BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0085013052&53:

ROBERT MAFFIT AND MYRLE TOMPKINS,	)	Case Nos. 1139-2009 & 1140-2009
Charging Parties,	)	
vs.	)	HEARING OFFICER DECISION AND NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION
CITY OF HELENA,	)	
Respondent.	)	

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I. Procedure and Preliminary Matters

Charging parties Robert Maffit and Myrle Tompkins filed a joint complaint and a joint amended complaint with the Department of Labor and Industry, alleging that the respondent City of Helena discriminated against them both because of disability in the provision of public services when it did not provide accessible voting services (available through the use of AutoMARK voting machines) in the Helena Citizens' Council election, re-run in mid-December 2007 and final on January 8, 2008. Maffit and Tompkins alleged that by refusing to provide accessible voting machines for registered voters with sight impairments that substantially limit major life activities (including seeing), of which class they are both members, the City violated both Mont. Code Ann. §49-2-308 and §49-3-205. Lewis & Clark County Elections Department was originally a respondent, but settled with Maffit and Tompkins before completion of investigation of the charges.

On January 14, 2009, the Hearings Bureau received the original and amended complaints from HRB, for contested case hearing proceedings. The notice of hearing, appointing the undersigned Hearing Officer to the cases (assigned separate case numbers by HRB), issued the same day. The City, and thereafter Maffit and Tompkins, acknowledged service of the notice of hearing on January 20, 2009 and January 23, 2009, respectively. The Hearing Officer issued his "Order Setting Contested Case Hearing Date and Prehearing Schedule" on January 27, 2009.

After three orders rescheduling the cases due to various scheduling problems, the parties completed discovery and agreed to submit liability issues in these cases on cross-motions for summary judgment. Maffit and Tompkins filed the last brief on

the cross-motions on September 24, 2009. On October 27, 2009, the Hearings Bureau received confirmation that the parties waived oral argument and the cases were deemed submitted for decision on the cross-motions. On November 3, 2009, the Hearing Officer issued his "Order Granting and Denying Cross-Motions for Summary Judgment on Liability and Setting a Filing Deadline for Briefs on Certification or a Damages Hearing." The parties thereafter agreed that certification of summary judgment as immediately final for appeal purposes would not be proper.

A contested case hearing on damages was held on May 3, 2010, in Helena, Montana. Maffit and Tompkins attended, with their counsel, Beth Brenneman, Disability Rights Montana. The City attended through its designated representative, City Attorney David Nielsen, with its counsel, Oliver H. Goe, Browning, Kaleczyc, Berry & Hoven, PC. Maffit, Tompkins and Paulette DeHart testified. Exhibits 2-3, 101-105, 107 and 111-116 were admitted into evidence by stipulation. Exhibit 117 was offered, and a ruling upon its admission into evidence over objections interposed by the City reserved until after the parties submitted their proposed decisions and briefs. The parties filed their last post hearing arguments on July 16, 2010. A copy of the hearing officer's docket accompanies this decision.

II. Issues

The liability of the City was determined by summary judgment. The issues for hearing were (1) What harm, if any, Maffit and Tompkins sustained as a result of the City's illegal discrimination, and what reasonable measures should the department order to rectify any such harm; (2) Whether any damages awarded to Maffit and Tompkins should be reduced by their recoveries in their settlements with Lewis & Clark County; and (3) In addition to an order to refrain from such conduct what, if anything, should the department further require to prevent future similar discriminatory practices.

III. Findings of Fact[1]

1. Paulette DeHart is, and was at all times pertinent to these cases, the Lewis and Clark County Treasurer and Clerk and Recorder. Her duties include being the election administrator for the County. The county election administrator conducts county elections, and other local government entity elections within the county, including municipal elections for the respondent City of Helena.

2. The County owns 37 accessibility voting machines called AutoMARK machines, which it obtained in 2006 and first used in the federal primary election in

[1] For clarity, the Hearing Officer has incorporated within these findings pertinent portions of his summary judgment order, which the City maintains its right to challenge on any review.

2006. Use of the AutoMARK machines requires preparation of AutoMARK compatible ballots. It takes the County appreciably more time to obtain such ballots, as opposed to the usual paper ballots, after the slates of candidate names for such ballots are finalized. Whenever this decision refers to use of AutoMARK machines, that reference includes the process of obtaining compatible ballots.

3. The November 2007 mail ballot municipal elections marked the first use of the machines by the County for municipal elections. The County has used the machines in subsequent municipal elections and will continue to use them (or comparable accessibility technology) in all future City elections unless and until the applicable laws clearly do not require such use.

4. For mail ballot municipal elections, beginning with the November 2007 election, the County has provided two AutoMARK machines, with one held as a back-up. In the November 2009 municipal election, the machines were provided at the Capital Hill Mall (for 2 to 3 days) and the County election office (for 30 days).

5. The City pays the County for the costs of conducting its municipal elections, including the costs of use of AutoMARK machines.

6. AutoMARK machines facilitate private voting for voters with sight impairments,[2] not necessarily only for voters whose sight impairments substantially limit their major life activities, but certainly including such voters. Without AutoMARK machines, voters for whom it is difficult or impossible to read and mark their ballots without assistance cannot vote independently, but must rely upon election officials, family members or others to provide the assistance they need, whether voting by mail or in person. Private voting for such persons is likewise difficult or impossible without AutoMARK machines or other comparable accessibility technology. Absent such accessibility technology such persons rely upon whoever is providing them with assistance for the accuracy of their recorded votes.

7. For the November 2007 Helena municipal elections, the City requested and authorized the County's use of AutoMARK machines.

8. Because of a mistaken application of a later candidate filing deadline for the Helena Citizens' Council election, as opposed to the candidate filing deadlines for the rest of the municipal elections, ballots for the Helena Citizens' Council election were not prepared until it was too late to obtain AutoMARK compatible ballots. The ballots for that one municipal election were prepared on separate AutoMARK incompatible sheets. Thus, the available AutoMARK machines for the rest of the

[2] AutoMARK machines also facilitate private voting for voters with some other impairments.

November 2007 municipal elections were not available for the Helena Citizens' Council election.

9. There were other problems with the ballots for the November 2007 Helena Citizens' Council election. After recognizing these problems while the mail ballot election was still proceeding, the City, on October 23, 2007, requested a redo election. There was sufficient time to order AutoMARK compatible ballots for the redo election.

10. The City did not specifically request AutoMARK machine availability, in its memo requesting the redo election or otherwise. DeHart, in her capacity as the election administrator for the County, did not order and obtain AutoMARK compatible ballots for the redo election and the redo election was completed without available AutoMARK machines.

11. No voters had used the available AutoMARK machines to vote in the other municipal races decided by the November 2007 elections. DeHart knew this when she made the decision not to use AutoMARK compatible ballots and machines for the redo Helena Citizens' Council election. She subsequently explained, in a March 27, 2008, letter to counsel for the charging parties in these cases, that she "decided not to spend the taxpayer dollars" since there had been no use of the machines in the November municipal elections.[3] Nonetheless, had the City requested the use of AutoMARK machines for the redo Helena Citizens' Council election, DeHart would have honored that request and made the machines available.

12. But for the City's failure to request use of the machines for the January 2008 Helena Citizens' Council redo election, as it had done for the entire rest of the November 2007 municipal elections, the County would have made AutoMARK machines available for the redo election.

13. Charging parties Robert Maffit and Myrle Tompkins are both blind. Both have been blind for a long time and neither expects to regain their sight. They both reside in Helena and are registered voters and were eligible to vote in the 2007 and 2008 Helena municipal elections. Their blindness constitutes, for each of them, a physical impairment that substantially limits one or more of their major life activities, in other words, a disability as defined by Mont. Code Ann. § 49-2-101(19)(a).

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[3] Exhibit 116. The City argues that this establishes that the County not only paid for the redo election but would also have paid for the use of AutoMARK machines. The Hearing Officer finds the reference in the letter (Exhibit 116) ambiguous at best, since both the County and the City have "taxpayers," and makes no finding about who would have been responsible for the additional costs of making AutoMARK machines available, at the City's request, for the redo election.

Because of their disabilities Maffit and Tompkins cannot complete their ballots individually and privately without an AutoMARK or other accessibility machine.

14. Prior to the availability of accessible voting technology, Maffit had to rely upon other people to fill out his ballot. At one point, Maffit was required to have two election judges in the booth with him to fill out his ballot. In the more recent past, he has been allowed to choose who to have accompany him, and has had his wife fill out his ballot. Regarding his feelings about being unable to vote privately and independently, Maffit testified that " . . . it was humiliating, but, on the other hand, the value of being able to vote was extremely important to me, and so I tolerated that."

15. Prior to the availability of accessible voting technology, Tompkins also had to rely upon other people to fill out her ballot. The first time she voted after she became legally blind, she had her mother accompany her into the polling booth to fill out her ballot for her. This made her feel like a child. She has also had her husband fill out her ballot.

16. Independence is of great importance to Tompkins and Maffit. Both have taken steps to maintain their independence after each became blind.

17. Over the years, Maffit has used assistive technologies to be as independent as possible. In college, he used a cassette recorder and clipboard for listening to lectures. He currently uses electronic technology for reading books and scanning documents. He uses a computer to manage information at work. He has also learned how to use a cane to walk and has learned Braille.

18. Maffit is the director of Montana Independent Living Project in Helena, Montana. He has been in this position for seven years. His organization advocates for individuals with disabilities and provides support for them to be as independent as possible. He also advocates for systems change and encourages entities, including governmental entities, to be accessible to people with disabilities.

19. The first time Maffit voted independently in Helena using an AutoMARK machine, which occurred before the election at issue in this case, was a great experience that he has cherished ever since.

20. Tompkins has worked to be as independent as possible. She has learned Braille. She has learned how to use a cane. She uses various devices in her home to establish and maintain her independence.

21. Tompkins has been a vocal supporter of use of the AutoMARK machines in Montana, and was instrumental in getting access to AutoMARK machines for

demonstrations at the Montana Association for the Blind summer programs at Carroll College starting three years ago.

22. Maffit voted in the November 2007 municipal elections, using mail in ballots for the Helena Citizens' Council election and the other municipal elections. He did not use an AutoMARK machine, and does not believe he even knew that the machines were available for the rest of the November 2007 municipal elections aside from the Helena Citizens' Council election. He did not make any inquiries about the availability of AutoMARK machines for the November 2007 election before voting by mail, with the assistance of his wife.

23. Tompkins is not certain whether she voted in the November 2007 municipal elections. Since no voters used AutoMARK machines in that election, if Tompkins voted in the November 2007 municipal elections, she voted by mail ballot, with the assistance of her husband.

24. Both Maffit and Tompkins knew, before the 2008 redo of the Helena Citizens' Council municipal election, that the County had AutoMARK machines, Maffit because he had used the machines before and Tompkins because she had been involved in obtaining information about them for local use.

25. Because AutoMARKs were not provided in the 2008 redo of the Helena Citizens' Council municipal election, Maffit and Tompkins had the options either to forego voting independently and privately or not to vote at all.

26. Maffit testified at hearing that he was disgusted to be denied an accommodation in the form of the accessible voting machine for the 2008 Helena Citizens' Council redo election. He further testified that he was fed up because he was not given that reasonable accommodation, after the work he had done with the City regarding disability issues. He threw away his ballot and did not vote.

27. Tompkins had her husband mark her paper ballot and send it to the Lewis and Clark County election office, telling him how she wanted to vote so that he could mark her ballot for her. She was frustrated and angry, and felt that she was being deprived of her right to a private vote. It was especially infuriating because she knew the AutoMARKs had been purchased and used, yet no one bothered to provide them for the redo election.

28. The failure of the City to request AutoMARK ballots for the 2008 Helena Citizens' Council redo election prevented both Maffit and Tompkins from voting privately and independently in that redo election. Maffit and Tompkins each suffered emotional distress as a result of the City's failure.

29. Maffit probably was frustrated about the lack of AutoMARK machines for the 2008 Citizens' Council redo election. However, given the "extreme importance" that he testified he places upon the ability to vote, it is more likely than not that he considered the situation a minor irritant and decided to "forget the whole thing" (so to speak), and simply to skip the exercise of his franchise as a citizen. His participation in the present litigation indicates that he later decided that prevention of future denials of the independent and private exercise of the right to vote, which he decided not to exercise at all in January 2008, remains important to him. Nonetheless, his decision to forego voting altogether because the AutoMARK machines were not available for the 2008 Helena Citizens' Council redo election evidences a minimal amount of emotional distress caused by the City's failure to request use of the machines for that election. An award of $750.00 against the City is a reasonable measure to rectify Maffit's emotional distress. The amount recovered by Maffit from his settlement with Lewis & Clark County is irrelevant to this award to remedy his emotional distress.

30. Tompkins voted by mail, if she voted at all, in the November 2007 municipal elections. It is not clear whether she knew at the time that for all of the municipal elections except the Helena Citizens' Council election, AutoMARKs were available. If she did know, her right to vote independently and privately was not, at that time, sufficiently important for her to vote in person. If she did not know, her right to vote independently and privately was not, at that time, sufficiently important for her to find out if she could exercise it. Therefore, the amount of emotional distress she experienced two months later, as a result of the City's failure to request use of the machines for the 2008 Helena Citizens' Council redo election, was not extensive. An award of $1,500.00 against the City is a reasonable measure to rectify Tompkin's emotional distress. The amount recovered by Tompkins from her settlement with Lewis & Clark County is irrelevant to this award.

31. To prevent future similar discriminatory practices, an order requiring the City to request that the County use AutoMARK machines (or comparable accessibility technology) in all future City elections unless and until the applicable laws clearly do not require such use is required. The actual discrimination involved the City's failure to request the use of the AutoMARK machines. Although the County is on record as planning to utilize those machines for future municipal elections, assuring that the City does not again fail to request that use is also very reasonable. Whether there should be any additional measures to improve and to insure the privacy of voters using AutoMARK machines is not an issue raised by discrimination consisting of the failure to request use of the available technology for the redo election. Therefore, further affirmative relief requiring any such additional

measures would be outside the scope of what the department can or should require to prevent future similar discriminatory practices.

IV. Opinion[4]

Under Montana law, a local government has an affirmative duty to review its own policies and practices for discriminatory effect and is prohibited from entering into any arrangement, plan or agreement that "has the effect of sanctioning discriminatory practices." Mont. Code Ann. §§ 49-3-205(2), (3). The plain language of these provisions requires local governments to do their best to prevent, address and redress discriminatory effect as well as discriminatory practice. In this case, the local government failed to act in accord with that law, although it easily could have so acted by requesting the use of AutoMARK machines for the January 2008 Helena Citizens' Council redo election, after requesting their use in every municipal race for which the machines could be used in the November 2007 Helena municipal elections.

The Montana Human Rights Act empowers a hearing officer to order any reasonable measure to rectify harm suffered by a charging party as a result of the illegal discrimination found to have occurred. Mont. Code Ann. § 49-2-506(1)(b). The same remedy applies under Montana Governmental Code of Fair Practices Act. Mont. Code Ann. § 49-3-315. These broad remedial provisions provide the means to restore victims of discrimination to the positions that they would have been in without the discrimination. Mercer v. McGee, ¶25, 2008 MT 374, 346 Mont. 484, 197 P.3d 961; Vortex Fishing Systems v. Foss, ¶27, 2001 MT 312, 308 Mont. 8, 38 P.3d 836.

Recovery for emotional distress is proper for illegal discrimination in violation of Montana law. Vainio v. Brookshire (1993), 258 Mont. 273, 852 P.2d 596, 601; Benjamin v. Anderson, ¶70, 2005 MT 13, 327 Mont. 173, 112 P.3d 1039. Damages for emotional distress can be "established by testimony or inferred from the circumstances. . . . . Furthermore, 'the severity of the harm should govern the amount . . . .'" Vortex Fishing Systems at ¶33, citing Johnson v. Hale (9th Cir.1991), 940 F.2d 1192, 1193, and quoting Chatman v. Slagle (6th Cir.1997), 107 F.3d 380, 385.

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[4] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. Coffman v. Niece (1940), 110 Mont. 541, 105 P.2d 661. The Hearing Officer's November 3, 2009, "Order Granting and Denying Cross-Motions for Summary Judgment on Liability and Setting a Filing Deadline for Briefs on Certification or a Damages Hearing" is incorporated by reference with regard to the imposition of liability on the City in these cases.

The Hearing Officer deferred ruling upon the admissibility of evidence regarding the settlements of Maffit and Tompkins with the County until after submission of proposed decisions and briefs, anticipating that the post hearing submissions might clarify the precise issues involved. That has, indeed, occurred. Abandoning the issue stated in the final prehearing order, the City, in its initial post hearing brief (Sec. B.2.), clarified its position, stating that the settlement agreement was "relevant and admissible to determine . . . the appropriate measure of emotional distress damages." The Hearing Officer must conclude that considering the amount of the settlement agreement for such a purpose would violate the express prohibition of Rule 408, Mont. R. Ev., against admitting and considering evidence of a settlement to prove the amount of a disputed claim:

> Evidence of . . . accepting . . . a valuable consideration in compromising . . . a [disputed] claim . . . is not admissible . . . to prove . . . its amount.

Disregarding that evidence (and refusing Exhibit 117), the Hearing Officer has weighed the testimony of Maffit and Tompkins and observed their demeanor. He has considered carefully the actual circumstances of the discrimination involved as well as the various authorities and arguments presented. At the end of the day, the most telling point is that the charging parties' behavior regarding the original municipal elections and the subsequent Helena Citizens' Council redo election supports the amount awarded. Despite the able arguments of counsel for the charging parties, the much larger awards sought are not justified here. On the other hand, the smaller amounts for which counsel for the City ably argued are not enough to compensate the charging parties for their emotional distress at being denied their respective rights to vote independently.

With regard to affirmative relief, the Montana Human Rights Act requires a hearing officer to enjoin future repetition of the discriminatory practice found. Mont. Code Ann. § 49-2-506(1). It also allows prescription of conditions upon future conduct relevant to and imposition of any reasonable measure to correct the discriminatory practice found. Mont. Code Ann. § 49-2-506(1)(b). The same enforcement powers apply under Montana Governmental Code of Fair Practices Act. Mont. Code Ann. § 49-3-315.

Given the role of the City in municipal elections, Maffit and Tompkins' claims against the City are not moot. The evidence (DeHart's testimony) did establish that the County, responsible for actually managing municipal elections, has used the AutoMARK machines in municipal elections since the January 2008 Helena Citizens' Council redo election and will continue to use them (or comparable accessibility technology) in all future City elections unless and until the applicable

laws clearly do not require such use. Nonetheless, the evidence also established that, for a City election, the County will honor a request from the City to use the machines (or comparable accessibility technology). Thus, no matter what the County may or may not do, the City had and still has the power to assure that its elections will include use of the best available technology to assist vision-impaired voters to vote independently and privately. Ordering it to do so is required.

As already noted in the findings, the privacy protection issue raised by Maffit and Tompkins is not a proper part of affirmative relief addressing a discriminatory failure to request use of the machines at all. Thus, further affirmative relief regarding such matters is not appropriate.

Finally, evidence of the City's subsequent conduct between December 2009 and the present regarding ADA compliance is not relevant to affirmative relief. It does not address the discriminatory practice found in this case, and involves distinguishable circumstances.[5] The evidence is simply too far removed from the facts and legal issues involved in the voting violation involved in this case. Even if it had been considered (it was not), it would not support any different decision herein.

V. Conclusions of Law

1. The Department has jurisdiction over the subject matter of these cases. Mont. Code Ann, §§ 49-2-509(7) and 49-3-315.

2. When a municipal government has voting technology, which it either already possesses or has the power to direct the election authority possessing to use for municipal elections, to provide assistance that voters with disabilities may require to vote, and has commenced the practice of using that technology for its municipal elections, that local government entity cannot fail or refuse to make the technology available for one or more subsequent municipal elections absent a sufficient change of law and/or pertinent circumstances to justify that failure or refusal. "Order Granting and Denying Cross-Motions for Summary Judgment on Liability and Setting a Filing Deadline for Briefs on Certification or a Damages Hearing," Nov. 3, 2009. Failure to make such a request for the January 2008 Helena Citizens' Council redo election discriminated against Robert Maffit and Myrle Tompkins because of disability. Mont. Code Ann. §§ 49-2-308(a) and 49-3-305(1) and (3).

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[5] To the extent this evidence was offered in support of enhanced emotional distress damages for denial of the right to vote privately, it is likewise irrelevant, since the City's conduct on other issues of building accessibility unrelated to elections cannot reasonably result in an increase in the emotional distress suffered from the failure to ask for use of AutoMARK machines in a prior election..

3. The reasonable measure to rectify the harm (emotional distress) that Maffit and Tompkins sustained as a result of the City's illegal discrimination is to award Maffit $750.00 and Tompkins $1,500.00 to compensate them for such emotional distress. Mont. Code Ann. § 49-2-506(1)(b).

4. The department must order the City to refrain from again failing and refusing to provide available technology for voters with visual disabilities for municipal elections, absent a sufficient change of law and/or pertinent circumstances to justify that failure or refusal, by a request to the County for the use of such technology in such elections. Mont. Code Ann. §§ 49-2-506(1) and 49-3-315.

5. No other conditions relevant to the discrimination found herein should be prescribed upon the City's future conduct. Mont. Code Ann. §§ 49-2-506(1)(a) and 49-3-315.

6. No other reasonable measures are necessary to correct the discriminatory practice found herein. Mont. Code Ann. §§ 49-2-506(1)(b) and 49-3-315.

7. The City must be required to report on the manner of its compliance with the requirements imposed. Mont. Code Ann. §§ 49-2-506(1)(c) and 49-3-315.

VI. Order

1. Judgment is found in favor of charging parties Robert Maffit and Myrle Tompkins and against respondent City of Helena on the charge that respondent illegally discriminated in the provision of governmental services because of disability when it failed and refused to request that Lewis and Clark County use AutoMARK machines in the January 2008 Helena Citizens' Council redo election.

2. The City of Helena must immediately pay to Robert Maffit the sum of $750.00 and to Myrle Tompkins the sum of $1,500.00 to compensate each of them for the emotional distress they suffered as a result of the discrimination found.

3. The City of Helena must refrain from again failing and refusing to request that Lewis and Clark County, for municipal elections, use AutoMARK machines or other comparable and available technology for voters who may need or desire to use same, absent a sufficient change of law and/or pertinent circumstances to justify that failure or refusal. The City of Helena must report to the Montana Human Rights Bureau the steps it has taken to comply with this provision of this order.

Dated: July 29, 2010.
/s/ TERRY SPEAR
Terry Spear, Hearing Officer
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Beth Brenneman, Disability Rights Montana, attorney for Robert Maffit and Myrle Tompkins, and Oliver H. Goe, Browning, Kaleczyc, Berry & Hoven, P.C., attorney for the City of Helena:

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

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

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

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

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

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

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

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal, and file the original transcript (with 6 copies) as part of your notice of appeal.

Maffit & Tompkins.HOD.tsp