professionally during the campaign. He had never had problems with Castle before the election. Within days of the election, Castle told Edwards that there were no hard feelings. Edwards "felt pretty good about Castle at that point."

7. Within days after the election, Corneliusen told Deputy Tom Dalton,<sup>1</sup> who had supported Castle, that he, Corneliusen, was "going to root out the turncoats." Corneliusen was referring to Funyak supporters in the Sheriff's Office.

8. Also within days of the election, Edwards learned that there was a Post-It™ note in one of the detectives' offices documenting a bet between Sheriff's Office employees about whether five deputies would leave employment within 365 days after the primary election. Without discussing it with the involved peace officers, Edwards interpreted the bet to be whether Castle and his supporters would drive out at least five Funyak supporters within the first year after the election. He began to fear hostile treatment from the new administration.

9. Shortly after the election, Funyak unexpectedly resigned. There were no Republican contenders for the office. The Cascade County Commissioners appointed Castle as Cascade County Sheriff effective on the same date and time as Funyak's resignation became effective, June 30, 2004 at 5:00 p.m.

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<sup>1</sup> Dalton later resigned because of problems he had with Corneliusen.

10. Assuming the office at the end of June 2004 instead of in January 2005, after winning the November general election, Castle had to make immediate decisions about the operations of the Sheriff's Office. He created an informal advisory board of his supporters, to assist in immediate decision-making necessitated by his June appointment as sheriff. Funiyak supporters who were part of the Sheriff's Office command staff, with higher ranks than the participants in Castle's informal board, were not part of that advisory process.

11. Castle had the right to listen to his supporters' suggestions about changes in the Sheriff's Office. Doing so in a fashion that left higher ranking officers who had supported Funiyak feeling left out, while not illegal, exacerbated existing concerns of Funiyak supporters that they would now receive less favorable treatment.<sup>2</sup>

12. Castle appointed Corneliusen as undersheriff. Corneliusen was a junior deputy prior to this appointment. Edwards and numerous other officers and deputies in the Sheriff's Office held more rank and/or seniority than Corneliusen. With Castle's approval, Corneliusen participated in all subsequent promotion boards.

13. Castle appointed Corneliusen as undersheriff because he trusted and felt he could rely upon Corneliusen, and also because he believed Corneliusen's prior experience in the military qualified him for the command position. Castle had the right, as the new sheriff, to appoint Corneliusen. The appointment was not illegal, but it fueled the concerns of some Funiyak supporters, including Edwards.

14. Had Funiyak remained sheriff through December 2004, the delay might have attenuated concerns of the Funiyak supporters concerns (including Edwards), about how they would now be treated. Castle would have had time to explain coming changes, to reassure Funiyak supporters and to reconsider and perhaps to modify changes in light of expressed concerns. Castle's initial efforts to assume effective command of the Sheriff's Office immediately upon his appointment did not include any illegal discrimination against Edwards.

15. In July 2004, Jo Suden, who served for 25 years as executive assistant in the Sheriff's Office, heard Corneliusen, on the telephone in his office, say that he would not be done with Funiyak supporters until they were out of the Sheriff's Office.

16. Soon after the primary election, the Sheriff's Office received a complaint that Edwards had mishandled a death investigation. After becoming undersheriff, Corneliusen performed an internal investigation into this complaint and concluded that Edwards had done nothing wrong. Edwards found the internal investigation file hanging on a "report spindle" in a public area of the Sheriff's Office. He complained to Castle that this was both an invasion of his privacy and an improper publication of

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<sup>2</sup> Finding whether Castle excluded high ranking Funiyak supporters from the entire decision making process is unnecessary to decide Edwards' case.

the complaint. Castle promised to have Corneliusen write a letter verifying that Edwards had been cleared of wrongdoing. Corneliusen never wrote the letter.

17. Neither Castle nor Corneliusen engaged in illegal discrimination against Edwards in their actions regarding the complaint and the internal investigation. Nevertheless, their handling of this matter increased Edwards' concern about the treatment he would receive from the Castle administration. After this incident, Edwards told his supervisor, Lieutenant Ray Hitchcock (who had supported Castle), that he was very concerned about his future in the Sheriff's Office. Hitchcock reported to Castle that Edwards was so upset that he was in tears.

18. Friends and family observed changes in Edwards' demeanor after the election. They observed that Edwards was tense, hurt, afraid and disillusioned with what he perceived to be unfair treatment.

19. In late June 2004, the Chief Deputy Coroner position had opened within the Sheriff's Office, as a result of the retirement of Tim Wong, the prior Chief Deputy Coroner, just before the election. Castle asked Wong about possible replacements. Wong told Castle that there were many capable people. Wong did express reservations about one potential replacement among the current deputy coroners—Deputy Sheriff Scott Wagner.

20. In July 2004, the Sheriff's Office formed a promotion board regarding the Chief Deputy Coroner position. The board's job was to review the applications, to interview the candidates and to make a non-binding recommendation to the sheriff. The board consisted of Corneliusen and three deputy coroners not seeking the chief deputy coroner position—Dave Zrowka, Jesse Callendar and Bob Rosipal. Two current deputy coroners had applied for the position—Edwards and Wagner (a Castle supporter). Except for Corneliusen, as the new undersheriff, the board members were peers of Edwards and Wagner, rather than higher ranking sworn peace officers, as had been the practice and procedure for such promotion boards before Castle became sheriff.

21. The promotion board agreed at the outset that Edwards and Wagner were both qualified to be Chief Deputy Coroner. Each board member scored the two applicants. The total scores favored Edwards by less than a third of a point. The board then discussed who each member preferred. Two of the three deputy coroners chose Edwards. Corneliusen and the third deputy coroner chose Wagner.

22. Corneliusen had control of the conduct of the promotion board by virtue of his rank as undersheriff. For example, when he had earlier presented the other board members with the personnel files of the two candidates, and some board members protested that their review of the personnel files was improper, Corneliusen had overruled them.

23. Corneliusen declared the candidates tied, and asked whether the Sheriff's Office needed the position. He directed that the board members compile a list of key functions of the Chief Deputy Coroner. The board members compiled an *ad hoc* nine-item list, which did not comprehensively follow the job description for the position. Corneliusen told the other board members that he would meet separately with Wagner and with Edwards and ask each about the functions of the position (without disclosing the existence of the nine-item list), after which he would compare their answers with the nine-item list.

24. Corneliusen then met separately with Wagner and with Edwards, asking each of them to list the primary functions of the Chief Deputy Coroner. Edwards' list contained three of the nine items on the board's list. Wagner's list contained six of the nine. Corneliusen gave no credit for listing other functions of the position, but only for matching the functions on the *ad hoc* list.

25. Corneliusen reported back to the other board members that Wagner had identified more of the items on the board's list than Edwards, and that Wagner would therefore be the board's recommendation for the Chief Deputy Coroner position. Since Corneliusen was the undersheriff and effective "chair" of the board, the other members were not free to express any disagreement they may have felt. Corneliusen told Castle that the board considered Wagner and Edwards "tied" for the job and that Wagner had won the "tie breaker."

26. Without Corneliusen's voting participation in the selection process, the other three deputy coroners involved in the selection process would have chosen Edwards for the position, by a two to one vote, and Edwards would have assumed the position, with extra pay of \$250.00 per month, in October 2004. Had Corneliusen participated in but not taken charge of the promotion board process, the four board members could have used their own evaluative scores of Wagner and Edwards as the "tie-breaker," recommending Edwards for the position. Corneliusen was responsible for the recommendation of Wagner rather than Edwards for the job. He sought and achieved that outcome because Edwards has supported Funyak in the primary.

27. On October 5, 2004, Edwards filed a grievance alleging that the recommendation of Wagner for Chief Deputy Coroner resulted from improper practice and procedure in the Sheriff's Office.

28. On October 29, 2004, Edwards filed his Human Rights complaint regarding political belief discrimination.

29. In early November 2004, Castle read a newspaper article about both Edwards' grievance and another grievance by Deputy Sheriff Dan Kohm (undersheriff for Funyak), both of whom were named in the article. Angry about the bad public relations the article might generate, Castle began one of his command staff morning meetings with comments about the article. He told the command staff (the

undersheriff and the two ranking captains—Ray St. Onge and Dan O’Fallon) that “when somebody says something about the office or ... about the sheriff, it affects us all and we need to move on.” Castle next commented to his command staff that all the members of the Sheriff’s Office “needed to remember our oaths.” He asserted that he had “received some letters” and “received statements” about deputies using drugs and deputies using the Sheriff’s Office for political reasons. Castle told his command staff that “this had got to stop.”

30. Captain O’Fallon concluded<sup>3</sup> that Castle’s comment about drug use accusations referred to Edwards and Kohm, and reported this to Edwards. Shocked by the report and concerned about a formal charge of illegal drug use, Edwards immediately arranged to take drug tests, which were negative. Castle, Corneliusen and the Sheriff’s Office were not responsible for O’Fallon deciding and telling Edwards that the sheriff had accused him of illegal drug use.

31. With his grievance pending and an ever increasing concern for his future under the Castle administration, Edwards’ sought medical help for his mounting emotional distress. On November 12, 2004, he saw his family doctor, Dr. Timothy Weill. Dr. Weill found Edwards “stressed out, he was anxious, concerned, unhappy, mentally and physically ill.” Weill also concluded that Edwards’ abdominal pain “was secondary to ... psychological stress ... at work.” Concluding that Edwards’ symptoms were related to acute stress, Dr. Weill prescribed medication and directed Edwards not to work for 2 weeks.

32. Wagner’s selection for the Chief Deputy Coroner position was not the only factor in Edwards’ work related stress, but it was the major factor. Among the various events that Edwards considered possible adverse actions, Wagner’s selection was the only event of which Edwards was aware as of that date that had a tangible adverse impact on Edwards’ career.

33. On November 22-23, 2004, the County’s hearing on Edwards’ grievance occurred.

34. On November 30, 2004, Dr. Weill released Edwards to return to work.

35. On December 15, 2004,<sup>4</sup> the Cascade County Commissioners ruled that Edwards’ grievance had merit. The Commissioners found that the promotion recommendation and decision regarding the Chief Deputy Coroner position were

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<sup>3</sup> O’Fallon, like Edwards, had been the subject of an investigation of possible wrong-doing during Castle’s tenure as sheriff. Unlike Edwards, O’Fallon was suspended during the investigation. Like Edwards, he was cleared. His treatment by the Castle administration may be the reason O’Fallon did not ask if Castle was referring to Edwards and Kohm, but that still would not impact the findings regarding whether O’Fallon’s report to Edwards was somehow attributable to the respondents.

<sup>4</sup> The original grievance decision of December 8, 2004, was amended on December 15, 2004.

arbitrary and capricious and that Castle, Corneliusen and the Sheriff's Office had violated County and Sheriff's Office policies in the process and the decision.

36. The Commissioners also ordered Castle and Corneliusen to apologize and ordered that, to avoid any appearance of impropriety or retaliation, promotion boards should not include the sheriff or undersheriff. The Commissioners also directed that the promotion process be restarted and redone, following policy. Castle and Corneliusen did none of those things.

37. On January 26, 2005, an opening for a narcotics investigator position occurred (a "HIDA" position<sup>5</sup>). This position was not under the direct supervision of Corneliusen. Edwards applied for the position, and was rated second out of the four applicants. The deputy rated ahead of him, Scott Van Dyken, got the job.

38. On March 14, 2005, Castle and Corneliusen, with approval from the Cascade County Commission, adopted a new promotion policy for the Sheriff's Office that conformed the existing policy to the practices already implemented by Castle and Corneliusen. The new promotion policy did not address the Commission grievance decision.

39. After the election, Edwards, one of two certified FTOs in the Sheriff's Office, had continued to work as an FTO for a few months. The Sheriff's Office then stopped assigning FTO duties to Edwards, assigning some FTO duties to uncertified deputies. Edwards also was no longer invited to FTO meetings. Part of the cessation of FTO duty assignments to Edwards could have resulted from the shift assignments of trainees, but not all of it. Trainees commonly rotate between the various shifts. The cessation of assignment of FTO duties to Edwards was because he had supported Funyak in the primary election.

40. Edwards asked why he was no longer assigned FTO duties, but received no explanation. On April 4, 2005, Edwards followed up on his unanswered questions with a written inquiry about why he was not doing FTO work.

41. Also on April 4, 2005, Edwards was scheduled to meet with an investigator from the Human Rights Bureau, at the investigator's request, regarding Edwards' discrimination complaint. The day before, Edwards had asked his immediate supervisor for time off patrol duty to meet with the investigator the next day and had been referred up the chain of command to Lieutenant Greg Tadman, who was at home. Edwards called Tadman and repeated the request. Edwards told Tadman that he would return for full duty after the meeting, to be held in his attorney's office, and that he would be available for calls while at the meeting. Tadman, unhappy because of the short notice, grudgingly authorized Edwards to be off duty for the meeting and arranged for other patrol coverage during that time. Edwards was also the "on call

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<sup>5</sup> "HIDA" apparently is an acronym for "High Intensity Drug Traffic Area."



coroner” on April 4. Edwards, in uniform, drove his patrol car to the meeting, and was available for duty by telephone and by portable radio call during the meeting.

42. Shortly after Edwards’ April 4 meeting with the investigator, Castle received complaints that Edwards had driven his patrol car to meet with his lawyer while off duty. Castle directed Corneliusen to talk to Edwards to verify that the car use had occurred and was unauthorized and then to counsel Edwards not to do it again.

Castle also told Corneliusen that Edwards had in the past made critical remarks about the operations of the Sheriff’s Office (“political comments”) while on duty.<sup>6</sup> Castle directed Corneliusen to counsel Edwards not to criticize the operations of the Sheriff’s Office while on duty.

43. Five days later, on April 9, 2005, Edwards was called into a meeting with Hitchcock and Corneliusen. The “two primary issues” for the meeting were identified as Edwards’ concerns about loss of FTO duties and Edwards’ treatment by other deputies, articulated in his April 4 letter.

44. Corneliusen informed Edwards that certain, but not all, recent recruits were given a written survey about their favorite and least favorite FTOs and that Edwards was a “least favorite” FTO.<sup>7</sup> Edwards asked why the survey was done. Hitchcock told him, “There’s a problem and it’s going to get fixed.” Edwards had always trusted Hitchcock. To Edwards, Hitchcock’s comment indicated that the Castle administration viewed Edwards as the “problem.” Corneliusen told Edwards to try to figure out what might have caused the negative feedback in the survey, even though Edwards had no information about who made the comments or what those comments involved.<sup>8</sup>

45. In the same meeting, Edwards told Hitchcock and Corneliusen that he felt officers were refusing to talk to him. Corneliusen acknowledged that Edwards’ concerns were legitimate. He told Edwards to go to the people he thought were shunning him and try to solve the problem himself.

46. The failure and refusal of Castle, acting through Corneliusen, Corneliusen and the Sheriff’s Office to provide a legitimate explanation for no longer assigning Edwards to FTO duties and to address Edwards’ admittedly legitimate concerns about his treatment by other officers caused and contributed to a hostile work environment for Edwards, because he supported Funyak in the primary election.

47. By the time the April 9, 2005, meeting had covered all of these matters, Edwards was upset and defensive. At that point in the meeting, Corneliusen told Edwards that

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<sup>6</sup> The “political comments” complaint to Castle apparently had occurred in July 2004.

<sup>7</sup> The surveys were evaluation tools regarding the FTO program and the FTOs. Edwards had no notice before this meeting of the evaluations. The use of the surveys as evaluation tools probably violated Cascade County and Sheriff’s Office performance evaluation policy.

<sup>8</sup> Edwards never received copies of the surveys or an explanation for his low ratings.

the sheriff had received complaints about Edwards criticizing Castle while on duty and driving his patrol car to his attorney's office while off duty. Edwards asked for specifics. Corneliusen declined to provide specifics during the meeting, but required an immediate answer from Edwards. Edwards, with no specifics provided, did not understand that Corneliusen was referring to an alleged criticism of the Sheriff's Office nine months earlier. He also did not realize that Corneliusen was referring to the interview with the Human Rights investigator, which Edwards believed he had handled appropriately, with permission. Edwards denied both accusations.

48. After the meeting, Corneliusen reported Edwards' denials to Castle and verified that Edwards had driven his patrol car to his attorney's office on April 4.

49. On April 9, 2005, Castle appointed Wagner as "Assistant County Coroner" (a newly created position, to replace the Chief Deputy Coroner position), with a pay increase of \$25 per month. Soon after the Commissioners' grievance decision, Castle attended "coroner's school" (the training for sheriff's officers to qualify for deputy coroner). At some point thereafter, Castle decided to create the new position instead of complying with the Commissioner's decision. The position was not posted, and Wagner did not apply.

50. Until his appointment to the new position, Wagner had performed many of the duties of the Chief Deputy County Coroner and had identified himself in writing as the Chief Deputy Coroner, even though his appointment to that position was disapproved by the Commissioners' decision on Edwards' grievance.

51. But for the Commissioners' grievance decision, Wagner would have remained Chief Deputy Coroner, a position Castle decided not to fill rather than complying with the Commissioners' decision. Compliance would have reopened the position for Edwards as well as Wagner. The creation of the new position, although it did result in monetary savings for the Sheriff's Office, would never have occurred, and Edwards would have been originally selected as and remained Chief Deputy Coroner, but for his support of Funyak in the primary election.

52. Cascade County never attempted to enforce the Commissioners' grievance decision.

53. In April 2005, Dr. Weill changed Edwards' medication to Prozac, for depression and anxiety. Dr. Weill concluded that Edwards' depression and anxiety were caused by acute and persistent stress at work, and referred him for continuing therapy to Dr. Mark Johnson, PhD., a psychologist. Dr. Johnson diagnosed Edwards as suffering from depressive disorder, moderate severity, and began on-going treatment. From the end of November 2004 through April 2005, the events at work that had sustained and increased Edwards' work-related stress resulted from illegal adverse actions by Castle, Corneliusen and the Sheriff's Office.

54. On April 27, 2005, Edwards met with Castle, Hitchcock and O'Fallon. Castle accused Edwards of using his patrol car to see his attorney off duty and of speaking "ill" about Castle. When Edwards learned that he was accused of driving a patrol car to see his present attorney, he told Castle that he had gone once to his attorney's office in a patrol car for the purpose of meeting with the Human Rights Bureau investigator. He told Castle that other deputies used patrol cars for personal business, like going to the gym (Castle supporter Jeff Ivers), on day shifts. He reminded Castle that officers used their patrol cars to go to the car wash, to get haircuts and to go to the grocery store. Edwards also told Castle that he was confused "about a lot of policy issues." For example, Castle had recently admonished him for talking to the press, which was something all coroners had historically done. Edwards told Castle that he did not understand receiving criticism for using a patrol car for a purpose that historically was permitted. He explained that he was doing his best to follow policy.

55. On May 8, 2005, Castle and Corneliusen assigned the HIDA position previously assigned to Van Dyken in January<sup>9</sup> to the fourth place finisher in the January application process, Jeff Ripley. This assignment came without reopening of the position, giving notice of the opening or appointing Edwards (who scored second to Van Dyken in the January application process). Officers in that position averaged approximately ten hours of overtime per week, at pay rates beginning at \$19.09, which amounted to at least \$795.42 per month (50 weeks x 10 hours per week x \$19.09 divided by 12 months).

56. Castle testified during this contested case hearing that one of the reasons he selected Ripley was that he "had some mounting concerns dating back quite a while" about Edwards being emotionally unstable, based upon Edwards demeanor during the grievance hearing and Hitchcock's report (nearly a year before) that Edwards was teary-eyed during a conversation about possible political belief discrimination. This testimony was not credible. Castle did not take Edwards off patrol duty (a position of equivalent responsibility and stress to the HIDA position) or obtain an evaluation of his fitness.

57. Castle also testified at hearing that he did not select Edwards for the HIDA position in May 2005 because "he lied to me" regarding using the patrol car to attend the interview with the Human Rights investigator. Castle's conclusion that Edwards actually had lied to him lacked a credible basis in fact.<sup>10</sup>

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<sup>9</sup> See Finding 38, *supra*. Van Dyken elected not to stay in the position.

<sup>10</sup> See Findings 58-61, *infra*, regarding the subsequent disciplinary action taken based on that same conclusion.

58. The selection of Ripley was made because Edwards had supported Funyak in the primary election.

59. On May 26, 2005, the Hearings Bureau issued and served a notice of hearing in this present proceeding, after receiving a referral of this matter for hearing from the Human Rights Bureau.

60. On June 6, 2005, Castle wrote to Edwards, demanding a written explanation of the conflict between the April 9 statement that Edwards had not driven his patrol car to a meeting with his attorney while off duty and the April 27 statement that he had driven his patrol car to a meeting with the Human Rights investigator at his attorney's office, with permission and in accord with what Edwards understood to be customary practice.

61. Edwards submitted a detailed written response on June 10, 2005. In essence, he reiterated his April 27 statement. He wrote that he misunderstood the accusation Corneliusen posed to him on April 9, and did not realize it involved the meeting with the investigator. He repeated his assertion that Tadman had given him permission. He raised concerns about the timeliness of the inquiry into the allegations of criticism of the Sheriff's Office in July 2004. He concluded by asking that further communications be sent to his attorney.

62. On June 22, 2005, Castle disciplined Edwards for "being less than honest" with regard to whether he drove his patrol car to his attorney's office. Castle imposed a two-day suspension and officially relieved Edwards of his FTO duties for misrepresentation, gross inefficiency of duty and insubordination. In the disciplinary memo, Castle stated that the claim that Tadman "was aware" Edwards was driving his patrol car to his attorney's office to meet with the Human Rights investigator was "in direct conflict" to what Tadman stated.

63. The evidence of record in this case does not support the conclusions in the disciplinary memo.<sup>11</sup> The discipline was imposed because Edwards supported Funyak in the primary election.

64. The suspension aggravated Edwards' anxiety. He started having chest pain. He sought help that day at the Immediate Care Clinic, receiving treatment from Dr. Greg Houlihan. Dr. Houlihan found Edwards to be emotional and tearful. Edwards "looked like he was fatigued, run down, distressed ... very concerned, almost a fear ... of going back to work and facing conflicting interests ... and ... chest pain." Dr. Houlihan did an EKG and concluded that stress and anxiety caused Edwards's chest pain, not heart disease. Dr. Houlihan decided that Edwards was suffering from "work-related stress" and prescribed Zoloft (an antidepressant), Pamelor for sleep and depression, and Xanax for anxiety. Dr. Houlihan also concluded that Edwards would

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<sup>11</sup> See pp. 20-21 of the opinion, *following*, and especially footnote 14.

need additional services for treatment of his work related stress, depression and anxiety, with prescription medications to manage his condition.

65. Edwards' work-related stress resulted, in substantial part, from adverse employment actions taken by Castle, Corneliusen and the Sheriff's Office. The work-related stress also resulted from Edwards' fear of such political idea/belief discrimination, and his scrutiny of how he was being treated for evidence of such discrimination. The fear of political idea/belief discrimination was reasonable. Some of the work-related stress, but not most of it, resulted from Edwards' scrutiny of actions unrelated to his support of Funyak. Work-related stress caused Edwards to suffer depression, sleep disturbance, loss of appetite, diminished sex drive and lack of enjoyment of activities previously enjoyed. Edwards began to isolate himself. In all these particulars, Edwards suffered serious emotional distress as the proximate result of the illegal discrimination.

66. Edwards has continued to require medication for depression and anxiety and has incurred medical bills for treatment of his emotional distress, all of which resulted from the work-related stress.

67. Edwards had seen Dr. Johnson six times before the hearing, and his diagnosis of moderate depressive disorder never changed. Dr. Johnson described Edwards's need for future care as being dependent on the existence of the stressors which caused his condition in the first place.

68. As a result of his treatment by Castle, Corneliusen and the Sheriff's Office, and the failure of Cascade County, with notice, to correct or curtail this treatment, Edwards suffered harm.

69. Edwards lost income as a result of the illegal political idea/belief discrimination found herein. There is no evidence that he would have been able to be both Chief Deputy Coroner and an undercover narcotics (HIDA) officer at the same time. Therefore, Edwards lost \$250.00 per month from October 2004 through April 2005, and subsequently lost \$795.42 per month beginning in May 2005 and continuing. Edwards also incurred medical expenses, which are continuing, and amount to \$1,980.21 to the date of hearing. Edwards also suffered emotional distress that resulted mainly from the illegal discrimination but partially other occurrences (the post election bet and the erroneous report that Castle had accused Edwards of smoking marijuana, for two examples in these findings). The current dollar value for only the compensable emotional distress is \$25,000.00.

70. Edwards' wage loss to date is \$12,885.88, with interest at .83% per month (10% per year divided by 12 months per year) on that loss as it has accrued being \$1,082.74 [ $\$250.00 \times .0083 \times 210$  {20 months + 19 months + ... 2 months + 1

month}}] + [\$795.42 x .0083 x 98 {13 months + 12 months + ... 2 months + 1 month}].<sup>12</sup>

71. Edwards will continue to lose \$795.42 per month for the next year. He may also incur additional out of pocket costs (beyond his health insurance coverage) for prescriptions and treatment of his depression and anxiety for the next year. Both losses result from the illegal political idea/belief discrimination found herein.

72. Edwards is entitled to be restored to his former FTO status. There is no evidence upon which any findings of financial loss resulting from the removal of that status can be based.

73. Absent training and adoption of more specific policies related to political idea and belief discrimination, there is an unacceptable risk that further such illegal discrimination may occur within the Sheriff's Office, and be uncorrected and uncurtailed by the County.

#### IV. OPINION<sup>13</sup>

##### A.1. Liability of Castle, Corneliusen and the Sheriff's Office

Montana law prohibits government discrimination against employees, in terms and conditions of employment (which includes such matters as evaluations, career advancement, promotions and discipline), because of their political ideas or political beliefs. Mont. Code Ann. § 49-2-308(1)(c); Mont. Code Ann. § 49-3-201(1); *Taliaferro v. State* (1988), 235 Mont. 23, 764 P.2d 860, 862. "State and local government officials and supervisory personnel shall . . . appoint, . . . evaluate, and promote personnel on the basis of merit and qualifications without regard to . . . political ideas." Mont. Code Ann. § 49-3-201(1). "It is an unlawful discriminatory practice for the state or any of its political subdivisions . . . to discriminate against a person . . . in a term, condition, or privilege of employment because of that person's political beliefs." Mont. Code Ann. § 49-2-308(1)(c).

With both direct and indirect evidence (discussed *infra*), Edwards proved that adverse employment actions were taken against him because of his political ideas or political beliefs. That proof established a clear case of illegal discrimination—failure of the respondents to "appoint, . . . evaluate, and promote" him based on "merit and qualifications without regard to . . . political ideas" and repeated adverse actions against him "in a term, condition, or privilege of employment" because of his

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<sup>12</sup> The hearing examiner considers each month involved to commence approximately 1 week into the calendar month.

<sup>13</sup> Statements of fact in this opinion are hereby incorporated by reference to supplement the fact findings. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

“political beliefs.” Edwards proved that Castle, Corneliusen and the Sheriff’s Office illegally discriminated against him as charged.

*Taliaferro* specifically applied a three-tier evidentiary test that the Montana Supreme Court had adopted from *McDonnell Douglas Corporation v. Green* (1973), 411 U.S. 792; *see, European Health Spa v. H. R. Comm.* (1984), 212 Mont. 319, 687 P.2d 1029, 1032, **quoting** *Martinez v. Yellowstone County Welfare Dept.* (1981), 192 Mont. 42, 626 P.2d 242. The *McDonnell Douglas* evidentiary analysis applies to cases when the charging party has presented indirect, rather than direct, evidence of discriminatory motive.

Direct evidence is evidence “which if believed, proves existence of the fact in question, without inference or presumption.” *Black’s Law Dictionary*, p. 460 (6<sup>th</sup> Ed. 1990); *e.g., Laudert v. Richland Cty S.D.* ¶¶ 20-25, 2000 MT 218, 301 Mont. 114, 7 P.3d 386. In Human Rights cases, direct evidence can prove both discriminatory adverse acts and discriminatory intent. *Foxman v. MIADS* (HRC, 6/29/92) (race discrimination); *Edwards v. West. Energy* (HRC, 8/8/90) (disability discrimination); *Elliot v. City of Helena* (HRC 6/14/89), (age discrimination).

Edwards used both direct and indirect evidence to prove by the preponderance of the evidence that Castle, Corneliusen and the Sheriff’s Office engaged in illegal political idea/belief discrimination against him. The discussion will combine the two analyses.

Edwards proved that he, rather than Wagner, would have been recommended for the Chief Deputy Coroner position, but for the actions of Corneliusen. He proved that he was as qualified as Wagner, a Castle supporter, for the appointment. He also proved that Corneliusen, pivotal decision maker for the appointment, was twice heard explicitly stating his animus toward Funyak supporters like Edwards.

Edwards proved that after the Cascade County Commissioners found in favor of his grievance and directed the Sheriff’s Office to reopen and reappoint a Chief Deputy Coroner, Wagner continued to perform many of those duties until Castle ultimately eliminated the position and appointed Wagner, without any application and selection process, to the newly created position of Assistant County Coroner.

Edwards proved that although he was a successful and well-qualified FTO the Sheriff’s Office ceased assigning him those duties within months after Castle became sheriff. He proved that six months after he was no longer given those duties, he was confronted by Corneliusen about being a “least favorite” FTO according to a survey of some trainees, with no explanation or additional information made available to Edwards. He proved that two months later still, a misunderstanding regarding accusations of using his patrol car off duty to see his lawyer was presented as a justification for formally removing the FTO duties that he was no longer assigned.

Edwards proved that Corneliusen, directed by Castle to inquire about whether Edwards drove his patrol car off duty to an interview at his lawyer's office with a Human Rights investigator, instead made a general accusation that Edwards had driven his patrol car to meet with his lawyer, refused to provide any specifics and insisted upon a response. Edwards proved that his denial of the accusation was based upon his misunderstanding of the question, not any dishonesty. Edwards proved that when he was provided the specifics about the accusation by Castle, he admitted what he had done and explained why. He proved that Castle concluded, without considering or even finding out all of the pertinent facts, that Edwards had lied. Edwards proved that Castle used that "lie" as a justification to deny him an appointment (the HIDA position—see next paragraph) and subsequently used that "lie" to suspend him and formally to remove him from FTO status, which as a practical matter had already been taken away from him.

Edwards proved that when a narcotics investigator (HIDA) position for which he had been the second-highest scoring applicant was vacated by the highest scoring applicant within four months, Castle appointed the lowest scoring prior applicant, with no new application and selection process.

Edwards also proved that Castle offered unsupported justifications for rejecting Edwards for the newly reopened HIDA position. In addition to the supposed "lie" about the patrol car usage, Castle asserted that he feared Edwards to be emotionally unstable. Edwards proved that Castle's conduct negated any reasonable belief that Edwards was emotionally unstable, since Castle neither removed Edwards from patrol duty or referred him for an evaluation of his emotional stability.

The first tier of *McDonnell Douglas* tests Edwards's *prima facie* case by measuring flexible elements, which are not woodenly applied but instead adapted to the nature of the proof proffered.<sup>14</sup> There are three basic elements: "(1) the employer received an application or equivalent from a qualified protected-class person; (2) a job vacancy or employment opportunity existed at the time of the application; and (3) the person was not selected." *Taliaferro at* 863-64. The basic test can be readily adapted to fit the issues in this case. Edwards established his *prima facie* case by proving that:

Edwards proved that he:

- (1) (a) was a Funyak supporter qualified to be Chief Deputy Coroner and Assistant County Coroner after the grievance decision in December 2004;
- (b) was a Funyak supporter qualified to remain an FTO;

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<sup>14</sup> *Martinez, supra*, 626 P.2d 242, 246, *citing Crawford v. Western Electric Company, Inc.* (5<sup>th</sup> Cir. 1980), 614 F.2d 1300.



- (c) was a Funiyak supporter and the best qualified remaining former applicant for the HIDA position in May 2005 and
- (d) was a Funiyak supporter qualified to remain on active duty in June 2005.
- (2) (a) The Chief Deputy Coroner and Assistant County Coroner positions were available at times when Edwards either applied or was known to be interested in them;
- (b) Edwards sought to remain in and resisted removal from his FTO duties;
- (c) Edwards had not withdrawn from consideration for the HIDA position, which he had actively sought in January 2005, when it reopened in May 2005 and
- (d) Edwards had not engaged in misrepresentation, gross inefficiency of duty and insubordination in driving his patrol car to his attorney's office to meet with the Human Rights investigator.
- (3) (a) Because of Corneliusen's participation, Wagner (a Castle supporter) was appointed for Chief Deputy Coroner, a position Edwards would otherwise have been received; Wagner was subsequently appointed without an application and selection process for Assistant County Coroner, a position created to avoid reopening the Chief Deputy Coroner position for Edwards as well as Wagner;
- (b) Edwards was no longer assigned FTO duties and was subsequently formally removed from those duties;
- (c) A less qualified deputy was appointed to the HIDA position, without an application and selection process, in May 2005; and
- (d) Edwards was suspended for misrepresentation, gross inefficiency of duty and insubordination in driving his patrol car to his attorney's office to meet with the Human Rights investigator.

Direct evidence established that Edwards was qualified to be Chief Deputy Coroner (and Assistant County Coroner) and that Corneliusen, despite his denials, had announced an illegal animus toward Funiyak supporters with the goal of getting them out of the Sheriff's Office. Corneliusen was the pivotal decision maker in the selection of the recommended applicant for Chief Deputy Coroner. Corneliusen was

also the interviewer who collected the initial “evidence” in the process leading to the insufficiently supported conclusion by Castle that Edwards lied about driving his patrol car to his attorney’s office to meet with a Human Rights investigator.

Edwards established a prima facie case of illegal political idea/belief discrimination by respondents Castle, Corneliusen and the Sheriff’s Office.

The second tier of *McDonald Douglas* requires defendants to “meet the plaintiff’s prima facie case by presenting a legitimate reason for the action and . . . frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.” *Texas Dept. of Comm. Affairs v. Burdine* (1981) 450 U.S. 248, 255-56. In this case, Castle, Corneliusen and the Sheriff’s Office failed to “articulate some legitimate, nondiscriminatory reason” for the adverse actions they took. *McDonnell Douglas at 802; see also Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813, 817.<sup>15</sup>

The direct evidence of Corneliusen’s animus toward Funiyak supporters was neither rebutted nor proved unworthy of belief. Corneliusen’s vote helped create the “tie” that he then declared between Edwards and Wagner, after which he engineered the “tie-breaker,” the decision-making process that led to Wagner’s appointment as Chief Deputy Coroner. The entire process was irretrievably tainted with Corneliusen’s animus toward Funiyak supporters. It was also, as the grievance decision established, contrary to existing policy and practice.<sup>16</sup>

The taint upon the decision to appoint Wagner as Chief Deputy Coroner carried over to the appointment of Wagner as Assistant County Coroner, with no application and selection process. In addition, Castle’s explanation that he, after attending coroner’s school, decided he did not need a chief deputy coroner was unworthy of belief, since he gave the position, with many of the same duties, a new name and placed his previous choice for the old job in the “new” job. By doing so he saved money, but without the prior discriminatory selection of Wagner, Edwards would have already been selected as Chief Deputy Coroner. The substantial and credible evidence of record supports the finding that it was to avoid appointing Edwards that Castle eliminated the Chief Deputy Coroner position.

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<sup>15</sup> Even if respondents’ unsupported justifications were considered “legitimate business reasons” for the second tier of the *McDonnell Douglas* test, the serious flaws in all these purportedly legitimate business reasons would render them pretextual in the third tier, *McDonnell Douglas at 802; Taliaferro at 863-64; Crockett at 817-18; Martinez at 246*, leading to the same ultimate result.

<sup>16</sup> Evidence suggesting that the County Commissioners were at odds with Castle over a jail bond ballot issue fell short of proving that the grievance decision was not based on the merits. The grievance decision may never have been enforced, but it does stand as a final decision after due process was accorded to the parties.

The informal elimination of Edwards' FTO duties was never adequately explained. The argument that scheduling necessities prevented Edwards from training new officers was not proven to be the cause for even a reduction in, let alone the cessation of, Edwards' training responsibilities. The disclosure to Edwards of "results" of a survey that was neither justified nor adequately explained as a reason for no longer assigning him FTO duties had a Kafkaesque quality rendering it inherently suspect. The subsequent formal elimination of those duties as part of the unwarranted discipline of Edwards only confirmed the discriminatory motive behind the entire process of stripping Edwards of his FTO duties.

Castle, Corneliusen and the Sheriff's Office offered two "legitimate business reasons" for passing over Edwards to fill the vacant HIDA position in May 2005. Neither Castle's assertion that Edwards was lying about the patrol car incident nor the alleged suspicion that Edwards was emotionally unstable were credible. Neither explanation even addressed the reasoning for entirely skipping the normal process of application and selection to fill the position.

One of the two purported legitimate reasons for passing over Edwards for the HIDA position was also offered as the basis for suspending him—"lying" about patrol car use. Lying to a superior officer is a serious matter. *Kinnick v. Park County* (7/6/05), HRC #0049010701 and #049010702. In this case, the informality, uncertainty and incompleteness of Castle's investigative conclusion, which relied in large part on Corneliusen's initial meeting with Edwards, stands in stark contrast to the formality and the supporting documentation in the investigation of Ed Kinnick.

The factual basis of Castle's conclusion that Edwards lied is insufficient and the assertion that this justified the suspension is unworthy of belief. Respondents failed to prove that Tadman in fact contradicted Edwards.<sup>17</sup> Because lying to a superior officer is, indeed, a serious matter, Castle's conclusion that Edwards had lied required more factual support than was provided in this hearing. The "legitimate business reason" for the future 2-day suspension (which also formally removed Edwards' FTO duties as well as supposedly justifying not appointing Edwards to the HIDA position) simply was not proved.

Edwards' argument that a discrimination claim against the public employer renders the claimant's attendance at an investigative interview of his claim within the

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<sup>17</sup> Edwards testified under oath at this hearing that Tadman, his superior officer, gave him permission to take the time off and that he told Tadman he would be in uniform with his patrol car while attending the interview stands uncontroverted by sworn admissible evidence in this record. The record does contain an unsigned typed statement to Castle, dated June 16, 2005, and bearing Tadman's name, which recites that Tadman authorized the April 4 time off but did not authorize use of the patrol car for attendance at the meeting. Tadman did not testify at hearing, and therefore Edwards direct testimony stands as worthy of belief.

scope of his work for the employer need not be addressed in this decision. The hearing examiner does note in passing that this proposition, unsupported by legal authority in argument, appears questionable.<sup>18</sup>

Throughout the *McDonnell Douglas* burden shifting analysis, Edwards always had the ultimate burden to prove that the respondents illegally discriminated against him. *Taliaferro at* 864; *Crockett at* 818; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209, 213. Edwards presented substantial and credible evidence which carried that ultimate burden and established discrimination based upon political ideas and political beliefs.<sup>19</sup>

### **A.2. Discriminatory Treatment of Employees other than Edwards**

Although Edwards offered considerable evidence that other sheriff's officers were subjected to discriminatory treatment because they were Funyak supporters, none of that evidence is ultimately necessary or pertinent to the decision. As a result, there are no findings about the treatment of other Funyak supporters, and this decision does not determine whether any employee of the Sheriff's Office other than Edwards was subjected to discriminatory treatment.

**A.3. Retention of the Sheriff's Office as a Respondent** Contrary to the respondents' argument, the Sheriff's Office exists. "The duties and functions of the sheriff's office are provided for in Title 7, Chapter 32, part 21." Mont. Code Ann. § 7-4-3001. The Board of Private Security Patrol and Investigation Officers include among its voting members a representative of a sheriff's office, Mont. Code Ann. § 2-15-1781(2)(d); certain county sheriff's offices are the labor market for the highway patrol salary survey, Mont. Code Ann. § 2-18-303(9)(a); deputy sheriffs employed by the sheriff's offices have certain prior rights, which survive a change in form of local government, Mont. Code Ann. § 7-3-1344(1); and a sheriff's office has the power to establish an alternative to the statutory work week for purposes of determining overtime worked, Mont. Code Ann. § 7-4-2509(1)(a). The liability of the Sheriff's Office in this case arises out of the conduct of the sheriff and the undersheriff, acting as agents for the Sheriff's Office as well as for Cascade County.

For the reasons noted in section A.4. of this opinion (following), the inclusion of the Sheriff's Office appears to have no impact upon the case, given the affirmative

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<sup>18</sup> Clearly an employer, public or otherwise, cannot obstruct its employee's exercise of civil rights in pursuing a claim of employment discrimination. On the other hand, Edwards' pursuit of his claims were not within the scope of his duties as a sworn peace officer, in furtherance of his employer's business. The respondents were under no identified obligation to treat Edwards' pursuit of his claims as something that he could properly do while "on the clock" for the employer.

<sup>19</sup> Because there is political idea/belief discrimination, findings regarding retaliation would be redundant in this case. *See, Stringer-Altmaier v. Haffner*, 2006 MT 129, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_.

relief imposed herein and the ultimate fiscal responsibility of Cascade County for the monetary award to Edwards. Nonetheless, it is an appropriately liable respondent.

#### **A.4. Liability of Cascade County**

Cascade County holds the purse-strings for the Sheriff's Office and the Sheriff, and is the employer of Castle and Undersheriff Corneliusen. Therefore, Cascade County is a proper and necessary respondent.

Edwards filed his Human Rights Act complaint on October 29, 2004. The only discriminatory acts occurring before that filing were the appointment of Wagner as Deputy County Coroner and the beginning of the elimination of Edwards' FTO duties. There is no substantial and credible evidence that the county, through agents and employees other than Castle and Corneliusen, participated in either of these acts. The county's grievance decision is powerful evidence that the county did not participate in the political idea/belief discrimination before the complaint was filed.

However, the county was on notice, through the Human Rights complaint and the grievance, of Edwards' claims and took no effective action after the grievance decision to curb the prior discrimination or prevent further discrimination. For unexplained reasons, the county took no action to enforce the grievance decision, made no other inquiry and took no other action. Taking legal action against an elected county official—the sheriff—regarding his conduct and that of his undersheriff is a thorny proposition for the county itself, acting through the County Commissioners. Nonetheless, the failure of the county to take effective action renders it liable for what its employees did, as found herein. The actions that occurred after the complaint was filed have been made a part of this case by adoption of the prehearing order.

On the other hand, the county's defense of this case, as a named respondent, is not a basis for liability in this case. It would be entirely improper to look at the particulars of that defense for evidence of a discriminatory motive.<sup>20</sup> The liability of the county is joint and several liability<sup>21</sup> as an employer who failed to act to correct or to end its employees' on-going discriminatory acts.<sup>22</sup>

#### **B. Relief Granted and Imposed**

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<sup>20</sup> This approach is analogous to pleading and trying a bad faith claim in the same lawsuit as the underlying insurance claim, so that both the alleged wrongdoing and the defense of the alleged wrongdoing are on trial together, a practice Montana no longer allows.

<sup>21</sup> Joint and several liability does not enlarge the personal liability of individual respondents beyond what the law normally imposes for public officials whose conduct is also the legal responsibility of the public employer.

<sup>22</sup> How respondents allocate the cost of satisfaction of the monetary award for budgetary purposes is not an issue addressed in this case.

The department may order any reasonable measure to rectify harm Edwards suffered as a result of illegal discrimination. Mont. Code Ann. § 49-2-506(1)(b). The purpose of awarding damages in an employment discrimination case is to make the victim whole. *E.g.*, *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *see also Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; *accord*, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.

Edwards has lost and will continue to lose wages. By proving discrimination, Edwards established a presumptive entitlement to an award of back pay. *Dolan, supra*; *Albermarle Paper Co., supra at* 417-23. Edwards also proved with reasonable accuracy the wages that he lost because of the discrimination. *Horn v. Duke Homes* (7<sup>th</sup> Cir. 1985), 755 F.2d 599, 607 *and Goss v. Exxon Office Sys. Co.* (3<sup>rd</sup> Cir. 1984), 747 F.2d 885, 889. The award should reasonably redress the harm that Edwards suffered to date and will suffer in the future. Mont. Code Ann. § 49-2-506(1)(b); *cf.*, *Rasimas v. Mich. Dept. of Mental Health* (6<sup>th</sup> Cir. 1983), 714 F.2d 614, 626. Given Edwards' performance history, it would be unreasonable to extend future wage loss beyond one year.<sup>23</sup> Unless his performance proficiency decreases, or he is subjected to further discrimination, he will more likely than not advance in his career and eliminate the continuing earning loss after that one year. For the same reason, it would be both unreasonable and speculative to include reduced retirement benefits in the award, since his ultimate retirement entitlement will depend upon time in service and best years' earnings, neither of which is necessarily altered by his treatment since the election.

Prejudgment interest on lost income is a proper part of the damages award. *P. W. Berry, Inc., supra*, 779 P.2d *at* 523; *European Health Spa v. H.R.C.* (1984), 212 Mont. 319, 687 P.2d 1029, 1033; *see also, Foss v. J.B. Junk* (H.R.C. 1987), HR No. SE84-2345. The hearing examiner calculated that interest in Finding 70.

Ascertaining future lost wages is necessarily an exercise in reasoned speculation. The hearing examiner cannot hold Edwards to an unrealistic standard of proof (*see Horn, op. cit.*), yet there must be credible and substantial evidence to support a finding that future lost wages extend into the distant future. The facts include evidence of Edwards's intent to remain with the Sheriff's Office and evidence

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<sup>23</sup> "Front pay" is an award for probable future losses in earnings, salary and benefits to make the victim of discrimination whole for future losses, ordinarily when placement in the lost job is not feasible – it is usually temporary to permit the victim to reestablish his "rightful place" in the actual job market. *Martinell, op. cit.*; *Rasmussen v. Hearing Aid Inst.*, (H.R.C. 1992) HR #8801003988, *approved, H.A.I. v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 635; *Sellers v. Delgado C. C.* (5<sup>th</sup> Cir. 1988), 839 F.2d 1132; *Shore v. Fed. Ex. Co.* (6<sup>th</sup> Cir. 1985), 777 F.2d 1155, 1158. By close analogy, lacking evidence that any position comparable to the HIDA job is available, the hearing examiner has decided that one year's future overtime pay is reasonable.

of his strong performance in the past. In light of these facts, the hearing examiner considers that one year of future lost wages reasonably rectifies the future harm, avoids impermissible speculation and provides the parties with finality. Given the necessary uncertainty involved in front pay, setting an amount certain is best.

In the Montana Wrongful Discharge from Employment Act, recovery of lost wages and fringe benefits is for a maximum of four years from the date of discharge. Mont. Code Ann. § 39-2-905(1). There is no comparable statutory limitation applicable to human rights complaints, but the legislative concern with future lost wage awards is properly considered in determining the meaning of “any reasonable measure . . . to rectify any harm” in Mont. Code Ann. § 49-2-506(1)(b). Clearly, future lost wages awards are to be carefully considered before extending them far into the future. The award of one year’s front pay, in addition to back pay, is reasonable and supported by the credible and substantial evidence of record. More front pay is not sufficiently supported and would be unreasonably speculative.

Edwards also sought recovery for his emotional distress. Any reasonable measure to rectify “any harm, pecuniary or otherwise” suffered because of the discrimination, Mont. Code Ann. § 49-2-506(1)(b), includes an award for emotional distress. *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2d 596, 601. The evidence supports the award of \$25,000.00, under the applicable legal standard set in *Vortex Fishing Sys. v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836.

Edwards is also entitled to recover for his medical expenses to date and for the reasonable future, limited to those expenses which did result from the illegal conduct. Mont. Code Ann. § 49-2-506(1)(b). The reasonable recovery consists of the amount proved at hearing for past expenses, plus one year of future expenses for treatment of conditions resulting from his work-related stress. This takes into account (as did the emotional distress award) that there were factors contributing to his work-related stress that did not result from illegal discrimination. It also takes into account that his future treatment may extend beyond one year.

Edwards, to be made whole, is also entitled to reinstatement of his FTO duties and removal of the disciplinary record of his suspension from his personnel file and the county’s records.

Upon a finding of illegal discrimination, the law requires affirmative relief that enjoins any further discriminatory acts and may further prescribe any appropriate conditions on the respondent’s future conduct relevant to the type of discrimination found. It is proper and reasonable to enjoin the respondents from similar conduct in the Sheriff’s Office in the future and to require both the adoption of clearer policies against political belief and idea discrimination and the training of the sheriff and undersheriff. Mont. Code Ann. § 49-2-506(1)(a) and (b). The hearing examiner concludes it is unnecessary to include the Commissioners in the training requirement,

because their legal counsel can provide a thorough explanation of how to avoid similar joint and several liability in the future.

## **V. CONCLUSIONS OF LAW**

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. Castle, Corneliusen and the Sheriff's Office discriminated against Edwards because of his political beliefs and political ideas (support of Funyak over Castle in the 2004 primary election) when: (a) a Castle supporter rather than Edwards was selected and appointed as Chief Deputy Coroner; (b) that same Castle supporter was appointed to the newly created Assistant County Coroner position without any application and selection process; (c) Edwards was no longer assigned FTO duties; (d) the fourth place applicant from the January 2005 open HIDA position was appointed, in May 2005, to fill that reopened position, without an application and selection process, despite Edwards being the second place applicant behind the original appointee in January; and (e) Edwards received a two-day suspension and was officially relieved of his FTO duties. Mont. Code Ann. § 49-2-308(1)(c) and Mont. Code Ann. § 49-3-201(1).
3. Cascade County is jointly and severally liable because with notice it neither took nor attempted any effective action to curb or ameliorate its employees acts. Mont. Code Ann. § 49-2-308(1)(c) and Mont. Code Ann. § 49-3-201(1).
4. The department should require the reasonable measures detailed in the findings and opinion to rectify the harm, pecuniary and otherwise, Edwards suffered. Mont. Code Ann. § 49-2-506(1)(b).
5. The department must order the respondents to refrain from engaging in the discriminatory conduct and should also prescribe conditions on the respondents' future conduct relevant to the type of discriminatory practice found and require reasonable measures to correct the discriminatory practice, as detailed in the findings and opinion. Mont. Code Ann. § 49-2-506(1)(a) and (b).

## **VI. ORDER**

1. The department grants judgment in favor of the charging party, **Robert Edwards**, and against the respondents, **Cascade County, Cascade County Sheriff's Office, Undersheriff Clyde "Blue" Corneliusen** and **Cascade County Sheriff Dave Castle**, on Edwards's charges of illegal political idea/belief discrimination against him.

2. Respondents are jointly and severally liable and must:



(a) immediately pay Edwards \$40,948.83, making the appropriate employer deductions, contributions and tax payments to reflect that this payment includes payment of past wages of \$12,885.88 for October 2004 through June 2006;

(b) as soon as practicable, restore Edwards to his FTO duties;

(c) expunge from the records of the county and the Sheriff's Office every reference, documentation or record of the two-day suspension of Edwards announced in June 2005 for purported misrepresentation, gross inefficiency of duty and insubordination;

(d) on the 8th working day of each calendar month beginning in August 2006 and ending in July 2007, pay Edwards \$795.42, as lost wages, making the appropriate employer deductions, contributions and tax payments; and

(e) within ten calendar days after receipt from Edwards of proof that he incurred specific amounts of out of pocket costs within 12 calendar months of the date of this decision for prescriptions or other health care treatment or services reasonably necessitated by his depression and/or anxiety, pay to Edwards those amounts (Edwards should submit this proof monthly, as soon as reasonably possible after the close of each calendar month).

3. The department permanently enjoins **Cascade County Sheriff's Office, Undersheriff Clyde "Blue" Corneliusen and Cascade County Sheriff Dave Castle** from taking adverse employment action against Sheriff's Office employees because of their political ideas/beliefs and permanently enjoins **Cascade County** from allowing the other respondents to take such adverse actions.

4. The department enjoins and requires **Cascade County, Cascade County Sheriff's Office and Cascade County Sheriff Dave Castle**, within 60 days after this decision becomes final, to submit to the Human Rights Bureau proposed policies to comply with the permanent injunction, including the means of publishing the policies to present and future employees and applicants for employment and advancement, and to adopt and implement those policies, with any changes mandated by the Bureau, immediately upon Bureau approval of them.

5. The department enjoins and requires **Cascade County, Cascade County Sheriff's Office and Cascade County Sheriff Dave Castle**, within 60 days after this decision becomes final, to submit to the Human Rights Bureau proposed training of at least 6 hours to be completed by **Undersheriff Clyde "Blue" Corneliusen and Cascade County Sheriff Dave Castle** regarding political idea/belief discrimination and how to avoid engaging in it and prevent others from engaging in it.

DATED: July 7, 2006.

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner

Hearings Bureau, Montana Department of Labor and Industry